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Volume 41  
Number 4 *Symposium: The Frontiers of Tort  
Law*

Article 7

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6-1-2008

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### Recommended Citation

John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 Loy. L.A. L. Rev. 1455 (2008).

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## FORM AND SUBSTANCE IN THE LAW OF COUNTERINSURGENCY DAMAGES

*John Fabian Witt\**

*“Money is ammunition.”*

—U.S. Army & Marine Corps, *Counterinsurgency Field Manual*, 2007<sup>1</sup>

*“Services: Death of Wife / Qty: 1 / Unit Price: \$2,500”*

—U.S. Government Purchase Order-Invoice-Voucher,  
Afghanistan, June 2005<sup>2</sup>

*“I am sorry for your loss, and I wish you well in a Free Iraq.”*

—Foreign Claims Commissioner, Hawija, Iraq, July 2005<sup>3</sup>

On May 29, 2006, a Heavy Expanded Mobility Tactical Truck in an American convoy lost its brakes on the steep mountain road leading down from Bagram Air Force Base into Kabul.<sup>4</sup> The twenty-ton armored truck crashed into the city, careening off of cars, trucks, and buildings. By the time the truck came to rest, it had injured dozens of people. At least one person was killed. As the dust settled, an angry crowd gathered at the scene. A riot ensued and

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1. U.S. ARMY & MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL 49 (2007).

2. U.S. Government Purchase Order-Invoice-Voucher (May 16, 2005), available at [http://www.aclu.org/natsec/foia/pdf/Army0205\\_0207.pdf](http://www.aclu.org/natsec/foia/pdf/Army0205_0207.pdf).

3. Letter from Foreign Claims Commissioner, Dep't of the Army (Feb. 25, 2005), available at [http://www.aclu.org/natsec/foia/pdf/Army0253\\_0254.pdf](http://www.aclu.org/natsec/foia/pdf/Army0253_0254.pdf).

4. ACLU, Claims Filed Under the Foreign Claims Act by Civilians in Afghanistan and Iraq, Army Bates No. 18–22, 30–51, (Released by the ACLU Apr. 12, 2007), <http://www.aclu.org/natsec/foia/log.html> [hereinafter ACLU FOIA Report].

shots rang out. In the crossfire, bullets that the Pentagon later traced to American weapons killed at least six young Afghan men. One of the victims left behind a one-and-a-half-year-old son and a pregnant widow. According to the dead man's father, he had been delivering spare parts for the family auto repair shop. Another victim was a thirteen-year-old boy. He had been selling pizzas on the street. Another was a taxi driver who happened to have a fare at the wrong place at the wrong time. Others had been returning home from work and school.<sup>5</sup>

War causes collateral damage, and such harms have rarely been more salient than in the armed conflicts of the twenty-first century—armed conflicts that take place cheek-by-jowl with civilians.<sup>6</sup> What makes the truck crash and its aftermath on the outskirts of Kabul striking is that it became an occasion for the deployment of an American tactic that has taken on increased significance in the era of war among civilians. The families of the six men killed by U.S. forces in Kabul in May 2006 were paid damages for their losses under an obscure piece of legislation from the Second World War known as the Foreign Claims Act.<sup>7</sup> Between 2001 and the spring of 2007, the United States paid about \$32 million in legal claims to civilians injured or killed in Afghanistan and Iraq.<sup>8</sup> Trumpeted in the army's widely praised new counterinsurgency manual as an important tool in asymmetric conflicts,<sup>9</sup> American-style damages payments are fast becoming one of the ways the twenty-first-century U.S. military attempts to win the hearts and minds of civilians in war zones. Damages payments, as one of the authors of the counterinsurgency manual puts it, are among the latest non-lethal weapons systems in the American military.<sup>10</sup>

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5. *Id.*

6. PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* (2008); RUPERT SMITH, *THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD* (2007); H. R. McMaster, *On War: Lessons to Be Learned*, 50 *SURVIVAL* 19 (2008).

7. Foreign Claims Act, ch. 645, 55 Stat. 880 (1942) (current version at 10 U.S.C. § 2734 (2000)).

8. Paul von Zeilbauer, *Confusion and Discord in U.S. Compensation to Civilian Victims of War*, *INT'L HERALD TRIB.*, Apr. 12, 2007, <http://www.iht.com/articles/2007/04/12/news/abuse.php>.

9. U.S. ARMY & MARINE CORPS, *supra* note 1, at 1–2

10. John A. Nagl, *Forward* to U.S. ARMY & MARINE CORPS, *supra* note 1, at xvii (2007); see also JONATHAN TRACY, *CONDOLENCE PAYMENTS* 4 (2006), <http://www.civicworldwide.org/storage/civic/documents/condolence%20payments%20current.pdf>.

For all their novelty, however, the damages claims of the wars on terror take part in an old American tradition. Since its founding, the United States has been a world leader in creating international law to constrain the conduct of armies, in particular the body of international law known as the law of war. But ever since the winter of 1862–63, when Abraham Lincoln felt his way toward a law of war that could spur the Union Army to victory after a year and a half of indecisive campaigns, the United States has typically insisted that law (properly understood) does not come at the expense of strategy.<sup>11</sup> To the contrary, the American law of war tradition is to assert that we can have it both ways. We can announce and follow laws to regulate war—and we can win those wars. Inside the American military, in particular, the tradition is to assert that the laws of war are both a moral obligation and a strategic imperative.<sup>12</sup> What is good for America is also lawful—and right.

Sometimes, however, the convergence between legality and military advantage is more apparent than real. For at least a century and a half, America has sought to work out the tensions contained in the project of aligning law and strategic advantage. In recent years the damages law of the United States armed forces has cast the problem in bold relief. Call it the dilemma of law and strategy. In the law of foreign claims, as the field is known, the relationship between legality and tactical advantage is often inverse. The more law-like the claims payment system, the less tactical flexibility soldiers have to deploy money as a weapon tailored to the terrain of the battlefield. The more flexible it is, the less law-like it tends to be.

Commanders and claims officers in Afghanistan and Iraq seem to understand this much better than the official doctrine suggests. But in these theaters, the opposite problem has come to the fore. Unconstrained tactical flexibility produces inconsistent determinations, and lawless inconsistency may be as strategically harmful as overly legalistic rigidity. The nub of the law-strategy dilemma is that legality is both a threat and an imperative. This is

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11. See generally FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD (1863); see also BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION AND THE LAW OF WAR (2007).

12. See, e.g., David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61, 61 (2005)

the lesson of the armored truck that careened down the road from Bagram to Kabul.

## I.

Almost a century ago, in April 1918, President Woodrow Wilson signed into law an awkwardly named piece of legislation titled “An Act to give indemnity for damages caused by American forces abroad.”<sup>13</sup> The Act authorized the payment of claims made by the inhabitants of allied European countries—principally France—for damages caused by American Expeditionary Forces.<sup>14</sup> The legislation was simple. It adopted the military claims law of the country in which the claims arose: if a claim would have been payable by the French military to a French civilian, it would be payable by the United States armed forces to the same civilian.<sup>15</sup> By the end of the war—in little more than a year—the U.S. Quartermaster General received 51,745 civilian claims under the Act, 38,299 of which it paid.<sup>16</sup>

Until the 1918 legislation, neither American law nor international law had afforded remedies to individuals injured by the actions of members of the armed forces. The basic jurisdictional rule in American law (as in international law) was one of sovereign immunity: a state may not be hauled against its will into its own civil courts or into those of coequal sovereigns.<sup>17</sup> In the United States, employees of the federal government are protected by an absolute immunity from suit for all claims arising within the scope of their employment.<sup>18</sup> Similarly, under traditional international law rules, members of the armed forces of one state who go with their armies into the territory of another are generally accountable only to their own legal system, not to the legal system of the state in which they

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13. Act of 18 April, 1918, ch. 57, 40 Stat. 532 (1918).

