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US Military Claims System for Civilians

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In April 2007, the US military released the first-ever documents detailing individual claims for civilian casualties in Iraq and Afghanistan. While the US military attempts to minimize civilian casualties, loss of innocent life is a reality in conflict. Knowing innocent civilians suffer death, injury and property loss during armed conflicts – whether in combat or merely by the presence of military forces – the question arises: What should, or must, the US military do to address the damage caused by military operations to civilians?

Moral and strategic need exists to provide victims and their survivors with monetary assistance and sympathy for their suffering. The US military recognizes these needs, as evidenced by the creation of systems to compensate civilians for losses. However, the released documents expose major problems in both those systems and their practice on the ground.

### **What programs currently exist?**

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The US military uses two systems to provide payments to civilians who have been harmed as a result of U.S. military personnel activities: the Foreign Claims Act and condolence payments.

The **Foreign Claims Act (FCA)**, 10 U.S.C. § 2734, allows the military to offer compensation to foreign nationals harmed by the US military so long as “it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.” Therefore, any injury, death, or property damage caused during a combat action may not be paid under the FCA. This is known as the ‘combat exclusion,’ referenced throughout this white paper. Harm that may be compensated is that resulting from non-combat activities, negligent acts, or wrongful acts.

The US military offers “**condolence payments**” which are monetary payments made by the US military directly to victims, or their survivors, who suffer physical injury, death, or property damage as a result of US military or coalition combat operations. Claims denied under the FCA should be automatically considered for condolence payments if the harm to a civilian was caused by US forces in combat. Condolence payments are nominal amounts (currently a maximum of \$2,500 for a life in Iraq) meant to express sympathy and provide immediate monetary relief to innocent victims. Between October 2001 and September 2003 all condolence-type payments were specifically prohibited in Afghanistan and Iraq by order of Central Command. Only after certain elements of the military realized the need to provide some assistance to innocent victims was the condolence payment program authorized. The documents released show that while the condolence payment system is a step toward helping where the US has harmed, the program fails to properly deliver justice to civilians and, ultimately therefore, to achieve its goal of winning support of the civilian population.

### **What the documents say (and what they don’t)...**

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On April 10, 2007, the American Civil Liberties Union (ACLU) released nearly 2000 pages of documentation relating to civilian casualty claims filed by Iraqis and Afghans under the FCA. The claims – handed over by the US government under the Freedom of Information Act – are the first to officially detail the human cost of war in Iraq and Afghanistan.

In analyzing these documents, Center for Civilians in Conflict found major problems with the functioning of both the Foreign Claims Act and the condolence payment system including: (1) ad hoc application of the FCA and the condolence system; (2) low and seemingly arbitrary valuations of life in both FCA and condolence payments; (3) weighing military evidence over other relevant materials, often to the exclusion of important documentation supporting a claimant’s case; and (4) the lack of referral to the condolence system once a claim is denied under the ‘combat exclusion’ of the FCA.

To be clear, the documentation released by the US military is incomplete. The claims only cover a portion of all the claims filed from late 2004 to early 2006. The files released are also incomplete – most consisting only of a claims form, the ‘memorandum of opinion’ by the Judge Advocate (JA) adjudicating the case and the letter sent to the claimant advising them of the status of their claim. Some fail to reach even this level of completeness. In some instances, the files contain but a single page indicating neither the specific incident nor the harm suffered by the civilian. In all cases, no evidentiary documentation (medical reports, investigations, death certificates, etc) is included.

In examining the documents, we found 505 partial claims files and 490 viable claims, i.e. claims containing enough information to decipher the incident and a decision of some kind. Of the viable claims, 404 of them were denied under the FCA – most for lack of evidence or under the ‘combat exclusion’.

Rather than struggling to piece together incomplete facts to create a comprehensive picture of the claims programs, each case detailed here should be considered a snapshot of the larger story. We urge the reader to keep in mind that each case is the story of a family who has been harmed by war. Each victim and survivor deserves access to a fair and transparent claims system to declare their grievances and receive just and equitable compensation for their losses. For many innocent civilians who have suffered tremendously, the process of filing claims is arbitrary, ad hoc, and can create frustration leading to ill will toward the US.

Incomplete information makes completely accurate inferences impossible. Rather, we examined each case closely and – based on the expertise of our staff and our military legal expert who served in Baghdad as a Judge Advocate and adjudicated both FCA and condolence payment claims – illustrate various problems with both programs through the cases detailed below.

To ensure further accuracy and transparency regarding civilian claims in war, we call on the Department of Defense to release all claims materials so that a complete and accurate picture of the claims and condolences system can come to light.

