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# **Ex-gratia Payments in Afghanistan:**

A Case for Standing Policy for the US Military

May 11, 2015

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U.S. Army Central (ARCENT) recently made public detailed information on ex-gratia payments awarded by the US military in Afghanistan from October 2005 to September 2014.<sup>1</sup> Sometimes referred to as “solatia”, “condolences”, or “amends” these monetary payments may be made to Afghan civilians for death, injury, and property damage as a result of US combat operations. This newly released data, in response to a Freedom of Information Act (FOIA) request, further substantiates the inconsistencies and ad hoc nature of this program as detailed in a 2008 white paper by Center for Civilians in Conflict (CIVIC).<sup>2</sup> While efforts to assist civilians harmed during military operations are laudable, the US military should urgently adopt a standing policy to govern such programs in a fair and equitable manner both within and across combat theatres. This is both a strategic and ethical imperative.

The Department of Defense (DoD) currently has two options for implementing standing policy on providing ex-gratia payments for incidental harm during combat operations: operationalize Section 8121 of the Consolidated Appropriations Act of 2015 which creates a funding stream for such a program; or create a standing DoD policy on this issue.<sup>3</sup> A clear policy—whether through the legislation or through policy channels—available now and for any future engagement—will address the inconsistencies of the current ex-gratia payment programs and ensure prompt and effective implementation in future conflicts to which the US is party.<sup>4</sup>

## Overview of the Data

According to the newly released information, the US military committed \$5,927,275, obligated \$5,929,994, and disbursed \$4,865,851 in condolence payments to Afghan nationals between October 1, 2005 and September 30, 2014. The widest gap in terms of amount committed and amount disbursed was in Fiscal Year (FY) 2007, where the US Military committed \$612,584 but only disbursed \$248,361 (see Table 1).

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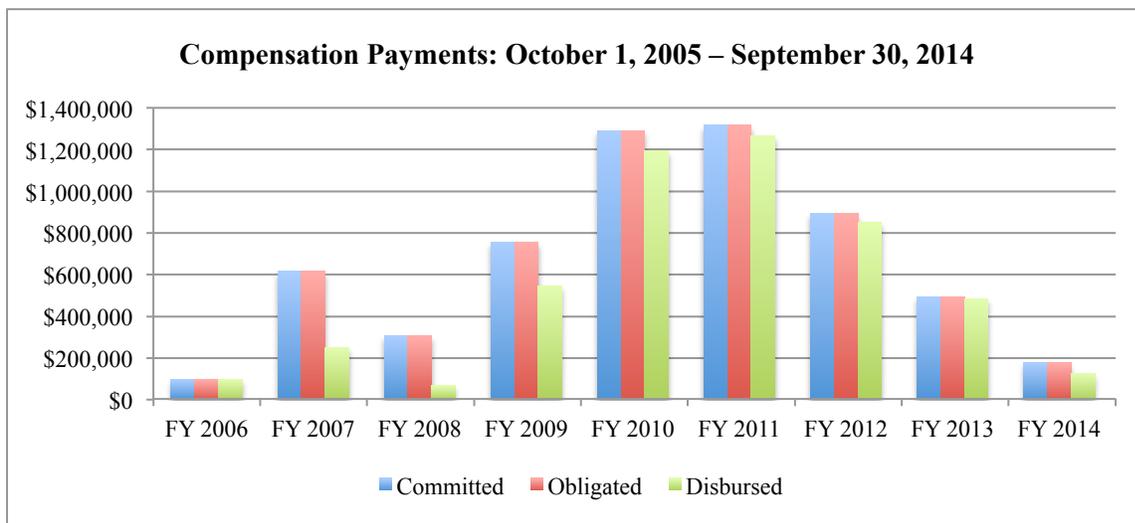
<sup>1</sup> U.S. Army Central, Freedom of Information Act – FOIA, <http://www.arcent.army.mil/foia>

<sup>2</sup> Center for Civilians in Conflict, “US Military Claims System for Civilians,” April 30, 2008, <http://civiliansinconflict.org/resources/pub/us-military-claims-system-for-civilians>

<sup>3</sup> Section 8121 allocates funding to the Pentagon to make amends to civilian victims of US combat operations and directs the Secretary of Defense to draft regulations to implement the program. It also enables the Secretary to direct local military commanders to make ex gratia payments to foreign civilians for “property damage, personal injury, or death” if they are determined to be “friendly” to the US by a local military commander and the harm is incidental to a lawful combat operation. Additionally, legal advisors must advise local military commanders prior to making such payments. Written records of all condolence payments are to be kept and periodically reported to an “appropriate office” at the Pentagon. The law also requires the defense secretary to report to congressional defense committees on an annual basis the “number of types of cases considered, amounts offered, the response from ex-gratia payment recipients, and any recommended modifications to the program.” This reporting to Congress would be useful to learn how civilians are being helped, whether the sums are sufficient, and what more could be done to assist them. See Sahr Muhammedally, “Civilian War Victims Receive Recognition in US Law,” *Just Security*, April 3, 2014, <http://justsecurity.org/8882/civilian-war-victims-receive-recognition-law/>