14. *Id.* § 1.

15. *Id.* § 2.

16. William R. Mullins, *The International Responsibility of a State for Torts of Its Military Forces*, 34 MIL. L. REV. 59, 63 n.21 (1966).

17. See U.S. CONST. amend. XI.

18. 28 U.S.C. § 2679(d) (2000).

find themselves.<sup>19</sup> Armies are like massive lumbering embassies, carrying immunity with them as they move across the landscape.<sup>20</sup>

To be sure, an alien could always appeal to his government to lodge a claim with the offending soldier's government. But such claims were necessarily few and far between, and they were unlikely to be granted absent some diplomatic imperative to pay reparations. As the eighteenth-century Swiss jurist Emmerich de Vattel put it, the classic eighteenth- and nineteenth-century approach was to deem damages in wartime simple "misfortunes."<sup>21</sup> Chance dealt them out to those "on whom they happen to fall."<sup>22</sup>

When General John "Black Jack" Pershing arrived in France in 1917, he decided to turn Vattel's lottery toward the service of American military interests.<sup>23</sup> Pershing encountered a new kind of problem in warfare, one which the long tradition of sovereign immunity aggravated rather than relieved. On the western front, the First World War was paradigmatically a war between armies dug into trenches. Civilians in France and Germany were for the most part able to avoid being caught up in the midst of combat. Behind the front lines, however, the First World War brought an unexpected but deadly force to bear on civilian life.

By early 1918, Pershing had become the first American commander to be confronted with the inevitable fallout from tens of

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19. 1 LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 500 (2d ed. 1912) (1905).

20. *Id.* ("[I]t matters not whether armed forces are at home or abroad; for they are organs of their home State, even when on foreign territory, provided only that they are there in the service of their State, and not for their own purposes.").

21. E. DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 518 (Joseph Chitty trans., T. & J. W. Johnson ed. 1852) (1758).

22. *Id.* In the aftermath of the American Civil War, the United States government established a labyrinthine claims process that dragged on for decades after the war. The Civil War claims processes provided compensation for property injuries only, not personal injuries or death. At first, the claims process did not include claims for injuries to property arising in those states that remained in the Union. Only in 1871 was the claims act amended to include claims by loyalists in the Confederate states. JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 316-41 (Univ. of Ill. Press ed. 1997) (1926); see generally DANIEL W. HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR* (2007); DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* (2003). Significantly, Civil War claims were almost all claims arising out of the intentional acts of soldiers (confiscations, seizures, pillaging, etc.). There were relatively few negligence or accident cases.

23. 2 JOHN J. PERSHING, *MY EXPERIENCES IN THE WORLD WAR 16-17* (TAB Books ed. 1989) (1931).

thousands of young men behind the wheel in a war zone. The Great War was the first automobile war. During the year and a half of its involvement in the war, the United States floated more than 100,000 motor vehicles across the Atlantic.<sup>24</sup> The cars and trucks America had so successfully delivered to the western front quickly began to cause mayhem. Soldiers were driving motorized vehicles on roads built for horse-drawn vehicles in towns accustomed to horse-drawn speeds. The situation was a prescription for injury and accidental death. The carnage was so great that it even affected those who were sent to try to resolve it. In May 1916, an auto accident took the life of the British officer charged with compensating French civilians injured by British army vehicles.<sup>25</sup>

By January 1918, Pershing was practically begging Congress to enact legislation like the British law that would allow the United States' Expeditionary Forces to pay injured French civilians for their losses. Pershing insisted that a program to compensate the victims of those injuries and deaths was crucial to maintaining civilian morale and to protecting the reputation of the United States with the French people.<sup>26</sup> The program was important enough to Pershing that when Congress at last enacted the indemnity statute, he remarked upon it in his diary.<sup>27</sup> "The prompt settlement of claims," he later wrote in his memoirs, "had an excellent effect upon the people of the European countries concerned."<sup>28</sup>

In the law of military claims, the automobile seems to have produced the same kind of growth that the railroad and industrialization caused in the civil courts. In peacetime, the railroad created the law of torts.<sup>29</sup> In wartime, the automobile created a similarly new field of damages law, one centrally concerned with promoting the reputation of the United States abroad and maintaining

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24. UNITED STATES WAR DEP'T, ANNUAL REPORT OF THE SEC'Y OF WAR 791 (1919); UNITED STATES WAR DEP'T, ANNUAL REPORT OF THE SEC'Y OF WAR 294 (1918).

25. Obituary, *Death of General C. G. Morrison*, LONDON TIMES, May 26, 1916 (Brig. Gen. Colquhoun Grant Morrison).

26. S. REP. NO. 65-379, at 1-2 (1918).

27. PERSHING, *supra* note 24 at 16-17.

28. *Id.* at 17.

29. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 7 (3d ed. 2006); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 223-25 (2004); Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1227 (2001).

the morale of the civilian populations alongside which U.S. armed forces fought.

## II.

When the United States entered into the Second World War, President Franklin Roosevelt quickly moved to update the 1918 Indemnity Act.<sup>30</sup> The result was the Foreign Claims Act (“FCA”), enacted less than a month after the Japanese attack on Pearl Harbor, which announced in a preamble its purpose of “promoting and maintaining friendly relations” between the United States and the inhabitants of foreign countries.<sup>31</sup> During the war, the Army Judge Advocate General’s office handled some 87,000 claims.<sup>32</sup> Amended in 1943 and then again about a dozen times in the decades since, the Foreign Claims Act is still in effect today.<sup>33</sup>

On first reading, the Act seems straightforward. It applies to inhabitants of foreign countries who allege injury to person or property caused by U.S. armed forces overseas.<sup>34</sup> Injuries arising out of combat activities—defined as activity resulting directly or indirectly from enemy action, or alternatively as engagement in, or preparation for, armed conflict—are ineligible for payment.<sup>35</sup> Claimants who are nationals of a country at war with the United States may only recover if the claims commission or local commander determines the claimant to be friendly to the United States.<sup>36</sup> Claims filed anytime within two years of the actions in question are decided by Foreign Claims Commissions (“FCC”), made up of between one and three commissioned officers, typically

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30. In the interwar period, the U.S. had declined to enact new claims legislation. Incidents arising out of U.S. troops stationed in China, Chile, and Nicaragua during this period produced special bills in the U.S. Congress to compensate civilians killed by automobiles or injured by brawling sailors. Mullins, *supra* note 16, at 64 n.22. Remember that the 1918 statute applied only to the inhabitants of allied European nations.

31. Foreign Claims Act, ch. 645, 55 Stat. 880 (1942).

32. U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975, at 171 (1975).

33. 10 U.S.C. § 2734 (2000).

34. *Id.* § 2734(a).