### **Problems raised by released cases**

*(NOTE: All names and identifying information was redacted according to Freedom of Information Act and Privacy Laws. Names used here are aliases.)*

#### **Non-uniform application of FCA standards**

One of the major problems we identified is the failure to uniformly apply the FCA. Each Foreign Claims Commissioner (FCC) relies on his/her training and personal judgment when considering claims. It is apparent that different FCCs take different approaches and come to different conclusions when faced with substantially similar facts. Consider this case:

*On February 28, 2005, US forces erected a checkpoint in Baghdad near Al Mahdya. Kamal was driving his truck in the area around 7:30pm. As he approached the checkpoint, U.S. forces opened fire on the vehicle. He sustained multiple gunshot wounds and the car burned with him inside it. Witnesses stated that he was “very far away (130m)” from the forces and was driving very slowly. His father filed a claim on behalf of his son with the 4<sup>th</sup> Brigade Combat Team, 3<sup>rd</sup> Infantry Division. The adjudicating JA stated: “Statements and pictures support story. No weapons found in vehicle and civilian was approx 130m [away].” The JA recommended a payment of \$7,000. (BATES 707-708)*

Based on the information available on the claim form and the recommendation by the JA (there is no mention of an actual payment being made but the Center assumes one was made in the amount of \$7,000) this case seems to have been given adequate consideration. In fact, the family filed the claim for only \$4,000 and the JA, seeing that there was indeed death and property damage, recommended a \$7,000 payment. In this case, the claimant met the burden of proof and the JA made a decision based on the evidence at hand.

However, this example is an exception and not the rule. Consider the similar case at Bates 763-766 in which the claimant’s brother was killed while driving near a checkpoint. In the file is a note from a U.S. service member stating the “man is innocent...89<sup>th</sup> ENG fired a warning shot. It accidentally ricocheted and hit the truck.” The man died of his injuries but the claim was denied because of the “combat exclusion.” The Foreign Claims Act is intended to provide continuity, but this case is irreconcilable with the previous claim. One unit’s conclusion was the exact opposite of the second unit’s, illustrating an inconsistent method of adjudication.

Of the 490 viable claims, only 86 were paid under the FCA. Of those, only 16 claims were paid the amount claimed by the victim or slightly more. In many cases of FCA claim denial, there is no evidence of a condolence being paid afterwards. Of the 59 cases involving incidents at checkpoints, 24 received condolence payments (ranging from \$150 to \$2,500) and three received FCA payments (from \$2,500 - \$7,000).

#### **Over reliance on the ‘combat exclusion’**

The FCA ‘combat exclusion’ appears to be applied arbitrarily. Of the 401 total claims denied, 233 were denied under the ‘combat exclusion’; 163 of those contained no documentation of a referral to the condolence system. It appears that FCCs almost universally invoke the ‘combat exclusion’ anytime gunfire is involved. In our experience, erring on the side of the ‘combat exclusion’ this frequently is inappropriate as other factors may in fact prove the incident did not involve combat. A determination of the ‘combat exclusion’ requires a reasoned decision based on all facts, which seems to be absent in most of the released cases.

### **Low valuation of life in both FCA and Condolence Payouts**

According to Army Regulation 27-20, valuation for life, injury and property should be based on a calculus that includes economic loss and non-economic loss similar to damages in a US civil court case. However, in most of the cases we examined payments seem to be arbitrarily determined.

*On October 15, 2005, a Bradley fighting vehicle hit the wall of a home, causing the wall to collapse on a young child. The child was taken to the US hospital but died of her injuries. There was an entry in the SIGACTS to confirm the incident. The family filed a \$5,000 'wrongful death' claim with the US military. The claim was approved but only a payment of \$2,400 was "reasonably substantiated." (BATES 837-839)*

This is a perfect example of an appropriate FCA case deserving full compensation. The FCC who adjudicated this case only awarded the family \$2,400 of the \$5,000 they asked for, summarily "bidding down" the value of the young girl's life. For the FCA to fulfill its purpose of compensating victims of inadvertent US harm, the valuation of life must be fair and equally applied.

Of the 86 claims paid, the maximum amount comes from an incident in which three children were killed when a paladin negligently fired (BATES 157-160). The family was paid \$35,000 (\$33,000 for the loss of life and \$2,000 for property damage). This is extremely rare. The next highest paid case was a fatal car accident (BATES 1292 – 1295). The claim paid \$12,000 (\$7,000 for property damage and \$5,000 for wrongful death). The average payment for loss of life under the FCA is slightly more than \$4,200 and slightly more than \$2,200 under condolence.

### **Evidentiary problems**

The military's reliance on the Significant Acts Database (SIGACTS), which details incidents in which the US military was involved, over eye-witness reports and other supporting materials gives undue importance to one kind of questionable evidence (SIGACTS databases are known to be incomplete).

