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Present-Day Effects of United States Bombing of Laos During the Vietnam War: Can Injured Laotians Recover Under the Federal Tort Claims Act?

From break of day
Till sunset glow
I toil.
I dig my well
I plow my field,
And earn my food and drink.
What care I
Who rules the land
If I
Am left in peace?

Anonymous (Chinese, 2300 B.C.)¹

The roar of the bombs and the noise of the planes frightened me terribly. Our life . . . was without tomorrows. Each day, across the forests and ditches, we sought only to escape from the bombs. When looking at the face of my innocent child, I could not stop crying for his future. . . . Why do the men in this world not love each other, . . . [a]nd why do they kill each other this way? . . . In any case, in all that happens, it is the innocent people who suffer all the terrible consequences so fatal and tragic.

Laotian Refugee (1971)²

I. INTRODUCTION

During the Vietnam War, the United States conducted a massive aerial bombing campaign over Laos. The bombing had two official purposes. First, the United States sought to interdict the major south-

1. *War-Related Civilian Problems in Indochina, Part II: Laos and Cambodia: Hearings Before the Subcomm. to Investigate Problems Connected with Refugees and Escapees of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 100 (1971) (Appendix II, prepared by Fred Branfman) [hereinafter *Hearings*]. Lewis Sitzer, a volunteer in Laos with International Volunteer Services, Inc., included this poem in a newsletter to friends and family in the United States. As he was clearing his belongings from the remains of his house, which was destroyed along with the rest of his village during an American bombing raid, he noticed the poem on the Laotian War Resister's League Peace Calendar hanging on the wall. *Id.*

2. *Hearings*, *supra* note 1, at 108. Essay by a Laotian refugee.

bound North Vietnamese supply route known as the Ho Chi Minh Trail.³ Second, the bombing provided specifically-requested aerial support for the general operations of the Royal Lao Army.⁴ The immediate impact was devastating. The bombing wiped out entire villages,⁵ killing more civilian villagers than communist soldiers.⁶

3. SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG., 1ST SESS., BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM 355, 359 (Comm. Print 1970) (Statement by President Nixon on the Situation in Laos, Mar. 6, 1970) [hereinafter Nixon Statement].

4. *Id.*

5. *Hearings, supra* note 1, at 90-113. Consider the following excerpts from refugee interviews:

Q. How many of the 100 houses in the town weren't destroyed or damaged by the bombing?

A. [In] 1969 they were all lost, but he says in some cases there were still posts standing.

.....

Q. Now, among those 21 villages are there still any houses left?

A. Now, among those 21 villages, there is not a single house left.

Q. Why is there not a single house left?

A. The airplanes bombed them.

Q. The airplanes bombed them all?

A. Yes.

Id. at 105, 111.

6. *Id.* at 90-113. From refugee interviews:

Q. What of the 60 people killed and injured, were most of them old people, or were they Pathet Lao soldiers or were they children? Or were they simply men working in fields during the day and not working for the Pathet Lao?

A. He says, well, he can't say, you know about their ages, they were like all ages. But, as far as soldiers, they never saw any soldiers, get killed by the bombing. They never sad [sic] a Pathet Lao soldier die.

Q. Why was that?

A. He says that they were in their own area and the villagers were in a different area. And they never saw any soldiers, the soldiers were off in the forest.

Q. Were, did, . . . then did these people who were killed, do I understand you're telling me, that they had nothing to do with the war at all?

A. He says he doesn't know anything about the war . . . all he know [sic] is about these 20 people was that they were simple villagers, just farmers, they didn't have guns. He says as far as the soldiers go that's the soldiers' business, I don't know anything about soldiers.

.....

Q. Did the Pathet Lao ever come, I gather from what he said before that the Pathet Lao never came to his village, that they were some distance from it. Did the people ever wonder why they were being bombed?

A. He says during that period, they couldn't think. They were very afraid. They hated just like that.

Q. Did you think it was the Lao bombing you or did you think it was the Americans?

A. He says at that time we didn't know who it was but the Pathet Lao would tell us that it was the Americans.

Q. When did they see the Pathet Lao?

A. They would come to talk to us in the village, propaganda talks in the village.

.....

This modern, war-torn history has left Laos a poor and underdeveloped country.⁷ However, in the late 1980s, Laos began to stabilize economically and politically.⁸ Despite its communist government, Laos is reaching out to its Western-oriented neighbors in hopes of

Q. And did you see any Pathet Lao soldiers killed?

A. He says no, he doesn't know about that . . . he never went out . . . looking around the place.

Q. But did you ever hear of Pathet Lao being killed or injured by the bombs?

A. He said that he heard of Pathet Lao soldiers being wounded but the [sic] never heard of any dying.

. . . .

Q. Were there any Pathet Lao in your town at all?

A. He says he doesn't know . . . he didn't see anything.

Q. Didn't they come in every now and then and talk to the people?

A. When the shooting (bombing) started they weren't there.

Q. The townspeople were but the Pathet Lao were long gone, huh?

A. Yes.

Id. at 102-06.

From a sample case history of a victim of the bombs:

Thao Sipa: Thao Sipa's father: My son is six years old. We are from Ban Ngoui.

Sao Toun became very afraid and jumped out of trench and began running.

The planes bombed, and she was killed.

In July, 1969, we were all sitting in our small shelter out in the forest, when planes bombed around 11 a.m.

Two people with us, a man aged 60 and a little girl aged 7, were killed lying in their beds.

My son's hand was hit and his fingers flew up, embedding themselves in the roof.

Id. at 109.

7. L.A. Times, Jan. 13, 1985, Part I, at 2, col. 1. Laos is one of the poorest nations in the world. Sesser, *A Reporter at Large: Forgotten Country*, THE NEW YORKER, Aug. 20, 1990, at 44. In 1988, the gross national product was \$546,000,000, less than the revenue of over 800 United States companies. *Id.* Per capita income is \$156 a year. *Id.* One hundred and nine babies out of every thousand dies. This infant-mortality rate is three times higher than Thailand's rate and ten times greater than the United States' rate. *Id.* This poverty is a direct result of the fighting in Laos during the 1960s and the 1970s. With farmers comprising over 75 percent of the population, the war on and over their fields disrupted the nation's major source of wealth. *Id.*

8. L.A. Times, Jan. 13, 1985, Part I, at 2, col. 1. When the Pathet Lao claimed victory in 1975, it immediately sent people to reeducation camps. As a result, most of the country's educated elite fled. The new government also attempted to collectivize the economy. However, this was met by reduced production from the peasants. This reaction and the effects of the previous 15 years of violence caused the economy to collapse. Consequently, Laos became dependent on its neighbors. *Id.*

In 1979, the Communist Party, realizing its problems, abandoned the collective economy idea and allowed increased private ownership. Sesser, *supra* note 7, at 63. Additionally, the government has become increasingly conscious of the country's natural resources. *Id.* The state recently constructed a highway connecting Laos with the Vietnamese coast, reducing the country's dependence on Thailand. L.A. Times, Jan. 13, 1985, Part I, at 2, col. 1. This new attitude is called *chin ta nakan mai*, or "new thinking." Sesser, *supra* note 7, at 48-49.

economic self-improvement.⁹ Yet such improvement is difficult, if not impossible, for a country that cannot afford to make its arable land safe to farm.¹⁰ Two decades after the war, innocent villagers continue to be maimed and killed by unexploded bombs in their villages and rice fields.¹¹

These modern-day victims have no local remedy for their problem. The Lao government cannot afford to pay money damages to its citizens for injuries resulting from hostile enemy actions two decades ago.¹² Meanwhile, each victim becomes an economic burden to his or her family and community. Each person killed by an old bomb represents one less able body to assist in farming. Each person that merely loses a limb not only represents one less able body, but continues to be a mouth to feed.

Because the United States government owns these bombs and is directly responsible for their presence in Laos, it is a reasonable party against whom to attach liability for the Laotian injuries. The United States, however, enjoys sovereign immunity and cannot be sued in American courts without its consent.¹³ By enacting the Federal Tort Claims Act ("FTCA"),¹⁴ Congress expressly waived the federal government's sovereign immunity in limited circumstances.¹⁵ The FTCA's general purpose is to provide a remedy to those injured by negligent federal employees acting within the scope of their employment.¹⁶ A second statute which may be applicable to this problem is the Foreign Claims Act ("FCA").¹⁷ The FCA provides an administrative remedy for inhabitants of foreign countries who are injured by the noncombatant activities of the United States military.¹⁸

9. Sesser, *supra* note 7, at 62; L.A. Times, Jan. 13, 1985, Part I, at 2, col. 1. With Vietnam and the Soviet Union recently bickering over which would exert its influence over Laos, the government in Vientiane is showing some signs of independence and a potentially receptive attitude towards United States economic aid. Kaylor, *A Land Where Russia, Vietnam Vie for Power*, U.S. NEWS & WORLD REP., Oct. 25, 1982, at 43; Hiebert, *Laos: The Road to Reform*, FAR E. ECON. REV., Feb. 16, 1989, at 18.

10. L.A. Times, June 26, 1988, Part I, at 12, col. 1 (bulldog ed.); N.Y. Times, Nov. 25, 1987, § A, at 9, col. 1 (city final ed.).

11. Sesser, *supra* note 7, at 41-42; see L.A. Times, June 26, 1988, Part I, at 12, col. 1 (bulldog ed.); N.Y. Times, Nov. 25, 1987, § A, at 9, col. 1 (city final ed.).

12. See Sesser, *supra* note 7, at 44.

13. United States v. Sherwood, 312 U.S. 584, 586 (1941).

14. 28 U.S.C. §§ 1346, 1402, 2401, 2402, 2411, 2412, 2671, 2672, 2674-2680 (1982).

15. See *id.* § 1346.

16. See H.R. REP. NO. 1287, 79th Cong., 1st Sess., at 1 (1945).

17. 10 U.S.C. § 2734 (1988).

18. *Id.*

This Comment will identify and discuss the remedies modern Laotian victims might have against the United States government under United States law.¹⁹ After briefly highlighting the history of the United States' involvement in Laos during the Vietnam War,²⁰ this Comment will discuss the nature and extent of damages these civilians have suffered. It will then consider the applicability of the FTCA and the FCA to this situation. Although concluding that any claims the Lao may have under the FTCA would, in all likelihood fail, this Comment suggests a chance of limited success under the FCA. Finally, this Comment will propose an alternative political solution to the problem: If under existing law there is even a remote chance of a substantial recovery against the United States, perhaps Congress can be persuaded to take necessary steps to redress the grave losses the Lao people continue to suffer.

II. THE UNITED STATES PRESENCE IN LAOS

A. *Historical Facts*

United States involvement in Laos evolved gradually, much as it did in Vietnam.²¹ At the end of the French Indochina War in 1954, the commanders-in-chief of the French Union Forces and the People's Army of Vietnam signed the Agreement on the Cessation of

19. For an analysis of a similar problem in Libya after World War II, see Partsch, *Remnants of War as a Legal Problem in the Light of the Libyan Case*, 78 AM. J. INT'L L. 386 (1984). After World War II, Libya faced the problem of unexploded land mines placed there by Germany, Italy, and the United Kingdom. *Id.* at 387. Partsch analyzed the legal implications under principles of international law. He concluded that there was no practical remedy for the Libyans under international law and the problem could only be resolved by mutual cooperation between the countries involved. *Id.* at 400. The article's final paragraph stated:

One should not rely too much on legal doctrines, one of the participants [of the 1981 symposium on the Libyan mines] had urged: "Let's tackle that problem in a practical way, in a manner that is uncontroversial and can obtain the consensus of the international community." Certainly, a practical approach would be commendable. Yet the question remains whether this practical way would be more effective if it were used in bilateral negotiations or in discussions involving a larger community of states, which inevitably would bring one back to legal doctrines.

Id. at 401.

20. For a thorough treatment of the history of the United States' involvement in Laos, see Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990) [hereinafter Ely, *The American War in Indochina, Part II*]. Professor Ely concludes that the United States' war in Laos and Cambodia was unconstitutional primarily because of its secrecy. *Id.* at 1094, 1099, 1132.

21. STAFF OF SENATE COMM. ON THE JUDICIARY, 91ST CONG., 2D SESS., REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS IN INDOCHINA 17 (Comm. Print 1970) [hereinafter STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS].

Hostilities in Laos.²² Differing interpretations of the Agreement resulted in continued hostilities between the Pathet Lao and the Royal Government.²³ In 1956, Prince Souvanna Phouma, the leader of the neutralist faction, gained power and attempted to reconcile with the Pathet Lao.²⁴ These efforts resulted in a coalition government including all three historic Laotian factions: the Royalists, the Neutralists and the Leftists (Pathet Lao).²⁵ By the end of 1958, Laos was at peace for the first time since World War II.²⁶

Laos' new found tranquility did not last long. The growing political power of the leftist Pathet Lao²⁷ alarmed the United States, which had hoped at the very least to keep Laos neutral.²⁸ A group of pro-Western conservatives ousted Souvanna and installed Phoui Sananikone as Prime Minister.²⁹ Phoui immediately exhibited a pro-Western policy, resulting in military and economic assistance from the United States between 1955 and 1962 totalling \$450 million.³⁰ The Soviet Union responded by rendering overt aid to the Neutral-

22. *Id.* at 17; D. WHITAKER, H. BARTH, S. BERMAN, J. HEIMANN, J. MACDONALD, K. MARTINDALE & R. SHINN, *AREA HANDBOOK FOR LAOS* 35, 189 (1972) [hereinafter WHITAKER]; Dai, *Canada's Role in the International Commission for Supervision and Control in Laos*, *THE CAN. Y.B. OF INT'L LAW* 235 (1972). The Agreement, signed at the 1954 Geneva Conference, ended the fighting between the French and the Viet Minh. WHITAKER, *supra*, at 35. The Viet Minh were the communist Vietnamese faction resisting French colonial rule in Vietnam. *Id.* The Agreement called for the withdrawal of all French and Vietnamese troops from Laos and the transfer of Pathet Lao troops to the Lao provinces of Phongsaly and Sam Neua, "pending a political settlement." Dai, *supra*, at 236. The "political settlement" would integrate the Pathet Lao into the general Laotian community. WHITAKER, *supra*, at 35. Laos was on the Geneva Convention agenda because the French Indochina War was partly conducted on Laotian soil. 4 R. BUHITE, *THE DYNAMICS OF WORLD POWER: A DOCUMENTARY HISTORY OF UNITED STATES FOREIGN POLICY 1945-1973* 569 (A. Schlesinger, Jr. ed. 1973) [hereinafter Schlesinger].