35. U.S. DEP’T OF ARMY, REG. 27–20, CLAIMS 107 (2008), available at [http://www.army.mil/usapa/epubs/pdf/r27\\_20.pdf](http://www.army.mil/usapa/epubs/pdf/r27_20.pdf) [hereinafter AR 27–20] (“Activities resulting directly or indirectly from action by the enemy, or by the Armed Forces of the United States engaged in armed conflict, or in immediate preparation for impending armed conflict.”).

36. 10 U.S.C. § 2734(b)(2).



members of the Judge Advocate General's office.<sup>37</sup> The commissions adjudicate claims according to liability rules derived from the local tort rules at the place of the occurrence.<sup>38</sup>

Like the liability standards, the cash value of valid claims is also determined largely on the basis of the local tort law.<sup>39</sup> One-member claims commissions may approve claims for up to \$2,500, or \$15,000 if the member is a Judge Advocate.<sup>40</sup> Three-member commissions have authority to pay single claims of up to \$50,000, and multiple claims arising out of the same event for up to \$100,000.<sup>41</sup> The current limit on the value of claims payments is \$100,000, though the Secretary of the Army may authorize payments exceeding that amount.<sup>42</sup> Acceptance by the claimant of payment on a claim constitutes full and final satisfaction of, and complete release of the United States and its employees from, further liability for any and all claims arising out of the injuries at issue.<sup>43</sup>

If a claim is denied in part or in full, an unsatisfied claimant may request that the claims commission reconsider its decision.<sup>44</sup> If the commission denies a claim, the claimant may request further reconsideration by the Judge Advocate General, the Secretary of the relevant armed service, or the Secretary's designees, who may reopen and correct an FCC's decision if that decision appears to have been incorrect on the law or the facts.<sup>45</sup> Further requests for reconsideration may be granted only if there was fraud in the original determination, if there is substantial new evidence warranting reconsideration, or if there was an error in calculation or a mistake of law.<sup>46</sup> There is no federal court jurisdiction to entertain claims or

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37. *Id.* § 2734(b)(1); 32 C.F.R. §§ 536.26(a), 536.140–142 (2007); AR 27–20, *supra* note 35, at 13, 53–54.

38. 32 C.F.R. § 536.139; OPERATIONAL LAW HANDBOOK 147 (John Rawcliffe ed., 2007), available at <http://www.fas.org/irp/doddir/army/law2007.pdf>.

39. 32 C.F.R. § 536.139.

40. OPERATIONAL LAW HANDBOOK, *supra* note 38, at 147 n.14.

41. AR 27–20, *supra* note 35, at 54.

42. *Id.*

43. 32 C.F.R. §§ 536.63, 536.72.

44. *Id.* § 536.140(f).

45. *Id.* § 536.144.

46. *Id.* § 536.144(b).

appeals under the FCA because the statute does not waive the sovereign immunity of the United States.<sup>47</sup>

Independent of the claims system, civilian victims of injuries caused by the U.S. armed forces may receive condolence or “solatia” payments if they live in countries in which condolence payments are thought to be customary.<sup>48</sup> Condolence payments are typically nominal, and may be paid either in cash or as in-kind expressions of sympathy.<sup>49</sup> The funds for condolence payments come from unit operations budgets, rather than claims funds, even though judge advocates in claims commissions often find themselves administering condolence payments.<sup>50</sup> In 2003 and 2004, the Department of Defense determined that condolence payments are customary in Afghanistan and Iraq; since then, U.S. armed forces have made approximately \$30 million in condolence and solatia payments to Iraqi and Afghan civilians.<sup>51</sup>

Except for these condolence payments, the Foreign Claims Act process is essentially the only way a person injured by U.S. troops in places like Afghanistan and Iraq can recover damages. Inhabitants of many foreign countries can rely on the civil damages provisions written into so-called Status of Forces Agreements or SOFAs—treaties that define the legal rights and obligations of U.S. forces.<sup>52</sup> SOFAs establish tort claims procedures for injuries caused by U.S. armed forces in the North Atlantic Treaty Organization (“NATO”) countries, as well as in Japan, Korea, and many other states.<sup>53</sup> But absent a SOFA, the Foreign Claims Act is the only legal path (short of diplomatic intervention) available to alien civilian claims. The

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47. See *Lloyd's Syndicate 609 v. United States*, 780 F. Supp. 998, 1001 (S.D.N.Y. 1991).

48. OPERATIONAL LAW HANDBOOK, *supra* note 38, at 149.

49. *Id.*

50. *Id.*

51. AR 27–20, *supra* note 35, at 46; OPERATIONAL LAW HANDBOOK, *supra* note 38, at 147. The Operational Handbook cites a November 2004 memo by the Defense Department authorizing condolence payments in Afghanistan and Iraq, but other sources suggest that the army began making condolence payments in Iraq in September 2003, five months after the invasion of Iraq. See TRACY, *supra* note 10, at 2–3. Statistics come from U.S. GOV'T ACCOUNTABILITY OFFICE, THE DEPARTMENT OF DEFENSE'S USE OF CONDOLENCE AND SOLATIA PAYMENTS IN IRAQ AND AFGHANISTAN 20 (2007), available at <http://www.gao.gov/new.items/d07699.pdf>.

52. OPERATIONAL LAW HANDBOOK, *supra* note 38, at 148.

53. Since 1995, several dozen countries have entered into an agreement that extends the terms of the NATO SOFA. See Agreement Among the States Parties to the North Atlantic Treaty and the Other States Participating in the Partnership for Peace Regarding the Status of Their Forces, June 19, 1995, T.I.A.S. No. 12,666.

Federal Tort Claims Act, enacted in 1946 as a partial waiver of the United States' sovereign immunity, is inapplicable because it excludes claims arising in a foreign country.<sup>54</sup> The Alien Tort Claims Act, which might apply to injuries caused by acts in violation of international law, does not waive the sovereign immunity of the United States.<sup>55</sup> The Military Claims Act (legislation that closely resembles the Foreign Claims Act) applies only to inhabitants of the United States.<sup>56</sup> And individual employees of the United States are absolutely immune from suit for all acts performed within the scope of their employment.<sup>57</sup> In short, the FCA is often the only game in town.<sup>58</sup>

Despite its importance and century-long history, however, the law of the Foreign Claims Act is beset by deep internal tensions. The Act provides only for the payment of "meritorious claims," without further specifying the meaning of the phrase.<sup>59</sup> Regulations promulgated pursuant to the FCA specify that like the Federal Tort Claims Act, the Foreign Claims Act adopts the liability standards of the jurisdiction in which the incident occurred.<sup>60</sup> Yet the regulations as a whole sharply limit the extent to which local law really governs such claims. United States law determines whether or not an actor is an employee of the U.S. armed forces for purposes of the Act.<sup>61</sup> The

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54. 28 U.S.C. § 2680(k) (2000).

55. *Id.* § 1350 (2000); *see Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985).

56. 32 C.F.R. § 536.74(c) (2007).

57. 28 U.S.C. § 2679; Non-Scope Claims Act, 10 U.S.C. § 2737 (2000) (covering claims falling outside of the FTCA, MCA, and FCA regarding defective government equipment and non-scope claims arising out of the acts of foreign civilian employees); 32 C.F.R. §§ 536.90–536.95.

58. Interestingly, the principle of civilian compensation has become increasingly salient in the international law of armed conflict in recent years. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 91, June 8, 1977, 1125 U.N.T.S. 3. ("A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."); *see also* W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381 (1997).

