

Compensating Civilian Casualties:

*“I am Sorry for your Loss,
and I Wish You Well in a Free Iraq”*

A Research Report
Prepared for the Carr Center for Human Rights Policy and
Campaign for Innocent Victims in Conflict

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I. Executive Summary & Recommendations

On November 12, 2004, U.S. soldiers and anti-Iraqi forces battled on the streets of Hawija, Iraq.¹ An innocent Iraqi civilian, standing at the front gate to his family's property when the firefight began, was killed in the crossfire. Several months later, the victim's brother filed a claim for compensation under the Foreign Claims Act with the judge advocate at the 116th Brigade Combat Team, 42nd Infantry Division. The judge advocate denied the claim. A denial letter explained the decision: "The U.S. cannot pay your claim because your brother's death was incident to combat. I am sorry for your loss, and I wish you well in a Free Iraq."² Yet, in a symbolic gesture, the judge advocate approved a condolence payment in the amount of \$500 for the victim's family "as an expression of sympathy and good will and in the best interest of the US government."³ Tens of thousands of similar cases have been decided in Afghanistan and Iraq since 2002. This is an under-examined element to U.S. armed conflicts. The public and military experts understand the reality facing civilians in a combat zone, but few wonder how the military helps individual victims after harm occurs.

The "center of gravity" in counterinsurgency campaigns is the civilian population and U.S. military counterinsurgency doctrine focuses strategists' primary attention on "securing the civilian" rather than "destroying the enemy."⁴ In such operational environments, civilian casualties are not viewed merely as "unintended consequences" that result in "collateral damage." Instead, gaining civilian support after, and despite, instances of civilian casualties becomes a vital strategic goal. Two programs help achieve this goal in Afghanistan and Iraq: the Foreign Claims Act (FCA) and the condolence payment program. These programs are not new; however, for the first time, the public now has access to numerous cases decided in Afghanistan and Iraq. These files provide insight into both the nature of the fighting in Afghanistan and Iraq and how well the U.S. military helps people after causing civilian casualties.

¹ See http://www.aclu.org/natsec/foia/pdf/Army0268_0270.pdf.

² Ibid.

³ Ibid.

⁴ See e.g., U.S. Dep't of Army, Field Manual 3-24, *Counterinsurgency* (Dec. 15, 2006).

The FCA authorizes compensation awards to foreign nationals for death, injury and damage to property from “noncombat activity or a negligent or wrongful act or omission” caused by U.S. service members.⁵ The condolence payment program, separately, is part of the Commander’s Emergency Response Program fund and authorizes commanders to provide symbolic “gifts” for death, injury, or battle damage caused during U.S. military combat operations.⁶ Various sources indicate that approximately \$30-35 million in Foreign Claims Act awards and \$40-45 million in condolence payments have been made in Afghanistan and Iraq since 2002.⁷ Both programs are *ex gratia* (an “act of grace”), meaning no law requires an award or payment. However, many military planners understand the strategic imperative in using these programs to gain civilian support. Similar programs date back to World War I in U.S. military history. Yet, the American public, the Iraqi and Afghan people, and major segments of the U.S. military do not adequately understand these programs.

This report examines 506 claims filed by Afghan and Iraqi civilians against the U.S. military for monetary aid for harm allegedly caused by U.S. forces. Tens of thousands of such claims have been filed in Afghanistan and Iraq; however, the 506 claims researched for this report represent the only files released by the U.S. government to date. The American Civil Liberties Union (ACLU) received these documents pursuant to a Freedom of Information Act (FOIA) request.⁸ The files account for close to 2,000 pages.

The cases examined indicate that the FCA and the condolence payment program are not being utilized appropriately. If steps are taken to improve these programs, the military will be better able to respond to civilian harm and better meet its strategic objectives. Military doctrine and training properly stresses the need to limit civilian casualties. However, zero civilian casualties in a combat zone will always remain

⁵ U.S. Dep’t of Army, Reg. 27-20, *Claims* (Feb. 8, 2008), para. 10-3(a).

⁶ See Multi-National Corps – Iraq, *Commander’s Emergency Response Program (CERP) Family of Fund Standard Operating Procedures*, April 24, 2006.

⁷ See General Accountability Office, *The Department of Defense’s Use of Solatia and Condolence Payments in Iraq and Afghanistan*, May 2007; Tina Susman, “A Martyr and More in his Mother’s Eyes,” *Los Angeles Times*, Mar. 6, 2008; Sharon Behn, “U.S. Paid \$42.4 Million to Iraqis,” *Washington Times*, Feb. 28, 2008; Special Inspector General for Iraq Reconstruction, *Quarterly Report to Congress*, Jan. 30, 2008.

⁸ See <http://www.aclu.org/natsec/foia/search.html>.

impossible. A fair and equitable FCA system and condolence payment program will help ameliorate animosity toward the U.S. military after civilian casualties occur.

While the strategic interests involved should be enough to influence military planners to improve these programs, it is essential to remember that these claims affect people's lives and livelihoods. Militaries should attempt to help where they have harmed to lessen civilian suffering. Therefore, the goal must be to utilize the FCA and the condolence payment program to gain the trust and support of the civilian populations and victims and survivors recover after harm occurs.

Methodology

The documents examined in this report relate to claims filed by Afghan and Iraqi civilians for harm allegedly caused by the U.S. military. These cases represent a small portion of the total claims filed, but much information may be gleaned from the facts and decisions made by officers in Afghanistan and Iraq. A basic understanding of the harm at issue, the nature of the U.S. military's involvement, and the decisions reached could be discerned in almost every case. The rules, regulations and policies governing the operation of the Foreign Claims Act and the condolence payment program are publicly available. Therefore, the facts presented in the files as applied to the rules publicly known provided a rich avenue for study. Further, the cases represent a good cross-section of the units involved and the types of cases handled in Afghanistan and Iraq.

Key Findings

The 506 cases expose several problems in the adjudicative process under the Foreign Claims Act and in the implementation of the condolence payment program:

1. The "combat exclusion" of the Foreign Claims Act is applied broadly, arbitrarily, and inappropriately.
2. Condolence payments are not always offered when harm results from the "combat acts" of U.S. soldiers.
3. There is a lack of analysis in the adjudication of cases involving acts that may be considered "negligent" and/or "combat-related."
4. There is a lack of analysis in the adjudication of cases involving acts that may be considered "negligent," "wrongful," or "lawful."
5. Judge advocates use inappropriate burdens of proof.

6. Contradictory decisions exist within individual cases.
7. Judge advocates use questionable standards and application of “contributory negligence” when the victim’s actions may have caused some of the harm at issue.
8. Judge advocates render inappropriate denials.
9. Claimants receive unexplained denials.
10. Several cases are approved or denied under suspicious circumstances.
11. Judge advocates inappropriately weigh different types or sources of evidence.
12. Victims receive inappropriately low amounts for awards or payments.
13. Application of the Foreign Claims Act and condolence payment program results in drastically different results across a combat zone for substantially similar cases.

Recommendations

1. Improve training opportunities for judge advocates on the Foreign Claims Act.
2. Require detailed legal analysis in all Foreign Claims Act memorandums and decisions.
3. Require more continuity in awards under the Foreign Claims Act.
4. Improve training opportunities for judge advocates, civil affairs officers, and commanders on the condolence payment program.
5. Incorporate the claims and condolence payment missions at all levels within a unit.
6. Distill lessons learned from appropriate cases to improve escalation of force and rules of engagement training.
7. The Department of Defense must publicly release all claims documents with appropriate redactions of personal information.

II. Applicable Laws

The United States military has a long history of providing some monetary aid for harm to civilians in a combat zone. After the U.S. entered World War I, President Wilson signed into law “An act to give indemnity for damages caused by American forces abroad”⁹ to authorize the U.S. military to pay claims for damages caused by American Expeditionary Forces in France. The military cut a large swath through the civilian population to the trenches, causing harm and inconvenience; the expenditures helped ease tensions between the French public and the U.S. military. The law needed updating when the U.S. entered World War II because of the geographic limitation of the original language. Congress passed the Foreign Claims Act shortly after the attack on Pearl Harbor.¹⁰ The preamble of the FCA defines its purpose: to “promote and maintain friendly relations through the prompt settlement of meritorious claims.”¹¹ Foreign nationals may file claims to receive compensation for a death to a family member, personal injury, or property damage caused by a member of the armed forces or a civilian employee accompanying the force.¹² The Department of Defense grants one service branch authority to adjudicate foreign claims for a particular geographic location. The Air Force originally had authority in Iraq until June 2003 when the Army assumed responsibility.¹³ Foreign Claims Commissions (FCCs), made up of between one to three officers, generally judge advocates, adjudicate the claims pursuant to the law and implementing regulations.

Several elements of the FCA must be satisfied before compensation may be authorized. The claimant must be “friendly.”¹⁴ This means the victim may not be an enemy to the U.S. or provide aid to an enemy. A claim must be filed within two years from the date the harm occurred.¹⁵ Importantly, the FCA only applies to uniformed personnel or civilian employees of the Department of Defense – it does not apply to contract employees. To be payable, the damage or injury must result from a

⁹ An Act to Give Indemnity, ch. 57, 40 Stat. 535 (1918).

¹⁰ 10 U.S.C. § 2734 (2000).

¹¹ 10 U.S.C. § 2734(a).

¹² 10 USC § 2734(a)(3).

¹³ See Memorandum, Acting General Counsel, Department of Defense, to Secretary of the Army, subject: Claims responsibility-Iraq (June 17, 2003).

¹⁴ 10 U.S.C. § 2734(b)(2).

¹⁵ 10 USC § 2734(b)(1).

“noncombat” activity or a negligent or wrongful act.¹⁶ A claim is not payable if the harm results from a lawful and reasonable combat act. For example, civilians standing between insurgents and U.S. soldiers during a firefight would not be eligible for compensation under the FCA for any harm as long as the U.S. soldiers involved operated within the rules of engagement (ROE) and without negligence. Claims judge advocates call this the “combat exclusion.” It is defined as any incident that results directly or indirectly from action by enemy or U.S. forces engaged in armed conflict or in immediate preparation for impending armed conflict.¹⁷ If read literally, all military acts could be interpreted as “related” to combat in Afghanistan and Iraq. However, such application would clearly subvert the purpose of the law. Therefore, “combat” should be interpreted narrowly. Further, even if an act does constitute “combat” it may still result in compensation if negligence or wrongfulness played a role. A foreign claims commissioner must inquire into these questions in all appropriate cases.

Two other categories of cases exist under the FCA system: “noncombat” and “not-combat”. Army Regulation 27-20 provides that “noncombat” acts are those actions that are military in nature with little civilian parallel and historically serve as a basis for paying claims. Strict liability attaches to “noncombat” claims, meaning that fault is irrelevant – if the harm occurred in a “noncombat” incident, a payment should be awarded. Typical examples include maneuver damage, the operation of convoys of large tracked fighting vehicles (as opposed to civilian trucks) on roads, and the operation of firing ranges. Finally, a “not-combat” act would be one where the action falls outside the course of combat and is “civilian” in nature. Compensation requires a showing of negligence or wrongfulness on the part of the U.S. personnel involved. Examples include a vehicle accident between a HMMWV (humvee) and a civilian car or a U.S. service member robbing a civilian.

How much the U.S. has spent on FCA awards is open to some debate. According to the *L.A. Times*, in fiscal year 2006, 3,658 claims were paid under the FCA for approximately \$8.4 million.¹⁸ In fiscal year 2007, 2,896 claims were paid under the FCA

¹⁶ U.S. Dep’t of Army, Reg. 27-20, *Claims* (Feb. 8, 2008), para. 10-3(a).

¹⁷ 10 U.S.C. § 2734(b)(3).

¹⁸ See Tina Susman, “A Martyr and More in his Mother’s Eyes,” *Los Angeles Times*, Mar. 6, 2008.

for approximately \$13 million.¹⁹ The only official U.S. government document released on FCA expenditures provides that in Afghanistan and Iraq between fiscal years 2003-2006, 21,450 claims were filed and \$26 million awarded.²⁰

International humanitarian law – the law governing the course and conduct of war – allows for some civilian casualties during armed conflict. However, IHL imposes several restrictions on the use and application of force that serve to minimize civilian casualties. When combatants do not follow those rules, they fall outside the legal protections of international humanitarian law and their use or application of force was not authorized. In effect, the FCA acts to authorize payments in combat zones for civilian casualties when U.S. soldiers violate or are negligent in following the rules governing lawful combat.

Of course, a substantial amount of the harm suffered by civilians in Afghanistan and Iraq occurs during lawful combat engagements precluding compensation under the FCA. To provide some monetary assistance in these cases, the U.S. military instituted the condolence payment program in Afghanistan and Iraq under the Commander's Emergency Response Program (CERP) fund. The CERP fund is one of the main tools by which commanders implement reconstruction efforts in Afghanistan and Iraq. Condolence payments constitute one small aspect of the CERP fund. Since November 2004, \$2,500 can be paid per incident of death, personal injury, or damage to property.²¹ Before November 2004 only \$1,500 could be provided for serious injury or damage to property and \$2,500 per death.²² In fiscal year 2005, the U.S. spent \$21.5 million in condolence payments, which shrank to \$7.37 million in 2006.²³ There is no indication as to why the amount decreased so dramatically between 2005 and 2006. In 2007 the military budgeted \$10.8 million for condolence payments.²⁴ Since 2004, condolence

¹⁹ Ibid.

²⁰ See General Accountability Office, *The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan*, May 2007.

²¹ See Multi-National Corps – Iraq, *Commander's Emergency Response Program (CERP) Family of Fund Standard Operating Procedures*, April 24, 2006; Christopher M. Ford, "The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting for the Cycle, and All Aspects of a Full Spectrum Practice," *2004 Army Lawyer* Vol. 22 (December 2004).

²² See General Accountability Office, *The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan*, May 2007.

²³ Ibid.

²⁴ Special Inspector General for Iraq Reconstruction, *Quarterly Report to Congress*, Jan. 30, 2008, p. 39.

payments account for \$38 million in CERP expenditures.²⁵ However, the *Washington Times* claims the Pentagon reported \$42.4 million spent since the start of 2005.²⁶ Regardless, condolence payments represent a small fraction of CERP expenditures. As of March 2008, expenditures on the CERP fund totaled \$2.66 billion and total reconstruction expenditures totaled \$46.3 billion.²⁷

One of the interesting aspects of the condolence payments is that, according to the sources above, Anbar province accounted for half of all condolence payments. Yet, only a couple files released by the Department of Defense originated there.²⁸ It appears some portion of condolence payments are provided in bulk, meaning an entire neighborhood or section of town was handed cash instead of amounts being provided for specific instances of death, injury or damage to property. This sort of disbursement is contrary to the program's stated rules.

Condolence payments mirror an older program called "solatia."²⁹ Army Regulation 27-20 governs the solatia program. "Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her family is common in some overseas commands."³⁰ Like condolence payments, these are nominal gifts of sympathy. The main substantive difference between the two is that solatia payments are funded by a unit's operation and maintenance fund and condolence payments come from the CERP fund. The Government Accountability Office reports that Marines made solatia payments in Iraq between 2003 and 2005 for \$1,732,002.³¹ Afghanistan civilians received \$141,466 in solatia payments. The Department of State implements its own solatia program to pay for harm caused by security contractors. In the fiscal year 2006, the Department of State made eight payments for \$26,000.³² None of the files analyzed for this report reference a specific solatia payment.

²⁵ Ibid.

²⁶ Sharon Behn, "U.S. Paid \$42.4 Million to Iraqis," *Washington Times*, Feb. 28, 2008.

²⁷ Special Inspector General for Iraq Reconstruction, *Quarterly Report to Congress*, April 30, 2008, p. 15

²⁸ Special Inspector General for Iraq Reconstruction, *Quarterly Report to Congress*, Jan. 30, 2008, p. 37.

²⁹ U.S. Dep't of Army, Reg. 27-20, *Claims* (Feb. 8, 2008), para. 10-10.

³⁰ Ibid.

³¹ See General Accountability Office, *The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan*, May 2007.

³² Ibid.

Judge advocates play an essential role in both the FCA system and the condolence payment program. The staff judge advocate for the highest level of command in a particular region appoints foreign claims commissioners to administer the FCA. New FCCs receive some training before receiving authority. FCCs with different amounts of payment authority operate at the brigade, division, and corps level of command. Each judge advocate generally holds “office hours” certain days of the week at locations accessible to local nationals. To help facilitate this program, units are encouraged to order soldiers to carry “claims cards” that notify a civilian where and how to file a claim. Soldiers may also write a brief comment on the card to explain what happened, which the civilian can later show the judge advocate to help support the claim. Military doctrine also provides for battalion and company-sized elements to appoint “unit claims officers” to collect and gather evidence for any incident that may potentially lead to a claim. The unit claims officer forwards claims to the judge advocate for adjudication.

Condolence payments are usually paid at the brigade level. While the condolence payment program does not require an adjudicative process, generally, judge advocates play a role by making official recommendations to the brigade commander and providing legal reviews for all expenditures made under this program.

The U.S. military’s history of using these and similar ad-hoc programs is not unique to Afghanistan and Iraq. The military enacted similar programs in each major conflict of the 20th century.³³ However, this is the first time the government has released files during an ongoing conflict. The facts presented in each claim released from Afghanistan and Iraq were analyzed against the FCA and the rules governing the CERP fund to determine how well the military implements these programs. The government should release all claims files with appropriate redactions. Transparency allows for thorough analysis, which should lead to reform and adjustments to help the military meet its strategic objectives in current and future conflicts.