23. Dai, *supra* note 22, at 239-43; Schlesinger, *supra* note 22, at 569; see WHITAKER, *supra* note 22, at 35.

24. Dai, *supra* note 22, at 245.

25. *Id.* The Pathet Lao was the military force of the Neo Lao Hak Xat (or Lao Patriotic Front). In 1965, it was renamed the Lao People's Liberation Army. WHITAKER, *supra* note 22, at 35, 279, 322.

26. Dai, *supra* note 22, at 246.

27. WHITAKER, *supra* note 22, at 35-36; Dai, *supra* note 22, at 247.

28. DEPARTMENT OF STATE, *AMERICAN FOREIGN POLICY CURRENT DOCUMENTS* 1067 (1962) (President Kennedy replying to a question at a news conference, January 15, 1962); STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 17; see WHITAKER, *supra* note 22, at 191; Dai, *supra* note 22, at 247.

29. Dai, *supra* note 22, at 248.

30. *Id.* Phoui's government tried to suppress the Pathet Lao and other "dangerous ideologies" throughout the country. Schlesinger, *supra* note 22, at 569-70. The resulting United States aid came in the form of supplies and military equipment as well as advisors and technicians. *Id.* at 569.

ists.³¹ Meanwhile, North Vietnam offered its support to the Pathet Lao.³²

Inevitably, verbal warfare escalated into armed conflict.³³ No single faction was able to maintain a legitimate government in Vientiane, Laos' modern capital.³⁴ Cambodia's Prince Sihanouk urged an international conference to restore peace in Laos and to recognize that nation's neutrality.³⁵ The conference convened in Geneva in May 1961 and resulted in a coalition government with Souvanna Phouma as premier.³⁶ In July 1962, Souvanna declared that Laos would not participate in any future military activity or alliance,³⁷ nor would Laos accept further military assistance or permit foreign military bases on its soil.³⁸

In an effort to protect his country's precarious neutrality, Souvanna unsuccessfully sought to establish an independent Lao military force consisting of the three coalition members.³⁹ However, the pro-Western faction soon ousted Souvanna,⁴⁰ and Laos reverted to its pre-Geneva Conference configuration.⁴¹ The Royalists controlled Vientiane and the Mekong Valley, which contained roughly half the territory and two-thirds of the population of Laos.⁴² The Pathet Lao and the North Vietnamese Army commanded the northeastern region and the southern panhandle,⁴³ while the Neutralists governed the

31. Dai, *supra* note 22, at 248; see WHITAKER, *supra* note 22, at 196, 198. The Soviet Union provided supplies and weapons. Schlesinger, *supra* note 22, at 569.

32. WHITAKER, *supra* note 22, at 193-95; Dai, *supra* note 22, at 249. North Vietnam helped recruit and train guerrilla forces. Schlesinger, *supra* note 22, at 569.

33. Dai, *supra* note 22, at 248-49.

34. *Id.* at 249.

35. *Id.* at 249-50. The United States and Great Britain agreed to participate in the conference on the condition that a verified cease-fire existed in Laos before the Convention convened. *Id.* at 250. United States participation became a reality partly because of a new administration in Washington which had reluctantly recognized a neutral government in Laos. *Id.* at 249; see also, WHITAKER, *supra* note 22, at 36, 191.

36. Nixon Statement, *supra* note 3, at 356; WHITAKER, *supra* note 22, at 4, 37; Dai, *supra* note 22, at 250-51.

37. WHITAKER, *supra* note 22, at 192; Dai, *supra* note 22, at 251.

38. WHITAKER, *supra* note 22, at 192; Dai, *supra* note 22, at 251.

39. Dai, *supra* note 22, at 252.

40. Schlesinger, *supra* note 22, at 570.

41. Dai, *supra* note 22, at 252.

42. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 19; Dai, *supra* note 22, at 252.

43. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 19; Dai, *supra* note 22, at 252.

northern provinces.⁴⁴

In 1963, hostilities erupted again, this time with the Royalists and the Neutralists allied against the Pathet Lao.⁴⁵ Laos became embroiled in a series of seasonal offensives. As the conflict intensified, so too did the interest of neighbors and superpowers.⁴⁶ Therefore, it is not surprising that Laos' internal struggle was closely linked to the ongoing war in Vietnam.⁴⁷ The Pathet Lao received considerable military aid from North Vietnam in its fight to retain control of the Plain of Jars region⁴⁸ and to establish a government in Vientiane.⁴⁹ In return for this assistance, the Pathet Lao fought to keep the Ho Chi Minh Trail open.⁵⁰ The trail, a system of roads and footpaths, was a major artery over which the North Vietnamese transported troops and supplies to South Vietnam.⁵¹ As the war between North and South Vietnam intensified, Laos was drawn ever-deeper into the con-

44. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 19; Dai, *supra* note 22, at 252.

45. WHITAKER, *supra* note 22, at 4, 37; Dai, *supra* note 22, at 252.

46. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 19; see Nixon Statement, *supra* note 3, at 356; WHITAKER, *supra* note 22, at 36-37; *Laos: Plain (and Fancy) Talk*, NEWSWEEK, Mar. 23, 1970, at 34.

47. See I G. MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE DRAMA OF NATIONS* 398 (1968). "It is patently clear that there can be no hope of peace and stability in Laos unless there is a settlement of the more bloody struggle in Vietnam such as to bring about a slackening of cold war tensions throughout the whole area of what was formerly French Indo-China." *Id.*

48. The Plain of Jars is a region in northern Laos where much of the local fighting during the Vietnam War took place. WHITAKER, *supra* note 22, at 12, 92. Ringed by mountains, its elevation averages 3,600 feet above sea level. The name comes from ancient stone jars, three to eight feet high, that lie in a meadow at the center of the region. Scholars believe the jars were funeral urns dating back roughly 2,000 years. W. BURCHETT, *THE FURTIVE WAR: THE UNITED STATES IN VIETNAM AND LAOS* 200 (1963); A. DOMMEN, *CONFLICT IN LAOS: THE POLITICS OF NEUTRALIZATION* 2 (1964).

49. Nixon Statement, *supra* note 3, at 356; WHITAKER, *supra* note 22, at 281; *FACTS ON FILE, INC., 5 SOUTH VIETNAM: U.S.-COMMUNIST CONFRONTATION IN SOUTHEAST ASIA* 1970, 21 (1973) [hereinafter *FACTS ON FILE*].

50. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 19; WHITAKER, *supra* note 22, at 8, 281.

51. Nixon Statement, *supra* note 3, at 356, 358; *FACTS ON FILE, supra* note 49, at 22; see WHITAKER, *supra* note 22, at 5. The Chinese had been shipping military supplies through Cambodia to the Viet Cong in South Vietnam. In 1969, Prince Sihanouk of Cambodia prohibited Chinese ships from entering the port of Sihanoukville. As a result, the supplies were shipped to Viet Cong camps on the border between Cambodia and South Vietnam, prompting United States troops to neutralize the Viet Cong camps. This left the Ho Chi Minh Trail as the only remaining open route from North Vietnam into South Vietnam. *Laos: American Air Support for Invading Troops from South Viet-Nam*, 17 *ASIAN RECORDER* 10070 (Mar. 26-Apr. 1, 1971).

flict, despite its attempts to remain neutral.⁵²

By 1965, the United States' major objective in Laos was to neutralize the Ho Chi Minh Trail in order to prevent North Vietnamese infiltration of South Vietnam.⁵³ In addition, the Central Intelligence Agency ("CIA") conducted its own covert activity in Laos.⁵⁴ The CIA maintained a clandestine army of "irregular forces" comprised of Hmong tribesmen⁵⁵ and Thai⁵⁶ forces, commanded by General

52. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 17.

53. *Id.*; WHITAKER, *supra* note 22, at 203, 278.

54. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 92D CONG., 1ST SESS., REPORT ON LAOS: APRIL 1971 14-15 (Comm. Print 1971) [hereinafter STAFF REPORT ON LAOS: APRIL 1971]; STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 27-28; L. JOHNSON, AMERICA'S SECRET POWER: THE CIA IN A DEMOCRATIC SOCIETY 26 (1989); R. JEFFREYS-JONES, THE CIA AND AMERICAN DEMOCRACY 132-33 (1989); Scott, *Laos: The Story Nixon Won't Tell*, N.Y. REV., Apr. 9, 1970, at 37; see Ely, *The American War in Indochina, Part II*, *supra* note 20, at 1095-1100.

55. The Hmong (originally known as the Meo) are an ethnic minority of Tibeto-Burman origin who live in the mountain regions of Laos. According to Chinese records, they originally lived along the Yellow River. Oppressed by the Chinese, the Hmong migrated south from China into Burma, Thailand, and Laos. It is not certain when they first arrived in Laos, but by the mid-1800s the Hmong were settled in the mountains near Luang Prabang. P. LEWIS & E. LEWIS, PEOPLES OF THE GOLDEN TRIANGLE 102 (1984). The Hmong are a very independent people. They felt threatened by the communist movements in Laos and consequently were willing to take up arms to resist. *Id.* at 10. Their support of United States efforts and their continued resistance to communism have resulted in Lao governmental and Vietnamese persecution. Moreover, due to their relative wealth from opium production, they are resented by the lowland Lao. See Ely, *The American War In Indochina, Part II*, *supra* note 20, at 1095 n.11.

For an extensive account of CIA activity with the Hmong in Laos and the CIA's alleged involvement in opium trafficking, see A. MCCOY, THE POLITICS OF HEROIN IN SOUTHEAST ASIA 242-353 (1972). McCoy suggested that the Hmong were so vital to CIA efforts in Laos that the CIA felt compelled to assist in distributing the tribe's major source of income.

Wartime conditions had increased [Hmong] dependence on [opium] cultivation, and the lack of air transport created serious economic problems for hill tribe opium farmers. Since the CIA was using the [Hmong] population to combat Pathet Lao forces in the mountains of northeastern Laos, the prosperity and well being of this tribe was of paramount importance to the agency's success

Without air transport for their opium, the [Hmong] faced economic ruin. There was simply no form of air transport available in Northern Laos except the CIA's charter airline, Air America. And according to several sources, Air America began flying opium from mountain villages north and east of the Plain of Jars to Gen. Vang Pao's headquarters at Long Tieng.

A. MCCOY, *supra*, at 263.

56. STAFF REPORT ON LAOS: APRIL 1971, *supra* note 54, at 16; see WHITAKER, *supra* note 22, at 278; see also Ely, *The American War in Indochina, Part II*, *supra* note 20, at 1095.

The Thai irregulars are transported from Thailand to Laos by Air America and are returned to Thailand when their tours are up again by Air America. We were told that the Embassy wanted to [deleted] the [deleted] with [deleted] because the [deleted] were more mobile and thus "could do things the others could not do." . . . The need for Thai "volunteers" results from the fact that the military manpower base in

Vang Pao.⁵⁷ These forces supplemented the Royal Lao Army by engaging in secret guerrilla warfare against the Pathet Lao and the North Vietnamese Army.⁵⁸

One CIA-supported operation was particularly important to the entire Vietnam War effort. From 1965 to 1968, the United States operated a secret radar station on a mountain called Phou Pha Thi in northern Laos, 17 miles from the North Vietnamese border and only 160 miles from Hanoi.⁵⁹ The installation, run by twelve Americans

Laos is estimated to be 114,765 and the Lao Army, neutralist army, irregulars and Pathet Lao all must draw from this base which is now exhausted. . . . Thus additional military manpower can only come outside Laos.

STAFF REPORT ON LAOS: APRIL 1971, *supra* note 54, at 16 (the notation "[deleted]" appears in the original). According to one commentator, 99 Thai police commandos worked with the Hmong under the CIA in Laos. A. MCCOY, *supra* note 55, at 275.

57. STAFF REPORT ON LAOS: APRIL 1971, *supra* note 54, at 14-17; *Laos: The Unseen Presence*, TIME, Oct. 17, 1969, at 39; *Laos: Another Vietnam?*, NEWSWEEK, Mar. 16, 1970, at 42. In 1960, the CIA began organizing an army of Hmong tribesmen in Laos to combat increasing guerrilla activity in Laos and South Vietnam. In this way, the United States was able to control the effort to resist communist insurgency in Laos without using troops. A. MCCOY, *supra* note 55, at 265. To command this army, the CIA needed "a real slugger who would take casualties." *Id.* at 268. They chose Vang Pao, a young Hmong officer whose paramilitary experience began when he was thirteen years old. A lieutenant colonel in the Lao Army, he also commanded the Hmong self-defense forces in the Plain of Jars. *Id.* at 268, 271. Today, Vang Pao is a naturalized United States citizen. Sesser, *supra* note 7, at 62.

58. STAFF REPORT ON LAOS: APRIL 1971, *supra* note 54, at 14-17. General Vang Pao's clandestine army was considered superior to the regular army. The Royal Army was commanded by generals in the various regions. These generals were tantamount to "warlords," each with his own idea of how the war should be fought. *Id.* at 14. As a result, the authorities in Vientiane were not able to mobilize troops as easily as they wished. Such a decentralized army was weak and largely ineffective. Furthermore, most of the Lao regular army was used to guard populated areas, airfields, and depots. *Id.* By contrast, the CIA-backed, clandestine forces were free to mobilize as General Pao wished. Indeed, these secret forces were transported in and out of Laos by Air America. *Id.* at 16. For more on Air America, see *Air America: Anything Goes*, NEWSWEEK, April 6, 1970, at 37. On the need for secrecy, the Senate Foreign Relations Committee staff reported:

The principal arguments we heard for the need to continue to maintain secrecy were these: first, that General Vang Pao does not want to allow the press to visit because his military security would be compromised; second, that if reporters were permitted to visit Long Tieng, they would concentrate on the role of the United States, overlooking Vang Pao's contribution; third, that CIA [sic] is a clandestine organization not used to operating in the open and that its operations in other parts of the world might be compromised if the techniques and individuals involved in Laos were to become known; fourth, that were U.S. activities publicized, the United States would be accused of violating the Geneva Agreements of 1962 and it would thus be more difficult to re-establish the Geneva Agreements as a framework for a future settlement in Laos; and fifth, that the details of the Thai presence would become known which would [deleted].