59. 10 U.S.C. § 2734.

60. 32 C.F.R. § 536.139(a) ("In determining an appropriate award, apply the law and custom of the country in which the incident occurred to determine which elements of damages are payable and which individuals are entitled to compensation."); *see also* AR 27–20, *supra* note 35, at 43.

61. 32 C.F.R. § 536.23(b). For example, private security contractors working for firms such as Blackwater and Triple Canopy are not employees under the Act.

regulations assert a comparative negligence defense to claims.<sup>62</sup> With respect to acts by a soldier or civilian employee that fall outside the scope of the employee's employment, the regulations assume that there will only be liability for "negligent or wrongful" acts or omissions, apparently ruling out some strict liability torts that might be derived from local law.<sup>63</sup> And regardless of local legal rules to the contrary, both the statute and the regulations preclude insurers or other third-party payers ("subrogees" in the language of torts and insurance law) from bringing claims.<sup>64</sup>

The tension between local law and U.S. law appears again in the Foreign Claims Act's approach to damages. The FCA regime initially seems to incorporate and adopt local damages rules from the place in which the tort occurred.<sup>65</sup> Those damages may include what the regulations call "moral damages" in jurisdictions where those damages are permitted.<sup>66</sup> But once again, the Act and its regulations move away from the local rules of the jurisdiction by imposing limits on the kinds of damages payable. The regulations, for example, reverse the usual common law collateral source rule by providing that any insurance payments recovered or recoverable by the claimant are to be deducted from the award.<sup>67</sup> The regulations preclude the application of joint and several liability rules to the United States and prohibit the compensation of legal costs associated with a claim.<sup>68</sup> Punitive damages are not payable.<sup>69</sup> The FCA, it seems, cannot decide whether it means to apply local law or U.S. law.

The tensions between foreign and American law in the Act pale in significance when compared to the central background fact of the FCA. Nowhere does the statute use mandatory language to describe

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62. *Id.* § 536.138(a) (excluding claims resulting "wholly from the negligent or wrongful act of the claimant").

63. *Id.* § 536.137(a).

64. 10 U.S.C. § 2734(a); 32 C.F.R. § 536.138(l).

65. 32 C.F.R. § 536.139(a).

66. *Id.* § 536.139(b).

67. *Id.* § 536.139(c).

68. OPERATIONAL LAW HANDBOOK, *supra* note 38, at 147.

69. *Id.*; *see also* AR 27–20, *supra* note 35, at 24.

the payment of meritorious claims.<sup>70</sup> At the end of the day, the statute does not mandate payment of claims at all. All the Act does is authorize the secretaries of the armed services to create FCCs.<sup>71</sup> The secretaries may create FCCs, but they need not do so. In turn, FCCs may pay claims, but they need not do so.<sup>72</sup> The FCA thus creates authority to pay certain claims, but ultimately leaves the payment of those claims to the discretion of the secretaries of the armed services and the claims personnel on the ground.<sup>73</sup> We can see this most clearly when we look at a provision buried deep in the regulations. A claim is not payable under the FCA, reads the regulation, if it is “not in the best interest of the United States.”<sup>74</sup> If an individual claimant is “considered to be unfriendly to the United States,” for example, no claim may be paid.<sup>75</sup> The FCA, it seems, is barely law at all, if by law we mean general and binding rules set out in advance. Despite its legal armature, the FCA is instead a system of administrative authority exercised at the discretion of American armed forces.

Seen in this light, the statute and its accompanying regulations move back and forth among at least three competing theories of how best to accomplish the goal that General Pershing set out in 1918. When it tracks onto local law, the FCA purports to maintain the reputation of American armed forces abroad by playing according to the rules of the local state; think of this as the “when in Rome” principle.<sup>76</sup> By contrast, when it limits the scope of local law by asserting U.S. law limits on liability,<sup>77</sup> the FCA implicitly asserts that supporting the reputation of the United States requires only that the United States pay compensation to make up for certain of the wrongful acts of the armed services and its members. This is the

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70. See 10 U.S.C. § 2734(a) (2000) (indicating that the Secretary, at his discretion, “may appoint . . . one or more claims commissions . . . to settle and pay . . . a claim against the United States”).

71. *Id.*; see *Aaskov v. Aldridge*, 695 F. Supp. 595, 599 (D.D.C. 1988).

72. 32 C.F.R. § 536.138(h).

73. See *Aldridge*, 695 F. Supp. at 599 (holding that the government has no obligation to create a Foreign Claims Commission to hear claims arising out of the crash of a U.S. military aircraft in Greenland).

74. 32 C.F.R. § 536.138(h).

75. *Id.*

76. See 10 U.S.C. § 2734(a) (2000) (stating that the purpose of the Act is “[t]o promote and to maintain friendly relations”).

77. 32 C.F.R. § 536.138.

corrective justice principle. When the FCA system gives the armed services discretion as to when claims are payable in the best interests of the United States,<sup>78</sup> however, it asserts a third theory of how to advance the reputation of American armed forces abroad. The third theory is that legal principles drawn from torts or other bodies of law—whether foreign or domestic—do not effectively accomplish the goal of winning hearts and minds at all. The best approach, this third theory suggests, is simply to give the armed forces discretionary cash with which to advance their tactical and strategic ends. This is the tactical flexibility principle.

Seated awkwardly astride these three principles, the FCA embodies an uncomfortable compromise between legality and strategy. It incorporates legal doctrines from domestic and international law and extends them to war zones around the world in which American forces come into contact with civilians. But it limits those legal doctrines by incorporating tactical limits on the payment of claims. Without creating any enforceable rights for aliens overseas, it vests discretionary authority in the armed services to use claims to buy civilian good will. To quote one of the epigraphs of this paper, it uses money as ammunition.<sup>79</sup>

The problem is that these two aims—legality and strategy—often cut in opposite directions. As a strategic or tactical matter, there often seems little reason to adopt tort rules. Tort law was hardly designed with the functional imperatives of the military in mind. None of tort law's basic elements—the negligence standard, the causation and proximate causation tests, defenses such as assumption of risk and comparative negligence, limited-duty and no-duty rules—were constructed with the FCA context in mind. Domestic surveys of litigant satisfaction suggest that tort law is barely able to promote its own reputation even in those areas where it might be expected to do best.<sup>80</sup> It would be a small miracle if tort law provided an accurate guide to how to protect the reputation of armed forces living among civilian populations abroad.

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78. *Id.* § 536.138(h).

79. U.S. ARMY & MARINE CORPS, *supra* note 1.

80. See E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990).

## III.

Lawyers like to say that the law in action often looks startlingly different from the law on the books. Thanks to the institutional histories of the Judge Advocate General's Corps we have a pretty good picture of what the Foreign Claims Act has actually looked like in the armed conflicts of the past half-century.