For example:

*On October 1, 2005, Ali – a newlywed whose wife was pregnant – was shot in the abdomen by a Coalition Forces (CF) convoy. This caused the vehicle to flip, killing Ali. His father filed a claim on his behalf for \$4,800 (\$2,500 for Ali's death and \$2,300 property damage). The claim was denied for lack of evidence, stating: "A SIGACTS investigation revealed no activity similar to the Claimant's description of events." However, an email from the administrator to a paralegal states: "If he [claimant] wants to come file a claim here to possibly get a CERP [condolence] payment that's fine. How was he [deceased] supposed to know to get out of the vehicle when they fired warning shots? If I was [sic] in his place I would have stayed put too. All TF BoB (Task Force Band of Brothers) SIGACTs from early October are missing from their database... a general search turned up a couple of EOFs that could match Abdulkalik's claim." (emphasis added).*

In this case, as in others, there is a discrepancy within the unit claims office as to whether combat operations (referred to here as EOF, or an Escalation of Force incident) occurred at the time the claimant's son was shot. All evidence – including eyewitness reports, death certificates and photos – should be considered by lawyers making judgments on these types of claims.

### **Lack of referral for condolence payments**

Claims denied under the FCA but worthy of compensation (because the harm occurred during US combat activity) should be automatically considered for condolence payments. Though only a token gift provided without an admission of fault, a condolence payment – if used correctly – can go a long way toward showing sympathy and respect for civilian losses. Of the cases denied under the FCA 'combat exclusion' only 84 were documented to receive consideration for a condolence payment.

*On November 7, 2005, in Tikrit, Sameer was driving his Toyota Corolla toward a US checkpoint. He allegedly pulled over to the side of the road but troops fired into the car. US troops then approached the car, removed Sameer, and began to transport him to the local hospital, but by this point Sameer had died. His father filed a claim on behalf of his son. Though there were photos, a death certificate, a police report and judicial documents to substantiate the claim, the Significant Acts (SIGACTS) database told a significantly different story. It claimed the car was approaching at high speed and that hand signals were used and a single warning shot was fired before the deadly shots were fired. The JA*

*denied this FCA claim because “the evidence show[ed] that the damage was caused during combat”. No recommendation was made in the documents for a condolence payment to be paid.*

This claim, documenting harm to an innocent civilian in a combat situation, should have been referred for a condolence payment. Though the US military appears to have followed the rules of engagement, a life was still lost. Necessary to ensuring the family and the community understand that the US values innocent life, the military must recognize the harm caused. Condolence payments exist to show sympathy and to mitigate resentment in cases just like this. Every case denied under the FCA’s ‘combat exclusion’ should therefore be considered for a condolence payment.

## **The way forward**

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Humanity, justice and the rule of law are important American values from which the US should not stray in times of war. To ensure Iraqis and Afghans (and civilians in future US conflicts) see these values at work, the United States must improve these programs. Beyond the moral arguments are important strategic reasons for creating viable programs to address this issue – ensuring the counterinsurgency linchpin of ‘winning the hearts and minds of the people.’ Providing compensation and recognition for civilian losses also sets an example for other countries in times of armed conflict.

The United States can improve its policy on civilian casualties by:

### ***Recognizing the victims***

Whether death and injury result from an accident, lawful engagement, wrongful acts, or negligent acts, the US military should keep as transparent and accurate account of civilian casualties as possible. That accounting of civilian harm goes a long way toward dignifying a family’s loss and provides valuable information to the military itself. Maintaining data on civilian casualties enables the military to gauge how well it abides by the principle of civilian inviolability in armed conflict.

### ***Releasing all information available on civilian casualties***

The US government should voluntarily release all documentation referring to civilian casualties in times of war, particularly the current conflicts in Iraq and Afghanistan. This should include but not be limited to: a) the full FCA claims database from 2001 – present; b) all backup documentation on civilian claims filed by Iraqis and Afghans; and c) complete documentation on all claims made under the condolence payment system within the Commander’s Emergency Response Program (CERP) fund. Only through transparency will the United States be able to appropriately address and avoid civilian casualties and more effectively aid innocent victims.

### ***Examining valuation of life under both programs***

Crucial to a fair and just system of claims is the valuation placed on innocent life lost. Though the current condolence system is a ‘token payment’ with an artificial ceiling of \$2,500 per life (in Iraq), the FCA clearly states that valuation for life, injury and property should be based on a calculus that includes economic loss and non-economic loss – a calculus FCCs are apparently not utilizing. Of note is the small margin between the average payments under the two systems (FCA averages \$4,200 and condolence averages \$2,200) revealed in the released documents. The military should closely examine their process of valuing life under the FCA to ensure that it is appropriately implemented. Any dollar limitation on the condolence program should also be examined to ensure it sends the appropriate message of sympathy.

### ***Adopting a permanent claims system for combat situations***

The US needs a consistent, uniform system to provide claims adjudication for civilians harmed as a result of US actions. A permanent system will better enable the Pentagon to process claims during wartime with standard procedures, guidelines and funding – important both for dignifying innocent civilians harmed and providing the military with a powerful tool to foster goodwill with the local population.

### ***Implementing more rigorous training on ‘combat exclusion’ and evidentiary issues***

Even without the CCA, there are steps the US military must immediately take to improve the condolence and FCA systems. Judge Advocates and unit claims officers must receive better training to ensure that their decisions are just, appropriate, and timely. More comprehensive and improved guidelines and training will ensure better systems than those in place for the first five years of the current conflicts in Iraq and Afghanistan.