STAFF REPORT ON LAOS: APRIL 1971, *supra* note 54, at 16-17 (the notation "[deleted]" appears in the original).

59. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note

and protected by roughly 100 Hmong tribesmen of General Vang Pao's army,⁶⁰ guided United States bombing missions over North Vietnam.⁶¹

The North Vietnamese Army attached great strategic importance to the radar station.⁶² The North Vietnamese and Pathet Lao forces mobilized far more troops than were ultimately necessary to overrun the station.⁶³ Many of the excess troops spilled over onto the Plain of Jars, creating the impression that they were conducting an offensive.⁶⁴ Washington interpreted this North Vietnamese thrust as aggression and used the situation to justify an increase in United States military assistance to Laos.⁶⁵ By venturing onto the Plain of Jars, the North Vietnamese troops became dispersed and vulnerable.⁶⁶

21, at 21. The secrecy of the installation was evident in the following questions by Senators Fong and Kennedy directed at William H. Sullivan, former United States ambassador to Laos, during the hearing of the Subcommittee to Investigate Problems Connected with Refugees and Escapees.

Senator FONG. So our activity is confined to bombing. No infantry men, no foot soldiers; is that correct?

Ambassador SULLIVAN. Some of our military personnel are there in an advisory capacity, but they are not engaged in combat and they are under strict instructions to disengage if the area falls into a combat situation.

Senator KENNEDY. By your response to Senator Fong's questions, you don't mean to suggest that we haven't put in very sensitive installations such as the one at Phou Pha Thi which has been reported in the press as a secret installation to guide American bombing in North Vietnam. You don't want to leave us with the impression that the only thing that our advisers were doing was just "advising" and not operating very sensitive and highly classified and extremely important offensive equipment?

Ambassador SULLIVAN. We had that one, and that one only, sir.

Senator KENNEDY. But that was a significant one, was it not?

Ambassador SULLIVAN. Yes, it was.

Senator KENNEDY. And after that was destroyed, we stopped the bombing of the North, did we not, 2 weeks afterward?

Ambassador SULLIVAN. I can't remember the exact date, but it was in the same time frame.

Senator KENNEDY. So to suggest that the only action or activity of these advisers was to sort of help and assist these [Hmong] tribesmen is not a very complete or fair characterization of our involvement there, is it?

Ambassador SULLIVAN. No, I wouldn't want to leave the impression that that is all they have done since they have been there. That is their main burden.

Id. at 22.

60. *Id.* at 21; A. MCCOY, *supra* note 55, at 278.

61. STAFF REPORT ON REFUGEES AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 22; A. MCCOY, *supra* note 55, at 278.

62. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 22.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

A counteroffensive launched by Royal Lao forces and General Vang Pao, and supported by United States aerial bombing, easily re-established control of the Plain of Jars.⁶⁷ However, in taking the Plain, General Vang Pao, like the North Vietnamese, overextended his forces. Consequently, the Communists soon recaptured the Plain.⁶⁸ These sudden changes in control of the Plain transformed Laos' numerous seesaw battles into a major war.⁶⁹

By 1969, the United States officially admitted only to conducting reconnaissance missions over Laos.⁷⁰ The planes engaged in those missions were supposedly authorized to fire only in self-defense.⁷¹ United States planes had in fact provided tactical air support to the Royal Lao forces and repeatedly bombed the Ho Chi Minh Trail.⁷² One United States official in Vientiane articulated the concern over publicly admitting to the United States bombing, saying:

If we [acknowledged it], . . . every dove in the U.S. would hit us over the head with it like they did with Johnson and the bombing of North Viet Nam. The North Vietnamese don't admit the presence of their 47,000 troops. Why should we give them the advantage of admitting the bombing?⁷³

The official United States position possibly reflected concern that United States assistance to Laos may have violated the 1962 Geneva accords declaring Laos' neutrality.⁷⁴

In 1970, the United States finally acknowledged a more active military role in Laos. President Nixon defended the bombing as a response to communist aggression on the Plain of Jars.⁷⁵ Nixon described the United States' aerial military campaign over Laos with such euphemisms as "limited," "requested," "supportive," and "defensive."⁷⁶ The President insisted that the United States had simply

67. *Id.*

68. *Id.*

69. *Id.* at 21, 22; *Laos: Plain (and Fancy) Talk*, NEWSWEEK, Mar. 23, 1970, at 34.

70. *Laos: The Unseen Presence*, TIME, Oct. 17, 1969, at 39.

71. *Id.*

72. *Id.* One United States Air Force pilot said, "We've creamed that place, . . . some places even worse than Viet Nam." *Id.*

73. *Id.*

74. *Id.*

75. Nixon Statement, *supra* note 3, at 358-60.

76. *Id.* In the speech, President Nixon stated:

I turn now to the precise nature of our aid to Laos I have indicated:

—That the United States has no ground combat forces in Laos.

—That there were 50,000 North Vietnamese troops in Laos and that "more perhaps are coming."

responded to Royal Lao Government requests for assistance.⁷⁷ Nixon admitted the bombing but did not mention the radar station at Phou Pha Thi. Meanwhile, North Vietnam insisted that the installation's presence necessitated its invasion of the Plain of Jars.⁷⁸

B. *Extent of the Bombing*

Many groups have attempted to estimate the scope of the bombing of Laos.⁷⁹ Some unofficial accounts suggest that at its peak in 1968 and 1969, United States bombing of Laos surpassed the level of United States bombing in Europe and the South Pacific during World War II.⁸⁰ Indeed, it is considered "the heaviest sustained bombing campaign in history."⁸¹ These reports indicate that the bombs were directed primarily at the civilian population⁸² in an effort to demoral-

—That, at the request of the Royal Laotian Government which was set up by the Geneva Accords of 1962, we have provided logistical and other assistance to that government for the purpose of helping it to prevent the Communist conquest of Laos.

—That we have used air power for the purpose of interdicting the flow of North Vietnamese troops and supplies on that part of the Ho Chi Minh Trail which runs through Laos.

—That, at the request of the Royal Laotian Government, we have flown reconnaissance missions in Northern Laos in support of the Laotian Government's efforts to defend itself against North Vietnamese aggression and that we were engaged in "some other activities."

Id. at 359.

77. *Id.* at 359-60.

78. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 21.

79. *Id.* at 29; Sesser, *supra* note 7, at 40; Strock, *Laotian Tragedy: The Long March*, NEW REPUBLIC, May 9, 1970, at 12; *Laos: Another Vietnam?*, NEWSWEEK, Mar. 16, 1970, at 42.

80. *Hearings, supra* note 1, at 89-90 (Appendix II, prepared by Fred Branfman). Mr. Branfman spent four years in Laos interviewing Laotian refugees and United States military personnel. *Id.* at 89. He compiled documentation in the form of interview transcriptions and excerpts from articles written by other researchers, including United Nations Advisor Georges Chapelier and Jacques Decornoy, Southeast Asia desk editor of *Le Monde*, who visited Northern Laos and witnessed the bombing first hand. *Id.* at 89-91. Professor Ely reports that the United States dropped 1.6 million tons of bombs on Laos. Ely, *The American War in Indochina, Part II, supra* note 20, at 1098. Other reports indicate that the United States dropped over 2 million tons of bombs on Laos. Sesser, *supra* note 7, at 40.

81. Ely, *The American War in Indochina, Part II, supra* note 20, at 1098 (quoting A. ISAACS, G. HARDY & M. BROWN, *PAWNS OF WAR: CAMBODIA AND LAOS* 72 (1987)).

82. *Hearings, supra* note 1, at 90-113. Professor Ely suggests that the United States was "less restrained in . . . killing civilians" in Laos because the war there was a secret. Ely, *The American War in Indochina, Part II, supra* note 20, at 1098 n.33. "While as in any war, atrocities were not uncommon, the military did exercise caution in conducting ground and air operations [in Vietnam] in order to minimize civilian casualties. The difference can be seen in the 'gloves off' bombing in Laos where the cameras were not watching." *Id.* (quoting L. GELB & R. BETTS, *THE IRONY OF VIETNAM: THE SYSTEM WORKED* 266 (1979)).

ize the Lao people and turn them against the Pathet Lao.⁸³

United States bombing of Laos occurred in four phases.⁸⁴ Phase I, from May 1964 to October 1966, consisted of sporadic missions by Laotian T-28 aircraft,⁸⁵ directed primarily at enemy troops in the jungles.⁸⁶ Phase II lasted from autumn 1966 to early 1968.⁸⁷ It involved the use of United States planes which bombed enemy-held or threatened villages, resulting in thousands of civilian casualties.⁸⁸ Phase III ran from the middle to the end of 1968, just after the bombing of North Vietnam had subsided.⁸⁹ This phase also saw the use of more United States than Laotian planes and an increased targeting of civilian populated areas.⁹⁰ Phase IV began in early 1969, after the bombing of North Vietnam had completely terminated and involved a substantial increase in the bombing of Laos.⁹¹ By the time the bombing stopped in 1973, United States planes had flown 580,944 sorties,⁹² averaging 177 sorties a day, "or one planeload of bombs every eight minutes around the clock for nine years."⁹³

Although the United States ambassador in Vientiane theoretically directed all bombing missions,⁹⁴ a staff report to a Senate subcommittee indicates that this was not the case.

Evidence in the field suggests that, although the U.S. Embassy in

83. *Hearings, supra* note 1, at 90. "[I]t was decided to bomb civilian targets in an attempt to demoralize the civilian population, deprive the Pathet Lao of indigenous food supplies, force them to employ civilians to do portorage, kill off potential recruits and porters, and cause a population flow away from their zones." *Id.*

84. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 29; *Hearings, supra* note 1, at 6 (Sen. Edward Kennedy questioning Rep. Paul McCloskey, Jr.).

85. Trainer aircraft converted into light attack aircraft. Hammond, *U.S. Intervention and the fall of Diem*, in *THE VIETNAM WAR: THE ILLUSTRATED HISTORY OF THE CONFLICT IN SOUTHEAST ASIA*, 66, 67 (R. Bonds ed. 1988).

86. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 29.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* During the first nine months of 1969, the United States Air Force and Navy were conducting four hundred sorties per day. WHITAKER, *supra* note 22, at 278.

92. A sortie is "one mission or attack by a single military airplane." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1733 (2d ed. 1983).

93. Sesser, *supra* note 7, at 40.

94. *Hearings, supra* note 1, at 5 (statement of Rep. Paul McCloskey, Jr.); WHITAKER, *supra* note 22, at 278. In fact "the validating and monitoring of air strikes" was usually directed by a junior Foreign Service Officer acting on the ambassador's behalf. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 30.

Vientiane has both the technical means and necessary information to validate and monitor air strikes by U.S. aircraft, the sheer volume and constancy of bombing activity since 1968 makes effective control of these strikes almost impossible. . . . The result is that, as critics have long argued, "free fire" zones are not uncommon in Laos and the military had de facto daily control over American bombing—not the American Ambassador, nor, for that matter, the Royal Lao Government.⁹⁵

Mistakes were inevitable. A staff report prepared for another Senate subcommittee confirms that Lao civilians were often the victims of bombing by the United States.

There are plenty of instances known to American civilian employees who have been in Laos for some years in which civilian targets have been bombed. There is a certain reluctance, especially on the part of the Air Force, to admit that mistakes have happened which tends to undermine the credibility of official claims made about the infallibility of the conduct of the air war in Laos.⁹⁶

95. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 30.

96. STAFF REPORT ON LAOS: APRIL 1971, *supra* note 54, at 11. On the issue of credibility of refugee reports, note the following statement by Senator Kennedy to Congressman McCloskey during the Hearings on War-Related Civilian Problems in Indochina:

These are figures which must be, I would think, exceedingly conservative. I just wonder what goes through a refugee's mind when he is down in a refugee camp, which is either under the control or at least under the jurisdiction of the friendly Laotians. When they ask him how he got there he probably doesn't say, "Well, you fellows are the guys who put me here." I would think if he were going to try and ingratiate himself to those who are now providing him with the tin roofing and the wheat or the little compensations that he might get, I would think he would be talking about those terrible Communist Pathet Lao that drove him here and that they are the bad guys. Instead, when surveyed you get an overwhelming response about bombing—that it is the air power that has made them move. I should think that this adds an additional degree of credibility to the observations you have made and were able to detect from your personal conversations with refugees.

Hearings, supra note 1, at 8.

With respect to targeting "mistakes" one staff report noted:

[A] few words should be said on accidental bombing[.] . . . [T]he official record indicates that in the period from January 1, 1967, to early May of [1970], there were "eight accidental bombings of *friendly* villages resulting in civilian casualties [97 killed and 54 wounded] or property damage, and three incidents where USAF planes jettisoned ordnance near civilian population centers. . . ."

How many other such raids, if any, have been carried out on friendly villages and have not been recorded on the official list of accidental bombings, is not fully known.

. . . [I]t is of interest to note that the list only records bombing accidents over friendly villages. Presumably, such accidents have also occurred over unfriendly villages, the nature and scope of which will never be fully known.

STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at

As a free-lance researcher and journalist, Fred Branfman spent four years in Laos where he interviewed United States pilots and officials, as well as Laotian refugees.⁹⁷ These interviews suggest two basic reasons for the United States' bombing of civilian targets.⁹⁸ First, because villages tended to be in the open, they were the easiest targets to identify from the air.⁹⁹ The regions controlled by the Pathet Lao were densely wooded,¹⁰⁰ and the guerrillas stayed in the forest where they were not easily detected.¹⁰¹ Moreover, those military targets that were identifiable were difficult to hit by jets flying 600 miles-per-hour at an altitude of five thousand feet.¹⁰² The second reason for bombing civilian targets was to destroy the civilian infrastructure of the Pathet Lao regions.¹⁰³ This eroded moral support and depleted the supply of potential military recruits.