The Vietnam War presented army judge advocates with their first opportunity to implement the FCA claims system in a counterinsurgency context. In the mid-1960s, the army constructed a claims program under the FCA in the hopes of creating a climate of law and order while denying insurgents a propaganda weapon.<sup>81</sup> Like the First World War fifty years earlier, the Vietnam War created truck and motor vehicle traffic in a culture more accustomed to the bicycle and the animal-drawn wagon.<sup>82</sup> Injuries from automobile and truck traffic multiplied, and though judge advocates would later recount with some justification their pride in the claims payment system they created, claims practice was simply overwhelmed.<sup>83</sup> By the end of the 1960s there were fourteen foreign claims offices operating in Vietnam, two of which were three-man claims commissions with authority to pay claims of up to \$15,000, one for claims arising out of Saigon and the other taking claims forwarded from the field.<sup>84</sup> The remaining twelve were one-man commissions with authority up to \$1,000.<sup>85</sup>

For all the work of the judge advocate's office, the claims process in Vietnam broke down along two key dimensions. Most visibly, the claims process became bogged down in administrative delays. A long backlog of claims developed.<sup>86</sup> In 1970, a claims riot broke out at a military base in Da Nang to protest the delays.<sup>87</sup>

For the judge advocates who administered the FCA in Vietnam, the combat exclusion<sup>88</sup> was second only to the claims backlogs as a

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81. GEORGE S. PRUGH, *LAW AT WAR: VIETNAM, 1964-1973*, at 79 (1975).

82. FREDERIC L. BORCH, *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI* 27 (2001).

83. *Id.* at 42.

84. *Id.*

85. *Id.*

86. *Id.* at 41-42.

87. *Id.* at 44.

88. 10 U.S.C. § 2734(b)(3) (2000) (allowing a claim only if it did not "result directly or indirectly from an act of the armed forces of the United States in combat").

source of frustration. Taken literally, the exclusion of all claims “indirectly” related to combat threatens to exclude every claim that might conceivably be brought into the system. The very existence of the armed forces is indirectly related to combat, let alone any particular act in a place like Afghanistan or Iraq. Interpreting the statute as broadly as the language seems to warrant would defeat the purpose of the Act. And though no one has sought to expand the combat exclusion to its natural scope, even narrower approaches to the combat exclusion have carved out a gaping exception to the military’s authority to pay damage claims.

When a military aircraft suffered a mechanical failure and crashed into a village in 1965, for example, claims personnel from the Judge Advocate Claims Section concluded that they were barred from paying FCA claims to the victims; the injuries were related to the combat mission of the aircraft and thus not qualified under the statute.<sup>89</sup> In cases like this and thousands of others, claims attorneys in Vietnam experienced the combat exclusion as a “constant problem,” one that they often worked hard to circumvent.<sup>90</sup> In 1968 these efforts led to an amendment to the FCA itself, allowing claims to be paid for accidents such as the 1965 aircraft crash.<sup>91</sup> More often, judge advocates sought to be liberal with their claims resolutions in what one Staff Judge Advocate in Vietnam later called the “gray area” between combat and noncombat claims,<sup>92</sup> or to use other assistance funds to compensate combat-related damages.<sup>93</sup>

During the 1980s and 1990s, the combat exclusion again interfered with the efforts of claims personnel to bolster civilian morale in the United States’ military campaigns. In Grenada in 1983, army judge advocates discovered that the FCA claims system could become a powerful strategic asset: some of the hundreds of Grenada citizens who walked into claims offices brought valuable information about the Marxist insurgents.<sup>94</sup> But until the State Department established an ad hoc compensation program, the

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89. BORCH, *supra* note 82, at 25.

90. *Id.* at 41–42.

91. Pub. L. No. 90–521, 82 Stat. 874, § 3 (1968) (codified as amended at 10 U.S.C. § 2734(b)(3) (2000)).

92. PRUGH, *supra* note 81, at 83.

93. BORCH, *supra* note 82, at 42.

94. *Id.* at 75.



combat exclusion sharply limited the capacity of army lawyers to garner civilian good will.<sup>95</sup> In Panama six years later, the same problem arose once more: army lawyers sought to pay combat-related claims but were unable to do so by the terms of the statute; eventually the United States gave funds to the Panamanian government for the purpose of compensating the combat-related losses of Panamanian citizens.<sup>96</sup> In Somalia in the 1990s, judge advocates worked to get around the combat exclusion as well as they could, often making small “solatia” and condolence payments in lieu of paying FCA claims.<sup>97</sup>

The combat exclusion raises most acutely the tensions between legality and strategy that are at the heart of the FCA regime. The exclusion is as close to a rule of law as one can find in the FCA. The armed services may pay some claims if they so choose, though as we have seen, they do not have to pay any.<sup>98</sup> But they shall not (except under limited circumstances set out by the 1968 amendment for injuries caused by aircraft)<sup>99</sup> pay claims arising directly or indirectly out of combat. In combat situations, in other words, sovereign immunity and the tradition of noncompensation remain mostly untouched by the FCA.

If army claims personnel drew a lesson from the armed conflicts of the second half of the twentieth century, it was that legal obstacles to paying claims threatened to undermine campaigns for the hearts and minds of civilians. Legalistic delay produced disenchantment and, in some cases, even riots. The combat exclusion severely limited the discretionary power to pay friendly civilian claims in cases in which payment seemed to promote the best interests of the United States. In the aftermath of Vietnam, the official army guidelines for administering the FCA exhorted claims officials to limit the scope of the combat exclusion and at the very least to use solatia or condolence payments to deliver compensation when the best interests of the United States so warranted.<sup>100</sup>

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95. *Id.* at 75–76.

96. *Id.* at 112–13.

97. *Id.* at 210–11.

98. See *supra* text accompanying notes 72–75.

99. 10 U.S.C. § 2734(b)(3) (2000).

100. 32 C.F.R. § 536.36 (2007) (urging that “every effort be made to discover another remedy and inform the inquirer as to its nature”).

When we turn to the wars of the twenty-first century, however, a counter-lesson is emerging. The lesson of Vietnam was that legality may sometimes obstruct strategy. It turns out that in the world of claims, untethered tactical discretion can be self-defeating, too.

#### IV.

The crash of the armored truck in Kabul in May 2006 came to light a year later in the spring of 2007 when the American Civil Liberties Union (“ACLU”) released a huge cache of documents obtained under the Freedom of Information Act (“FOIA”).<sup>101</sup> The ACLU made its FOIA request after public disclosure of the well-known incident in which two dozen Iraqis were killed by U.S. Marines in Haditha.<sup>102</sup> The unarmed civilian deaths included seven women and three children.<sup>103</sup> The ACLU requested from the Department of Defense all documents relating to the killing of civilians in Afghanistan and Iraq between January 2005 and June 2006, including (among other things) paperwork relating to the compensation of victims and their families.<sup>104</sup> What the ACLU’s request produced—largely by accident—was a ground-level view of the claims system in Afghanistan and Iraq. The claims files are skewed toward civilian deaths and away from property and injury claims.<sup>105</sup> Nonetheless, they offer as good a perspective on the process as we are likely to get for some time. The picture they reveal is disturbing.<sup>106</sup>

Approximately 490 discrete claims are identifiable in the FOIA request materials, and of those, 404 were denied.<sup>107</sup> The eighty-six

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101. ACLU FOIA Report, *supra* note 4.

102. See Paul von Zielbauer, *General and 2 Colonels Censured for Poor Investigation Into Haditha Killings*, N.Y. TIMES, Sept. 6, 2007, at A12.

103. See Tim McGirk, *Collateral Damage or Civilian Massacre in Haditha?*, TIME, Mar. 19, 2006, available at <http://www.time.com/time/world/article/0,8599,1174649,00.html>.