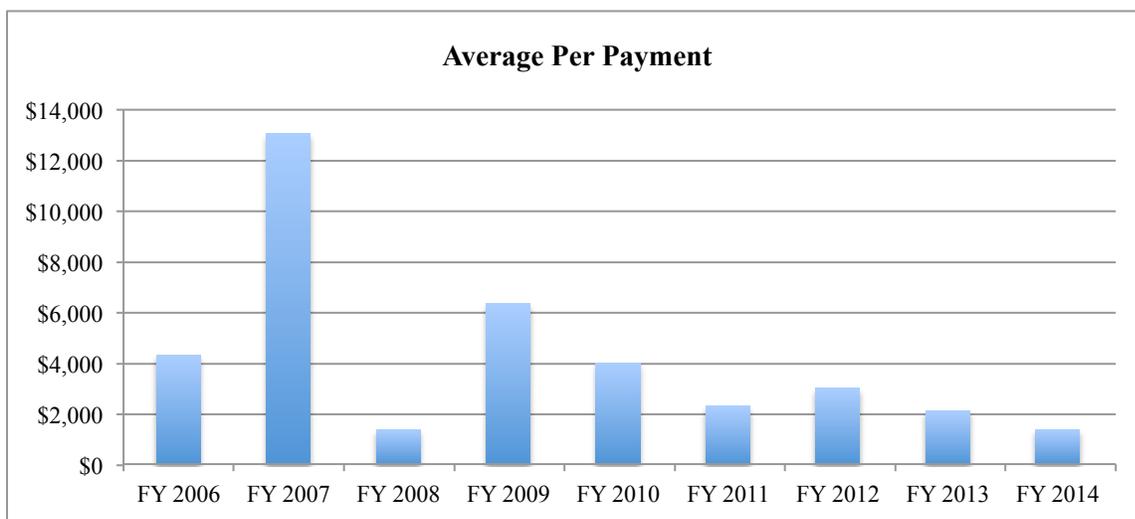
<sup>4</sup> Cora Currier, “Our Condolences: How the U.S. Paid for Death and Damage in Afghanistan,” *The Intercept*, February 27, 2015, <https://firstlook.org/theintercept/2015/02/27/payments-civilians-afghanistan/>

**Table 1: Condolence Payments: October 1, 2005- September 30, 2014**



The US military issued 1,630 condolence payments in Afghanistan between October 2005 and September 2014 with an average per payment of \$2,985.

**Table 2: Average Per Payment October 2005 – September 2014**



The fewest condolence payments (19) were disbursed in FY 2007 and the most (555) in FY 2011.

While the information released shows the most complete accounting to date, the disparate nature of the information makes it very difficult to draw any solid conclusions from the

information.<sup>5</sup> It is, however, possible to see how widely the payments vary within the theatre of operations. While we cannot assign causal relationships to these variations, we draw attention to some of qualitative differences we have identified:

### ***Discrepancies in compensation based on gender***

- In FY 2012, the death of two female nationals in Logar was worth \$3,084.91, whereas the death of a male national was worth \$9,302.44.
- In FY 2013, a husband in Helmand province received \$972.76 for the death of his wife, whereas a wife received \$2,483.11 for the death of her husband.

### ***Discrepancies in compensation based on level of harm***

- In FY 2011, a condolence payment of \$1,124.61 was awarded to a husband in Helmand province for the death of his wife. In comparison, a local national (no gender noted in the data) in Kandahar was awarded \$2,284.15 for damage to left eye.
- In FY 2011, two fathers in Helmand province each received a condolence payment of \$2,030.69; one son died, the other was injured.
- In FY 2014, two condolence payments of \$1,020.69 were issued in Helmand province; one was for the death of a son, the other for injuries to a sister.

### ***Discrepancies in compensation amongst identical harms***

- In Kandahar in FY 2012, a condolence payment of \$145.90 was issued for the death of a son, and a condolence payment of \$4,993.76 was issued for the death of a daughter.
- In FY 2011, two separate condolence payments were made in Helmand Province to the next of kin for the death of a family member; one payment was \$406.14 and the other \$2,493.23.
- In FY 2011, two fathers in Kandahar each received a condolence payment “for the death of a local national.” One received \$1,026.93, the other received \$4,858.76.
- In Helmand Province in FY 2011, one son’s life was valued at \$1,579.42 and another at \$3,622.37.
- In FY 2013, two local nationals received condolence payments for “injury to right arm, right hand, right leg, right foot, and head”; one received \$410.34, the other received \$1,000
- In FY 2011, payment in the amount of \$2,778.40 was made for the death of three adults and two children, whereas compensation for the death of one son was \$3,622.37.
- In FY 2011, two civilians in Helmand sustained leg injuries described as “gunshot/leg,” one received \$1,579.42, the other received \$496.39.