The United States' bombing of civilian targets leveled virtually every village on the Plain of Jars.¹⁰⁴ Villagers were forced to live in jungle caves and did not dare to go out during the day.¹⁰⁵ They feared that if they were seen by aircraft flying overhead they would be bombed again.¹⁰⁶ Consequently, the little farming that was possible

31. For statistics on the eight friendly villages accidentally bombed, see *id.* at 77 (Appendix VI).

97. Documentation from his interviews was included in the report of hearings before the Senate Committee on the Judiciary, Subcommittee to Investigate Problems Connected with Refugees and Escapees held on April 21 and 22, 1971. *Hearings, supra* note 1, at 89.

98. *Id.* at 90.

99. *Id.*

100. *Id.*; WHITAKER, *supra* note 22, at 17-18.

101. *Hearings, supra* note 1, at 90.

102. *Id.*

103. *Id.*

104. *Id.* at 15; WHITAKER, *supra* note 22, at 1. "Nothing stood on the earth, . . . [e]very building was destroyed." Sesser, *supra* note 7, at 41.

105. *Hearings, supra* note 1, at 101-13; STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 29; Sesser, *supra* note 7, at 41.

106. *Hearings, supra* note 1, at 108. "During the bombing, if the planes couldn't select a place to bomb, but they saw some animals or people, they would simply drop the bombs on them." *Id.* at 95 (excerpt from Decornoy, *Owls in the Grotto*, LE MONDE, July 1968). As the Southeast Asian Desk editor for *Le Monde*, Jacques Decornoy visited Laos in 1968. *Id.* at 90. The accounts of his trip appeared in a five-part series in *Le Monde* in July, 1968. *Id.* He is one of the few Westerners to experience the bombing of Laos first-hand.

From a refugee interview, conducted by Fred Branfman:

Q. Did the planes also destroy things other than the houses or the people? Did they destroy any of the water buffalo or anything else?

A. He says they didn't know the difference between a person and a water buffalo. If they saw anything moving they'd shoot.

Q. You mean they'd strafe the water buffalo?

A. He says if they had bombs left over, then they'd bomb the buffalo.

was done at night.¹⁰⁷

C. The Present Situation

Farmers on the Plain of Jars in northeastern Laos use a hoe to till the soil. Swung high above the head and driven into the earth, the hoe digs into the soil and turns it over.¹⁰⁸ If the farmer is unlucky, the blade may strike an unexploded anti-personnel cluster bomb and he may lose his legs or even his life.¹⁰⁹

The cluster bombs, which United States airplanes dropped, consisted of a large canister or "mother bomb"¹¹⁰ filled with hundreds of smaller *bombi*.¹¹¹ Before hitting the earth, the canister would split

Id. at 106.

107. *Id.* at 101-13. United Nations advisor Georges Chapelier wrote:

Prior to 1967, bombings were light and far from populated centers. By 1968 the intensity of the bombings was such that no organized life was possible in the villages. The villagers moved to the outskirts and then deeper and deeper into the forest as the bombing climax reached its peak in 1969 when jet planes came daily and destroyed all stationary structures. Nothing was left standing. The villagers lived in trenches and holes or in caves. They only farmed at night. All of the interlocutors, without any exception, had his village completely destroyed. In the last phase, bombings were aimed at the systematic destruction of the material basis of the civilian society.

Id. at 92.

108. Sesser, *supra* note 7, at 41; N.Y. Times, Nov. 25, 1987, § A, at 9, col. 1 (city final ed.).

109. Sesser, *supra* note 7, at 41; N.Y. Times, Nov. 25, 1987, § A, at 9, col. 1 (city final ed.).

110. *Hearings, supra* note 1, at 94.

111. *Id.* at 96 n.*.

The most commonly encountered munition . . . has been the cluster bomb (more properly, bomblet), which is colloquially referred to as the "guava" bomb . . . and what the Laotians have commonly referred to as the "bombie". These are packaged for air drop in groups of perhaps 670 in a bomb-shaped dispenser . . . the combined package . . . being referred to as a cluster bomb unit.

The soft-metal casing of the "guava" bomb has embedded in it about 300 6 millimeter diameter steel balls which fly out in all directions when the bomblet explodes, with a lethal radius of over 5 meters. The dispenser is designed to split open before it reaches the ground so that the bomblets become distributed over an area of perhaps 0.5 hectare or more. . . .

The second most commonly encountered munition . . . has been the so-called "pineapple" bomb which is packaged for air drop in groups of 360 These are cylindrical bomblets with stabilizing fins whose soft-metal walls each contain about 250 small steel balls.

Several other types of small fragmentation munition . . . were also commonly dropped on Laos as cluster bomb units. The colloquially named 'orange' bomb . . . , weighing 730 grams, was designed to penetrate a jungle canopy and reach the ground before exploding. Here fragments of the casing, rather than embedded pellets, cause the damage. The so-called 'butterfly' bomb, weighing about 1.8 kilograms, was also dispensed in a cluster bomb unit. Another bomblet that was used . . . is similar in appearance to the 'guava' bomb but somewhat larger, weighs 1.0 kilogram, and is a combination fragmentation/incendiary device.

Also dropped in huge numbers for purposes of area denial were tiny anti-personnel mines referred to as 'dragontooth' mines These minelets are blast weapons weighing only about 20 grams each, but when stepped on are capable of tearing off

open and scatter its contents.¹¹² The smaller *bombi* did not explode, but simply lay in wait for a victim.¹¹³

The danger that the unexploded *bombi* pose is not limited to the farmer plowing his fields; children are often unsuspecting victims. The *bombi* are shaped like local fruits. When children find them lying on the ground they often pick them up and play with them.¹¹⁴ Unfortunately, their game is a short one.

Official statistics on the exact number of casualties are not available.¹¹⁵ Private North American relief agencies presently in Laos report that hundreds have been killed or injured.¹¹⁶ In the first five years following the bombing, 267 people were killed and 343 others injured in Xieng Khouang province alone.¹¹⁷ More recently, during the first six months of 1988, ten people were killed and another twelve were injured by *bombi* on the Plain of Jars.¹¹⁸

Although the Lao and United States governments are aware of the problem,¹¹⁹ no systematic clearing of the land has occurred.¹²⁰ In fact, when the Lao clear land to construct a building or a new road, *bombi* are usually removed by hand.¹²¹ Visible *bombi* are collected,

the foot. A cluster bomb unit contains about 4,800 dragontooth mines. Also much used was the 'spider' mine . . . which looks similar to the "guava" bomb, but sends out eight trip wires after being dropped and is not meant to go off until these are disturbed.

Martin & Hiebert, *Explosive Remnants*, in PEACE SEC. NEWSL., Mar.-Apr. 1986, at 5-6 (excerpting from EXPLOSIVE REMNANTS OF WAR: MITIGATING THE ENVIRONMENTAL EFFECTS (A. Westing ed. 1985)) [hereinafter Martin].

The military term for the *bombi* is "bomb live unit" or "BLU." Krepon, *Weapons Potentially Inhumane: The Case of Cluster Bombs*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 267 (R. Falk ed. 1976).

112. L.A. Times, June 26, 1988, Part I, at 12, col. 1 (bulldog ed.); Nalty, *The Air War on the Laotian Supply Routes*, in THE VIETNAM WAR: THE ILLUSTRATED HISTORY OF THE CONFLICT IN SOUTHEAST ASIA 164, 168 (R. Bonds ed. 1988).

113. *Hearings*, *supra* note 1, at 94.

114. *See id.* at 96 n.*.

115. L.A. Times, June 26, 1988, Part I, at 12, col. 1 (bulldog ed.).

116. *Id.*

117. Martin, *supra* note 111, at 5; Sesser, *supra* note 7, at 42. "In Xieng Khouang Province, on the Plain of Jars, anywhere from five to ten people are killed or injured by *bombis* every month." *Id.* Xieng Khouang is one of sixteen provinces in Laos. *See* STAFF REPORT ON REFUGEES AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 18. The district leader of Xepon district reports that *bombi* have killed at least three people a year in his district since 1975. Sesser, *supra* note 7, at 44.

118. L.A. Times, June 26, 1988, Part I, at 12, col. 1 (bulldog ed.).

119. L.A. Times, Nov. 8, 1981, Part I, at 5, col. 1.

120. L.A. Times, June 26, 1988, Part I, at 12, col. 1 (bulldog ed.).

121. Martin, *supra* note 111, at 6.

gingerly carried to a pit, and then detonated.¹²²

One private relief organization has attempted to deal with the problem.¹²³ With permission from the Lao government, it has employed a specially-rigged tractor to seek out and detonate *bombi*.¹²⁴ However, despite a protective shield on the tractor, few people are willing to operate the machine.¹²⁵ Furthermore, United States diplomats in both Laos and Thailand have warned that the tractor's use could be dangerous.¹²⁶ They fear that larger unexploded bombs also buried in the soil could easily be detonated by the device.¹²⁷

III. EXISTING STATUTORY REMEDIES

Laotian victims of these bombs contemplating legal action against the United States government are initially faced with the well-settled rule of law that the federal government is immune from suit without its consent.¹²⁸ This doctrine of sovereign immunity, which originated with the English concept that "the King can do no wrong,"¹²⁹ has become a fundamental principle of United States law.¹³⁰ Congress, however, may waive this federal immunity,¹³¹ as it

122. "Lao soldiers with long experience with ordnance have discovered that guavas can be carried, safely when the center seam is held in a particular position relative to the ground." Swartzendruber, *Picking Up the Pieces in Laos*, in PEACE SEC. NEWSL., Mar.-Apr. 1986, at 3. However, not all the *bombi* can be safely carried in this manner. No one is quite sure why some *bombi* can be carried and others simply explode when disturbed. *Id.*

Individual *bombi* can be destroyed by placing them in a hole with dynamite. An electric current is then used to detonate the dynamite and destroy the *bombi*. Zimmerly, *Mr. Boua Van and the Bombies*, in PEACE SEC. NEWSL., Mar.-Apr. 1986, at insert.

123. Swartzendruber, *supra* note 122, at 3.

124. *Id.* at 2.

The British-made International Harvester 674 tractor, with its custom-built steel and plexiglass cab, is designed to attack guava bombs About 200 kilos of chain, attached in two-foot lengths to a hydraulic-powered axle, beat the ground ahead of the tractor in an attempt to simulate the force of hand hoeing, a common cause of accidental bombie explosions The flail [sic] is hooded by a sheet metal shield, reinforced by a second layer at the crucial section facing the tractor. The tractor's power take-off runs a rear attachment called a rotavator, a heavy-duty tilling device consisting of rotating, four-inch blades, designed to clear thick brush, crop residues and pasture land. A shield welded to the front of the rotavator protects the tractor and driver from explosions in the rear.

Id. at 2-3.

125. L.A. Times, June 26, 1988, Part I, at 12, col. 1 (bulldog ed.).

126. Swartzendruber, *supra* note 122, at 3.

127. *Id.* "One official stated flatly that amateurs' use of a tractor was 'the wrong way to do it—we're not going to be part of it.'" *Id.*

128. See *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

129. Borchard, *Governmental Responsibility in Tort*, 34 YALE L. J. 1, 4 (1924).

130. Sovereign immunity was first applied on behalf of the states. In *Chisholm v. Georgia*,

did by enacting the FTCA and the FCA. Both statutes may allow potential suits against the United States under circumstances applicable to the injured Lao.

A. Federal Tort Claims Act

An action for damages by Laotian villagers against the United States¹³² might fall within the Federal Tort Claims Act.¹³³ Passed by Congress in 1946, the FTCA provides the federal government's general consent to be sued in tort.¹³⁴ The Act gives the federal district

the Supreme Court sustained federal court jurisdiction of a suit by a citizen of North Carolina against the State of Georgia. 2 U.S. (2 Dall.) 419 (1793). The idea that one state's citizen could sue another state without the latter's consent created such shock and surprise that the eleventh amendment was passed granting the states immunity from suit in federal courts. *Monaco v. Mississippi*, 292 U.S. 313, 320-23 (1934). While the language of the eleventh amendment did not expressly prohibit suit in federal court against a state by its own citizen, the Supreme Court in *Hans v. Louisiana* held that an unconsenting state was immune from suit by its own citizen. 134 U.S. 1 (1890). In 1846, the Court expressly ruled that the federal government cannot be sued without its consent. *United States v. McLemore*, 45 U.S. (4 How.) 286, 287-88 (1846). This principle had been stated in dicta as early as 1834. *United States v. Clarke*, 33 U.S. (8 Pet.) 436 (1834).

131. See, e.g., *United States v. Sherwood*, 312 U.S. 584, 590 (1941); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Valn v. United States*, 708 F.2d 116, 118 (3d Cir. 1983); *Colorado Flying Academy, Inc. v. United States*, 506 F. Supp. 1221, 1228 (D. Colo. 1981); *Kelley v. Kelley*, 425 F. Supp. 181, 182 (W.D. La. 1977).

132. Another potential defendant in such a case would be the manufacturers of the bombs. These private defendants could be sued on a products liability theory. The argument would be simply that the bombs were designed to last too long for their intended use. The purpose of these bombs was to destroy enemy targets or kill enemy personnel. Although strategy might dictate that a bomb lie dormant for a period of time and the target not be destroyed immediately, one can hardly suggest that twenty years is a reasonable period of dormancy.

A few years ago, suing the manufacturer might have been relatively simple, but in 1988, the United States Supreme Court, in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), extended the protection of the federal government's sovereign immunity to independent contractors performing work for the federal government. *Id.* at 504-07. In *Boyle*, a Marine helicopter copilot was killed when his helicopter crashed into the ocean. Boyle drowned when the escape hatch would not open. *Id.* at 502. The hatch was designed to open out instead of in, thus rendering it ineffective underwater because of outside water pressure. *Id.* at 503. Boyle's family sued Sikorsky, the manufacturer that built the helicopter for the United States. *Id.* at 502.

The protection extended by the Court is provided to manufacturers of military equipment when the government has approved the specifications, the equipment conforms to those specifications, and the manufacturer has warned the government of any dangers of which it is aware. *Id.* at 512. The effects of *Boyle* are to shield the manufacturers of the bombs and apply the FTCA exceptions to the manufacturers as well as to government defendants.