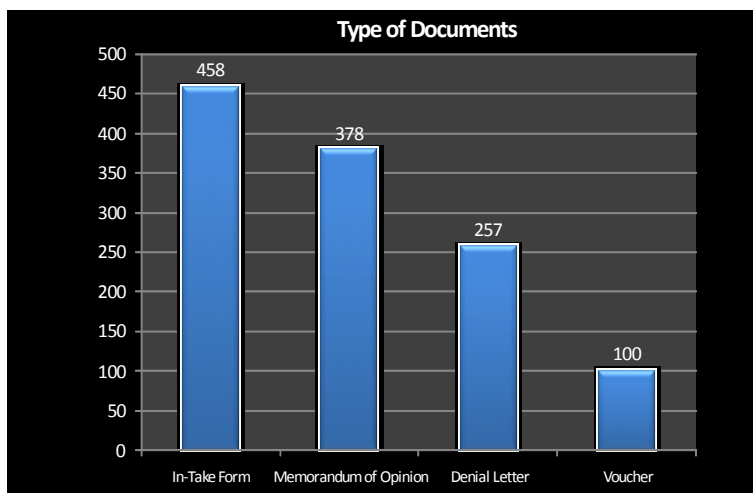
³³ See John Radcliffe and Jeannine Smith, eds., *Operational Law Handbook* (Charlottesville: Judge Advocate General’s School, 2006), pp. 156-157.

III. Overview of the 506 Claims

Five hundred and five (505) of the examined claims were released pursuant to the ACLU's FOIA request for documents related to civilian casualties. These documents include 512 claims paginated by the Department of Defense 18 through 1,771 and can be found in a searchable log on the ACLU's Web site.³⁴ However, seven do not contain enough information to discern any useful conclusions or the pages were exact repeats of previous pages. The final examined claim (bate stamped 45,945 through 45,962) was released pursuant to the ACLU's Torture FOIA. It is the only useful FCA file found in that collection of documents.³⁵ Of the 506 cases examined, eleven do not provide an indication of the outcome, and eight indicate the final disposition but little of the factual background.

With a couple of limited exceptions, the files include only U.S. generated documents and not evidence produced by the local nationals. Generally, each case contains the same types of documents or combinations of the same types of documents. The four most common include: in-take forms, memorandums of opinion, denial letters,

and payment vouchers. The claims intake form (sometimes called a Standard Form 95) identifies the claimant, the nature of the harm suffered, a short statement of the facts, and the monetary demand. Claimants are responsible



for providing all of this information in writing, but it is clear that translators or U.S. military personnel completed most of these documents. A judge advocate signed every FCA memorandum of opinion. They detail the facts of the case and the adjudicating officer's decision and reasoning. Judge advocates did not sign all the condolence

³⁴ See <http://www.aclu.org/natsec/foia/log.html>.

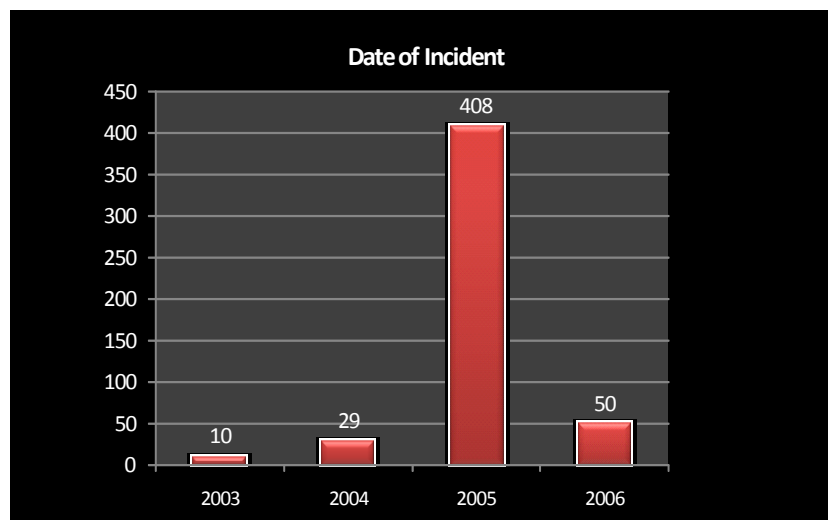
³⁵ See <http://action.aclu.org/torturefoia/released/050206/>.

payment memorandums. However, when a non-lawyer signed the memorandum, generally a reference to a legal review is included.

Every claimant who does not receive compensation must receive a denial letter. All 257 denial letters were typed in English – whether translated copies were provided is unknown. Payment vouchers indicate the amount of cash awarded. The files include several other types of documents, including: settlement agreements (eight), worksheets (six), witness statements (four), small claims certificates (three), local reports (two), army investigation findings (one), a claims card (one), and a significant activity report (one). Finally, eight claims are based on a single spreadsheet describing a series of condolence payments.³⁶ While no supporting documents exist for these cases the spreadsheet contains ample information from which to glean information.

The year the claim occurred in or was adjudicated in is known in all but nine cases. Most cases occurred in 2005. The vast majority of cases are adjudicated within a couple of months of

the incident and/or the filing of the claim. The earliest Afghanistan claim dealt with an incident on March 4, 2003 and the latest on May 29, 2006. The earliest Iraq claim dealt with



an incident on April 10, 2003 and the latest on December 22, 2006.

Eighteen (18) claims occurred in Afghanistan: two in 2003, two in 2004, six in 2005 and eight in 2006. The eight in 2006 all occurred on the same day. The foreign claims program in Afghanistan appears highly centralized. The staff judge advocate's office for Combined Joint Task Force-76 (CJTF-76), the highest level of U.S. military command in Afghanistan at the time, adjudicated 15 of the 18 claims. Task Force 504, of the 82d Airborne Division, adjudicated one and an unknown unit adjudicated two. CJTF-

³⁶ See http://www.aclu.org/natsec/foia/pdf/Army0546_0549.pdf.

76 paid eleven claims under the FCA and denied seven. Task Force 504 paid its claim under the FCA. The two cases without referenced units resulted in denials.

Four hundred and eighty-eight (488) claims occurred in Iraq: eight in 2003, 27 in 2004, 401 in 2005 and 42 in 2006. Twenty-five different units adjudicated the claims in Iraq – 17 by brigade-sized elements and the rest by division of higher-sized elements.³⁷

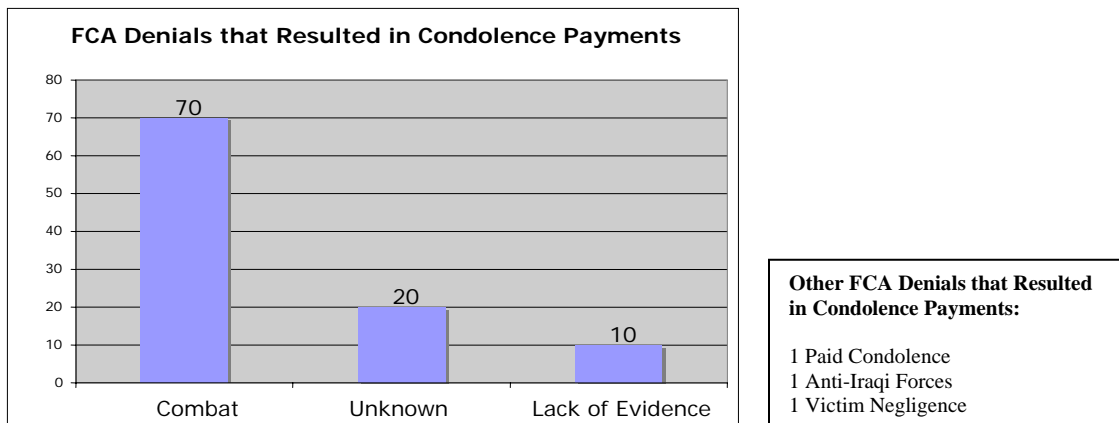
Claims by Unit in Iraq:

Unit	# of Claims	FCA Paid	Condolence Paid	Denied
116BCT, 4ID	26	0	3	23
155BCT	2	2	0	0
1BCT, 101	23	1	19	3
1BCT, 3ID	21	1	9	11
1BCT, 42ID	2	2	0	0
256BCT	39	1	18	20
278RCT	1	0	0	1
2BCT, 10MD	4	0	1	3
2BCT, 3ID	62	7	1	54
30BCT, 1ID	1	1	1	0
3BCT, 101	1	0	1	0
3BCT, 1AD	11	1	0	10
3BCT, 1ID	2	0	0	2
3BCT, 3ID	38	19	1	18
3BCT, 4ID	34	8	2	25
48BCT, 3ID	2	0	1	1
4BCT, 3ID	22	19	0	3
CJTF-7	1	1	0	0
HQ 101	94	3	33	58
HQ 1ID	1	0	0	1
HQ 3ID	29	1	9	19
MNC-I	13	3	0	10
HQ 42ID	30	2	3	25
HQ MND-S	8	2	0	6
II MEF	1	0	0	1
Unknown	20	0	1	19
TOTAL	488	74	103	311

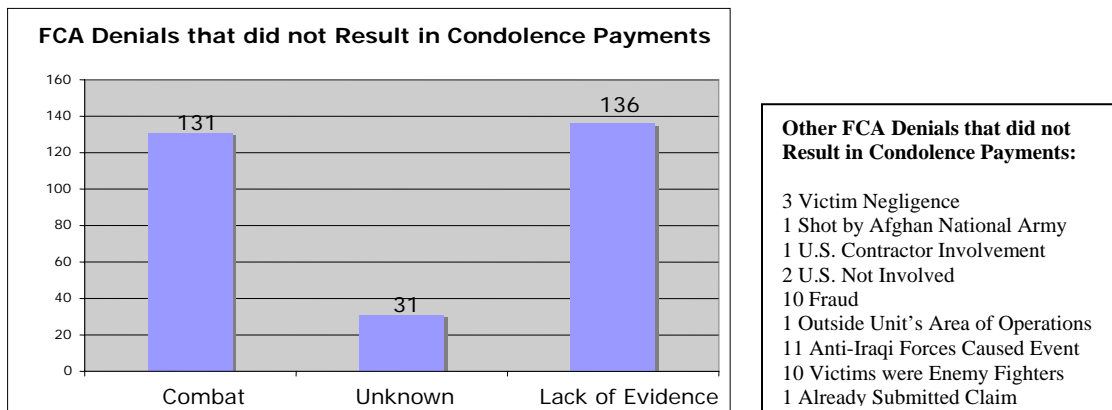
³⁷ In 20 cases it was impossible to determine what adjudicated the claim.

(Note: The numbers in the above chart do not exactly add up because two units (30BCT, 1ID and 3BCT, 4ID) each provided a condolence payment and an FCA award for a single claim.)³⁸

Eighty-six (86) claims received an FCA award and 103 received a condolence payment (with two claims receiving both). Nearly every condolence payment offer occurred after adjudication under the FCA. Denials of FCA compensation because of the “combat exclusion” resulted in the most condolence payments.



Yet, 131 claims denied under the “combat exclusion” did not receive consideration for a condolence payment.



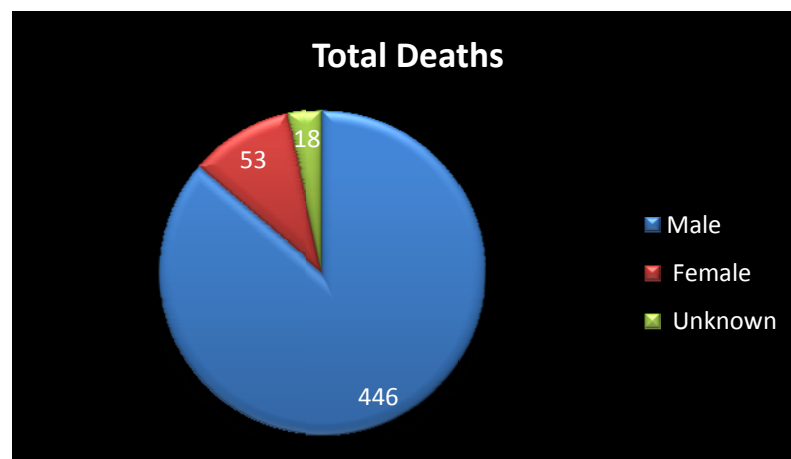
FCA awards totaled \$526,074.36: \$52,603.36 in Afghanistan and \$473,471.00 in Iraq. Condolence payments totaled \$236,980: all in Iraq.

³⁸ See http://www.aclu.org/natsec/foia/pdf/Army0612_0617.pdf; http://www.aclu.org/natsec/foia/pdf/Army0650_0652.pdf. While there is nothing in the regulations or rules that specifically forbid a condolence payment and an FCA award from being used to offer aid to a claimant for harm that results from a single incident, generally condolence payments appear to only be used when a FCA award is denied.

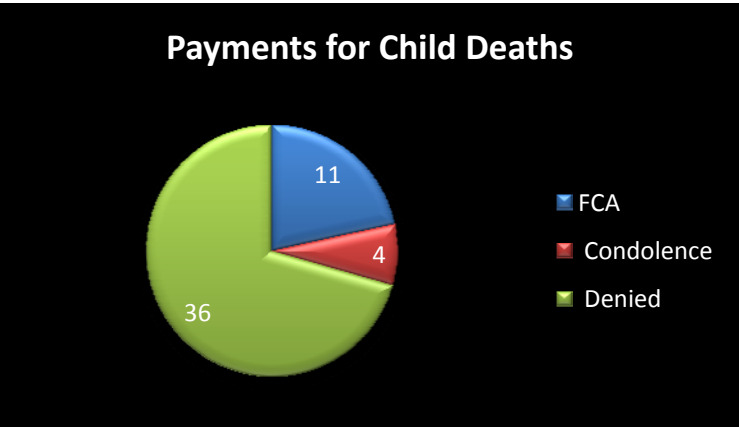
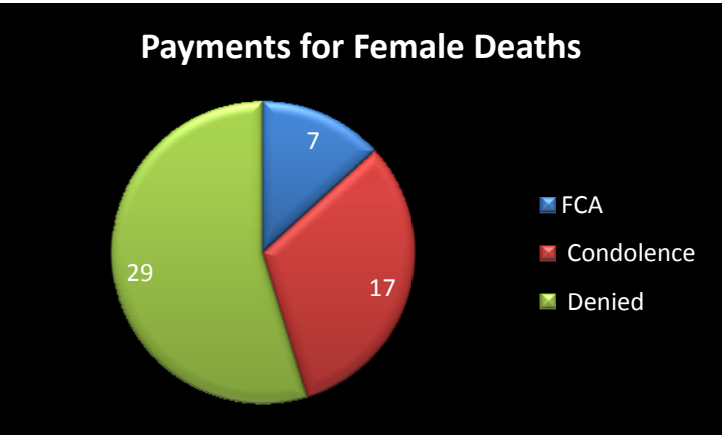
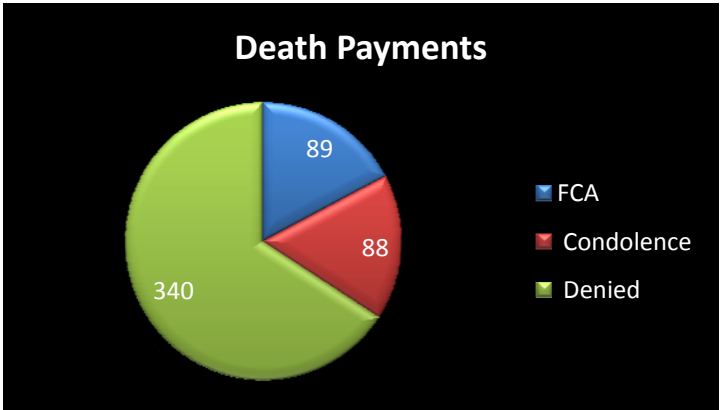
Claims for deaths totaled 517. This number does not include every death mentioned in the files; it represents only deaths in which a claimant sought an award for a particular death. In 459 files, a claim was brought for at least one death. Only one case (at pages 495-498) dealt with an instance of mass casualties where 13 family members died.³⁹ The graphs below provide further analysis on the death claims.

The Afghan files include 17 claimed deaths: all male, including three minors. The Iraq files include 500 claimed deaths, including: 53 females and 48 minors. The number of female deaths may be larger because a few cases used gender-neutral language.

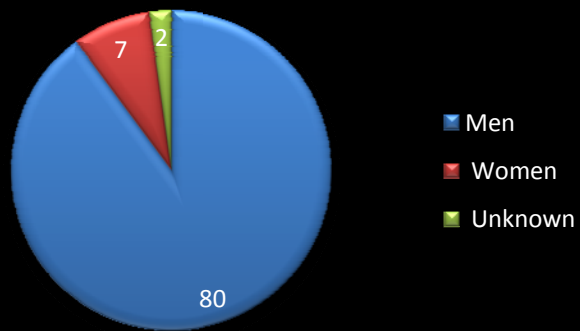
Compensation for deaths dominated the awards and payments. Only six FCA awards and 18 condolence payments did not concern a death. FCA expenditures for deaths totaled \$476,701.73 with an average per death of \$5,356.20. However, the real average is lower because in 21 cases the judge advocate did not apportion what amount compensated a death and what amount compensated injuries and/or property damage. In those cases the total award counted as compensation for the death. Condolence payments for deaths totaled \$199,565 with an average of \$2,267.78. In only one of those cases did the judge advocate fail to explain the apportionment of the payment. Most payments covered only a death, even if damage and/or injury occurred.