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<sup>5</sup> In FY 2008, the US military committed a total of \$302,471.47 in condolence payments, yet only only \$64,647.79 of this amount was disbursed. Additionally, because the majority of project descriptions in FY 2008 simply state “Condolence Payment” or “Condolence Payment in Khowst,” it is impossible to determine the nature of the harm, the victim of the harm, or the intended recipient of the condolence payment.

### ***Discrepancies in valuations by location***

- In FY 2012, a son's life was valued at \$5,000 in Uruzgan, \$2,451.29 in Nangarhar, and \$238.41 in Kandahar.
- In FY 2010, a mother's life was valued at \$197.59 in Nimruz Province and \$10,000 in Kunar Province.
- In FY 2013, a condolence payment of \$1,000 was issued for the death of a father in Logar, and a condolence payment of \$5,000 was issued for the death of a father in Ghazni.
- There seems to be a general variation across regional commands as illustrated in several of the examples above.

### ***Combined payments for multiple harms***

- In FY 2009, several condolence payments, including one for \$24,240, were "made to families of those that died as a result of US, Coalition or supporting operations." It is unclear from this description how many civilians were killed, who was awarded the payment, or how much each person was awarded.
- In FY 2010, a condolence payment of \$156,720.39 was issued to "family members of 23 wounded and 22 killed during US/Coalition Operations" in Daykundi Province.
- In FY 2010, a local national in Kandahar received \$14,993.34 for the "destruction of his home, death of 3 of his sons, and injury to his fourth son."
- In FY 2011, a condolence payment of \$5,582.85 was made to "next of kin" for the death of a daughter and three sons.

### ***Inconsistent and ambiguous project descriptions***

- One of the most detailed project descriptions was in FY 2006 where it was stated that a condolence payment was given to a "local national for damages to 5 doors, 3 windows, a large metal gate, a wheat stacker, and harvested wheat that occurred during military operations in the area." However, the majority of project descriptions during FY 2006 simply state "condolence payment to [individuals name] for actions in Kabul," without any description of the harm suffered or how it was caused.
- In FY 2007, some of the project descriptions list only the province in which the payment was made, such as, "Kunar" or "Nangahar." Other project descriptions simply state "Repair Ghazni Damages."
- In FY 2008, the majority of project descriptions simply state, "Condolence payment."
- The majority of project descriptions in FY 2009 state, "Condolence Payments were made to families of those that died as a result of US, Coalition or supporting operations."
- Project descriptions also, at times, combine death and injury making it impossible to discern what harm was caused. For example, in FY 2012, several condolence payments were made to local nationals in Kandahar "for death/injuries that occurred as a result of a U.S./Coalition operation."
- In FY 2014, a father of a 4 year-old child in Helmand Province was given \$5,000 without any explanation in the data set regarding whether this payment was for injury or death.

## **Condolence payments made in cases where Foreign Claims Act could apply**

- Some payments appear to be made for harm that did not result from US or coalition combat operations. For example, in FY 2010, funds were “used to compensate the family of a local national who was killed during a collision with a 1-5 IN Stryker.”
- Other examples of potential confusion include: “Condolence Payment for the 8 June traffic accident in Wardak”(FY 2007); “CERP Condolence payment for ARSIC-S (auto damage)” (FY 2009); and, “In a collision with a Rhino, 1 local national was killed in vehicle accident” (FY 2009).

## ***Unpaid condolence payments***

- In FY 2010, a condolence payment of \$13,369.95 was to be made to a local national for “injured daughter, local national killed, local national injured, local national injured, local national's hand injured and lost 3 fingers, local national left foot injured, local national shot in stomach, and local national's son was killed during US/Coalition operation.” Records show it was never disbursed.
- In FY 2008, the US Military committed to a \$13,500 condolence payment for 10 civilians who were killed in Ghazni, however, this amount was never disbursed and no explanation is provided in the datasets.
- In FY 2012, the US military committed to eight separate condolence payments of \$5,000 to local nationals for the death of a family member as a result of US/Coalition operations in Laghman, however not one of these eight
- A condolence payment of \$10,000 was to be made to an unknown recipient for an unspecified harm, however only \$7,147.45 of the amount obligated was disbursed.

## **Conclusion**

Systematically addressing civilian harm caused by US combat operations is critical to mission success in today’s complex conflicts. The ad hoc nature of the monetary payment policy cobbled together for Afghanistan—as this data clearly indicates—is an example of the need to create a standing policy for current and future theatres. A standing policy should include training and guidance for commanders and their civil affairs and judge advocates with clear rules on implementation. Sufficient funding must also be available to handle all valid claims.

The Pentagon is at a pivotal moment—poised to capture the lessons of Afghanistan and ensure they endure for all current and future conflicts. A failure to adopt and effectively implement a standing policy on amends for civilian harm squanders an opportunity to address an important strategic and ethical issue. It also places the commanders of tomorrow behind the curve as they must yet again re-invent a way to address civilian harm.

For additional information:  
Marla B. Keenan, managing director  
[marla@civiliansinconflict.org](mailto:marla@civiliansinconflict.org)  
+1 917 353 7076  
[www.civiliansinconflict.org](http://www.civiliansinconflict.org)