133. The FTCA has been held to allow actions by alien claimants. In *United States v. South Carolina Highway Dep't*, the court noted that the statute's language does not limit its applicability to United States citizens. 171 F.2d 893, 899 (4th Cir. 1948).

134. 28 U.S.C. §§ 1346, 1402, 2401, 2402, 2411, 2412, 2671, 2672, 2674-2680 (1982).

court jurisdiction to hear certain claims against the United States government.¹³⁵ However, if the district court concludes that the case before it fits into one of the Act's many exceptions,¹³⁶ the court will dismiss the case for lack of jurisdiction. The exceptions which may deprive a federal court of jurisdiction to hear cases for injuries resulting from the government's activities in Laos during the Vietnam War are the foreign country exception, the combatant activities exception, and the discretionary functions exception.¹³⁷

1. Theories of Tort Liability

The FTCA provides a cause of action against the federal government in tort. When applying the statute, it is necessary to first identify potential tort theories before considering the possible exceptions. There are several theories that Laotian persons who were recently injured or killed by bombs dropped during the Vietnam War might assert to recover damages against the United States.

a. Deliberate and Intentional Bombing of Civilians

To the extent that the bombing of civilian targets in Laos was deliberate, those acts and the decisions to execute those acts constituted intentional torts resulting in personal injury and wrongful death. The FTCA, while exempting certain intentional torts, allows recovery for wrongful death.¹³⁸ Section 1346(b) provides that the

135. Section 1346(b) states:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

136. The exceptions to the FTCA are: 1) discretionary functions, 28 U.S.C. § 2680(a); 2) negligent transmission of letters or postal matter, § 2680(b); 3) tax and customs claims, § 2680(c); 4) admiralty claims, § 2680(d); 5) claims relating to the Trading with the Enemy Act, § 2680(e); 6) claims arising out of United States imposed quarantines, § 2680(f); 7) specified intentional torts, § 2680(h); 8) claims arising out of government regulation of the monetary system, § 2680(i); 9) combatant activities, § 2680(j); 10) foreign countries, § 2680(k); 11) Panama Canal Company activities, § 2680(m); and 12) activities of federal land banks, federal intermediate credit banks, or banks for cooperatives, § 2680(n). (28 U.S.C. § 2680(g) has been repealed.)

137. These three exceptions will be discussed in detail below.

138. 28 U.S.C. § 2680(h). "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights" is not actionable under the Act. *Id.*

United States is liable in tort "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."¹³⁹ Although the common law did not recognize a tort action once a victim died, each of the states now has a wrongful death statute.¹⁴⁰ These state statutes are generally "held to cover intentional, as well as negligent" wrongful death torts.¹⁴¹ Because the decision to deliberately bomb civilian targets was made in Washington, D.C., the applicable wrongful death statute would be the District of Columbia's, which covers intentional torts.¹⁴²

b. Mistake

If the bombing of civilian targets was accidental, as the United States government has claimed,¹⁴³ there may have been negligence at the day-to-day decisional level in Laos, or on the part of those operating the United States aircraft. For example, negligent conduct by the junior Foreign Service Officer¹⁴⁴ in charge of targeting decisions at the United States embassy in Vientiane could have resulted in accidental bombings. Moreover, negligence on the part of United States pilots or navigational officers operating the bombers may also have contributed to accidents. Finally, negligence by United States ground crew could have caused mechanical malfunctions on the aircraft, resulting in inaccurate drops. It is entirely possible, however, that individuals in the aircraft intentionally bombed civilian targets contrary to orders, rendering the tort intentional and not merely a mistake.

c. Use of Cluster Bombs

Whether the bombing was intentional or accidental, cluster bombing itself might be considered negligent. Although such bombs were used in the Korean War, their destructive capabilities were not fully realized until the Vietnam War.¹⁴⁵ Extensive military testing be-

139. 28 U.S.C. § 1346(b).

140. PROSSER AND KEETON ON THE LAW OF TORTS 945 (W. Keeton 5th ed. 1984).

141. *Id.* at 946.

142. D.C. CODE ANN. § 16-2701 (1981).

143. See *supra* note 96 and accompanying text.

144. See STAFF REPORT ON REFUGEE AND CIVILIAN CASUALTY PROBLEMS, *supra* note 21, at 30.

145. Krepon, *supra* note 111, at 268.

Upon detonation, each dispenser can blanket an oval, linear, or figure-eight patterned area on the ground. The shower of fragmentation can be effective against light military targets, but for the most part the CBU [cluster bomb unit] is effective only

gan in 1966.¹⁴⁶ The results were so favorable that the military immediately sought to deploy the bombs.¹⁴⁷ The debate over their use was minimal and confined almost exclusively to military circles.¹⁴⁸ The major issue was whether the great military advantage gained by using the cluster bomb outweighed the risks of revealing the weapon's technology to the enemy.¹⁴⁹ This matter was resolved when proponents noted that the technology involved was so simple that enemies were sure to develop cluster bombs independently.¹⁵⁰ Consequently, the weapon was not classified as a military secret.¹⁵¹ One commentator noted the significance of non-classification, stating:

To have [classified the bombs] would almost automatically have brought in a wider array of civilians and compelled some discussion of the political consequences of deploying a weapon that was not only far more effective than any previous one, but also far more likely to cause civilian casualties. It appears that in this and other respects the military promoters of the weapon went to considerable lengths not to raise the broader questions.¹⁵²

Furthermore, the Joint Chiefs of Staff had recently endured a bitter policy debate with civilians in the Department of Defense over the deployment of napalm.¹⁵³ They were not eager to engage in another bureaucratic dogfight over cluster bombs. Thus, the Joint Chiefs never formally requested political authority to use the weapon.¹⁵⁴ This meant that "[t]here was virtually no debate at tech-

against human beings. Because of the high velocity of the fragments and the uniformity of their dispersion, it is a virtual certainty that any person located within the pattern area will be killed or wounded.

Id. at 267-68.

146. *Id.* at 269.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 270.

151. *Id.*

152. *Id.*

153. *Id.* at 270-71.

154. According to [Vice Admiral Lloyd M. Mustin, former Director of Operations for the Joint Chiefs of Staff], . . . "In our view, they were a purely conventional weapon, and we regarded them as available, and the less said, the better. Somebody somewhere would want to raise the argument, 'Well, do we or don't we want to authorize the use of this weapon?' . . . We in J-3 [Directorate for Operations] had ways of exchanging information with our subordinate echelons all the way out to pilots on the line, and we just said, 'As far as we know, that's authorized to you, you've got 'em, use 'em when you want, and keep your mouth shut, or somebody will tell you that you can't.'"

Id. at 271.

nical or policy-making levels about the indiscriminate nature of the munition and mechanics for monitoring its use."¹⁵⁵

The history of this decision-making process in deploying cluster bomb units suggests that the military exercised little care in determining the weapon's effect on the civilian population. The major concern was that the cluster bombs would save the lives of United States pilots.¹⁵⁶ Although this was a valid concern, it should not have been the only one. A more careful inquiry might have revealed that the bombs had a potential active life of more than twenty-five years.

d. *Failure to Remove*

The United States' failure to return to the battlefields after the war to assist in removing the *bombi* from the soil might also be considered tortious conduct. As the Vietnam War ended, the United States public was not inclined to worry about conditions in Southeast Asia.¹⁵⁷ Although some commentators called for humanitarian aid to that region through international and private relief agencies, there was little actual commitment from the United States government.¹⁵⁸

Failing to remove the *bombi* might be actionable under the FTCA if the *bombi*'s presence constituted a trespass or a nuisance. According to the Restatement (Second) of Torts, a trespass has occurred if an object originally placed on land with the consent of the landowner, or by privilege, is not removed when the consent is withdrawn or the privilege terminates.¹⁵⁹ Arguably, the United States possessed a form of privilege as a combatant in the Vietnam War. This privilege, however, would have terminated as soon as the hostilities ceased and the United States pulled out of Indochina. Under this scenario, a trespass would have occurred when the United States left

155. *Id.* at 274.

156. *Id.* at 271-72.

157. Falk, *Vietnam: The Final Deceptions*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 1021 (Falk ed. 1976).

158. *Id.*

159. RESTATEMENT (SECOND) OF TORTS § 160 (1965) states:

A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land

(a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated, or

(b) pursuant to a privilege conferred on the actor irrespective of the possessor's consent, if the actor fails to remove it after the privilege has been terminated, by the accomplishment of its purpose or otherwise.

Id.

and did not make reasonable efforts to remove its ordnance from Laotian soil.

An even stronger argument can be made under a nuisance theory. The *bombi* buried in the ground in Laos may constitute a public nuisance because they unreasonably interfere with the general public's right to safety.¹⁶⁰ Although the interference the bombs caused in the late 1960s may have been reasonable, it is no longer reasonable today. Additionally, the threat posed by the bombs has been of a continuing nature and has created a permanent threat to the public. Furthermore, the United States has ample reason to know that the ordnance it left behind has had, and is continuing to have, this harmful effect. The *bombi* may also constitute a private nuisance, as they are "a non-trespassory invasion of another's interest in private use and enjoyment of land."¹⁶¹ The Laotian farmer's interest in the use and enjoyment of his land has clearly been adversely affected by the *bombi*'s presence.¹⁶²

160. RESTATEMENT (SECOND) OF TORTS § 821B (1979) states:

- (1) A public nuisance is an unreasonable interference with a right common to the general public.
- (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
 - (a) Whether the conduct involves a significant interference with the public health, the public safety, . . . or
 -
 - (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Id.

161. RESTATEMENT (SECOND) OF TORTS § 821D (1979). The term "nontrespassory" means that interference with the landowner's possession is not required. Unlike a trespass, which is "an invasion of the interest in the exclusive possession of land," a nuisance is merely the interference with use and enjoyment of land. *Id.* § 821D comment (d) at 101. Indeed, trespass and nuisance are not mutually exclusive as actions.

If the interference with the use and enjoyment of the land is a significant one, sufficient in itself to amount to a private nuisance, the fact that it arises out of or is accompanied by a trespass will not prevent recovery for the nuisance, and the action may be maintained upon either basis as the plaintiff elects or both.

Id. § 821D comment (e) at 102.

162. RESTATEMENT (SECOND) OF TORTS § 821D comment (a) at 100 (1979). Comment (b) to § 821D states in part:

The phrase "interest in the use and enjoyment of land" . . . comprehends not only the interests that a person may have in the actual present use of land for residential, agricultural, commercial, industrial and other purposes, but also his interests in having the present use value of the land unimpaired by changes in its physical condition. . . . "Interest in use and enjoyment" also comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land.

Clearly the Laotian farmer's interest in the agricultural use of his land has been impaired by the presence or potential presence of *bombi* in his soil. Moreover, the pleasure and comfort he derives from his land is substantially limited by the omnipresent threat to his life.

The success of these tort theories depends on whether enough facts can be proven to establish a prima facie case of liability.¹⁶³ Assuming that a plaintiff can overcome this burden, a number of serious jurisdictional and immunity problems remain.

2. Foreign Country Exception

Once a tort theory has been established, the next inquiry is whether the action is precluded by one of the FTCA's exceptions. Section 2680(k) of the FTCA states that the Act does not apply to "[a]ny claim arising in a foreign country."¹⁶⁴ On its face, this language appears fatal to any claim by villagers for injury or death occurring in Laos. A careful analysis of what constitutes a "claim arising in a foreign country" however, suggests that the exception may not be applicable to such lawsuits.

Cases interpreting this exception generally fall into two categories: those that determine where the claim actually arose,¹⁶⁵ and those that consider whether to call the place at issue a foreign country.¹⁶⁶ Because this is not a situation where the geopolitical status of the foreign country is questionable,¹⁶⁷ or where the territory on which the injury occurred is subject to the control of a separate sovereign,¹⁶⁸ this discussion focuses on the first group of cases which deal with where the claim originates.

In *In re Paris Air Crash of March 3, 1974*,¹⁶⁹ a federal court held that the foreign country exception did not apply to claims arising out of a plane crash in Paris, France.¹⁷⁰ A Turkish Air Lines DC-10 crashed immediately after taking off from Paris, killing all passengers and crew members.¹⁷¹ Plaintiffs filed 203 separate claims in federal

163. Generally, to make out a cause of action for negligence, a plaintiff must prove that 1) the actor had a duty; 2) the duty was breached; 3) the actor's conduct or failure to act was the proximate cause of the injury; and 4) actual harm occurred. PROSSER AND KEETON, *supra* note 140, at 164-65.

164. 28 U.S.C. § 2680(k) (1982).

165. See *In re Paris Air Crash of Mar. 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975).

166. The leading case in this category is *United States v. Spelar*, 338 U.S. 217 (1949). See also *Meredith v. United States*, 330 F.2d 9 (9th Cir. 1964) (the exclusion barred a claim arising within the United States embassy in Bangkok, Thailand); *Straneri v. United States*, 77 F. Supp. 240 (E.D. Pa. 1948) (holding that the exclusion barred a claim arising in Belgium while that country was controlled by the United States military).

167. E.g., *Straneri*, 77 F. Supp. at 240.

168. E.g., *Meredith*, 330 F.2d at 9.

169. 399 F. Supp. 732 (C.D. Cal. 1975).

170. *Id.* at 737.

171. *Id.* at 735.

court.¹⁷² These claims were subsequently consolidated by the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407.¹⁷³ The United States' inclusion as a defendant rested on the theory that it had wrongfully approved, certified, and inspected the plane which had been manufactured in California.¹⁷⁴ The United States unsuccessfully moved to dismiss the complaints under the foreign country exception of the FTCA on the basis that the accident had occurred in France.¹⁷⁵ In denying the motion, the court held that the fact that the injury occurred in a foreign country was irrelevant.¹⁷⁶ The court explained that a claim arises where the negligence occurs, not where its "operative effect" is felt.¹⁷⁷ The court concluded that because all of the allegedly negligent conduct occurred in the United States, none of the claims against the United States arose in a foreign country.¹⁷⁸

Applying this reasoning to the injuries sustained by Laotian farmers compels a similar result. As noted earlier, the tortious conduct can be traced to the United States' original decision to bomb civilians, the decision to use cluster bombs without adequate inquiry into their effect upon civilian populations, or the decision to forego cleanup of the region after the war. The Department of Defense presumably made the overall policy decision to conduct a bombing campaign; the day-to-day decisions to bomb were made by the State Department.¹⁷⁹ Although the United States ambassador in Vien-

172. *Id.* at 736.