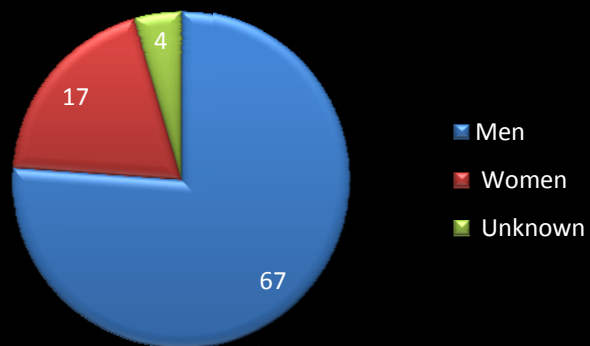
³⁹ See http://www.aclu.org/natsec/foia/pdf/Army0495_0498.pdf



Deaths that Received FCA Awards



Deaths that Received Condolence Payments



In Afghanistan, 10 deaths received an FCA award for a total of \$47,532.73 and an average of \$4,753.27. These deaths included three minors. The lowest award was \$1,500.⁴⁰ In that case a HMMWV hit an Afghan child crossing the road. The highest individual death award was \$6,984.63 (an amount used in the cases at pages 40-43 and 71-74).⁴¹ Interestingly, two cases from Afghanistan discuss the existence of a valuation chart to be used in determining awards. However, this chart was not included in the files and has never been released by the government. At page 61, a memorandum signed by a three member FCC from CJTF-76 explained that “according to the valuation chart for death claims in Afghanistan \$6,000.00 USD is fair and reasonable for the death of a local national...”⁴² This is the same office that adjudicated each of the other death claims, with the exception of the \$1,500 award. Yet, only three awards are at or above \$6,000, another is slightly under at \$5,986.83, but five fall well below \$6,000. In Iraq, 167 deaths received an FCA award for a total of \$429,169 and an average of \$5,432.51.

The deaths for the seven women (all in Iraq) were compensated for a total of \$40,173 under the FCA with an average of \$5,739. The highest award for an individual female death was \$11,000.⁴³ The average per award for all male deaths was \$5,281.60. The lowest award was \$500.⁴⁴

The average condolence payment for a woman’s death was \$2,470. Each death claim received \$2,500 (one may have included money for an injury and property damage as well) except for one awarded at \$2,000. The average condolence payment for a male’s death was \$2,202. Several payments fell below \$2,500, including four for \$500.

The youngest victim whose family received monetary aid was 4 years old.⁴⁵ The ages of children killed, whose family received monetary aid, include: 4, 5, 9, 12, 13, 15, 16, and 17. The youngest child whose family received no monetary aid was 8 months old.⁴⁶

⁴⁰ See http://www.aclu.org/natsec/foia/pdf/Army0075_0078.pdf.

⁴¹ See http://www.aclu.org/natsec/foia/pdf/Army0040_0043.pdf; http://www.aclu.org/natsec/foia/pdf/Army0067_0074.pdf.

⁴² See http://www.aclu.org/natsec/foia/pdf/Army0059_0065.pdf.

⁴³ See http://www.aclu.org/natsec/foia/pdf/Army0157_0160.pdf.

⁴⁴ See http://www.aclu.org/natsec/foia/pdf/Army0711_0712.pdf.

⁴⁵ See http://www.aclu.org/natsec/foia/pdf/Army0588_0591.pdf.

⁴⁶ See http://www.aclu.org/natsec/foia/pdf/Army1390_1393.pdf.

While claims for deaths made up the majority of cases, claimants brought 60 personal injury and 152 property damage claims.

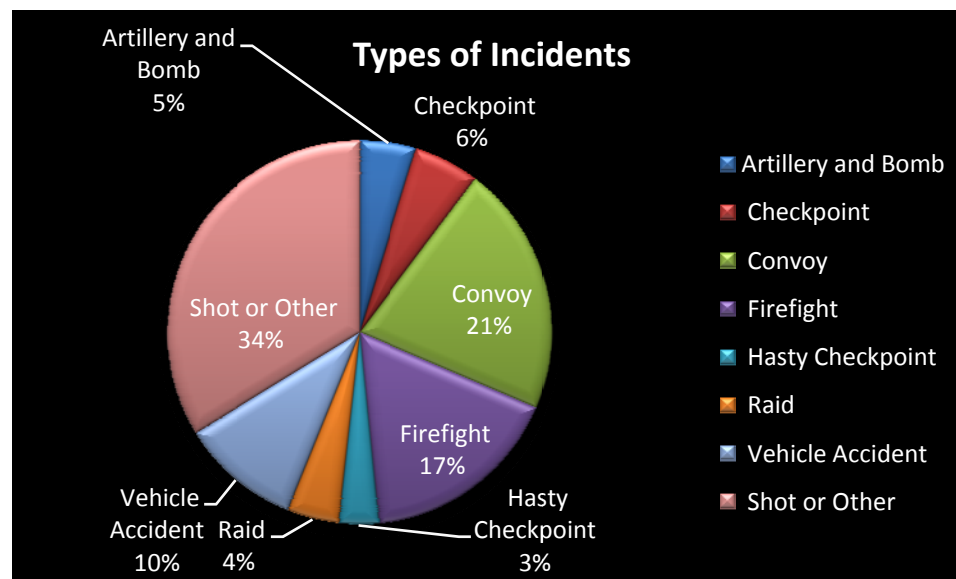
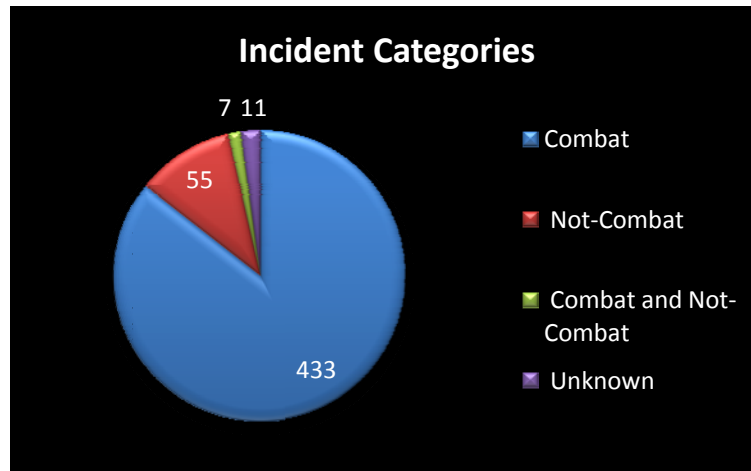
In only 11 cases does the evidence seem to indicate that most likely an enemy fighter caused the harm. Judge advocates in 10 cases seem to believe that an enemy fighter suffered the claimed harm – these cases include where it was merely possible. One of those cases involves a 12-year-old alleged to have been killed while positioning an IED.⁴⁷ In only 10 cases do judge advocates allege, or merely intimate the possibility, that a claim may be fraudulent.

The 506 claims do not include every claim the units adjudicated during their tours. Further, several units deployed to Iraq during the period covered are not represented. Some of these units include: 82nd Airborne Division; 2BCT, 25ID; and 1BCT, 24ID.

The claims fit within categories. Four hundred and thirty three (433) claims related to “combat” acts. “Combat” means that U.S. forces engaged enemy fighters or reacted to a real or perceived security threat. “Not-combat” cases involved no allegation that U.S. soldiers engaged in any type of armed combat, real or perceived – most of these cases concerned vehicle accidents between U.S. military trucks and civilian cars. The category “combat and not-combat” covers the cases dealing with the vehicle accident in Kabul that resulted in a riot on May 29, 2006. During the course of the riot, U.S. and Afghan forces fired into the crowd. A likely eighth claim should be included in this category but the judge advocate did not admit that fact in adjudicating that claim where allegedly an Afghan security officer killed a civilian.

Each case was further classified according to an incident type. Most classifications are based on the facts presented by the judge advocate. In the few cases missing a memorandum of opinion or notation by the claims office describing the nature of the event, the classification is based on the claimant’s description of events. The most non-descript category – shot or other – mainly covers cases where the claimant alleged that U.S. forces shot a family member and the judge advocate’s memorandum offers no further elaboration beyond explaining that the family member was shot during a combat operation.

⁴⁷ See http://www.aclu.org/natsec/foia/pdf/Army0857_0861.pdf.



The following table provides the results of cases by incident type, with a few more specific types added:

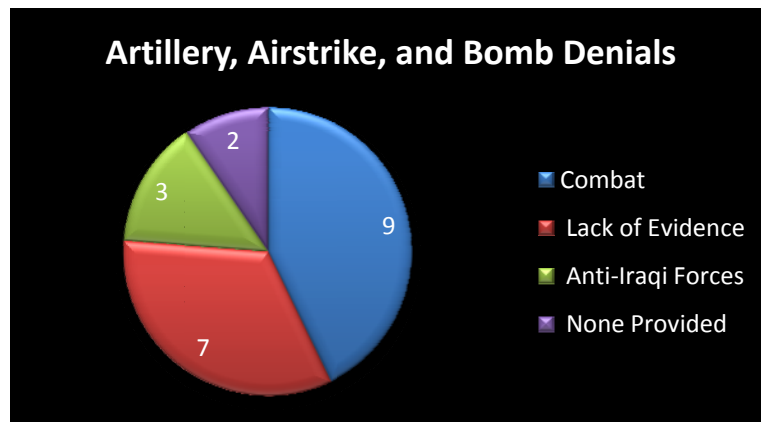
Type of Incident	Paid FCA	Paid Condolence	Denied Claims	Total Number
Artillery, Air Strike, and Bomb	1	2	21	24
Checkpoint Shooting	1	9	18	28
Hasty Checkpoint	1	10	6	17
Convoy Shooting	17	34	56	107
Criminal Act	1	0	1	2
Explosive Ordinance Disposal	0	0	2	2
Firefight / Crossfire	3	23	61	86
Negligent Discharge	2	0	0	2
Other Escalation of Force	1	0	5	6
Raid	4	7	11	22
Riot / Accident	7	0	1	8
Shot / Other	19	15	117	150
Unlawful Detention	1	0	0	1
Vehicle Accident	28	3	20	51
TOTAL	86	103	319	506

(Note: As discussed above, the numbers in this chart appear to be off by two; however, this discrepancy only exists because two units offered both condolence payments and FCA awards in a single claim.)

1. *Artillery, Air Strike, and Bomb:*

Twenty-four (24) cases appear to deal with harm caused by either an artillery round, a cluster bomb (at least 2 cases), or a bomb dropped from a U.S. fighter plane. In many of these cases the claimant appears unsure of the source of the explosion and the judge advocate indicates an inability to find corroborating U.S. evidence of an artillery or air strike.

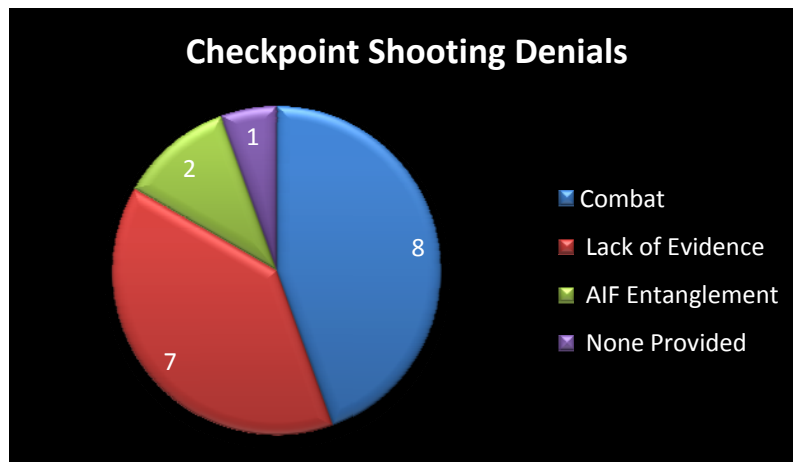
Paid FCA	Paid Condolence	Denied
1	2	21
\$2,500	\$7,700	\$0



2. *Checkpoint Shootings:*

Twenty-eight (28) claims concern checkpoint shootings. In these cases U.S. forces operated a permanent checkpoint, usually found in front of U.S. forward-operating bases, entrances to government facilities, and the like. Some of these cases may have been “hasty checkpoints,” but when it seemed unclear, cases were counted in this category. The military issues guidelines on how to run checkpoints to ensure civilian drivers see or hear plenty of warnings to slow down, stop and follow military commands. Guidelines show units how to deploy resources to establish a proper hasty checkpoint to minimize the risk of harm to civilians while attaining the proper force protection levels. When warnings go unheeded, U.S. service members must follow graduated response measures, escalating the level of force as the threat appears to grow. Soldiers first attempt to respond with various non-lethal means before employing lethal means. The typical series of responses – called Escalation of Force – would be: hand gestures, verbal warnings, shining lights, warning shots, disabling shots, and finally lethal shots.

Paid FCA	Paid Condolence	Denied
1	9	18
\$7,000	\$31,000	\$0



3. *Hasty Checkpoints:*

The difference between this category and the previous category is that hasty checkpoints are not permanent or semi-permanent traffic control points. U.S. forces generally use hasty checkpoints after encountering an improvised explosive device (IED), to secure the area after an attack, or to temporarily re-route traffic for some reason.

Paid FCA	Paid Condolence	Denied
1	10	6
\$2,500	\$24,700	\$0

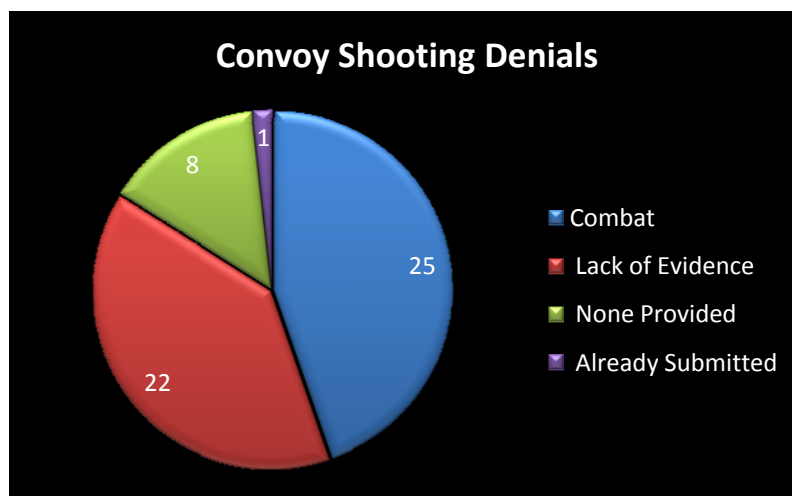
The “combat exclusion” accounted for five denials and victim negligence for one.

4. *Convoy Shootings:*

These cases involve graduated responses from U.S. service members when they perceive a threat while driving. U.S. patrols drive through towns and cities every day in Afghanistan and Iraq and remain on constant alert for suicide bombers, IEDs, and other

threats. In a typical case, the gunner of a HMMWV, perceiving a threat from a civilian vehicle may try to wave the driver out of the way, shine lights, shoot a flare gun, fire warning shots, fire disabling shots, and finally fire lethal shots.

Paid FCA	Paid Condolence	Denied
17	34	56
\$117,800	\$74,600	\$0



5. *Other Escalation of Force Events:*

The cases in this category also deal with instances where U.S. service members took graduated responses to various threats, but it is unclear if the cases occurred at checkpoints, during convoys, or some other type of event.

Paid FCA	Paid Condolence	Denied
1	0	5
\$3,500	\$0	\$0

The judge advocates used the “combat exclusion” to deny three claims, “victim negligence” to deny one, and one denial provided no justification.

6. *Criminal Act:*

The claimant or the judge advocate alleged wrongfulness on the part of a U.S. service member in 31 cases. However, only two cases allege overtly criminal acts; one resulted in an FCA award.

Paid FCA	Paid Condolence	Denied
1	0	1
\$5,000	\$0	\$0

A non-U.S. service member caused the harm in the denied claim.

7. *Explosive Ordinance Disposal:*

Sometimes, when U.S. military personnel discover an IED they must detonate the explosive on the scene due to risks associated with moving the bomb. Similarly, when the military uncovers a cache of weapons, EOD teams must sometimes detonate bombs in place.

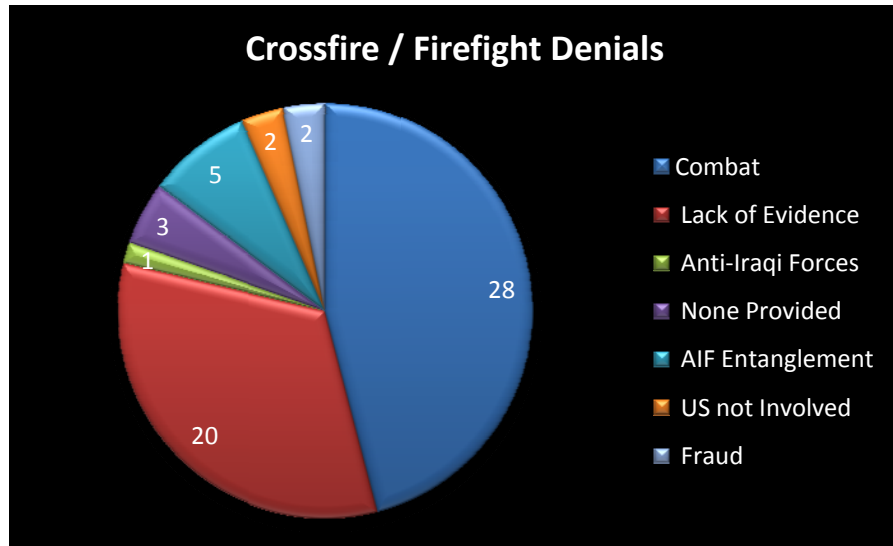
Paid FCA	Paid Condolence	Denied
0	0	2
\$0	\$0	\$0

One case was denied under the “combat exclusion”, and the other was denied due to a lack of evidence.