104. See Press Release, ACLU, *ACLU Releases Files on Civilian Casualties in Iraq and Afghanistan* (Apr. 12, 2007), <http://www.aclu.org/natsec/foia/29316prs20070412.html>.

105. See ACLU FOIA Report, *supra* note 4.

106. The claims are virtually all from 2005 and 2006, but in this regard they are not as unrepresentative as they might seem. Captain Jon Tracy, formerly a claims lawyer in the army’s JAG corps, has written eloquently about the woeful lack of preparation for claims administration during the crucial early days of the post-9/11 conflicts. It was a full five months before the Department of Defense authorized condolence payments in Iraq, and an astounding three years before such payments were approved for Afghanistan.

107. CIVIC, *ADDING INSULT TO INJURY: US MILITARY CLAIMS SYSTEM FOR CIVILIANS 2* (2007),

paid files include claims arising out of checkpoint shootings, motor vehicle accidents, accidental weapon discharges, and more—just about every kind of mayhem imaginable. The average damages awarded in death claims amounted to just over \$4,200, though the damage awards varied widely.<sup>108</sup> Relatively minor property awards for damages to automobiles and other personal property often rivaled the death payments in dollar value.<sup>109</sup>

Among the denied claims, more than half were denied on the basis of the combat exclusion built into the FCA system.<sup>110</sup> In the past, in places like Vietnam, claims denied because of the combat rule have been eligible for condolence payments. But the Department of Defense failed to authorize condolence payments in Iraq until September 2003, almost five months after the invasion began.<sup>111</sup> Condolence payments were not authorized in Afghanistan until November 2004, three years after combat began there.<sup>112</sup> Even once condolence payments were made available, the army seems to have referred only a small fraction of the combat-excluded cases for condolence payments.<sup>113</sup> Army judge advocates appear to have granted condolence payments in only 70 of the 233 combat-excluded claims in the FOIA request files from 2005 and 2006.<sup>114</sup>

The details of the FCA program in Afghanistan and Iraq are even more troubling than its aggregate statistics. There is distressingly sloppy lawyering throughout the system. Claims are denied for no reason at all in some cases.<sup>115</sup> Some American claims personnel insist on high evidentiary hurdles that are out of step with the liberal directives in the regulations.<sup>116</sup> In other claims, evidence

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<http://www.civicworldwide.org/storage/civic/documents/civic%20military%20claims%20white%20paper.pdf> (last visited Nov. 15, 2008).

108. *Id.* at 3.

109. *Id.*

110. *Id.*

111. *Id.* at 1.

112. See OPERATIONAL LAW HANDBOOK, *supra* note 38, at 149.

113. *Id.* at 4.

114. See *id.* at 3; see also TRACY, *supra* note 10.

115. ACLU FOIA Report, *supra* note 4, at Army Bates No. 754–56.

116. See ACLU FOIA Report, *supra* note 4, at Army Bates No. 797–800, 1043–46 (denying claims on the basis of insufficient evidence). AR 27–20 emphasizes that in cases of factual doubt, a determination must be made on the basis of “information obtained from the claimant and others.” AR 27–20, *supra* note 35, at 17.

in the record seems to be willfully disregarded.<sup>117</sup> There are wild inconsistencies in the administration of claims, without apparent pattern. A condolence payment is viewed as precluding a subsequent FCA claim in one case but not in the next (the latter view is more in tune with the statute).<sup>118</sup> Damages arising out of terrorist assassinations (excluded by any reading of the statute) are denied in one case, but compensated in another.<sup>119</sup>

Nowhere are the inconsistencies more readily apparent than in the interpretation of the combat exclusion. Sometimes checkpoint shootings are treated as combat exclusion cases.<sup>120</sup> At other times they are resolved on the merits as either negligent or not negligent shootings.<sup>121</sup> Sometimes warning shots gone awry are treated as evidence of fault on the part of the U.S. soldier.<sup>122</sup> Other times they are treated as falling within the combat exclusion.<sup>123</sup> Some raids on homes are later treated as combat, while others are not.<sup>124</sup> In at least one case, army claims personnel state that there is a presumption of combat exclusion when U.S. soldiers fire weapons.<sup>125</sup> Other claims for shooting deaths and injuries are compensated with no mention of a presumption one way or another.<sup>126</sup> Jonathan Tracy is a former judge advocate in the U.S. Army who served as a claims officer in Baghdad and is now affiliated with American University's National Institute of Military Justice. Tracy reviewed the ACLU materials and concluded (with some understatement) that "The FCA 'combat exclusion' appears to be applied arbitrarily."<sup>127</sup>

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117. See ACLU FOIA Report, *supra* note 4, at Army Bates No. 495–98 (denying a claim that was corroborated by witness statements, photographs, and a police report).

118. *Id.* at Army Bates No. 546–49.

119. See *id.* at Army Bates No. 732–33.

120. See *id.* at Army Bates No. 785–86.

121. See *id.* at Army Bates No. 762.

122. See *id.* at Army Bates No. 430–38.

123. See *id.* at Army Bates No. 666–68.

124. See *id.* at Army Bates No. 1406–09, 1424–27.

125. See *id.* at Army Bates No. 656–59.

126. See *id.* at Army Bates No. 385–88.

127. CIVIC, *supra* note 107, at 3. Tracy says that as a claims officer, he felt that the administration of the combat exclusion is terribly vague: "You look at the soldiers involved, and if they felt they were in combat, if they perceived a threat and reacted, you were supposed to conclude that that was a combat operation. . . ." David Wood, *Civilian Deaths Costly for U.S.*, BALTIMORE SUN, Oct. 11, 2007, at A1.

Even when judge advocates follow their Vietnam predecessors and creatively narrow the combat exclusion to include as many claims as possible, the results are sometimes perverse. In February 2006, a U.S. armed forces helicopter fired on and killed a man fishing in the Tigris River.<sup>128</sup> In the aftermath, U.S. forces in the area negligently failed to secure his boat. One wonders whether the family of the dead fisherman understood why they were able to recover \$3,500 for the value of the boat and fishing equipment, but not even a penny for the death of their family member. The shooting death was deemed to be within the combat exception, but the subsequent failure to secure the fishing boat (though indirectly related to combat and thus within the literal scope of the exclusion) was not.<sup>129</sup>

When damages are paid the awards are usually small, with erratic variations that again seem to follow no pattern. The FCA authorizes single claims of up to \$50,000, and contemplates claims that may reach even higher than that in value.<sup>130</sup> But most awards in Iraq and Afghanistan appear to be much, much lower. The average death award in the material released by the ACLU is \$4,200.<sup>131</sup> The highest death award was \$11,000 for each of three Iraqi children killed when a tank accidentally fired a 155-millimeter high-explosive round that struck a house in Hibhib, north of Baghdad.<sup>132</sup> But most awards are far lower. One death award summarily reduced without explanation a claim from \$5,000 to \$2,400 in a case brought by Iraqi parents whose child was killed when a Bradley fighting vehicle accidentally smashed through the wall of their home in Tikrit.<sup>133</sup> Perhaps most striking of all is the relative valuation of property damage and death. Again and again, damage to property such as automobiles counts for as much as (and often for more than) the value of a lost human life.<sup>134</sup> The total claims paid in Afghanistan and Iraq combined since 2001 constitute a mere 0.0032 percent of the total costs of the Iraq war (using the most conservative estimates

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128. ACLU FOIA Report, *supra* note 4, at Army Bates No. 550–54.