173. *Id.*

174. *In re Paris Air Crash*, 399 F. Supp. at 737.

175. *Id.*

176. *Id.*

177. Under the FTCA, a tort claim arises at the place where the negligent act or omission occurred and not where the negligence had its "operative effect," (i.e., the situs of injury). . . . Thus, *none* of the claims against the United States for death, as alleged in the complaints, is a "claim arising in a foreign country." All of the conduct, whether "act or omission," on the other hand, occurred as the result of acts allegedly arising, i.e., occurring, in California, and, under 28 U.S.C. § 1346(b), resulted in "claims against the United States, for money damages, accruing . . . for . . . death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment[.] . . ."

Id. at 737-38.

178. *Id.*; but cf. *Eaglin v. United States Dep't of Army*, 794 F.2d 981, 983 (5th Cir. 1986). *Eaglin*, a serviceman's civilian dependent, was injured on an Army base in West Germany when she slipped and fell on black ice. *Id.* at 582. She was from Louisiana and was unfamiliar with winter conditions. Claiming that the government failed to inform her of the dangers of the European climate before she went overseas, she brought suit under the FTCA. *Id.* The court held that the action was barred by the foreign country exception because the relationship between her claim and the alleged omission in the United States was too tenuous. *Id.*

179. STAFF REPORT ON REFUGEE AND CIVILIAN WAR CASUALTY PROBLEMS, *supra* note 21, at 29.

tiane¹⁸⁰ gave the daily orders, the decision vesting him with that broad authority was made in Washington.¹⁸¹ Likewise, the Department of Defense also made the decision to deploy cluster bombs in Laos.¹⁸² Based on their experience with napalm, the Joint Chiefs of Staff were wary of a potentially lengthy political debate over the weapon.¹⁸³ Accordingly, they chose not to classify the cluster bomb, thereby avoiding the policy discussion.¹⁸⁴ These decisions made in Washington also constituted the negligence. Similarly, the decision not to participate in removal of the *bombi* was also made in Washington.¹⁸⁵ Because all of these decisions were made in Washington, the foreign country exception to the FTCA would not apply to Laotian tort claims.¹⁸⁶

Another case that illustrates this reasoning is *In re Agent Orange Product Liability Litigation*.¹⁸⁷ That case involved a class action suit filed by Vietnam veterans who were exposed to the herbicide Agent Orange during the war.¹⁸⁸ The plaintiffs claimed that their exposure to the herbicide caused birth defects in their children.¹⁸⁹ The defendant manufacturers impleaded the United States, claiming that if they were held liable, the United States should indemnify them for some or all of the damages owed to the plaintiffs.¹⁹⁰

The United States asked to be dismissed from the action on the theory that the FTCA foreign country exception barred these claims against it.¹⁹¹ The court rejected the United States' argument on two grounds.¹⁹² First, the court stated that the reasons for the exception did not apply in this case.¹⁹³ The FTCA provides that the controlling

180. *Hearings, supra* note 1, at 5 (statement of Rep. Paul McCloskey, Jr.).

181. *Id.*

182. Krepon, *supra* note 111, at 269.

183. *Id.* at 271.

184. *Id.* at 270.

185. The failure to make a decision with respect to removal might also constitute the negligent conduct.

186. This is obviously not true with respect to those theories based on negligence of military personnel in Laos.

187. 580 F. Supp. 1242 (E.D.N.Y. 1984), *mandamus denied*, 733 F.2d 10 (2d Cir. 1984), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984).

188. *Id.* at 1244.

189. *Id.* at 1244, 1247.

190. *Id.* at 1244.

191. *Id.* at 1254.

192. *In re Agent Orange*, 580 F. Supp. at 1254-55.

193. *Id.* at 1254.

law is that of the place where the tort occurred.¹⁹⁴ Congress included the foreign country exception in order to ensure that the United States would not be subject to the laws of a foreign country.¹⁹⁵ However, where there is no danger of foreign law applying, the foreign country exception is inapplicable.¹⁹⁶

In the *In re Agent Orange* case, the court recognized that one of the countries where the soldiers were exposed to the herbicide, South Vietnam, no longer existed.¹⁹⁷ The other country, Cambodia, was, in the court's eyes, an independent country in name only since it was controlled by Vietnam.¹⁹⁸ The foreign country exception did not apply because there was no real danger that the law of South Vietnam or Cambodia would be applied to determine the United States' liability to its veterans.¹⁹⁹

Second, the court held that in order for the foreign country exception to control, the "act or omission of an employee of the government" must have occurred abroad.²⁰⁰ The court found that the decisions relating to the specifications for Agent Orange and its use were all made in the United States.²⁰¹ The court was unable to determine whether decisions regarding the alleged negligent use of the herbicide were made in the United States rather than in Vietnam.²⁰² However, it concluded that because the mistakes were probably omissions rather than commissions, the mistakes must have occurred at the policy-making level in Washington, rather than at the operational level in Vietnam.²⁰³

The court's reasoning in *In re Agent Orange* fully applies to the potential claims of Laotian villagers. In both cases, while the "operative effect" of the tort occurred in a foreign country, the negligent omissions by government employees occurred in the decision-making process in Washington.²⁰⁴ In the Laotian case, those omissions included failing to discern the danger posed to civilians at that time,

194. 28 U.S.C. § 1346(b) (1982).

195. *Id.*

196. *In re Agent Orange*, 580 F. Supp. at 1254.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 1254.

201. *In re Agent Orange*, 580 F. Supp. at 1242.

202. *Id.* at 1255.

203. *Id.*

204. The ultimate decision to bomb Laos was made at the State Department in Washington. *Hearings*, *supra* note 1, at 5.

ignoring the danger civilians would face decades later, and failing to engage in clean-up operations.²⁰⁵ Therefore, the reasoning of the *In re Agent Orange* case supports the inapplicability of the foreign country exception to a potential Laotian action.

3. Combat Exception

Section 2680(j) of the FTCA states that the Act does not apply to "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."²⁰⁶ Despite the apparent applicability of this exception, there is a good argument that the injuries suffered by the Lao did not arise out of combatant activities.²⁰⁷

In 1948, the Ninth Circuit in *Johnson v. United States*,²⁰⁸ articulated two necessary conditions for applying the exception. First, the claim must arise out of "combatant activities"; second, the combatant activities must occur during time of war.²⁰⁹ *Johnson* involved damage to a clam farm caused by sewage discharged from navy ships in a Washington State bay after the war ended in the Pacific.²¹⁰ Applying the second prong of its test, the court concluded that the activity in question was not connected to actual hostilities because the ships had returned from the theater of war and were awaiting reassignment.²¹¹ The court added that because the war with Japan was

205. One problem the *In re Agent Orange* plaintiffs faced was establishing causation. In approving a preliminary settlement agreement, the court expressed concern over the plaintiffs' ability to prove by a preponderance of the evidence that their injuries were in fact caused by dioxin. *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

The Lao have no such causality problem. There is no question that the cluster bombs are American. Any dispute can easily be settled by locating and inspecting unexploded bombs.

Another interesting similarity between the Agent Orange cases and the Laotian *bombi* situation is that both involve injuries that manifest themselves years after the alleged tortious conduct occurred.

206. 28 U.S.C. § 2680(j) (1982).

207. In determining whether a claim arises out of combatant activities, courts have considered a wide range of issues. For example, federal courts have addressed cases involving training exercises, *Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947), atmospheric testing of nuclear weapons, *In re Consolidated United States Atmospheric Testing Litigation*, 616 F. Supp. 759 (N.D. Cal. 1985), *aff'd*, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988), and negligent misdiagnosis during a pre-induction physical examination, *Redmond v. United States*, 331 F. Supp. 1222 (N.D. Ill. 1971).

208. 170 F.2d 767, 769-70 (9th Cir. 1948).

209. *Id.*

210. *Id.* at 768.

211. *Id.*

over at the time the injury occurred, there was no possibility that the first condition could be met either.²¹² These two requirements will be considered below in more detail.

a. Combatant Activities

In 1945, the federal district court in *Skeels v. United States*²¹³ stated that the phrase "combat activities" was intended "to denote actual conflict, such as where the planes and other instrumentalities were being used . . . in bombing enemy occupied territory, forces or vessels, attacking or defending against enemy forces, etc."²¹⁴ In that case, Jasper Skeels and several friends were fishing from a boat in the Gulf of Mexico while United States Army planes were conducting training exercises overhead.²¹⁵ During the exercises, an iron pipe fell from a plane and hit Skeels on the head, killing him.²¹⁶ Skeels' widow and mother together sued the United States under the FTCA.²¹⁷ In allowing the suit to proceed, the court concluded that had Congress intended the combatant activities exception to cover all activities of the military, including training operations, it would have used the words "war activities."²¹⁸ The words Congress actually used, "combatant activities," indicated that Congress meant to restrict the exception to military activities involving "the exercise of physical force."²¹⁹

In *In re Agent Orange*, the court likewise ruled that the combatant activities exception is to be narrowly interpreted²²⁰ and to be applied only to situations where United States forces are directly engaging the enemy.²²¹ The court employed reasoning similar to that which it had used with the foreign country exception, stating that "what must arise from the combatant activities is not a 'claim' but 'an act or omission of an employee of the government.'"²²² To illustrate its point, the court hypothesized a civilian injured on a battlefield by a malfunctioning grenade.²²³ In the hypothetical, the government pro-

212. *Id.*

213. 72 F. Supp. 372 (W.D. La. 1947).

214. *Id.* at 374.

215. *Id.* at 373.

216. *Id.*

217. *Id.*

218. *Skeels*, 72 F. Supp. at 374.

219. *Id.*

220. *In re Agent Orange*, 580 F. Supp. at 1255.

221. *Id.*

222. *Id.*

223. *Id.*

vided the manufacturer with incorrect specifications. According to the court, the civilian would not be barred by the combatant activities exception since the actionable conduct occurred in the United States, not on the battlefield.²²⁴ By contrast, a civilian injured by a soldier's inaccurate toss of a grenade towards the enemy would be barred by the exception.²²⁵

The first hypothetical described by the *In re Agent Orange* court is very similar to the problem facing Laotian farmers. The negligence involved in the improper grenade specifications occurred in the decision-making process, presumably by the procurement division of the military branch in question. The government's decision was not made in the course of direct combat with the enemy, but in Washington, long before the battlefield injury actually occurred. Similarly, the decisions to bomb Laotian villages, to utilize cluster bombs that by nature would not detonate upon dispersal, and not to return to the battlefield to assist in clean-up operations, were likewise made in Washington years before the battlefield injuries occurred. None of these decisions were incidental to direct engagement with the enemy. Under the *In re Agent Orange* court's reasoning, Laotian villagers would not be barred by the combatant activities exception for injuries or death that occurred decades after direct enemy activity had ceased.

Further support for not applying the combatant activities exception to the villagers' claims is found in the meaning of the word "combat." The FTCA itself contains no definition of the term.²²⁶ However, Webster's Dictionary defines the noun "combat" as "a fight or contest between individuals or groups."²²⁷ Black's Law Dictionary defines combat as a "forcible encounter between two or more persons; a battle; a duel."²²⁸

224. *Id.*

225. *In re Agent Orange*, 580 F. Supp. at 1255.

226. 28 U.S.C. §§ 1346, 1402, 2401, 2402, 2411, 2412, 2671, 2672, 2674-2680 (1982). Section 2680(j) does include the phrase "combatant activities of the military," but fails to define it. Furthermore, Title 10 of the United States Code, entitled Armed Forces, begins by defining 45 terms used throughout the title. 10 U.S.C. § 101 (1982). Although it defines terms such as "armed forces," (§ 101(4)), "active duty," (§ 101(22)), and "Department of Defense Field Activity," (§ 101(45)), there is no definition of "combat" or "combatant activities." Additionally, Title 10, Chapter 6, entitled "Combatant Commands," defines only three terms in its definitions section (§ 161(c)). None of these defines "combat" or "combatant activities." *Id.* §§ 101, 161(c).

227. WEBSTER'S NEW COLLEGIATE DICTIONARY 221 (1981).

228. BLACK'S LAW DICTIONARY 241 (5th ed. 1979). "A forcible encounter between two or more persons; a battle; a duel. To fight with; to struggle against." *Id.*

Under these definitions, the United States' bombing of Laos may well not have involved combat within the meaning of the FTCA. The bombing of unarmed civilian villages on the Plain of Jars was more of a unilateral action than a "contest between individuals or groups."²²⁹ Although the aerial bombardment was a "forcible encounter," it was certainly not a duel. Black's states that "a duel is any combat with deadly weapons fought between two or more persons"²³⁰ This implies active participation by both parties. Aerial bombing is not a contest fought between bombers and villagers. The unarmed villagers play no adversarial role as contemplated by these definitions.

Nor is bombing civilians an action taken against an enemy. Combatant activity during a war consists of activity aimed at enemy combatants. Activity aimed at anyone other than enemy combatants is purely extraneous. Various reports suggest that civilian villages were targeted in an admitted effort to demoralize the population and turn them against the Pathet Lao.²³¹ If this is proven, a strong argument can be made that such action aimed deliberately at non-combatants constitutes non-combatant activity.

b. Activities During Time of War

Johnson held that the combatant activities exception applies only to activities that occur during time of war.²³² This reading is consistent with the language and legislative history of the FTCA. The Committee Report accompanying the bill which later became the FTCA explained that the measure "exempts . . . claims arising out of activities of the military or naval forces or the Coast Guard *during time of war.*"²³³ This strongly indicates that the combatant activities exception requires that an actual state of war exists. Hence, if the United States military activity in and over Laos did not constitute a war, the combatant activities exception would not shield the United States from liability on claims brought by Laotian villagers.

229. This is supported by Laotian refugee reports that there were no Pathet Lao soldiers in their villages when they were bombed. *Hearings, supra* note 1, at 90-113.