8. *Firefight / Crossfire:*

The harm in these cases occurred as the result of U.S. forces battling enemy forces. Firefights regularly catch innocent civilians in the crossfire.

Paid FCA	Paid Condolence	Denied
3	23	61
\$25,020	\$58,065	\$0



9. *Negligent Discharge:*

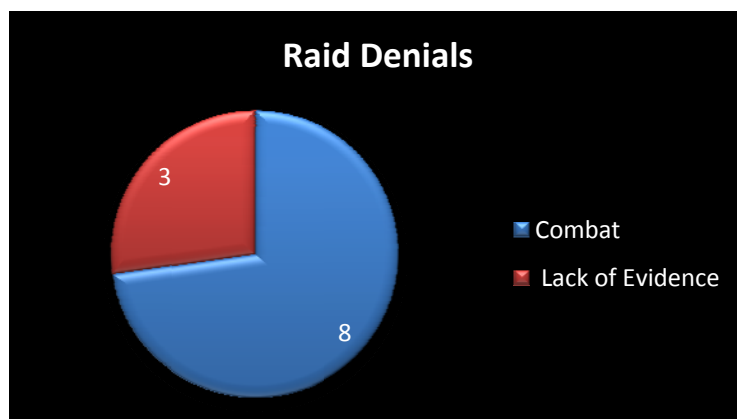
A negligent discharge occurs when a U.S. weapon system fires accidentally.

Paid FCA	Paid Condolence	Denied
2	0	0
\$40,000	\$0	\$0

10. *Raid:*

Harm in these cases resulted when U.S. forces raided a home or business looking for insurgents or contraband.

Paid FCA	Paid Condolence	Denied
4	7	11
\$22,000	\$12,000	\$0



11. *Unlawful Detention:*

One case falls within this category and it comes from the ACLU's Torture FOIA.⁴⁸ The claimant's son worked as a night guard in his home village. On July 16, 2003 a U.S. patrol shot him. They transferred him to a combat support hospital and then mistakenly took him to Abu Ghraib as a detainee. The judge advocate determined that the military police unit was negligent because they had no authority to be in the area since U.S. Marines were responsible for that village. After being mistakenly held at Abu Ghraib for some number of months, the victim received a \$1,000 FCA award.

12. *Riot / Accident:*

The cases in this category arose from a single incident on May 29, 2006. A HEMMT (a type of U.S. Army truck) lost control of its brakes at the top of a hill while entering Kabul. The HEMMT collided with a number of vehicles until it came to a complete stop. Harm consisted of numerous damaged vehicles, personal injuries, and one death.⁴⁹ Local nationals congregated around the scene and allegedly began to

⁴⁸ See <http://action.aclu.org/torturefoia/released/050206/>.

⁴⁹ See http://www.aclu.org/natsec/foia/pdf/Army0018_0022.pdf.

protest. Local Afghan national police and U.S. military personnel shot into the crowd. This resulted in numerous fatalities.

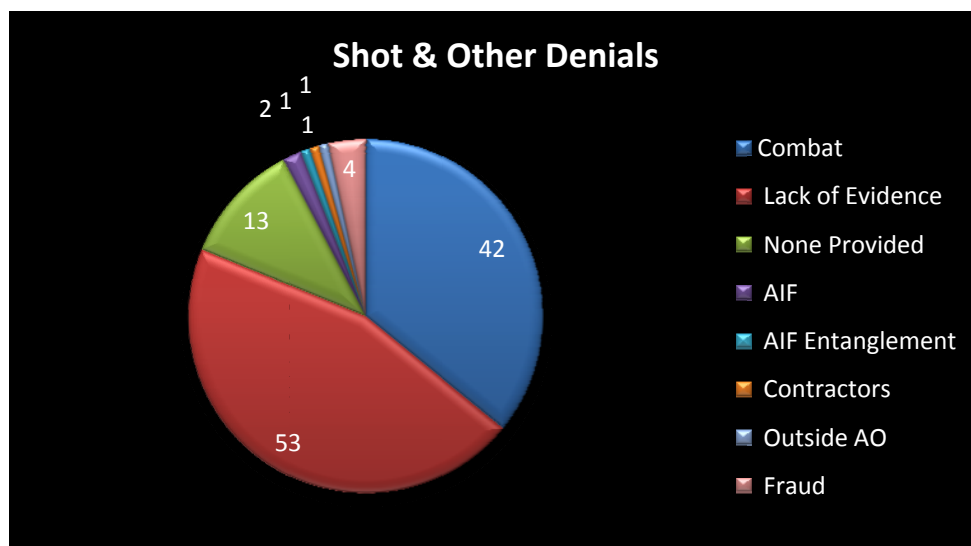
Paid FCA	Paid Condolence	Denied
7	0	1
\$32,005.77	\$0	\$0

An Afghan National Army soldier shot the victim in the denied case. The file does not indicate it was part of the riot, but it seems likely.

13. *Shot / Other:*

In this catchall category the exact nature of the event causing the harm is not apparent within the files.

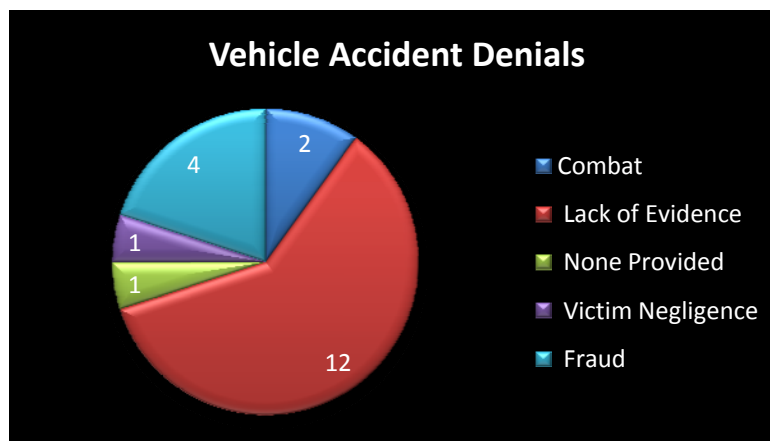
Paid FCA	Paid Condolence	Denials
19	15	117
\$78,486.83	\$19,915	\$0



14. *Vehicle Accidents:*

This category includes the most “not-combat” related incidents.

Paid FCA	Paid Condolence	Denied
28	3	20
\$189,261.76	\$9,000	\$0



The numbers and graphs above do little to present the human elements involved in these cases. Each case affected individuals and families. Every claim presents a story of harm that an Afghan or Iraqi family suffered. The claimant’s words on page 773 highlight the desperation found in many cases:⁵⁰

⁵⁰ See http://www.aclu.org/natsec/foia/pdf/Army0773_0776.pdf.

Give a brief statement of the accident or incident on which the claim for damages to property or for personal injury is based. (Use back of this sheet if necessary.)

The US forces shot my husband his name
" [REDACTED] " when he was
back to his house by his car, this shooting
led to killed him near of his house and now
We have not any source to cost the life
and we have large ^{number of} children and I am his
wife I have not job, please help, help
help just for our family.

Again, at page 784:⁵¹

Situation (المنهج القضائي):

More than one year, [REDACTED] was killed.
The killers are unknown. He was on his way from
Almosinia province to Baghdad to work
They found his body in the main road in the
intersection of Almosinia. The body was destroyed
His wife, [REDACTED] complained and asked
to find out who committed this act against her husband. She
also asked for compensation for she has seven children, and she
is pregnant. For ^{sake} humanity, she is asking for help for her children
who have no one to provide for them.

⁵¹ See http://www.aclu.org/natsec/foia/pdf/Army0783_0784.pdf.

IV. Lessons Learned

Several patterns emerge from the files that highlight significant problems with the implementation of the Foreign Claims Act and the condolence payment program. Each will be handled in turn.

1. “*Combat exclusion*” applied broadly, arbitrarily, and inappropriately:

As indicated in Part III, 201 claims appear to have been denied because of the so-called “combat exclusion” of the Foreign Claims Act. The limiting language in the law will obviously prohibit a significant number of claims from receiving an award in combat zones. However, given the stated purpose of the FCA the “combat exclusion” should be interpreted narrowly to ensure as many innocent civilians receive help as possible. The files indicate an abuse of the “combat exclusion” by many judge advocates to bar claims that should have received more thorough consideration. Unfortunately, in the vast majority of cases judge advocates assume combat occurred and determine that compensation is barred because of the combat nature of the event. They provide minimal or no substantive analysis despite their professional responsibility to do so.

Judge advocates inappropriately presume that any claim involving armed engagements must result in a denial. For example, in one case a judge advocate wrote: “Here, there is a *presumption* of combat activity when CF [coalition forces] *fire weapons*.”⁵² “Combat activity” in turn presumes exclusion of compensation. The FCA and its implementing regulations do not authorize these types of presumptions or this line of reasoning. By following this line of reasoning judge advocates come to hasty conclusions without even pausing to consider whether or not the use of the weapons resulted from negligent or wrongful acts – a required line of inquiry.

In another case U.S. forces “engaged a vehicle that was headed towards a blocking position by firing three warning shots. The vehicle did not stop so an additional shot was fired killing the driver of the vehicle.”⁵³ In denying the claim under the “combat exclusion” the judge advocate wrote, “Here, CF [coalition forces] actions

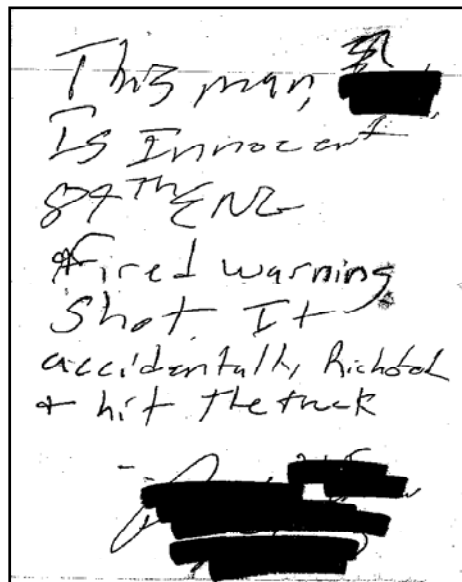
⁵² See http://www.aclu.org/natsec/foia/pdf/Army1535_1538.pdf (emphasis added).

⁵³ See http://www.aclu.org/natsec/foia/pdf/Army1076_1079.pdf.

constitute *combat activity* and thus *precludes compensation*.”⁵⁴ No further analysis is provided.

While this presumption is not always explicitly stated, the underlying reasoning is found in the vast majority of the cases. In many cases, judge advocates simply state the facts in a sentence or two to establish that a combat engagement occurred and then categorically deny the claim under the “combat exclusion.”

Applying this inappropriate presumption is not the only faulty portion of the “combat exclusion” analysis found. Judge advocates regularly overstate the significance of the “combat exclusion”. Many claim it categorically “prohibits” compensation for anything related to combat. Again, even if “combat” exists in a particular set of facts, compensation may be appropriate if negligence or wrongfulness played a role. For example, in one case a man was killed when a warning shot ricocheted.⁵⁵ His family did not receive compensation because the “combat activities bar” prohibited compensation. The judge advocate wrote: “We are sorry and very sympathetic to your loss, however your claim must be denied because U.S. law *prohibits* awarding compensation for claims resulting from and/or related to combat operations *in any way*.”⁵⁶ This is not an accurate statement of the law and this type of reasoning subverts the main purpose of the FCA. Consider the following note found in that case’s file written by a U.S. soldier:



This man, [REDACTED]
IS Innocent
89TH NG
Fired warning
Shot. It
accidentally ricocheted
& hit the truck
[REDACTED]

⁵⁴ Ibid. (emphasis added).

⁵⁵ See http://www.aclu.org/natsec/foia/pdf/Army0763_0766.pdf.

⁵⁶ Ibid. (emphasis added).

The FCA hopes to assist this sort of victim in order to win the community's trust. Yet, this categorical denial, supported by a misinterpretation of the law, blocked possible inquiries that may have justified compensation. Even where this sort of explicit expression is not found, the same underlying rationale exists in most cases where the judge advocate uses the "combat exclusion."

Several judge advocates inappropriately apply the "combat exclusion" by misstating the order of proof. For example, one judge advocate denied a series of claims because there was "Not enough evidence to show [the vehicle accident] was not combat related."⁵⁷ In effect, the judge advocate assumed a combat act occurred and waited for affirmative proof from the victim to show otherwise.⁵⁸ Yet, the facts released seem to indicate the harm resulted from a vehicle accident. The military will not meet the purpose of the FCA when implemented in this way.

Finally, in numerous cases, judge advocates discuss the "combat exclusion" even when no reason exists to do so, because the claim can be, and many times is, denied for a different reason. If a claim can be lawfully denied because no evidence proves the event occurred, why assume the events occurred to say that combat related events are not compensable in the categorical way most judge advocates express it? Ten cases follow this exact scenario, and the underlying elements are found in many more.

For example, one claimant alleged that coalition forces killed his 8-year-old sister while she played near a school.⁵⁹ The judge advocate held that there was "insufficient evidence to show that CF [coalition forces] committed a negligent or wrongful act."⁶⁰ Officially, a lack of evidence justified the denial. However, the judge advocate continued: "Even if the witness statements and Claimant's oral testimony is true, then this claim is barred because CF actions constitute combat activity."⁶¹ If the purpose of the FCA is to build good-will with the local population, cases should be denied on the

⁵⁷ See http://www.aclu.org/natsec/foia/pdf/Army0275_0276.pdf;
http://www.aclu.org/natsec/foia/pdf/Army0277_0278.pdf;
http://www.aclu.org/natsec/foia/pdf/Army0279_0280.pdf.

⁵⁸ Ibid.

⁵⁹ See http://www.aclu.org/natsec/foia/pdf/Army1038_1042.pdf.

⁶⁰ Ibid.

⁶¹ Ibid.

narrowest possible grounds and based on the most justified reasoning. Interpreting the “combat exclusion” as a catchall denial is inappropriate.

2. *Condolence payments not offered for “combat claims”:*

Seventy (70) cases denied under the “combat exclusion” resulted in a condolence payment. However, 131 cases denied under the “combat exclusion” did not receive a condolence payment or even appear to be considered for a condolence payment. The U.S. military created the condolence payment program to provide some monetary aid to civilian victims whose claims could not be compensated under the FCA. Condolence payments are nominal and merely serve as gestures of sympathy. This allows the rules associated with determining appropriate recipients to be much less stringent than the FCA. The analysis for determining an appropriate condolence payment is less legalistic. Essentially, if a case is denied under the “combat exclusion,” the victim was “friendly,” and U.S. or coalition forces caused the harm, it should be paid. The purpose of the condolence payment program allows coalition forces to demonstrate sympathy and recognition to the family and community for unfortunate occurrences. This recognition “will positively influence both the community” and local leaders.⁶² Yet, in 131 cases the chance to “positively influence” and express “sympathy for [an] unfortunate occurrence” was lost.

In many of these cases judge advocates “express sympathy” and “regret” concerning the harm a victim or family member suffered, but deny the FCA claim without authorizing, supporting or recommending a condolence payment. For example, U.S. forces killed one claimant’s son, age 12, while he played soccer with friends.⁶³ The judge advocate denied the claim because the loss “was a result of Combat Operations.”⁶⁴ Nothing in the file indicates the 12-year-old son engaged in any activity that the U.S. could perceive as a threat, yet the judge advocate did not consider a condolence payment.

A lack of evidence did not appear to be at issue in the majority of the 131 cases. While the weight of evidence in an average claim does not equal the amount of evidence an insurance adjuster requires in the U.S. for an insurance claim, the limitations for combat must allow for some leeway. In most instances judge advocates and other

⁶² See http://www.aclu.org/natsec/foia/pdf/Army0205_0207.pdf.

⁶³ See http://www.aclu.org/natsec/foia/pdf/Army0844_0846.pdf.

⁶⁴ Ibid.

officers can fairly easily determine whether an incident occurred if simple statements or pieces of evidence exist. Yet, in some cases, even with overwhelming evidence, condolence payments were not considered. For example, one claimant sought compensation for the wrongful deaths of his wife and daughter.⁶⁵ The claimant alleged that they were killed while U.S. forces fought insurgents. The judge advocate wrote: “Insurgents were engaging US Forces from the claimant’s home and two other houses. The predator video feed shows insurgents engaging US Forces with RPGs and small arms fire.”⁶⁶ The memorandum also mentions that the U.S. dropped a “500 pound bomb in [the] area on [the] day.”⁶⁷ Nothing connects the family to the insurgents and clearly an engagement took place at that time and location. Yet, a condolence payment did not follow for the deaths of two innocent civilians.

In one case it appears the judge advocate knew to consider the possibility of a condolence payment but still failed to refer the case for a payment. The claimant’s brother was killed at his farm, but it is not clear whether the U.S. soldiers believed the man to be a threat or were firing at other individuals in the area.⁶⁸ However, detentions resulted from the engagement and the victim was determined to not have been associated with any anti-coalition forces. On the intake sheet the word “condolence” was handwritten, likely by the judge advocate or paralegal. Yet, the judge advocate simply denied the claim under the FCA without submitting it for a condolence payment. Again, the judge advocate mentioned his sympathy: “Allow me to express my sympathy for your loss, however...your claim is not compensable.”⁶⁹

In some cases the need to offer a condolence payment seems obvious. For example, U.S. soldiers killed one young Iraqi man as he fished with a friend in a small boat at night.⁷⁰ A U.S. patrol saw them and fired an illumination round before firing their weapons. The judge advocate wrote that the “claimant and his son [the victim] were huge supporters of democracy and up to this day held meetings and taught there [sic]

⁶⁵ See http://www.aclu.org/natsec/foia/pdf/Army0878_0881.pdf.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ See http://www.aclu.org/natsec/foia/pdf/Army1469_1470.pdf.