129. *Id.*

130. 32 C.F.R. §§ 536.143(c)–(g) (2007).

131. CIVIC, *supra* note 107, at 3.

132. ACLU FOIA Report, *supra* note 4, at Army Bates No. 157–60.

133. *Id.* at Army Bates No. 836–39.

134. *See, e.g., id.* at Army Bates No. 1292–95.

of the costs of the war), or two-tenths of one percent of the cost of the American tort system as a share of the gross domestic product of the United States.<sup>135</sup>

Taken together, the inconsistencies, internal discrepancies, opaque judgments, and variable damages awards of the Foreign Claims Commissions invest massive discretionary authority in U.S. claims personnel. Any given claim seems susceptible to rejection or payment. When U.S. forces driving an HMMV struck and killed an Iraqi man on Christmas Day in 2005, for example, the claims commission had the virtually unreviewable discretion to deny or to grant his family's claim as it saw fit. In this case it did both. In January 2006, the commission denied the claim for lack of evidence, despite the family's statement of facts.<sup>136</sup> Two months later, a new claim before a second commission (without any apparent new evidence) produced the opposite decision on the theory that U.S. soldiers might have been negligent.<sup>137</sup>

After a claims denial in the FCA, many injured Afghans and Iraqis—four out of five in the ACLU files<sup>138</sup>—are thrown back onto the even more discretionary systems of small condolence and solatia payments. These ways of recognizing the losses of civilians in war zones strip away the few fixed standards of the FCA, leaving local commanders and claims commissions with the authority to make discretionary payments that often turn on little more than the availability of funds.<sup>139</sup>

What all this means is that the law of torts—Afghan, Iraqi, or American—goes almost completely ignored by the claims personnel

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135. Costs of the claims program since 2001 are estimated as \$32 million from the figure given in the International Herald Tribune. Zeilbauer, *supra* note 8. Costs of the Iraqi war are valued at \$1 trillion, based on estimates discussed in David Leonhardt, *What \$1.2 Trillion Can Buy*, N.Y. TIMES, Jan. 17, 2007, at C1 available at <http://www.nytimes.com/2007/01/17/business/17leonhardt.html>. Tort costs as a percentage of the U.S. economy are taken as 2 percent from the somewhat controversial (for being too high) estimates prepared by Tillinghast. See TOWERS PERRIN, 2007 UPDATE ON U.S. TORT COST TRENDS 5 (2007), available at [http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2007/200712/tort\\_2007\\_124\\_2007.pdf](http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2007/200712/tort_2007_124_2007.pdf). Condolence payments made up 8 percent and 5 percent of army CERP funds dispensed in Iraq in 2005 and 2006, respectively, and 1 percent of CERP funds dispensed in Afghanistan in 2006. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 51, at 20.

136. ACLU FOIA Report, *supra* note 4, at Army Bates No. 310–13.

137. *Id.*

138. CIVIC, *supra* note 107, at 3 (stating that 404 of 490 viable claims were denied).

139. See, e.g., ACLU FOIA Report, *supra* note 1, Army Bates No. 596–600 (granting a condolence payment for death caused by anti-U.S. forces).

with their boots on the ground in places like Afghanistan and Iraq. The official army line on the local tort law of Iraq is that it resembles the Anglo-American common law of torts.<sup>140</sup> But that is almost certainly untrue, and there is very little to make us think that anyone put much time into deciding one way or another. Instead, the lesson here is that the tort rules—local or American—bear little relation to the determination of individual claims.

There is little reason to mourn the abandonment of tort principles *per se*. Tort law principles were not made for the battlefield. And to the extent law binds judge advocates and denies them ground-level flexibility, law of any kind will be at odds with strategy. But lawless tactics can be at odds with strategy, too. Pure local tactical discretion is a dangerous way to try to win the hearts and minds of civilians in war zones, especially if those civilians can see the inconsistencies that result. The ACLU materials confirm what has been widely reported in the press: Iraqis observe and are angered by those inconsistencies.<sup>141</sup> In any event, polls suggest that the claims program's success is open to serious doubt. An August 2007 poll indicated that 72 percent of Iraqis believed that the United States' presence was making things worse, and that 85 percent of Iraqis had no or "not much" confidence in the American armed forces.<sup>142</sup>

Law and tactical flexibility, it seems, each have strategic dimensions. If the claims system is designed to sustain civilian morale and support civilian confidence in the U.S. armed forces, then the legitimacy of the system in civilian eyes is absolutely crucial. Law may help to create the kind of bureaucratic uniformity that can bolster this legitimacy. It provides a stock of ostensibly neutral reasons for denying some claims and granting others. But the discretionary American claims system barely succeeds in taking advantage of law's legitimizing capacity.

Underlying all of this, of course, is an even more uncomfortable question. Do cash payments advance the reputation of the United

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140. Captain Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, ARMY LAW. Feb. 2004 at 39, 40.

141. See, e.g., Nicholas D. Kristof, *'Inspiring Progress' on Iraq?*, N.Y. TIMES, Jul. 12, 2007, at A23, available at [http://select.nytimes.com/2007/07/12/opinion/12kristof.html?\\_r=1&scp=1&sq=%27Inspiring+Progress%27+on+Iraq&st=nyt&oref=slogin](http://select.nytimes.com/2007/07/12/opinion/12kristof.html?_r=1&scp=1&sq=%27Inspiring+Progress%27+on+Iraq&st=nyt&oref=slogin).

142. Wood, *supra* note 131; see also von Zeilbauer, *supra* note 8.

States in such situations? Or do they merely confirm the views of America's detractors? Even setting aside the uneven application of the program, even ignoring the small death awards, there is a question worth asking that has barely even been broached: What does an Afghan family think when they get a purchase order listing dead family members as "services provided"? Can money really be ammunition?

## V. CONCLUSION

There are steps the United States can take to ameliorate the law-strategy dilemma. Further administrative guidance for claims personnel in places like Afghanistan and Iraq could provide more continuity across claims decisions and eliminate at least some of the inconsistency that seems to plague the program. The army might, for example, develop something like what automobile accident claims adjusters use in the United States—grids and tables that provide guidance on the way to resolve the kinds of cases that recur again and again.<sup>143</sup> In the domestic automobile accident context, the relevant fact settings include rear-enders and red light cases, but in the FCA context the fact settings might include checkpoint shootings and warning shot cases. In addition, the army ought to develop systematic matrixes to guide the calculation of damages. Insurance claims adjusters and plaintiffs' lawyers in the United States employ such tables as a matter of course.<sup>144</sup> We see similar instruments in the criminal law in the Federal Sentencing Guidelines, which now function as non-binding guidance for the sake of equity and uniformity in criminal sentencing.<sup>145</sup> Some of these developments may be on the horizon in the law of foreign claims. U.S. Senator Patrick Leahy has endorsed legislation proposed by a number of advocacy groups that would bring greater uniformity to the law of

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143. See H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 232–34 (1980); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1602–06 (2004).

144. Charles R. McGuire, *Regulation of the Insurance Industry After Hartford Fire Insurance v. California: The McCarran-Ferguson Act and Antitrust Policies*, 25 LOY. U. CHI. L.J. 303, 310–11 (1994) (stating insurance companies employ actuary tables to calculate risks).