230. BLACK'S LAW DICTIONARY 449 (5th ed. 1979).

231. See *supra* note 83 and accompanying text.

232. *Johnson*, 170 F.2d at 769-70.

233. H.R. REP. NO. 1287, 79th Cong., 1st Sess., at 4 (1945) (emphasis added).

Title I contains definitions of certain words and phrases, which make it clear that the bill covers all federal agencies, including corporate instrumentalities, and all federal officers and employees, including members of the military and naval forces. Section 402(11) exempts from the bill claims arising out of activities of the military or naval forces or the Coast Guard during time of war.

The existence of a state of war requires no formal declaration by Congress, but merely congressional actions signifying approval of the executive action.²³⁴ In *Morrison v. United States*,²³⁵ a federal district court held that in the context of the Vietnam War, the FTCA's combatant activities exception could be applied even though there was no formal congressional declaration of war.²³⁶ There, the plaintiff was a soldier of the United States Army in Vietnam. While inspecting a cave, he found a container filled with \$150,000 in United States currency.²³⁷ His superiors took the cash and told him that he had no claim to it.²³⁸ When the plaintiff returned to the United States, he unsuccessfully petitioned the Secretary of Defense for the money.²³⁹ The plaintiff then sued the United States under the FTCA, arguing that the combatant activities exception did not bar his claim because the United States had not formally declared war against North Vietnam.²⁴⁰ The court disagreed, stating that an undeclared war is as much a war as a declared one.²⁴¹ It reasoned that any other holding would be contrary to the plain intent of the FTCA, and would subject the United States to suit in situations in which Congress had not meant to waive sovereign immunity.²⁴²

234. The Supreme Court first articulated this idea in the context of the Civil War. In *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), the Court held that President Lincoln had the authority to order a blockade of southern ports in April 1861 because of Congress' implicit approval in earlier legislation.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861 And . . . in 1861, we find Congress . . . in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been issued and done under the previous express authority and direction of the Congress of the United States."

Id. at 670 (emphasis omitted).

The Court analogized the situation to the earlier war with Mexico, part of which was fought before Congress passed the Act of May 13, 1846, acknowledging a state of war against Mexico. *Id.* at 668. The Court stated that the Act not only authorized continued fighting, "but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress." *Id.*

235. 316 F. Supp. 78 (M.D. Ga. 1970).

236. "While it may be true that a de jure state of war cannot exist without a formal declaration of war, a war is no less a war because it is undeclared." *Id.* at 79. See also *The Prize Cases*, 67 U.S. at 668 ("war may exist without a declaration on either side").

237. *Morrison*, 316 F. Supp. at 79.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Morrison*, 316 F. Supp. at 79.

While the *Morrison* court may have reached the correct conclusion with respect to United States military activity in Vietnam, it is unclear whether the conflict in Laos constituted a war.²⁴³ Contrary to its conduct with respect to Laos, Congress repeatedly appropriated funds to support the conflict in Vietnam.²⁴⁴ Indeed, on this basis, the federal court in *Orlando v. Laird*²⁴⁵ held that the Vietnam War was constitutional, Congress' approval through appropriation being tantamount to a formal declaration of war.²⁴⁶

In *Orlando*, two enlistees in the United States Army separately sought to enjoin enforcement of their deployment orders to Vietnam.²⁴⁷ The enlistees argued that by ordering them to fight a war not authorized by Congress, the commanding officers acted beyond their power under the Constitution.²⁴⁸ After deciding that the case did not pose a political question,²⁴⁹ the court ruled that congressional spending for the war sufficiently ratified the military activity despite the fact that war had not been expressly declared.²⁵⁰ The court cited cooperation between Congress and the Executive in the exercise of military activity in Vietnam.

The Tonkin Gulf Resolution . . . was passed at the request of President Johnson and, though occasioned by specific naval incidents in the Gulf of Tonkin, was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by the President at that time in Southeast Asia²⁵¹

No such congressional authority or acquiescence was involved in

243. There appears to be no case law settling the question of the legality, if not the constitutionality, of United States activity in Laos during the Vietnam War. Professor Ely's study, *supra* note 20, is probably the first authoritative analysis of the issue. See also Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990) [hereinafter Ely, *The American War in Indochina, Part I*].

244. Ely, *The American War in Indochina, Part I, supra* note 243, at 897-99.

245. 443 F.2d 1039 (2d Cir. 1971).

246. *Id.* at 1043. Other cases analyzing the Vietnam War's constitutionality include: *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973); *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); *Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); and *Atlee v. Laird*, 339 F. Supp. 1347 (E.D. Pa. 1972).

247. *Orlando*, 443 F.2d at 1040.

248. *Id.*

249. This was one of the few instances in which a constitutional attack on the Vietnam War was determined to present a justiciable question. E. BARRETT, JR., W. COHEN & J. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 466 (8th ed. 1989).

250. *Orlando*, 443 F.2d at 1043.

251. *Id.* at 1042.

the bombing of Laos.²⁵² To the contrary, the operations were deliberately undertaken by the executive branch without congressional knowledge.²⁵³ No money was knowingly appropriated to support these activities. Consequently, there is no basis on which to find congressional approval. This strongly suggests that United States military activity in Laos did not involve a state of war in the constitutional sense.

If the bombing of Laos cannot be classified as part of a war, even an undeclared one, the second prong of the *Johnson* test is not met, and the combatant activities exception does not apply. The combatant activities exception thus appears to be surmountable because the government might not be able to satisfy either the combat or the war requirement. The case law interpreting the exception as well as the dictionary definitions of combat suggest that the exception does not apply here: *Skeels* called for actual conflict,²⁵⁴ *In re Agent Orange* looked for direct engagement with the enemy,²⁵⁵ and the dictionary definition requires a duel or contest between groups.²⁵⁶ None of these conditions was present when the United States bombed Laotian villages. Moreover, *Johnson* and the FTCA's legislative history make it clear that a war is necessary.²⁵⁷ While formal declaration of war is not needed if Congress has taken other steps to signify its approval of executive action,²⁵⁸ Congress did nothing to indicate its support of United States activity in Laos. Thus, no war existed in Laos. With-

252. See Ely, *The American War in Indochina, Part II*, *supra* note 20, at 1116-21, 1134 (discussing, and eventually dismissing, an argument that "a substantial number of those in Congress had at least an inkling of what was happening in Laos all along . . .").

253. H.R. REP. NO. 327, 92d Cong., 1st Sess. at 3 (1971). "Information that has been furnished is misleading and incomplete. Neither the Congress nor the American people has been told the entire truth about the nature or type of U.S. operations in Laos." *Id.*; see Ely, *The American War in Indochina, Part II*, *supra* note 20, at 1116-37. One argument defending the constitutionality of the war in Laos discussed by Professor Ely is that the war was not in fact a secret because

any alert member of Congress or the public could have learned what was happening by careful attention to the right public reports—and thus, I guess the argument is supposed to run, Congress authorized it by not cutting any of the appropriations it might have surmised were being used to fund it.

Id. at 1100. Professor Ely concludes that it is nonsense to argue that "despite the administration's lies, we the American people were on sufficient notice of the nature of our government's activities in Laos that by not pressuring our representatives to stop them, we tacitly acquiesced." *Id.* at 1132.

254. *Skeels*, 72 F. Supp. at 374; see text accompanying note 214.

255. *In re Agent Orange*, 580 F. Supp. at 1255; see text accompanying note 221.

256. See text accompanying notes 227-28.

257. *Johnson*, 170 F.2d at 769-70; see text accompanying notes 232-33.

258. See text accompanying notes 234-246.

out war, there can be no combatant activities within the meaning of the FTCA.

4. Discretionary Functions Exception

A more severe obstacle to asserting Laotian claims under the FTCA is the “discretionary functions” exception. Section 2680(a) of the Act states that the FTCA does not apply to “any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”²⁵⁹

The leading case interpreting this exception is *Dalehite v. United States*,²⁶⁰ an FTCA wrongful death action arising out of an explosion of ammonium nitrate fertilizer produced according to government specifications.²⁶¹ The fertilizer was to be exported to countries subject to post-World War II military occupation, under a federal program designed to increase the food supply in those areas.²⁶² The district court ruled for the plaintiff, finding that the government’s decision to adopt the fertilizer program was negligent, as was the government’s supervision of manufacturing, packaging, and shipping.²⁶³ However, the Supreme Court reversed, holding that the discretionary functions exception barred the district court from exercising jurisdiction.²⁶⁴

The Court described the type of discretion necessary for the exception to apply. “It is the discretion of the executive or the administrator to act according to one’s judgment of the best course”²⁶⁵ The Court rejected the plaintiff’s argument that the exception should not apply because some of the acts directly causing the explosion occurred at the operational level rather than at the planning stage.²⁶⁶ The Court held that the discretionary functions exception covers even the actions of government employees who implement the policy decisions made by their superiors, as long as those acts require the em-

259. 28 U.S.C. § 2680(a) (1982).

260. 346 U.S. 15 (1953).

261. *Id.* at 18, 20.

262. *Id.* at 19.

263. *Id.* at 23.

264. *Id.* at 24.

265. *Dalehite*, 346 U.S. at 34.

266. *Id.* at 34-35.

ployee to exercise his judgment.²⁶⁷

Two years later, in *Indian Towing Co. v. United States*,²⁶⁸ the Court implicitly narrowed *Dalehite's* broad reading of the discretionary functions exception. In *Indian Towing*, the Coast Guard operated a lighthouse on an island off the coast of Mississippi.²⁶⁹ The plaintiff's tugboat ran aground due to the alleged negligence of Coast Guard personnel in maintaining the lighthouse.²⁷⁰ The plaintiff then sued the United States under the FTCA.²⁷¹ The Court held that the discretionary functions exception did not apply.²⁷²

The Court agreed that the Coast Guard did not have to provide lighthouse service. However, once the Coast Guard made the policy decision to provide service, any injury caused by the negligent operation of the lighthouse would not be excepted from liability under the FTCA.²⁷³ Some courts have interpreted *Indian Towing* to hold that the discretionary functions exception applies only to basic policy decisions and not to actions taken while executing those policies.²⁷⁴ Read

267. *Id.* at 43.

It is unnecessary to define . . . precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the [Federal] Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 35-36.

268. 350 U.S. 61 (1955).

269. *Id.* at 62.

270. *Id.*

The specific acts of negligence relied on were the failure of the responsible Coast Guard personnel to check the battery and sun relay system which operated the light; the failure of the Chief Petty Officer who checked the lighthouse . . . to make a proper examination of the connections which were "out in the weather"; the failure to check the light between September 7 and October 1, 1951; and the failure to repair the light or give warning that the light was not operating.

Id.

271. *Id.* at 61-62.

272. *Id.* at 68.

273. *Indian Towing*, 350 U.S. at 69.

The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the [Federal] Tort Claims Act.

Id.

274. *E.g.*, *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967). "It is now well established that when the government undertakes to perform

this way, *Indian Towing* effectively limits the scope of the discretionary functions exception as held by the Court in *Dalehite*.²⁷⁵

One such case narrowly interpreting *Indian Towing* was *Ward v. United States*.²⁷⁶ There, the plaintiff claimed that he was injured when a sonic boom caused the automobile under which he was working to fall on him.²⁷⁷ The Third Circuit held that under the circumstances, military supersonic flights fell within the discretionary functions exception because the flights involved policy decisions.²⁷⁸ The court relied on affidavits from three high-level officers stating that, as a matter of national security, training flights of supersonic aircraft over populated areas were necessary to simulate actual combat conditions.²⁷⁹ The court noted that, although the ordering of supersonic aircraft flights falls within the discretionary functions exception, any negligence of pilots in carrying out those orders would not.²⁸⁰

Another suit involving the discretionary functions exception with respect to military activities was *Bulloch v. United States*.²⁸¹ Plaintiffs claimed damages for injuries to their sheep herds resulting from nuclear tests conducted by the United States.²⁸² The plaintiffs alleged that government employees performed the tests negligently.²⁸³ In rejecting the government's discretionary function defense, the court reasoned that if the policy decisions involving the manner of conducting the tests had already been made, then any lack of ordinary care in failing to warn local sheep herders was actionable under the FTCA.²⁸⁴ The court emphasized that "[w]e must look to the nature of the acts

services, which in the absence of specific legislation would not be required, it will, nevertheless, be liable if these activities are performed negligently." *Id.* at 236.

Other often-cited cases involving the discretionary functions exception include *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) (negligence of Federal Aviation Administration employees in certifying an airplane); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957) (negligence of Forest Service employees in fighting fire); and *United States v. Brown*, 348 U.S. 110 (1954) (discharged veteran negligently treated in a Veterans Administration Hospital).

275. See *Monarch Ins. Co. of Ohio v. District of Columbia*, 353 F. Supp. 1249, 1257 (D.D.C. 1973).

276. 471 F.2d 667 (3d Cir. 1973).

277. *Id.* at 668.

278. *Id.* at 669.

279. *Id.*

280. *Id.* at 670. No such pilot negligence was involved in the case. *Id.*

281. 133 F. Supp. 885 (D. Utah 1955).

282. *Id.* at 886-87.

283. *Id.* at 887.

284. *Id.* at 889.

or omissions, themselves, rather than to the nature of the major project or undertaking in the course of which they occur.”²⁸⁵ Thus, *Dalehite* and its progeny stand for the proposition that, while executive policy decisions will be covered by the discretionary functions exception, acts by government employees implementing those policy decisions will not.

The bombing of Laos involved many levels of both decision-making and operational conduct. The initial policy decision to bomb Laos as part of the Vietnam War effort was presumably made at the highest levels of the executive branch. Like the government's decision to use Agent Orange as an herbicide,²⁸⁶ the decision to bomb Laos was certainly in the “discretion of the executive or the administrator to act according to one's judgment of the best course,” as articulated in *Dalehite*.²⁸⁷ Similarly, decisions as to when, where, and whom to bomb in Laos are analogous to the decisions in *Bulloch* of when, where, and in what manner to conduct nuclear tests.²⁸⁸ Such decisions no doubt fall within the scope of the discretionary functions exception.