⁶⁹ Ibid.

⁷⁰ See http://www.aclu.org/natsec/foia/pdf/Army0886_0888.pdf.

friends about democracy.”⁷¹ Continuing: “There is sufficient evidence to indicate that U.S. Forces intentionally killed the claimant’s son. Unfortunately, those forces were involved in security operations at the time.”⁷² The soldiers perceived a threat from the men fishing at night, but the threat proved nonexistent. Most certainly, a condolence payment to a man who wanted to work with the Americans to help bring democracy would have built greater good will in the man and in his community.

In another case, the claimant alleged that an aircraft fired a missile at his wife while she walked down the street carrying their 18-month-old child.⁷³ The explosion killed the child and injured the wife. The judge advocate determined after reviewing all the evidence to the “best of its ability” that the incident was a combat action and denied the claim for that reason. He did not consider a condolence payment for the loss of an 18-month-old child. The last line on the first page of the in-take form reads: “They will be very thankful if you help them.”⁷⁴ There is an opportunity in all such cases to offer concrete expressions of sympathy, but these 131 cases, and many more, indicate that the U.S. military fails to capitalize on these situations to build goodwill.

Unfortunately, even when a judge advocate or unit decides to make a condolence payment, inexcusable misapplications hinder building good-will. In one example, the condolence payment memorandum held that the “maximum amount authorized for a condolence payment in this case is \$500.00 for property, \$1,000.000 for injury, and \$2500.00 for death.”⁷⁵ The case concerned an incident that occurred on January 30, 2005. In November 2004, MNC-I raised the maximum condolence payment amounts to \$2,500 per instance of property damage, injury, and death.⁷⁶ These types of errors are inexcusable and damage the U.S. military’s ability to meet its strategic objectives.

3. *Lack of analysis regarding negligence and combat:*

Adjudicating foreign claims is a legal process requiring a determination involving the claimant’s rights and the U.S. government’s responsibilities. Judge advocates must

⁷¹ Ibid.

⁷² Ibid.

⁷³ See http://www.aclu.org/natsec/foia/pdf/Army1642_1645.pdf.

⁷⁴ Ibid.

⁷⁵ See http://www.aclu.org/natsec/foia/pdf/Army1031_1035.pdf.

⁷⁶ See General Accountability Office, *The Department of Defense’s Use of Solatia and Condolence Payments in Iraq and Afghanistan*, May 2007, P. 24.

analyze the facts and evidence presented in view of the Foreign Claims Act and the law's implementing regulations. They must adjudicate cases presented in conformity with the legal constraints and requirements of the system, and in accordance with their duty as licensed attorneys. Unfortunately, the analysis found in nearly all of the released memorandums are of poor legal quality with little, and many times no, substantive legal analysis.

Generally, a judge advocate should first determine if there is enough evidence to prove the incident occurred. Second, the judge advocate should determine the type and nature of the incident involved. Was the harm the result of a "noncombat" incident? If so, strict liability attaches. Was the harm not related to combat? If so, was negligence or wrongfulness at issue? Was the harm the result of a combat-related incident? If so, was negligence or wrongfulness at issue? Was the victim contributorily negligent? Finally, the judge advocate should determine what damages, if any, the victim suffered. However, this sequence of analysis, however cursory and simplistic, is found in only a handful of the cases.

Most cases where judge advocates considered the harm related to a combat activity were denied under the "combat exclusion" without analysis (as discussed in section I). However, if a claim is related to combat, a judge advocate must still determine, for example, if the combat was lawful, whether the rules of engagement were followed, whether U.S. service members involved used proportional force, and also did not act negligently or wrongfully. Yet, few cases apply this analysis in even a cursory way.

Negligence is a legal concept that operates to allow compensation for non-accidental injuries. Negligence means conduct that is culpable because it misses the legal standard required of a "reasonable person" in protecting individuals against foreseeably risky and harmful acts of other members of society. While evidence in a combat zone such as Afghanistan and Iraq will necessarily be limited and weak in comparison to evidence presented in a civil court inside the U.S., evidence is available and analyzing the facts as presented would have been possible in nearly every case reviewed for this report. Yet, questions are not asked and conclusions not drawn. Instead, judge advocates provide conclusory opinions that combat acts occurred and may not be compensated.

For example, one claimant alleged that a tank drove down the wrong direction of a street and ran over her family's car with her husband inside.⁷⁷ The husband died as a result of the accident. The judge advocate determined that the claim was not compensable because the loss resulted from a combat operation. If the tank was engaging enemy fire at the time it ran over the claimant's husband, then the claim could be rightly denied under the "combat exclusion", but nothing in the file indicates that was the situation. From the evidence presented, it appears the tank was on a routine patrol. If that were the case, the incident would be a "noncombat" act and strict liability would attach. However, the memorandum does not address these issues.

Several cases involve allegations that U.S. convoys began shooting to clear a way through heavy traffic. The son of one claimant was riding a bike along the street when a convoy began shooting to clear a path.⁷⁸ The judge advocate seemed to accept the claimant's version of events as true and does not attempt to justify the incident. Instead, he simply holds: "The evidence shows that the damage was caused during combat" and hence was not compensable under the FCA.⁷⁹ If the claim is at all true, the firing of weapons in this instance was well beyond the rules of engagement and an inquiry into possible negligence should have been conducted.

In another case, a U.S. convoy shot at a car that had been parked for too long.⁸⁰ The warning shot went through the car and hit and killed the victim who was waiting for a taxi. The judge advocate held that the unit fired in "self-defense in response to what they thought was a possible AIF (anti-Iraqi forces) attack."⁸¹ Was this perceived threat reasonable? Was the response reasonable? These essential questions were not considered in the analysis.

In what appears to be a particularly egregious case, a family received a condolence payment after an artillery round landed near their car.⁸² The \$5,200 condolence payment covered one death, two major injuries and the destroyed vehicle. The judge advocate denied the FCA claim because "an artillery strike clearly constitutes

⁷⁷ See http://www.aclu.org/natsec/foia/pdf/Army1276_1278.pdf.

⁷⁸ See http://www.aclu.org/natsec/foia/pdf/Army1346_1349.pdf.

⁷⁹ Ibid.

⁸⁰ See http://www.aclu.org/natsec/foia/pdf/Army1175_1179.pdf.

⁸¹ Ibid.

⁸² See http://www.aclu.org/natsec/foia/pdf/Army1318_1321.pdf.

combat activity.”⁸³ However, in the final sentence he wrote: “CF [coalition forces] regularly conduct artillery strikes on orchards such as the claimant’s orchard.”⁸⁴ It is hard to imagine what “military necessity” existed justifying this assault. Further, even if a military need existed, was the use of force proportional to the threat? Unfortunately, this judge advocate did not ask these questions.

Similarly, in one of the two cases dealing with the planned disposal of explosive ordinances, the claimant’s son died.⁸⁵ U.S. forces allegedly uncovered a stockpile of old regime ammunition. The victim, tending sheep 1,000 meters away, died from shrapnel wounds. The judge advocate denied the claim because “detonation of ammunition constitutes a combat activity.”⁸⁶ Certain questions immediately come to mind about potential negligence that does not appear in the analysis: Did the U.S. service members attempt to create a safe zone? How were warnings expressed? Should further measures have been taken?

At least 157 cases deal with events involving an escalation of force during a convoy movement or at a checkpoint. As defined above, when a U.S. soldier perceives a potential threat he may respond appropriately using graduated responses as the threat intensifies. In such cases, it is imperative to determine whether a soldier’s response was reasonable, justified, and within the rules of engagement. Not only does this analysis ensure that the claimant’s case is handled appropriately, it also allows the unit to learn how and when soldiers use force.

In one case, an FCA award was denied and no condolence payment offered where a claimant alleged that her son was shot and killed by a U.S. convoy.⁸⁷ A SIGACT (significant act report) revealed that a U.S. patrol saw a vehicle approaching them at a high rate of speed. The “gunner did not have sufficient time to load flares so a warning shot was shot in front of the vehicle. The driver swerved off the road. The patrol found that the driver had sustained major head wounds from the incident.”⁸⁸ The important, but

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ See http://www.aclu.org/natsec/foia/pdf/Army0518_0521.pdf.

⁸⁶ Ibid.

⁸⁷ See http://www.aclu.org/natsec/foia/pdf/Army1097_1100.pdf.

⁸⁸ Ibid.

unasked, questions were: Should flares be readily available? Was it negligent to not have non-lethal means of warning readily available before resorting to firing a weapon?

Several claimants allege that incidents began because U.S. convoys were traveling in the wrong direction. This would naturally catch a driver off-guard. Yet, analysis regarding the possibility that this fact contributed to the shooting is absent in these cases. For example, one U.S. convoy allegedly drove down the wrong side of the street and fired at a vehicle that failed to pull out of the way of the on-coming convoy.⁸⁹ A SIGACT from the unit claimed that the driver was heading “straight at the lead vehicle” of the convoy. The judge advocate found that the death occurred during the lawful escalation of force and that the soldier fired in “anticipatory self defense” due to the “threatening nature of the vehicle.”⁹⁰ The soldiers found no weapons or contraband in the vehicle. Which vehicle posed the greater threat, the civilian or the U.S. military convoy traveling in the wrong direction?

In another case, U.S. soldiers shot and killed the claimant’s father.⁹¹ The judge advocate denied the FCA claim because the victim was driving a BOLO (Be On the Lookout) vehicle. The soldiers fired when the man did not respond to their warnings. The judge advocate wrote: “BOLO [vehicles] pose a higher threat than normal vehicles”⁹² and denied the FCA claim under the combat exclusion. No contraband was found and a condolence payment was offered. Obvious questions arise regarding BOLO designations: Do BOLO vehicles pose a reasonable threat by their mere make and model? Does this authorize skipping some graduated responses? Do BOLO designations give license to kill with less constraint?

In rare cases judge advocates did find negligence to be an issue. Seventeen (17) cases resulted in FCA awards because a judge advocate found U.S. service members acted negligently. The facts appear similar to many cases that did not result in FCA awards or even in a discussion about potential negligence. Unfortunately, most of the memorandums indicating that negligence existed do not offer any substantive analysis of

⁸⁹ See http://www.aclu.org/natsec/foia/pdf/Army1165_1169.pdf.

⁹⁰ Ibid.

⁹¹ See http://www.aclu.org/natsec/foia/pdf/Army0926_0930.pdf.

⁹² Ibid.

the incident to discern the nature of the negligence at issue. Generally, the analysis is a conclusory summation, just as it is in denials.

A rare exception is a case where the claimant received a \$10,000 FCA award for the deaths of his brother and sister-in-law and the injuries of two small children (ages 7 and 4).⁹³ The judge advocate indicated that available U.S. reports established that a unit on patrol in the area followed escalation of force procedures when the victims' vehicle approached. When the vehicle did not yield to warning signs, the patrol fired 200 rounds with two M249 SAWs (high-powered machine guns). The judge advocate held that the "number of rounds fired was *not proportionate* to the need as required by the proportionality requirement of the existing ROE."⁹⁴ Therefore, the response was "excessive and wrongful."⁹⁵ Interestingly, this memorandum, one of the few with actual analysis, was one of the few written by a person above the rank of captain.

In another rare exception, the claimant received an \$11,020 award.⁹⁶ The judge advocate held that a unit "opened fire on" the claimant's home killing four family members, 32 sheep and injuring 40 other sheep.⁹⁷ The incident began when the father heard a dog barking during the night. He went outside to investigate with his AK-47. U.S. soldiers saw the man and opened fire thinking he posed a threat. The judge advocate held: "the ROE require units to have positive identification of target before engaging."⁹⁸ In this case, 100 rounds "were fired that impacted around a flock of sheep and [the] sleeping family."⁹⁹ A potential threat existed, but the reaction to the threat was disproportionate. Again, as in the last case, someone higher than a captain wrote the memorandum in this case. In many of the cases that did not receive awards, there seems to be evidence of disproportionate responses to perceived threats, but analysis was not provided.

Most cases where the judge advocate granted an award there is no analysis. For example, one claimant received \$3,000 after being shot in the kidney.¹⁰⁰ The payment

⁹³ See http://www.aclu.org/natsec/foia/pdf/Army0366_0370.pdf.

⁹⁴ *Ibid.* (emphasis added).

⁹⁵ *Ibid.*

⁹⁶ See http://www.aclu.org/natsec/foia/pdf/Army0612_0617.pdf.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ See http://www.aclu.org/natsec/foia/pdf/Army1328_1330.pdf.

voucher indicates that a “negligent shooting” justified the award. The memorandum provides no summation of the facts. The only statement reads: “TF [task force] Badger’s S-5 [brigade civil affairs] Officer verifies the occurrence of this raid and the facts and circumstances surrounding this incident.”¹⁰¹ Verification of the occurrence does not demonstrate negligence or provide the basis for an award. Regularly, language such as “the evidence supports the claim”, “the unit confirms” the incident, and “sufficient evidence” exists purports to justify an award, but there is no legal examination or analysis of the facts. It is as if a judge advocate in a civil case found the defendant liable without explaining why.

Another claimant received a \$2,500 FCA award for the death of his son.¹⁰² The claimant alleged that U.S. forces fired randomly and several bullets hit his wife and son, both sleeping on the roof of their home at the time. The judge advocate wrote that the unit’s commander verified “the validity of this claim and confirms U.S. involvement.”¹⁰³ But to what extent were the U.S. involved? What did they do? How did they act negligently?

4. *Lack of analysis regarding negligence and wrongfulness:*

As in the cases discussed in the preceding section, judge advocates rarely judged the actions of the U.S. service members against standards of negligence or wrongfulness, whether in cases where claims were denied or in the few where awards were granted. The claimant or the judge advocate alleged criminal behavior or wrongfulness in 31 cases. Judge advocates confirmed wrongfulness in five cases and a criminal act in one. No indication exists whether criminal proceedings followed. Of course, the claims process is separate and distinct from military justice.

In the one case where the evidence seems to indicate overt criminal behavior, the claimant alleged that U.S. forces killed his brother at a gas station for no reason.¹⁰⁴ The judge advocate wrote in his memorandum that an Article 15-6 investigation (a non-law enforcement investigation) was opened into the incident. A SIGACT explained that

¹⁰¹ Ibid.

¹⁰² See http://www.aclu.org/natsec/foia/pdf/Army0874_0877.pdf.

¹⁰³ Ibid.

¹⁰⁴ See http://www.aclu.org/natsec/foia/pdf/Army1691_1694.pdf.

“B17 Signal Patrol drove by the gas station and opened fire for no known reason.”¹⁰⁵ They killed the claimant’s brother and another man who happened to be in the Iraqi Army. The unit involved did not report the incident – a different unit reported the event. The judge advocate opined: “There is sufficient evidence to indicate that U.S. Forces negligently killed the claimant’s brother.”¹⁰⁶ The brother received an award of \$5,000. The judge advocate provided no substantive analysis.

In 51 of the 86 FCA payments awarded there is no determination whether the decision was based on the negligence or wrongfulness of the U.S. personnel involved. And none of the awards appear to be based on strict liability of a “noncombat” act. Not determining negligence or wrongfulness is a major legal error that prevents proper analysis. It also indicates that the military did not establish what really happened. Making a determination of negligence or wrongdoing is important for several reasons: 1) it indicates if a criminal investigation should be pursued; 2) it allows the claimant to know what happened and why, and 3) proper analysis of the facts in these cases could be used in “lessons learned” to improve training of soldiers.

One example of this error comes from a case where the claimant received a \$5,000 FCA award after alleging U.S. forces shot and killed his son for no reason.¹⁰⁷ The judge advocate held: “There is sufficient evidence to suggest that this incident arose out of negligence and/or wrongful acts” of the U.S. personnel.¹⁰⁸ But he provides no further analysis.

In one of the few cases where a judge advocate attempts analysis it does not seem to make sense. This was the case released under the ACLU’s “Torture FOIA” where the claimant’s son worked as a night guard in their home village.¹⁰⁹ The son was shot by a U.S. patrol, transferred to a combat support hospital and then mistakenly taken to Abu Ghraib as a detainee. The judge advocate determined that a military police unit with no authority to be in the area shot the son. According to the finding, the military police involved shot the man due to negligence or misconduct. The victim received a \$1,000 FCA award. The “misconduct” appears to be that the unit responsible for shooting the

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ See http://www.aclu.org/natsec/foia/pdf/Army1502_1506.pdf.

¹⁰⁸ Ibid.

¹⁰⁹ See <http://action.aclu.org/torturefoia/released/050206/>.

man should not have been in the area. But is that the negligent or wrongful act at issue? Wouldn't the misconduct or negligence stem from the act of shooting or wrongfully detaining, not from being in the wrong area?

5. *Inappropriate burdens of proof:*

In several cases, judge advocates apply inappropriate and non-legal adjudicative standards. For example, one claimant alleged that U.S. forces killed his brother when a military vehicle hit his brother's car. The judge advocate approved the claim because "There [was] evidence that US soldiers *might have been negligent* in the accident."¹¹⁰ The proper standard of proof that must be met in these cases is "preponderance of the evidence".¹¹¹ "Might have been negligent" is not equivalent to "preponderance of the evidence." Similarly, one claimant alleged that U.S. forces killed his son when he went to visit a friend.¹¹² The judge advocate denied the claim because it "seems to be combat related."¹¹³ "Seems" is not a legal term of art. These examples, which are representative of other problems, may appear to be inconsequential, but lawyers are trained and expected to adjudicate cases according to proper standards utilizing terms according to their legal significance.