145. U.S. SENTENCING COMMISSION, GUIDELINES MANUAL (2007); see also *United States v. Booker*, 543 U.S. 220, 246–54 (2005).



foreign claims.<sup>146</sup> Moreover, stray references in the claims files from 2005 and 2006 suggest that army lawyers are already developing informal grids and schedules.<sup>147</sup>

Such small improvements could help lessen the inevitable tensions that the law-strategy dilemma entails. But it is in the nature of the dilemma that it is essentially unresolvable, and this indelible fact about the law of foreign claims brings us back to the aftermath of the armored truck crash and riot in Kabul in May 2006.

The central question of the Kabul episode is why there was any recovery at all. The case seems at first glance to have been a straightforward combat exclusion case. U.S. troops, fighting alongside Afghan national police, fired on rioters threatening an American military convoy, killing a number of Afghans.<sup>148</sup> If there is a presumption of combat in shooting cases, as some claims files from Iraq seem to suggest,<sup>149</sup> claims arising out of the riot would seem to be excluded. Even without a presumption, the combat exclusion seems squarely implicated in a case in which American soldiers use force to defend themselves against attack. At the very least, we can be sure that analogous cases in Iraq have been treated as falling within the combat exclusion of the FCA.

How, then, can we explain the payment of the Kabul claims? One possibility, of course, is that payment was essentially a mistake. Given the disorder readily apparent in the claims files collected by the ACLU, there is little reason to be surprised by sloppy claims processing. Still, there were at least seven claims processed out of the incident, and all the claims were paid except for one in which the death was deemed to have been caused by a bullet from the Afghan National Police. A mistake might have been made in one death claim. But in six death claims? And why would the claims commission carefully sift through the evidence to deny one claim if it was being sloppy? Mistake is not the most plausible explanation.

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146. See Campaign for Fair, Just, Equitable Compensation, <http://www.campaign4compensation.org/Welcome.html>. (last visited Nov. 15, 2008).

147. ACLU FOIA Report, *supra* note 4, at Army Bates No. 61 (referencing a “valuation chart for death claims in Afghanistan”); ACLU FOIA Report, *supra* note 4, at Army Bates No. 83 (same).

148. ACLU FOIA Report, *supra* note 4, at Army Bates No. 18–22.

149. See, e.g., ACLU FOIA Report, *supra* note 4, at Army Bates No. 656–59.

A second and more powerful explanation is that the claims commissioners sought, like the judge advocates in Vietnam, Grenada, and Panama, to circumvent the combat exclusion in order to grant compensation. Under the relevant Department of Defense regulation, the fact that they paid the claims at all necessarily means that they understood the award of compensation to be in the best interest of the United States.<sup>150</sup> In order to pay the claims, however, the commissioners had to do some fancy footwork to evade the legal exclusion of combat claims. They had to treat the shooting deaths not as the result of self-defense by U.S. armed forces, but as the result of some prior noncombat act associated with the armored truck's skidding, out-of-control, no-brakes descent down the mountain road into Kabul. In other words, they had to turn the riot and subsequent shooting into the kind of motor vehicle mishap that General Pershing had in mind when he urged Congress to enact the original FCA in 1918.

The difficulty here (as any torts lawyer worth her boots will observe) is that the decision to make the Kabul claims into motor vehicle claims stretches the chain of causation dangerously close to its breaking point. Tort principles generally require that the injuries complained of be the proximate or reasonably foreseeable outcome of the negligent act in question. In the Kabul case, this required the claims commissioners to conclude that the shooting deaths of the Afghan claimants in Kabul were the reasonably foreseeable result of something like negligent brake maintenance at the Bagram Air Force base.

All of a sudden we seem not to be in the world of combat or on the front lines of the war on terror, but in the long history of difficult common law causation cases, cases such as *Scott v. Shepherd*,<sup>151</sup> *Palsgraf v. Long Island Railroad*,<sup>152</sup> and *In re Kinsman Transit*,<sup>153</sup> in which complex and extended factual scenarios test the causal reasoning of the common law. The causal sequence in Kabul—from negligent brake maintenance to a hair-raising trip down the mountains, from one collision to another, from crash to riot, and from riot to shooting—matches the chain of events that caused

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150. AR 27–20, *supra* note 35, at 51.

151. (1773) 96 Eng. Rep. 525 (K.B.).

152. 162 N.E. 99 (N.Y. 1928).

153. 338 F.2d 708 (2d Cir. 1964).

King's Bench to wonder about the proximity of cause and effect when a firecracker was thrown from one market stall to another, and then another and another in the eighteenth-century *Scott* case.<sup>154</sup> The Kabul sequence stands up to the improbable path of the *Palsgraf* case in the 1920s, from botched train boarding to explosion on the tracks to collapsing freight scales.<sup>155</sup> The Kabul events even look remote in comparison to the fantastic chain of the *Kinsman Transit* case from the 1960s, which featured dangerous ice flows, careening tanker vessels, a misplaced drawbridge, and massive unexpected flooding in upstate New York.<sup>156</sup> The case of the armored truck in Kabul is a proximate causation case for our unsettling times, a case that both fits in the tradition of well-known common law causation cases and transports that tradition into a radically new post-9/11 context.

Most of all, the *Palsgrafian* Kabul case catches us squarely on the horns of the dilemma of law and strategy. What the hidden proximate causation logic of the Kabul case reveals is that law offers no escape from the thorny problems of discretion and judgment. The Foreign Claims Act aspires to maintain a clean and determinate neutrality in hopes that the law can be what military strategists call a "force multiplier." But too much legal constraint restricts crucial tactical flexibility. Discretionary standards resolve the problem of constraint, but undermine the legitimacy law purports to provide. The truck crash in Kabul brings us full circle when it turns out that law is not actually able to deliver the kind of neutral judgment it seems to promise. Elastic causal chains are just one of the many ways tort law has invested common law juries and judges with wide discretionary power. Resort to law does not provide determinate answers. It merely provides a framework in which to reason toward answers. Hard judgments remain and discretion is inevitable.

In the past decade, some observers have coined a term for a new kind of twenty-first-century armed conflict. "Lawfare" is a kind of war fought (shades of Carl von Clausewitz) with the admixture of other means.<sup>157</sup> Its most widely publicized form has been the use of

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154. *Scott*, 96 Eng. Rep. at 527.

155. *Palsgraf*, 162 N.E. at 99.

156. *In re Kinsman Transit Co.*, 338 F.2d at 712-13.

157. Col. Charles J. Dunlop, Jr., USAF, *Law and Military Interventions: Preserving Humanitarian Values in 21<sup>st</sup> Century Conflicts*, available at

litigation against the United States by detainees and others accused of being terrorists.<sup>158</sup> But lawfare has an increasingly clear application to the legal strategies of powerful states—precisely the states in whose interests the laws of war have long been made. Indeed, law seems likely to play a special role for all sides in the era of war among civilians as a mediator between civilian and soldier. What claims act practice shows is that law does not solve the law-strategy dilemma. It reproduces that dilemma. If Afghanistan and Iraq are any guide, the United States has only just begun to confront the challenges that twenty-first-century lawfare entails.

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158. See *The National Defense Strategy of the United States of America*, at 6 (March 2005), available at <http://www.defenselink.mil/news/Apr2005/d20050408strategy.pdf>; see also DAVID KENNEDY, *OF WAR AND LAW* (2006).