To the extent that the alleged tortious conduct of the United States in bombing Laos consisted of top level decisions to bomb that country, including decisions to use cluster bomb units, the government would be shielded from liability by the discretionary functions exception. Policy decisions to forego clean-up of the country after the war would likewise be protected. The same might be true of the discretionary daily targeting decisions made by junior Foreign Service

285. *Id.* at 890. In holding that the discretionary functions exception did not apply, the court posited two extremes and then suggested that the case fell somewhere in the middle. *Id.* at 888. On the one hand, it was clear that decisions at any level as to how, when, and in what manner to conduct nuclear tests would fall within the exception. *Id.* On the other hand, an accident involving an employee driving an automobile within the scope of his duties obviously would not qualify under the exception, because the decision to drive too fast would not involve discretion with respect to his duties, but would merely constitute carelessness. *Id.*

The discretionary functions exception was also an issue in the *In re Agent Orange* cases. One case involved the University of Hawaii's field tests of Agent Orange. The plaintiffs, university employees, claimed that they were injured as a result of negligent handling and packaging of the herbicide. *In re Agent Orange Product Liability Litigation*, 818 F.2d 210, 212 (2d Cir. 1987), *cert. denied*, 484 U.S. 928 (1987). The court dismissed the allegations of negligent handling as vague and irrelevant to the issue of discretion, flatly rejecting any argument that the decision to use the herbicide was not a discretionary function. *Id.* at 215.

286. *In re Agent Orange*, 818 F.2d at 215.

287. *Dalehite*, 346 U.S. at 34.

288. *Bulloch*, 133 F. Supp. at 888.

officers at the United States embassy in Vientiane.²⁸⁹

Claims of tortious conduct based upon the negligence of flight crews on bombing missions, however, would not fall within the discretionary functions exception, because such conduct was incident to the purely operational stage of the policy. If one accepts the United States' official claim that Laotian villages were bombed by mistake, those mistakes are analogous to the Coast Guard's negligence in its operation of the lighthouse in *Indian Towing*.²⁹⁰ The United States, having taken on the task of assisting Laos in warding off the North Vietnamese-backed Pathet Lao, is liable if it failed to exercise the requisite care to protect civilian safety. This argument is supported by the court's statement in *Bulloch* that the exception has no applicability once discretion has been exercised and the negligence occurs in implementing the policy.²⁹¹ Moreover, the court in *Ward* stated that "ordering an army maneuver is a discretionary function, but the negligent operation of an army vehicle during such a maneuver is not."²⁹² This is exactly what occurred in the air over Laos, if one accepts the government's public explanation that the bombing of civilian targets in Laos was an accident.

B. Foreign Claims Act

A claimant whose FTCA action is barred by the foreign country or discretionary functions exception is not necessarily without legal redress against the United States. A possible administrative remedy exists under the Foreign Claims Act.²⁹³ The FCA allows inhabitants of foreign countries to pursue claims of up to \$100,000 against the

289. See *supra* note 94 and accompanying text.

290. *Indian Towing*, 350 U.S. at 62.

291. *Bulloch*, 133 F. Supp. at 889.

292. *Ward*, 471 F.2d at 670.

293. 10 U.S.C. § 2734 (1988). The FCA states in pertinent part:

(a) To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned . . . may appoint . . . one or more claims commissions . . . to settle and pay in an amount not more than \$100,000, a claim against the United States for—

(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, . . . and is caused by, or is otherwise incident to noncombat activities of, the armed forces . . .

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

(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 ordi-

United States²⁹⁴ for personal injury or death caused by noncombat activities of the United States military that occur in a foreign country.²⁹⁵ A commission appointed by the appropriate military Secretary rules on the claim.²⁹⁶ If the Secretary determines that a successful claim merits more than \$100,000, he or she may pay the award and report the excess amount to the Comptroller General for payment.²⁹⁷

A plain reading of the FCA indicates that Laotian villagers who are injured today fall within the class of claimants whom the Act was designed to benefit.²⁹⁸ The Lao are inhabitants of foreign countries who were injured by activities of the United States military. The only potential issue is whether bombing villages constitutes combatant activity. However, the FCA expressly defines as noncombat activity a category of military action that is directly applicable to the bombing of Laos.²⁹⁹ Section b(3) states that claims arising out of military aircraft accidents or malfunctions occurring before, during or after a combat mission—including accidents involving "airborne ordnance"—are specifically allowed under the Act.³⁰⁰ As noted earlier, to the extent the United States officially admits that Laotian villages were bombed, it claims the bombings were accidental.³⁰¹ Even if the

nance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.

Id. Note that recovery under the FCA is initially limited to \$100,000, whereas the FTCA imposes no such limit. Therefore, an action under the FTCA would be more desirable.

The FCA is not to be confused with the Military Claims Act ("MCA"), 10 U.S.C. § 2733 (1988), which provides an administrative remedy for personal injury or death caused by the negligent acts of military personnel or by acts of military personnel engaged in noncombat activities. The MCA has no foreign country exception. However, its purpose is not to benefit inhabitants of foreign countries; rather, its aim is to provide a remedy for Americans who suffer injury at the hands of the United States military in other countries and would therefore be precluded from recovering under the FTCA. *See Poindexter v. United States*, 777 F.2d 231 (5th Cir. 1985).

294. 10 U.S.C. § 2734(a).

295. *Id.* § 2734(a)(3).

296. *Id.* § 2734(a). Of course, under the circumstances posed here, such a tribunal's impartiality must be questioned.

297. *Id.* § 2734(d).

298. *Id.* § 2734(a).

299. *Id.* § 2734(b)(3).

300. *Id.* For the full text of section (b)(3), see *supra* note 293 and accompanying text.

301. *See supra* note 96 and accompanying text.

Given the apparent stringency of [the] rules of engagement, it is difficult to see how roads with civilian traffic, villages and groups of civilians could have been bombed, rocketed, or napalmed. It seems clear, however, although the rules are stricter now than they were some years ago, that *mistakes do happen*

STAFF REPORT ON LAOS: APRIL 1971, *supra* note 54, at 11 (emphasis added).

bombing raids themselves are deemed combat missions,³⁰² the alleged mistakes necessarily occurred during the mission or on the return trip. Therefore, potential Laotian plaintiffs could successfully employ the FCA to obtain compensation for their injuries caused by the United States military.

C. Summary: Effect of Existing Statutory Law

Although the FTCA exposes the government to tort liability in many contexts, it gives potential Laotian plaintiffs no practical legal remedy against the United States. As a sovereign nation, the United States has the power to choose when it will consent to be sued.³⁰³ This consent, implicit in the FTCA, has been limited by various exceptions.³⁰⁴ For prospective Laotian plaintiffs to prevail under the FTCA, they must successfully overcome the foreign country, combatant activities, and discretionary functions exceptions.

As illustrated above, it may be possible to establish that the United States bombing of Laos did not constitute combatant activity within the meaning of the FTCA.³⁰⁵ Yet this is merely a Pyrrhic victory, for two hurdles still remain. Those FTCA claims which allege negligence in the policy decisions made in Washington easily bypass the foreign country exception. However, the discretionary functions exception effectively destroys such claims, for the negligence that occurred in this country entailed decisions that involve policy discretion.³⁰⁶ To the extent that operational level action constituted the tortious activity, the discretionary functions hurdle is cleared.³⁰⁷ But because the tortious conduct occurred in Laos, those claims are precluded by the foreign country exception. Thus, when analyzed separately, the foreign country, combatant activities, and discretionary functions exceptions may appear to be surmountable. Yet in combination, the trio sound the death knell for FTCA claims brought by victims of past United States wars fought on foreign soil.

Although potential Laotian plaintiffs have little chance for an unlimited recovery under the FTCA, they may have a viable remedy under the FCA. The foreign country requirement of the FCA poses

302. If one concludes that the bombing raids were not combat missions, then they would be "noncombat activity" and the FCA would certainly apply.

303. See *supra* text accompanying note 131.

304. See *supra* note 136 and accompanying text.

305. See *supra* text accompanying notes 206-58.

306. See *supra* text accompanying notes 286-89.

307. See *supra* text accompanying notes 290-92.

no difficulty. A Laotian claimant merely needs to establish that the bombing of Laos was not a combatant activity of the United States military.³⁰⁸ This showing would not be difficult in light of the specific language of the FCA covering "accidents" that occur during or after combat missions.³⁰⁹

IV. PROPOSED SOLUTION

Although the likelihood of success under the FTCA is slim, the FCA may provide Laotian villagers with a possible remedy against the United States. Any actual relief under the FCA, however, may be unlikely because of the political circumstances in Laos. Given Laos' current communist government,³¹⁰ it is questionable whether a successful plaintiff would be allowed to keep any recovery for his or her own use. Because potential claimants may think they will be able to keep the money, they may still bring suit. Some may believe that upon receiving monetary compensation they will be permitted to emigrate to the West. Finally, the Lao government may encourage, or even require, potential plaintiffs to sue the United States and then confiscate the judgment.

Thus, while FCA claims may cost the United States a large sum of money, that amount may ultimately benefit Laos' communist government rather than the plaintiffs themselves. If the United States federal government is to furnish any monetary redress, it would be better spent if provided indirectly, through private and international relief agencies such as the International Red Cross. These agencies could use the money to clear the land of the unexploded *bombi* and provide medical care to victims in Laos, thereby providing the most needed form of redress.

Congress is in a strong position to achieve this result. In return for information on United States military personnel missing in action in Laos,³¹¹ Congress could create a fund to be administered by private

308. See *supra* note 293 and accompanying text.

309. *Id.*

310. See Y.B. ON INT'L COMMUNIST AFF. 1989, 233-34.

311. L.A. Times, July 30, 1988, part I, at 8, col. 3. There are 2,394 Americans classified as "missing or unaccounted for" in Southeast Asia. "The total includes 1,758 in Vietnam, 547 in Laos, 83 in Cambodia and six in China." *Id.* But see Sesser, *supra* note 7, at 66 (stating that the number of MIAs in Laos today is 533).

In 1984, the United States employed similar tactics when it donated 5,000 tons of rice to Laos in efforts to entice Laos to cooperate in the search for MIAs. L.A. Times, June 25, 1984, Part I, at 2, col. 2. During the Reagan Administration, Vietnam also linked official coopera-

and international organizations.³¹² These groups could go to Laos with the proper equipment and, in cooperation with the Lao government, clear the land of bombs or train the Lao to clear it themselves. The political and ideological differences between the two governments would be insulated by working through relief agencies. Everyone could win. The villagers would no longer live in constant fear of *bombi*, nor would they be forced to undertake the time and expense of litigating in a foreign country. The communist government would improve its image in the eyes of its local constituents.³¹³ Furthermore, the United States would receive credit in the international community for rectifying a serious human rights problem, while obtaining important information on its missing servicemen.³¹⁴

V. CONCLUSION

Exceptions to the FTCA create a formidable barrier to Laotian villagers seeking damages against the United States government for injuries caused by *bombi* left in Laotian soil after the Vietnam War.

tion on the MIA issue to economic aid. L.A. Times, Feb. 8, 1988, Part II, at 7, col. 1. However, actual United States aid to Laos has been minimal.

In five separate years, the United States donated emergency rice shipments, worth a total of ten million five hundred and ninety thousand dollars. Over four years, it sent a hundred and thirty-five thousand dollars in medical supplies, the last contribution being duly recorded as four thousand dollars worth in 1987. The crop-substitution program has brought seven hundred thousand dollars so far. All these figures add up to eleven million four hundred and twenty-five thousand dollars in American aid over a fifteen year period—approximately the average amount spent for five days of the nine years of bombing.

Sesser, *supra* note 7, at 66.

The United States and Laos have attempted to cooperate on the issue of American MIAs in Laos. Although both countries agreed to respect the other's humanitarian concerns, the United States emphasized that there was no direct link. DEPARTMENT OF STATE, AMERICAN FOREIGN POLICY CURRENT DOCUMENTS 1987, 579-81 (1988).

312. The communist government in Laos would be understandably reluctant to allow United States military or government personnel into the country for security reasons. This is supported by the fact that the United States embassy in Vientiane is limited to a handful of staffers and conducts business related only to POW/MIA information and to drug trafficking problems. See Sesser, *supra* note 7, at 66.

313. One potential problem to note is that the Lao government has rejected what little assistance the United States has officially offered. N.Y. Times, Nov. 25, 1987, § A, at 9, col. 1 (city final ed.); L.A. Times, Nov. 8, 1981, part I, at 5, col. 1; Sesser, *supra* note 7, at 66. The United States first made offers to help clear unexploded bombs from the Plain of Jars in 1978. It reiterated the offer in 1981 but the Lao government did not respond. L.A. Times, Nov. 8, 1981, part I, at 5, col. 1. Private North American aid agency workers in Laos believe that the local officials and the farmers would welcome whatever assistance is offered, regardless of who it comes from. N.Y. Times, Nov. 25, 1987, § A, at 9, col. 1 (city final ed.).

314. To prevent double recovery by Laotian victims, Congress at some point would have to amend the FCA to specifically bar future Laotian *bombi* claims.

The FCA provides a limited administrative remedy, but it is unlikely to directly benefit successful Laotian plaintiffs.

Although these provisions appear to protect the United States from unlimited liability, the threat of costly liability still remains. If a federal court were to interpret the FTCA's exceptions loosely, the government could be required to pay a large sum of money. Furthermore, the prospect of multiple Laotian claimants under the FCA is not remote. It is likely that a Laotian villager injured by a United States *bombi* in Laos would have a successful administrative claim against the United States Army or Air Force. Once news of that success spreads, many more Lao might be encouraged to bring claims under the FCA. Although recovery is limited to \$100,000 in most cases, the awards could multiply quickly. Under either scenario, the United States government could be subject to substantial liability.

Faced with even a remote chance of exposure to potentially costly FTCA liability, or with the prospect of multiple plaintiffs seeking \$100,000 or more each under the FCA, it would behoove Congress to act affirmatively before any legal action is contemplated. Money could be provided to relief agencies to fund clean-up operations in Laos. Such a program could persuade the Lao government to provide greater assistance in the United States' on-going search for information on MIAs in Laos and other parts of Southeast Asia. Both sides have considerable incentive to cooperate. By working together, both governments will be viewed favorably in the international arena for addressing each other's respective human rights concerns.

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