6. *Contradictory decisions exist within individual cases:*

A plethora of files contain inconsistencies in decisions made by the same judge advocates and/or units regarding the same case. In a case where the claimant's father was shot and killed during his drive home by coalition forces, the judge advocate held that the claim was "combat related and [could not] be paid under the FCA."¹¹⁴ However, the unit offered a condolence payment of \$1,500 for the damage to the vehicle. The condolence memorandum held that "*negligent fire* of Coalition Forces" damaged the vehicle.¹¹⁵ The finding that an incident resulted from a negligent use of a weapon is categorically opposed to a finding that the harm resulted from a combat activity. The FCA is designed to compensate negligent acts, if negligence occurred an award should have been paid.

¹¹⁰ See http://www.aclu.org/natsec/foia/pdf/Army0310_0313.pdf. (Emphasis added).

¹¹¹ Ibid.

¹¹² See http://www.aclu.org/natsec/foia/pdf/Army0307_0309.pdf.

¹¹³ Ibid.

¹¹⁴ See http://www.aclu.org/natsec/foia/pdf/Army1149_1152.pdf.

¹¹⁵ Ibid. (emphasis added).

Factual contradictions within files also abound. For example, in one case, the battalion unit claims officer wrote in his memorandum that the claimant sought compensation for damage to land.¹¹⁶ However, the judge advocate wrote in his final memorandum that the claimant sought compensation for death and injuries to family members.¹¹⁷ In another case, the claimant received a condolence payment of \$2,500 after being shot and injured in the head.¹¹⁸ The condolence memorandum explains that the injury left her blind in one eye. However, the FCA memorandum denying the claim under the “combat exclusion” holds that the victim died. The FCA memorandum was written two weeks before the condolence memorandum.

Another inconsistency is that in at least 14 cases denied by judge advocates because of a lack of evidence supporting the allegations condolence payments were offered. This indicates that evidence is being judged differently in different contexts – the FCA versus the condolence payment program. This most likely happens because judge advocates do not feel confident in their adjudicative processes under the FCA. Also, direct liability attaches to their decisions under the FCA. Judge advocates and units do not face such personal exposure under the CERP fund. In one case, a condolence payment was offered despite the fact there was “insufficient credible evidence to substantiate the claim”.¹¹⁹ Allegedly, a bullet ricocheted and hit the claimant’s 4-year-old daughter. Apparently, the sympathy associated with a deceased 4-year-old girl outweighed the lack of evidence. Another judge advocate denied a claim because the “Evidence shows that United States Forces did not cause the damage.”¹²⁰ Yet, the condolence memorandum indicates that U.S. forces killed the victim. Which account is accurate?

Two contradictory stories emerge in a case where the claimant alleged that her husband drove off the street to avoid an on-coming U.S. military convoy.¹²¹ A soldier then approached his car and shot him and detained a passenger. The judge advocate denied the claim and held that the “Investigation reveals that [the] claimant’s story is

¹¹⁶ See http://www.aclu.org/natsec/foia/pdf/Army0124_0127.pdf.

¹¹⁷ Ibid.

¹¹⁸ See http://www.aclu.org/natsec/foia/pdf/Army1547_1550.pdf.

¹¹⁹ See http://www.aclu.org/natsec/foia/pdf/Army0588_0591.pdf.

¹²⁰ See http://www.aclu.org/natsec/foia/pdf/Army0596_0600.pdf.

¹²¹ See http://www.aclu.org/natsec/foia/pdf/Army1477_1482.pdf.

inaccurate.”¹²² Yet, the claimant received a condolence payment. The condolence memorandum indicates that U.S. forces shot and killed her husband and a note from a captain supports this fact. There is no rational explanation for these inconsistencies. So, does the FCA memorandum or the condolence memorandum represent what the unit thinks happened?

In a sign of what is at best sloppy lawyering and at worst deceit, six cases provided multiple reasons for a denial. In four cases the memorandums denied the claims because of a lack of evidence, but the denial letters given to the claimant were based on the “combat exclusion.” In one of the more outrageous examples three different rationales were provided. The claimant alleged that U.S. forces shot and killed his father.¹²³ On June 23, 2006 the judge advocate denied the claim due to insufficient credible evidence. However, on July 5, 2006 the judge advocate wrote another memorandum denying the claim under the “combat exclusion.” Yet, in the denial letter given to the claimant on July 4, 2006 the reason provided is that “the evidence shows that the damage was caused by your own negligence or wrongdoing.”¹²⁴ Three documents, three different reasons.

7. *Questionable standards and application of contributory negligence:*

In 17 cases judge advocates hold, or at least insinuate, that the victim caused at least part of the harm by his own negligence. In some cases, the judge advocate considered the contributory negligence when downgrading or barring an award under the FCA. The FCA and its implementing regulations authorize these types of findings. However, several of the cases seem inappropriate based on the facts provided. A civilian unaccustomed to an occupying army may not act as a “reasonable person” as defined by an attorney for the occupying army. Judge advocates regularly hold victims negligent for not obeying verbal warnings or bodily gestures at checkpoints and while driving near convoys. But is that reasonable in light of the circumstances? Unfortunately, that question is rarely asked.

In one case, the judge advocate blocked an award due to the actions of the victim where the claimant approached a turn in the road where the U.S. had established a hasty

¹²² Ibid.

¹²³ See http://www.aclu.org/natsec/foia/pdf/Army0406_0409.pdf.

¹²⁴ Ibid.

checkpoint.¹²⁵ The U.S. shot at the claimant and damaged his vehicle when he did not stop at the appropriate place. The judge advocate wrote in the denial letter: “The U.S. cannot pay your claim because your damages are incident to combat and you (sic) ignored directions by Coalition Forces to stop.”¹²⁶ How were the directions expressed, and were they of a nature that it was reasonable to expect an Iraqi to understand them? If they were not reasonable, was it reasonable to shoot? Sadly, these questions went unasked.

One claimant received a condolence payment for the death of his brother who U.S. forces shot and killed in an escalation of force incident.¹²⁷ The claimant alleged that a U.S. convoy, traveling in the wrong direction, fired at his brother. The judge advocate denied the FCA award because of the driver’s negligence. The judge advocate offered no analysis regarding potential U.S. negligence from the fact that the convoy was traveling in the wrong direction. Further, could the victim have been caught off-guard and been too scared by the on-coming U.S. military convoy to follow instructions that likely came too fast? Again, this question was not asked.

Another claimant alleged that U.S. forces killed his son and a SIGACT confirmed that the rear vehicle of a U.S. convoy engaged a car approaching from behind.¹²⁸ The gunner waved the driver off to no effect and then fired a warning shot. The round ricocheted and hit the driver. The judge advocate held that the “claim [would] be paid in the amount of \$3,500.00 as the decedent was contributorily negligent under the circumstances.”¹²⁹ The claimant sought \$10,000. Was it proper to downgrade the award without analyzing the nature of the warnings? Consider that in none of these cases were the drivers or passengers found to be enemy fighters. It appears the U.S. military limits or bars FCA awards because drivers appear to get nervous and do not quickly and accurately follow directions from heavily armed soldiers.

The analysis found in one case seems particularly harsh. The driver failed to heed warning signs and approached a checkpoint at a high rate of speed.¹³⁰ The deceased was

¹²⁵ See http://www.aclu.org/natsec/foia/pdf/Army0237_0238.pdf.

¹²⁶ Ibid.

¹²⁷ See http://www.aclu.org/natsec/foia/pdf/Army1428_1432.pdf.

¹²⁸ See http://www.aclu.org/natsec/foia/pdf/Army0348_0352.pdf.

¹²⁹ Ibid.

¹³⁰ See http://www.aclu.org/natsec/foia/pdf/Army0666_0668.pdf.

not “connected with the AIF. He simply made a poor decision to disregard the warnings he was given and as a result was shot and killed.”¹³¹ How well-marked was the checkpoint? Did U.S. soldiers make a poor decision in believing it was reasonable for Iraqi drivers to understand the warnings? Without these questions, the analysis is lacking in these cases.

In another case, a SIGACT revealed that the victim attempted to bypass concrete barriers that U.S. forces were arranging at an election site.¹³² After one warning shot failed to stop the vehicle U.S. soldiers fired into the windshield. The judge advocate denied the claim under the “combat exclusion,” but went further in his analysis to explain that the driver “*assumed the risk* by failing to obey the many warnings.”¹³³ Without an analysis of these warnings we do not know what the driver “assumed.”

Finally, one claimant alleged his father was killed at a checkpoint while attempting to turn his vehicle around.¹³⁴ The judge advocate denied the claim due to lack of evidence but then added: “such fire engagement by any checkpoint guardsman was likely a result of the deceased’s failure to follow written or verbal instruction at a checkpoint.”¹³⁵ It seems inappropriate to exercise a presumption that drivers are at fault when warning signs go un-heeded. A case-by-case determination should be made into whether it was reasonable to expect a local national to follow particular orders in the time given and by analyzing the nature of the warnings.

8. *Inappropriate denials:*

Several judge advocates denied cases for inappropriate reasons. For example, the judge advocate in one case denied the claim because a different unit caused the harm.¹³⁶ The claimant alleged that U.S. forces shot at his van with several passengers inside.¹³⁷ One passenger died, the claimant suffered injuries and the van was damaged. The judge advocate wrote that the “location of this alleged shooting is outside the area of operation of the 278th RCT.”¹³⁸ He explained that “3rd BCT” held responsibility for this area.

¹³¹ Ibid.

¹³² See http://www.aclu.org/natsec/foia/pdf/Army0686_0689.pdf.

¹³³ Ibid. (emphasis added).

¹³⁴ See http://www.aclu.org/natsec/foia/pdf/Army0177_0178.pdf.

¹³⁵ Ibid.

¹³⁶ See http://www.aclu.org/natsec/foia/pdf/Army0609_0611.pdf.

¹³⁷ See http://www.aclu.org/natsec/foia/pdf/Army0609_0611.pdf.

¹³⁸ Ibid.

Further: “The 278th RCT has no authority to approve claims that occur outside the regiment’s area of operation. This claim needs to be presented to the 3rd BCT...”¹³⁹ In these cases, the receiving unit should write a detailed memorandum and forward the claim to the proper unit. A memorandum issued by MNC-I on April 15, 2006 requires that: “If a claim is filed in a different location, that FOB (forward operating base) or installation will forward the claim to the appropriate claims office.”¹⁴⁰ The claimant is not responsible for re-filing the claim. Here, the judge advocate even knew exactly where to forward the claim.

As indicated in Part II, claims must be submitted within two years after the harm occurs.¹⁴¹ In four cases, judge advocates denied claims because the incident happened “too long ago” to verify. Each claimant met the two-year statute of limitations. One claimant alleged that on November 8, 2005 coalition forces shot and killed her husband as he waited for a taxi.¹⁴² Allegedly, a U.S. convoy passed by and began shooting. The judge advocate denied the claim on March 10, 2006 because “The claim is too old to verify Claimant’s allegations.”¹⁴³ In the same memorandum the judge advocate wrote that there was jurisdiction for him to decide the case because the “claim was properly filed in a timely manner.”¹⁴⁴ Here, the claimant is punished because the military does not collect or maintain complete records of civilian casualties.

9. *Unexplained denials:*

Army regulation 27-20, paragraph 10-6(f) reads: “When an FCC [foreign claims commissioner] intends to deny a claim or offer an award less than the amount claimed, it will notify the claimant, the claimant’s authorized agent, or legal representative, in writing, of intended action on the claim and the legal and factual bases for that action. This notice serves to give the claimant an opportunity to request reconsideration of the FCC action and state the reasons for the request before final action is taken on the claim.”¹⁴⁵ Every claimant not granted an FCA award must receive a denial letter with the

¹³⁹ Ibid.

¹⁴⁰ Multi-National Corps – Iraq, Information Paper, Subject: Foreign Claims Act, April 15, 2006.

¹⁴¹ 10 U.S.C. § 2734 (b)(1).

¹⁴² See http://www.aclu.org/natsec/foia/pdf/Army1101_1104.pdf.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ U.S. Dep’t of Army, Reg. 27-20, *Claims* (Feb. 8, 2008), 10-6(f).

reasons clearly indicated. Yet, in 28 cases the judge advocate provided no reason. Here is an example:¹⁴⁶

Dear Sir:

I have thoroughly reviewed your claim pursuant to the Foreign Claims Act (FCA), Title 10, United States Code §2734, Army Regulation 27-20, and Department of the Army Pamphlet 27-162 Claims Procedures. In accordance with the cited references, I am unable to compensate you under the Foreign Claims Act.

If you are dissatisfied by this action, you may request reconsideration of the decision in accordance with AR 27-20. Any such request must be forwarded to this office for Foreign Claims Commission consideration. While there is no prescribed format for such a request, it must describe the legal and/or factual basis for relief. Any request for reconsideration should be made in writing within 30 days of your receipt of this letter.

Sincerely,

A black rectangular redaction box covering the signature of the official.

CPT, JA
Foreign Claims Commission

The claimant is left with no understanding of why his claim was denied. Even though the case was “thoroughly reviewed,” it was not thoroughly explained.

While 28 denials totally lack an explanation, many more list the legal reason, but do not explain the rationale for the denial or how the facts relate to the law. Here is an example:¹⁴⁷

¹⁴⁶ See http://www.aclu.org/natsec/foia/pdf/Army0977_0979.pdf.

¹⁴⁷ See http://www.aclu.org/natsec/foia/pdf/Army1097_1100.pdf.



DEPARTMENT OF THE ARMY
HEADQUARTERS, 101ST AIRBORNE DIVISION (AIR ASSAULT)
TASK FORCE BAND OF BROTHERS
FORWARD OPERATING BASE SPEICHER
APO AE 09393

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AFZB-JA-C

MEMORANDUM FOR Claimant

SUBJECT: Claim Denial

1. This is in response to your claim against the United States Government. Your claim has been reviewed under the Foreign Claims Act, 10 U.S.C. 2734, as implemented by Army Regulation 27-20, Chapter 10. I regret to inform you that your claim has been denied.
2. Your claim has been denied for the following reasons:
 - a. There is not enough evidence to prove your claim.
 - b. The evidence shows that United States Forces did not cause the damage.
 - c. The evidence shows that the damage was caused during combat.
 - d. The evidence shows that the damage was caused by your own negligence or wrongdoing.
 - e. The evidence shows that your claim was fraudulent.
 - f. Other: _____
3. If this is the first time your claim has been viewed by this office, you may submit an appeal. This office must receive the appeal no later than 30 days after receipt of this message. The appeal must also contain additional evidence proving your claim. If the appeal is sent after 30 days has passed, or does not provided additional evidence, then the appeal will be denied.
4. POC is the 101st Airborne Division (Air Assault) Claims Office at DSN 318-845-1022.

[REDACTED]
CPT, FCC
Foreign Claims Commissioner

001098

10. *Suspicious cases*

Nine (9) cases appear to have been approved under suspicious circumstances, where the facts as presented in the file do not seem to support a payment: five under the condolence payment program and four under the FCA. They seem fairly innocent, as in the case where the condolence payment appears to have been approved because of the victim's mother's relationship with the U.S. military.¹⁴⁸ The claimant "provided intel[ligence] (including names) regarding AIF activity on numerous occasions."¹⁴⁹ These unrelated facts justified the condolence payment – not sympathy for the son's death.

In another case, the claimant alleged U.S. forces killed his brother from a guard tower near a U.S. base.¹⁵⁰ A denial letter dated September 21, 2005 denied the claim due to a lack of substantiation. A year later, on July 24, 2006, a judge advocate approved the claim upon reconsideration. No new evidence is mentioned. However, the July 24, 2006 memorandum indicates that the deceased had "trade dealings with the military personnel at the tower," and that on the date of the incident the victim was on his way to the "tower to do some trading."¹⁵¹ The judge advocate then approved the claim because the "evidence supports possible negligence" by the U.S. soldiers. Did the judge advocate approve an award because of negligence or because the previous relationship between the victim and the military was discovered? While none of these cases represent malicious intent on the part of the judge advocates or units, it seems unfair that certain claimants receive awards not based on the facts but because of unrelated circumstances.

Other suspicious facts can be found throughout the files. One problem exists in at least seven denied cases. The claims in-take form in these cases does not contain pertinent information that would be essential in adjudicating the claim. Army regulation requires that claims be reduced to writing and contain certain essential information, such as a demand for a sum of money, the name of the claimant, and the address of the

¹⁴⁸ See http://www.aclu.org/natsec/foia/pdf/Army1245_1248.pdf.

¹⁴⁹ Ibid.

¹⁵⁰ See http://www.aclu.org/natsec/foia/pdf/Army0023_0029.pdf.

¹⁵¹ Ibid.

claimant.¹⁵² The fact that claims intake forms lack this pertinent information indicates that these cases were approached with a forgone conclusion.

Even with completed intake forms, issues arise. It is apparent that either a translator or the judge advocate or paralegal completed the intake forms in every case. This is justified considering the circumstances, but one wonders how much editorializing the translator or military official does when completing the intake form. Is the information portrayed in a particular light? In a few cases it is easy to see when a translator is going beyond what is necessary. The following note is on the side of one intake form: “This is true!”¹⁵³ A note in another cases reads “interp[reter] says this is unusual.”¹⁵⁴ There is no analysis or context provided for either of these notes.

11. *Riot in Kabul:*

An interesting set of cases that pose their own questions about the inner machinations of the FCA’s implementation are the 7 cases (possibly eight) from Afghanistan that arose from the same incident on May 29, 2006. These include pages: 18-22; 30-34; 35-39; 40-43; 44-48; 67-70; and 71-74 (and maybe 49-51). The eighth claim was denied because the judge advocate held that an Afghan National Army soldier shot the victim and the memorandum does not state the shooting occurred during the riot, but it likely did.

The facts are straightforward and were presented by the U.S. media shortly after the incident. A U.S. convoy traveling from Bagram entered Kabul. A HEMMT (a type of U.S. Army truck) lost control of its brakes at the top of a steep hill. The HEMMT collided with several vehicles until it came to a complete stop. Damage to numerous vehicles, personal injuries, and one death resulted from the accident.¹⁵⁵ Local nationals congregated around the scene and allegedly began to protest. Local Afghan national police and U.S. military personnel began shooting. Several local nationals died. The following table details the seven claims:

¹⁵² U.S. Dep’t of Army, Reg. 27-20, *Claims* (Feb. 8, 2008), Ch. 10.

¹⁵³ See http://www.aclu.org/natsec/foia/pdf/Army0208_0211.pdf.

¹⁵⁴ See http://www.aclu.org/natsec/foia/pdf/Army1433_1436.pdf.

¹⁵⁵ See http://www.aclu.org/natsec/foia/pdf/Army0018_0022.pdf.

Page #	Victim	Amount Awarded
18-22	Brother shot and killed.	\$3,991.22
30-34	Son shot and killed.	\$3,991.22
35-39	Cousin shot and killed.	\$3,991.22
40-44	Son shot and killed.	\$6,984.63
44-48	Son shot and killed.	\$3,991.22
67-70	Vehicle damaged in accident (but father died in riot)	\$2,071.63
71-74	Father shot and killed.	\$6,984.63

Why were four lives valued at \$3,991.22 and two lives valued at \$6,984.63? Did extenuating circumstances in certain cases justify more cash? In the case at pages 40-44, we know that the victim was married with one child (age one and a half) and his wife was pregnant.¹⁵⁶ In the case at pages 71-74 we know that the victim was a father and that he had at least two sons, one of whom was 34 years old.¹⁵⁷ Do these facts justify a higher award?

Interestingly, the memorandum in the case at pages 67-70 explains that the award is for a damaged car and that a solatia payment will be made to the family for the death of their father. Yet, all the other deaths received FCA awards. It is possible that pages 67-70 and 71-74 are the same case (one for the vehicle and one for the father)? Some similarities exist in the files. Unfortunately, names are redacted and there is no intake form associated with pages 67-70. Even if they are the same case, why did the judge advocate write in the memorandum in pages 67-70 that a solatia payment would be made for the father's death? The memorandum in pages 67-70 was written on July 15, 2006 – the first memorandum written in any of these cases. The one in pages 71-74 was written on July 20, 2006. The remaining memorandums were all written on or after July 20, 2006. It is possible that a decision was made after July 15 not to offer solatia but to pay wrongful death claims under the FCA. But why?

¹⁵⁶ See http://www.aclu.org/natsec/foia/pdf/Army0040_0043.pdf.

¹⁵⁷ See http://www.aclu.org/natsec/foia/pdf/Army0067_0074.pdf.

Each of the memorandums approving a wrongful death claim uses the same language: “Evidence supports the negligence of the U.S. Forces and therefore the claimant should be compensated accordingly.”¹⁵⁸ Yet, no analysis of the facts is provided in any of the memorandums. Were the soldiers negligent in driving a vehicle with bad brakes? This would not be the proximate cause of the deaths from the protest. Or were the soldiers negligent in shooting during the protest? If so, why not provide analysis?

It is possible that media scrutiny led to the FCA payments. The *New York Times* explained the incident this way: “A deadly traffic accident caused by a United States military convoy quickly touched off a full-blown anti-American riot on Monday that raged across much of the Afghan capital, leaving at least 14 people dead and scores injured. Witnesses said American soldiers fired on Afghans throwing stones at them after the crash, though the United States military said only that *warning shots had been fired in the air*.”¹⁵⁹ Obviously, the version of events in the story did not last as the language in the memorandums indicates. Maybe the FCA awards were offered to head off, or limit, imminent bad press.

12. *Evidentiary problems:*

Every claim examined was adjudicated by a judge advocate – U.S.-licensed attorneys. Despite this level of legal experience, several problems regarding evidence emerge when examining the files. The most significant is that judge advocates weigh different forms of evidence disproportionately. U.S.-generated or created evidence carries more weight than evidence generated or created by local nationals. U.S.-produced evidence includes SIGACTS (significant activity reports, also sometimes referred to as Spot Reports), other types of unit reports, claims cards, and notes from military witnesses. Forms of evidence that tend to be dismissed are local witness statements, local official reports (police, judicial, and medical), and statements from family members. Approximately 145 denials resulted primarily from a “lack of evidence,” whether it was a lack of evidence of U.S. involvement or lack of evidence of U.S. negligence or wrongdoing. This number does not include the numerous claims where the judge

¹⁵⁸ See http://www.aclu.org/natsec/foia/pdf/Army0018_0022.pdf.

¹⁵⁹ Carlotta Gall, “Anti-U.S. Rioting Erupts in Kabul,” *N.Y. Times*, May 29, 2006 (emphasis added).

advocates denied a claim because of the combat exclusion, but made more mention of the lack of evidence in their memorandums of opinion than the possibility that the harm occurred as a result of combat.

In 59 claims, judge advocates specifically mentioned that a SIGACT could not be found, and that served as the main basis for the opinion. In four of the 59 cases, the unit offered a condolence payment, but in the remaining 55, the claim resulted in no monetary aid. Fourteen (14) claims were denied because a SIGACT confirmed facts that justified a denial of the claim – i.e., that an event occurred but constituted a combat action.

In numerous cases, the fact that a “SIGACTS investigation revealed no activity meeting the Claimant’s description of events”¹⁶⁰ trumps whatever number of eyewitnesses were provided. For example, one judge advocate denied a claim primarily because of “insufficient evidence to prove” the claim.¹⁶¹ The claimant alleged that after an IED detonated and a convoy began shooting randomly, killing his two children (ages 10 and 15). “A SIGACTS investigation revealed two IED attacks in Samarra during the two previous days, but none on the alleged day.”¹⁶² The claimant provided two witness statements but the absence of a SIGACT resulted in a denial. Could either the SIGACT or the Iraqi have confused the dates?

In another case, the claimant alleged that a coalition forces patrol killed his two sons as they crossed a street. The soldiers stopped to offer first aid. The claimant provided death certificates, a witness statement, and court documents to substantiate the claim. The witness, a shopkeeper in the area, saw the incident.¹⁶³ However, a “search of SIGACTS revealed no such incident.”¹⁶⁴ The judge advocate wrote in his opinion that it “is highly unlikely that the incident would go unreported if the patrol stopped to render assistance.”¹⁶⁵ How unlikely? The SIGACT from the Haditha incident has no resemblance to the facts known today.

One judge advocate denied a claim because there was “not enough evidence to prove” the claim where the claimant alleged that his “mother and daughter were killed” in

¹⁶⁰ See http://www.aclu.org/natsec/foia/pdf/Army0558_0563.pdf.

¹⁶¹ See http://www.aclu.org/natsec/foia/pdf/Army0410_0412.pdf.

¹⁶² Ibid.

¹⁶³ See http://www.aclu.org/natsec/foia/pdf/Army1601_1604.pdf.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

front of their home.¹⁶⁶ A group of insurgents were using a garage near the victim's home to build IEDs and the U.S. raided the garage. It is not clear exactly how far the garage was from the victim's home. The judge advocate wrote: "A SIGACTS investigation revealed that CF and Iraqi MOI (ministry of interior) conducted a series of hasty raids in Samarra on the day of the incident. Six target houses were raided and several AIF were detained. There is no mention of any civilian casualties in the SIGACT."¹⁶⁷ It is possible that the U.S. soldiers involved did not know about civilian casualties standing some distance away. But without mention in a SIGACT, compensation was impossible.

The inflated significance of SIGACTS, or Spot Reports, is demonstrated in a case where the claimant alleged that his brother and mother were killed as they drove near Camp Babil.¹⁶⁸ Here is a portion of the claims in-take form:¹⁶⁹

Give a brief statement of the accident or incident on which the claim for damages to property or for personal injury is based. (Use back of this sheet if necessary.)

10:00 pm brother driving ~~from~~ near
camp in Babil

~~Both~~ brother & mother killed

no spot reports
denied
3-7-06 000355

In a particularly telling example, the judge advocate denied the claim because there was "not enough evidence to prove" the claim that the claimant alleged that his son was killed by a U.S. soldier firing from an observation tower at the north gate of FOB Danger (a U.S. military base).¹⁷⁰ The note on the claims form (which likely was written by the judge advocate) indicates that the claim "looks good, pending SIGACTS check."¹⁷¹ Apparently, he did not find a SIGACT and the claim was denied. How

¹⁶⁶ See http://www.aclu.org/natsec/foia/pdf/Army1149_1152.pdf.

¹⁶⁷ Ibid.

¹⁶⁸ See http://www.aclu.org/natsec/foia/pdf/Army0353_0356.pdf.

¹⁶⁹ Ibid.

¹⁷⁰ See http://www.aclu.org/natsec/foia/pdf/Army1399_1400.pdf.

¹⁷¹ Ibid.

reasonable is it to give such weight to SIGACTs considering the following email found in another file where the unit lost a series of SIGACTs:

From: [REDACTED] 101AA MAIN OSJA NCOIC ADMIN
[REDACTED]@DMAIN.D101.ARMY.SMIL.MIL]
Sent: Wednesday, May 17, 2006 7:28 PM
To: [REDACTED] SGT, 101 AA 1BCT Legal, Paralegal NCO
Subject: [REDACTED] Claims

Categories: UNCLASSIFIED FOR OFFICIAL USE ONLY

I couldn't find anything reported about [REDACTED] claim, but the note that was given to him states an escalation of force, a combat activity. I don't think there's a need to contact the unit about this one. [REDACTED] If he wants to come file a claim here to possibly get a CERP payment that's fine. How was he supposed to know to get out of the vehicle when they fired warning shots? If I was in his place I would have stayed put too.

All the TF BoB SIGACTs from early October are missing from their database. I haven't been able to get individual SIGACT reports from CIDNE the past couple days, but a general search turned up a couple EOFs that could match Abdulkalik's claim. Again, combat denied.

Let me know if there's anything else I can do to help.

SGT Barten

The only copy of an actual SIGACT found in the 506 files demonstrates that these highly-prized pieces of evidence are really nothing more than a few sentences about an incident that are reported up various levels, and should be weighed accordingly.¹⁷² It clearly should not carry the talismanic authority judge advocates grant them.

O AT 1300 1-64 AR REPORTS OBSERVING 1 X LN EMPLACING AN UNKNOWN OBJECT ON THE SIDE OF RTE PLUTO AT CP 515, 38SMB 542847. THE CONVOY ATTEMPTED TO STOP THE VEHICLE AND USING ESCALATION OF FORCE FIRED WARNING SHOTS THEN ENGAGED THE VEHICLE. 1 X LN KIA. 1-64 AR SECURED THE SITE AND CONTACTED IPs FOR ASSISTANCE. PATROL DID NOT DISCOVER ANY AIF RELATED EQUIPMENT.

SUMMARY:
1 X LN KIA

CLOSED OUT.

Just as many judge advocates deny claims because they can find no SIGACT or other U.S. record of an incident, they are also much more likely to approve a claim or condolence payment when a SIGACT can be found. Of the 103 condolence payments, 60 clearly reference the existence of a SIGACT or some form of corroborating U.S. military report or U.S. eyewitness to the event. Of the remaining condolence payments,

¹⁷² See http://www.aclu.org/natsec/foia/pdf/Army0478_0482.pdf.

seven payments do not specifically state they relied on a SIGACT or other independent-military evidence but the tone of the language used in the memorandum indicates that there was some sort of military corroboration, and 35 condolence payments may or may not have been based on a SIGACT or independent military corroboration. Of the 86 FCA awards, 28 of the memorandums specifically cited the existence of a SIGACT or other U.S. record to approve the claim.

In a related issue, judge advocates sometimes mention the lack of a claims card when denying a claim. One claimant alleged that as he drove with his wife and son a U.S. convoy approached from the rear and another from the front.¹⁷³ An accident ensued killing his wife and son. The judge advocate wrote: “Pictures show damages to the vehicle; however there is no supporting documentation from any unit involved. There is no claims card either.”¹⁷⁴ Reliance on the presence of a claims card by judge advocates likely stems from advice given by the U.S. Army Claims Service. In their standard operating procedure manual, the Claims Service writes: “Normally, lack of a claims card will provide a basis for denial of the claim on the grounds that the claimant has not provided required corroboration of the claim.”¹⁷⁵ Here is the only example of a claims card in the released documents:¹⁷⁶

¹⁷³ See http://www.aclu.org/natsec/foia/pdf/Army1731_1736.pdf.


¹⁷⁴ Ibid.

¹⁷⁵ Multi-National Corps – Iraq, *Commander’s Emergency Response Program (CERP) Family of Fund Standard Operating Procedures*, April 24, 2006, P. 38.


¹⁷⁶ http://www.aclu.org/natsec/foia/pdf/Army0474_0477.pdf.

12500

2 BDE



IRAQI CLAIMS POCKET CARD



The Army will consider compensation payment to Iraqi civilians for property damage, injury and death caused by US Forces.

If your unit is involved in an incident resulting in damage to property, or injury or death of an Iraqi civilian:

1. Fill out the required information below. Use the back side of the form to provide more details.
2. Give this card to the Iraqi civilian, or other appropriate person in the case of death.
3. Direct them to the Government Information Center located at the 9 Nissan District Advisory Council Building in Mahala 731 (Old Military Hospital), the Sadr City District Advisory Council Building located in Mahala 514, the Amannat, or the Rusafa GIC.

UNIT A/1-64
DATE 14 Aug
LOCATION MBS36897
DAMAGE 1x LN killed, Back windshield shot out
NAME (Optional) _____

Unit not directly involved in incident however →

SEND ME

inquiries made w/ other units event may have occurred

possible EDF incident w/ logistics convoy enroute to AMO HDP

Even producing a claims card does not guarantee payment. In one case, the claimant alleged that a U.S. patrol shot and killed her husband.¹⁷⁷ The unit gave the woman a claims card.¹⁷⁸ After the judge advocate denied the claim, the claimant submitted the following note:

¹⁷⁷ http://www.aclu.org/natsec/foia/pdf/Army1269_1271.pdf.

¹⁷⁸ Ibid.

To;
 The General Information Center in Kadhimiyeh

I had Submitted a claim asking for compensation for the killing of my husband on the hands of the Coalition Forces as well for damaging ~~my~~ his car.

The denial of my claim was on the ground of "Lack of evidence" does the claim card which is attached is not an enough evidence!

Sometimes cases were dismissed not because a SIGACT could not be found but simply because Iraqi witnesses were not believed. One judge advocate denied the claim because there was "not enough evidence to prove" the claim.¹⁷⁹ The claimant's two children were playing nearby and were killed when a U.S. convoy began shooting.¹⁸⁰ One witness saw the children get shot and another witness heard the shots and then saw the children dead.¹⁸¹ Yet, their testimony received no weight.

One claimant did not offer "enough evidence to prove that the claim occurred as alleged."¹⁸² The claimant alleged that U.S. forces shot and killed one of his brothers and injured another brother (ages 21 and 24) and damaged the vehicle the three were driving in.¹⁸³ The judge advocate's memorandum states that "no pictures" of the incident and no "local records" were produced by the claimant.¹⁸⁴ Was the surviving brother a witness? Wouldn't he be the best piece of evidence?

A final problem associated with evidence is the instances where judge advocates make unreasonable or inappropriate demands of proof. For example, one claimant alleged that a U.S. military vehicle hit his car from behind and pushed it off the road.¹⁸⁵ The claimant's son died in the accident. The judge advocate denied the case and wrote that the "Claimant needs to bring in pictures for this office to fully understand [the]

¹⁷⁹ See http://www.aclu.org/natsec/foia/pdf/Army1433_1436.pdf.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² See http://www.aclu.org/natsec/foia/pdf/Army0769_0772.pdf.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ See http://www.aclu.org/natsec/foia/pdf/Army0180_0181.pdf.

extent of [the] damages.”¹⁸⁶ Claimants supplied death certificates in nearly every case and one may assume that the father could easily have produced his son’s death certificate in this case. If there were a death certificate, why would pictures be needed to prove the “extent of [the] damages”? Further, the judge advocate seems to believe that the accident and death occurred, what would pictures add?

13. *Inappropriate amounts for awards/payments:*

The monetary amounts of individual awards approved provide an area of concern. The FCA requires “compensation” for harm suffered and the condolence payment programs provides limited gifts of “sympathy.” In both programs many awards and payments appear to be too low.

The amounts allowed under the condolence payment program are listed in Part II of this report – the maximum amount is generally \$2,500. None of the claims indicate any consideration for an amount over the \$2,500 limit. More significantly, many of the payments do not even reach the \$2,500 limit. Condolence payments do not compensate people’s loss; they provide a symbolic gesture of sorrow from the U.S. government. In the words of one judge advocate: “US forces make Condolence payments without reference to fault by either the local national or US forces, as an expression of sympathy and good will and in the best interest of the US government.”¹⁸⁷ Another judge advocate wrote: “By making [condolence payments], [the U.S.] demonstrates to the family and community its sympathy for [an] unfortunate loss. This demonstration will have a positive effect on both the community and local Iraqi leaders.”¹⁸⁸ Finally, the standard operating procedure for MNC-I (Multi-National Corps – Iraq) explains that “Condolence payments can be paid to express sympathy and to provide urgently needed humanitarian relief to individual Iraqis and the Iraqi people in general.”¹⁸⁹ Clearly, the understanding of the command and many judge advocates implementing the program in Iraq are that these payments can build goodwill. Why, then, do so many units offer less than the amount authorized?

¹⁸⁶ Ibid.

¹⁸⁷ See http://www.aclu.org/natsec/foia/pdf/Army0268_0270.pdf.

¹⁸⁸ See http://www.aclu.org/natsec/foia/pdf/Army1648_1650.pdf.

¹⁸⁹ Multi-National Corps – Iraq, *Commander’s Emergency Response Program (CERP) Family of Fund Standard Operating Procedures*, April 24, 2006, P. 18.

Of the 103 condolence payments, 85 indicate that a death occurred. In 17 of these cases an amount lower than \$2,500 was offered and in some instances no money was offered for the death, but an amount was offered for lost property or injuries to other civilians. Payments are as low as \$500 for a death. In four cases nothing was offered in sympathy for personal injuries and in six cases an amount less than allowed was provided for personal injuries.

Unlike the condolence payment program, the Foreign Claims Act should provide claimants with an award that compensates them for the loss suffered. Damage awards will certainly be different in different regions of the world. Yet, some appear unreasonably low. The lowest amount awarded for a death in Iraq was \$500.

As discussed previously, two cases mention the use of valuation charts to determine death awards in Afghanistan. One memorandum reads: “according to the valuation chart for death claims in Afghanistan \$6,000.00 USD is fair and reasonable for the death of a local national.”¹⁹⁰ However, this “fair and reasonable” amount was only used in four cases, the rest of the death cases in Afghanistan received much less. There is nothing intrinsically wrong with using a valuation chart. However, it is troubling when actual awards are lower than the suggested amounts on the chart.

14. *Lack of continuity:*

While foreign claims commissioners must follow the FCA and the law’s implementing regulations and all units should follow guidelines for the condolence payment program, great disparity exists in the disposition of cases that are substantially the same in their facts. This can be seen in most of the sections above. A perfect example would be the “traffic clearing” cases where U.S. convoys fire their weapons in order to clear traffic so that they can pass. The unit that adjudicated the case at pages 1346-1349 denied the claim under the “combat exclusion.”¹⁹¹ However, the unit that adjudicated a case based on very similar facts at pages 832-835 found that using shots to clear traffic was not within the rules of engagement and authorized an FCA award.¹⁹²

Similar instances can be found in almost every category of case in the files released. And while cases with very similar facts may come out differently in certain

¹⁹⁰ See http://www.aclu.org/natsec/foia/pdf/Army0081_0088.pdf.

¹⁹¹ See http://www.aclu.org/natsec/foia/pdf/Army1346_1349.pdf.

¹⁹² See http://www.aclu.org/natsec/foia/pdf/Army0832_0835.pdf.

situations, the patterns of disparity that exist in these cases is too wide. It is clear that the level and substance of understanding varies greatly among different judge advocates.

V. Recommendations

Each of the problems discussed in the preceding part of this report can be overcome. The solutions offered here can be accomplished within the existing structure of the two programs. They will not solve every problem associated with the FCA and the condolence payment program, but they would solve all the ones highlighted in this report that were evident in the files released. Further structural changes could be implemented to ensure greater success in gaining the trust and confidence of the civilian populations and thereby helping the military meet certain strategic objectives. Those are not outlined here. While the recommendations here will not create a perfect system, they would improve the current system without any structural changes to the military claims system.

1. *Improve training opportunities for judge advocates on the Foreign Claims Act:*

One of the problems uncovered in the above sections is that judge advocates appear hesitant to issue awards under the FCA when negligence of U.S. service members may be at issue. For example, in the few instances where service members did act negligently by firing too many rounds or not properly identifying a target before firing, a judge advocate above the rank of captain issued the decision. Quite possibly the younger judge advocates do not understand the nuances of the law and regulations well enough to make informed and reasoned decisions. Instead of approving an award they would rather deny claims under the easy banner of the “combat exclusion.” Most judge advocates serving as foreign claims commissioners at the brigade and division levels are captains and it would not be feasible to assign more senior officers to those positions. Therefore, more extensive training could help give the judge advocates the confidence and knowledge to adjudicate these cases properly and in accordance with the law. Providing with a slightly longer period during officer basic course dedicated to combat claims and by offering more continued legal education trainings before deployments could do this.

Increased training will ensure that claims will be adjudicated properly. For instance, the “combat exclusion” will not be the presumed conclusion for most claims, facts will be analyzed against the law and regulations, case-by-case determinations will be issued, amounts awarded will be fair and reasonable, inappropriate standards of proof will not be followed, unacceptable determinations on the value of certain evidence will be avoided, and continuity in the program will extend across a deployment area.

2. *Require detailed legal analysis in all Foreign Claims Act memorandums and decisions:*

One of the most disappointing aspects of the released files is the utter lack of legal analysis in the memorandums of opinion. The judge advocates serving as foreign claims commissioners are adjudicating legal claims. They must approach this duty knowing that their responsibility as licensed attorneys requires them to make reasoned decisions. Emphasis must be made in the training of foreign claims commissioners and direction must come from their senior officers in the field to perform their legal obligation by providing competent and legal decisions in every case.

3. *Require more continuity in awards under the Foreign Claims Act:*

When some local nationals receive an award in a certain type of case and their neighbor does not, and when some local nationals receive higher awards than others for substantially the same harm, animosity among the civilian population will likely rise. Therefore, it is in the interests of the U.S. military to ensure that similar cases be adjudicated similarly. Obviously, certain facts may require differences and cases should be decided on a case-by-case basis. However, wide disparities must be avoided. Certain insurance industries utilize various matrixes for determining damages. This would be appropriate in combat claims so long as there is still some room for judge advocates to adjust certain awards in specific cases.

4. *Improve training opportunities for judge advocates, civil affairs officers, and commanders on the condolence payment program:*

The condolence payment program is a powerful tool at the hands of a brigade or division. It holds the potential to increase the civilian population's support for the military in dramatic ways. The program is not as legalistic as the FCA system and is designed to be used quickly and without prohibitive barriers. But to use the program effectively, the unit must enact a comprehensive program at various levels to ensure all potential victims receive a payment in a timely fashion. Judge advocates, civil affairs and commanders all have the potential of meeting civilian casualties and need to know how to expedite valid claims through the system. If a FCA claim is denied under the "combat exclusion" and the victim was not an enemy of the U.S., a payment should be offered at the earliest possible moment.

This training would be best served if it comes during a unit's pre-deployment exercises at combat training centers and during class sessions at the unit's home station. During the unit's deployment to a combat training center (like the National Training Center at Fort Irwin) training scenarios should include combat claims and require units to walk civilian actors through the condolence payment program. During class room sessions at the unit's home station, a combat claims expert should detail different systems the unit should follow in the field to ensure the successful implementation of the program.

5. *Incorporate the claims and condolence payment missions at all levels within a unit:*

As discussed above, many claims did not receive an FCA award because of a lack of evidence. However, the analysis also demonstrated that SIGACTs are less than perfect. It appears that many cases could have received compensation if the unit recorded all instances of potential civilian casualties. Units should designate unit claims officers and empower them with authority to demand evidence and information regarding all potential instances of civilian casualties. Further, commanders must instill in soldiers the need and obligation to report all situations that may result in civilian casualties, whether from a vehicle accident or a firefight. The military must make capturing information surrounding civilian casualties caused by U.S. forces a top priority. Software programs exist that would enable this information to be captured easily and stored in a usable manner. Units and soldiers are already required to capture certain types of information, adding a requirement about civilian casualties would be a minimum burden and offer great benefits by increasing the military's chances for helping where it has harmed.

6. *Distill lessons learned from appropriate cases to improve escalation of force and rules of engagement training:*

A majority of the 506 cases resulted from incidents where the harm occurred during an event known as an escalation of force incident. This means U.S. personnel perceived a threat and tried to neutralize that threat through a series of graduated response measures. In almost every case the perceived threat was not substantiated. Training of commanders and soldiers is extensive in this area before units deploy. Clearly, the military would do well to capture the information in all claims files dealing with an

escalation of force event to draw lessons learned to determine how well soldiers implement their training and to determine if the training is adequate or needs changing.

Consider a few cases. In one, U.S. forces shot and killed the claimant's son when a convoy approached the victim's car from the rear.¹⁹³ A SIGACT explained that the son failed to yield to the convoy after proper warnings were issued. Next, a warning shot was fired and the victim slowed down. Fearing the vehicle was blocking the patrol into a complex IED attack, the patrol leader fired another shot into the cab of the vehicle. It appears at first the convoy wanted the driver to yield and when he did slow down they thought he was setting up an attack. Is this a reasonable use of force? Could trainers use this fact pattern to determine if a better approach could have been utilized? Nothing linked the man to the insurgency since no contraband was found in the vehicle.

In a second case, U.S. soldiers guarding an election site engaged a vehicle that seemed suspicious.¹⁹⁴ According to a SIGACT the U.S. used VS-17 panels, flashlights, and hand and arm signals to stop the vehicle. The driver claimed he did not see the light or the hand signals employed by U.S. soldiers. One passenger was killed and another injured. Were the lights and signals powerful enough? Should the unit revisit its systems to see what could be improved? How quickly can a soldier resort to force? These important lessons can be gleaned by examining these types of cases.

In another case, U.S. forces killed the claimant's brother.¹⁹⁵ Allegedly, the brother pulled over to the side of the road to fix his vehicle. The U.S. service members involved claim that the victim made eye contact with the patrol as it passed, he then picked up a long cylindrical object and began to run. The soldiers also claim the vehicle began to move. U.S. forces fired "multiple warning shots before the vehicle stopped."¹⁹⁶ The SIGACT excerpt reads: "Patrol did not discover any AIF [anti-Iraqi forces] related equipment."¹⁹⁷ Could different means have been used? Did the victim run because of the threat posed by U.S. forces? What could have been done differently?

This lesson is not lost on members of the military as the below email indicates:¹⁹⁸

¹⁹³ See http://www.aclu.org/natsec/foia/pdf/Army1161_1164.pdf.

¹⁹⁴ See http://www.aclu.org/natsec/foia/pdf/Army0686_0689.pdf.

¹⁹⁵ See http://www.aclu.org/natsec/foia/pdf/Army0478_0482.pdf.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

¹⁹⁸ See http://www.aclu.org/natsec/foia/pdf/Army0430_0438.pdf.

From: [REDACTED] 101AA MAIN OSJA NCOIC ADMIN
[REDACTED]@DMAIN.D101.ARMY.SMIL.MIL]
Sent: Wednesday, May 17, 2006 7:28 PM
To: [REDACTED] SGT, 101 AA 1BCT Legal, Paralegal NCO
Subject: [REDACTED] Claims

Categories: UNCLASSIFIED FOR OFFICIAL USE ONLY

I couldn't find anything reported about [REDACTED] claim, but the note that was given to him states an escalation of force, a combat activity. I don't think there's a need to contact the unit about this one. [REDACTED] If he wants to come file a claim here to possibly get a CERP payment that's fine. How was he supposed to know to get out of the vehicle when they fired warning shots? If I was in his place I would have stayed put too.

All the TF BoB SIGACTs from early October are missing from their database. I haven't been able to get individual SIGACT reports from CIDNE the past couple days, but a general search turned up a couple EOFs that could match Abdulkalik's claim. Again, combat denied.

Let me know if there's anything else I can do to help.

SGT Barten

The question, "How was he supposed to know to get out of the vehicle when they fired warning shots?" is excellent. Training on the use of force must include an understanding of how local nationals will likely react to U.S. forces in given circumstances. Simply expecting civilians unfamiliar with U.S. troops to obey commands perfectly is unreasonable.

For example, in one case, the claimant's father was warned to pull over by a U.S. convoy and then shot when he did not.¹⁹⁹ A SIGACT revealed that "Instead of pulling over to the side of the road, the deceased turned his lights on high and continued down the road toward the convoy. One warning shot was fired which caused the vehicle to depart the roadway."²⁰⁰ Nothing was found linking the victim to the insurgency. Is it not unreasonable for a driver to put on high beams when a truck approaches? Were his actions unreasonable or should the military reexamine how convoys travel on roads?

There was one example where the unit did use the incident to evaluate their processes.²⁰¹ They conducted an Army Regulation 15-6 investigation into an escalation of force event. According to the file, a "convoy observed a vehicle in the opposite lane pull out from a line of stopped vehicles and accelerated towards the convoy. The gunner (SPC [REDACTED]) waved a chemical light at the vehicle and then threw the chemical

¹⁹⁹ See http://www.aclu.org/natsec/foia/pdf/Army1380_1384.pdf.

²⁰⁰ Ibid.

²⁰¹ See http://www.aclu.org/natsec/foia/pdf/Army0439_0454.pdf.

light towards the vehicle in an effort to alert the driver.”²⁰² The victim did not stop and the gunner opened fire. The Army Regulation 15-6 investigation concluded that the shooter should not face any criminal charges but that “[r]etraining is appropriate under these circumstances.”²⁰³ The investigator also recommended that “the Battalion [review], and if necessary [revise] its standards for engagement criteria to include lessons learned from this incident.”²⁰⁴

Such thorough examinations should be conducted in all such cases to ensure the military does all it can to limit civilian casualties, not simply out of moral considerations, but because it is in their strategic self-interest. Clearly, the tools available to inspect situations in a non-combat zone versus a combat zone vary greatly. But every effort should be made to try and understand what happened, to determine if any important lessons learned can be drawn from the use of force in a given situation and to provide some help to all innocent civilian casualties.

7. *Release all claims documents:*

The 506 cases analyzed for the purposes of this report provide an important start to assessing the use of these programs. However, a more thorough examination is necessary. It is in the interest of the U.S. military to draw lessons learned from all of the claims files brought by Afghan and Iraqi civilians. This will help the military do a better job in the current conflicts and in future engagements. To date, requests by various civil society organizations have met with very limited success. The U.S. government should release all of the claims documents with appropriate redactions as early as possible.

²⁰² See http://www.aclu.org/natsec/foia/pdf/Army0439_0454.pdf.

²⁰³ Ibid.

²⁰⁴ Ibid.

VI. Conclusion

Successful implementation of the Foreign Claims Act and the condolence payment program are integral to success for the U.S. military in Afghanistan and Iraq and in future engagements. Analysis of the only files released to date provides keen insight into these programs. The “combat exclusion” is not being used appropriately. And when the “combat exclusion” is invoked, condolence payments are not being offered in many deserving cases. There is a paucity of analysis in many of the cases. Finally, several different errors in reasoning and analysis exist throughout a number of the claims. However, there a number of recommendations that may be easily implemented by the military. These include: better training, more stringent and regulated requirements of FCCs and units, and incorporating the claims and condolence missions as a main element of counterinsurgency methods. If the recommendations offered in this report are implemented, military success will be more easily achieved. Of course, appropriate use of these programs will also ensure that civilian casualties will be treated with appropriate recognition, sympathy, and respect.

Appendix 1: Foreign Claims Act

10 USCS § 2734 (2004)

FOREIGN CLAIMS ACT

TITLE 10. ARMED FORCES

SUBTITLE A. GENERAL MILITARY LAW

PART IV. SERVICE, SUPPLY, AND PROCUREMENT

CHAPTER 163. MILITARY CLAIMS

§ 2734. Property loss; personal injury or death: incident to noncombat activities of the armed

forces; foreign countries

(a) To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, each composed of one or more officers or employees or combination of officers or employees of the armed forces, to settle and pay in an amount not more than \$ 100,000, a claim against the United States for--

(1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;

(2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or

(3) personal injury to, or death of, any inhabitant of a foreign country;

if the damage, loss, personal injury, or death occurs outside the United States, or the Territories, Commonwealths, or possessions and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be. The claim of an insured, but not that of a subrogee, may be considered under this subsection. In this section, "foreign country" includes any place under the jurisdiction of the United States in a foreign country. An officer or employee

may serve on a claims commission under the jurisdiction of another armed force only with the consent of the Secretary of his department, or his designee, but shall perform his duties under regulations of the department appointing the commission.

(b) A claim may be allowed under subsection (a) only if--

(1) it is presented within two years after it accrues;

(2) in the case of a national of a country at war with the United States, or of any ally of that country, the claimant is determined by the commission or by the local military commander to be friendly to the United States; and

(3) 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, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.

(c) The Secretary concerned may appoint any officer or employee under the jurisdiction of the Secretary to act as an approval authority for claims determined to be allowed under subsection (a) in an amount in excess of \$ 10,000.

(d) If the Secretary concerned considers that a claim in excess of \$ 100,000 is meritorious, and the claim otherwise is payable under this section, the Secretary may pay the claimant \$ 100,000 and report any meritorious amount in excess of \$ 100,000 to the Secretary of the Treasury for payment under section 1304 of title 31.

(e) Except as provided in subsection (d), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction.

(f) Upon the request of the department concerned, a claim arising in that department and covered by subsection (a) may be settled and paid by a commission appointed under subsection (a) and composed of officers of an armed force under the jurisdiction of another department.

(g) Payment of claims against the Coast Guard arising while it is operating as a service in the Department of Homeland Security shall be made out of the appropriation for the operating expenses of the Coast Guard.

(h) The Secretary of Defense may designate any claims commission appointed under subsection (a) to settle and pay, as provided in this section, claims for damage caused by a civilian employee of the Department of Defense other than an employee of a military department. Payments of claims under this subsection shall be made from appropriations as provided in section 2732 of this title.

CURRENT THROUGH P.L. 227, APPROVED 5/7/04