

CONDOLENCE PAYMENTS¹

I. INTRODUCTION

Civilian casualties are a tragic result of combat operations. The U.S. military attempts to minimize civilian casualties, but their efforts will never eliminate loss of innocent life completely. Knowing innocent civilians suffer combat injuries, the questions that arise are, what must be done in the aftermath to mitigate their suffering, and what role does the military have in the process. A need exists to provide immediate monetary assistance to survivors to help them shoulder the loss, as well as provide empathy and condolence for their pain. The U.S. military ostensibly recognizes this need, as evidenced by the creation of the current condolence payment systems used in Iraq and Afghanistan. However, the programs operate less than ideally. For the purposes of this paper, a condolence payment will be defined as, “any monetary compensation made by the U.S. military directly to victims, or their survivors, who suffer physical injury, death, or property damage as a result of U.S. military or coalition operations.” Condolence payments are meant to express sympathy and provide urgently needed humanitarian relief to innocent victims. The current system fails to meet these objectives. The U.S. government must re-tool the condolence payment program to make it effective and permanent. With a strong condolence payment system, the U.S. military will be in a position to treat innocent civilian casualties humanely, as well as provide the military with a strong weapon to foster goodwill with the local population.

II. HISTORICAL OVERVIEW

A. FOREIGN CLAIMS ACT

The Foreign Claims Act, 10 U.S.C. § 2734, is the major piece of legislation governing the U.S. military’s duty to provide compensation for injury, death, or damage caused by acts of the U.S. military. However, the FCA contains a combat exclusion. A claim may be compensated under the FCA only if “it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.” 10 U.S.C. § 2734(b). Therefore, any injury, death, or property damage caused during a combat action may not be paid under the FCA.

B. SOLATIA PAYMENTS

Currently, the only permanent provision within military law providing for condolence payments is a single paragraph in each service branch’s claim’s regulation

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defining solatia payments. Army Regulation 27-20, Paragraph 10-10,² provides the authority for the use of condolence payments by the Army.

Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her family is common in some overseas commands. Such payments are not to be made from the Claims Expenditure Allowance. These payments are made from local operation and maintenance funds pursuant to directives established by the appropriate commander for the country concerned. This applies even where a command claims service is directed to administer the command's solatia program. AR 27-10, para 10-10.

According to this paragraph, solatia may not be funded via any claims program. Instead, the appropriate commander may fund a payment from his or her operation and maintenance fund (O&M). When a commander chooses to make a solatia payment he or she must coordinate and seek approval from the highest level of command for the deployment area. The Judge Advocate General's Corps Operational Law Handbook specifies that these payments are not an admission of fault by the U.S. government.³ At the start of operation Enduring Freedom and Operation Iraqi Freedom, solatia payments were not authorized anywhere within CENTCOM's area of responsibility.⁴ The reason proffered by the military was that issuing solatia payments was not in accordance with local customs.

Due to the prohibition against solatia and the combat exclusion of the FCA, there was no mechanism for the military to make condolence payments in Iraq from the start of the invasion until September 2003. Nearly six months of combat passed with no system in place to provide condolence payments.⁵ Indications from the field are that condolence

² AR 27-20, Claims, regulates all of the various claims programs in the Army. Each branch of the military has a similar regulation.

³ THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, *OPERATIONAL LAW HANDBOOK* (2005).

⁴ See Karin Tackabery, *Center for Law & Military Operations (CLAMO) Note from the Field: 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 note 41, citing Information Paper, CFLCC SJA, subject: Solatia Payments/Compensation for Iraqi Civilians Accidentally Injured/Killed by U.S. Forces during the War (4 Apr. 2003).

⁵ While I cannot provide an exact number of Iraqis who filed claims with me between May and September 2003 which were denied because of the combat exclusion in the FCA, I estimate it was over fifty. I estimate only about half, if that, returned after September 2003. Both of these estimates are based on my personal recollection and not on any records I maintained. In those first several months I listened to numerous Iraqis explain how their family members were killed or severely injured due to no fault of their own, but by merely being in the wrong place (such as their home or yard) at the wrong time. I knew solatia was prohibited but was repeatedly told by superiors that "maybe something would come along later." I repeatedly had to tell victims of horrendous suffering "to come back later, and maybe in a week or two something will open up." Many would come back week after week only to be told, "maybe next week." Understandably, many of those people became disillusioned and ceased coming to ask. When the current program was finally instituted, many had already given up hope or were no longer in a position where monetary aid could help.

payments were not used in Afghanistan until November 2004—three years of combat passed without a system in place to compensate innocent victims of U.S. combat actions.

Finally, in September 2003, the highest level of Command in Iraq, Combined Joint Task Force-7 (CJTF-7), authorized what it called “solatia-like” payments to be made out of the commander’s emergency response program (CERP) fund. The system was slightly altered by the current high command in Iraq, Multi-National Corps-Iraq (MNC-I), and remains the only authorization for condolence payments to date within Iraq.

III. CURRENT REGULATORY FRAMEWORK FOR CONDOLENCE PAYMENTS UNDER THE CERP FUND

While the phrase “solatia-like” was replaced by “condolence payments” the rules remain similar. The maximum payment in cases of death, serious injury, or property losses or damage is \$2,500. There has been information provided recently from the Center for Law and Military Operations within the U.S. Army JAG Corps that payments can be authorized up to \$10,000 if forwarded to a higher command. No one has provided any information on whether any claims have actually been paid above the original \$2,500 limit. Most claims are handled by the immediate officer who’s limit remains \$2,500. The CERP SOP, issued by MNC-I, provides the most current information on the implementing guidelines and rules for the use of condolence payments in Iraq. Paragraph 3.d.16 of the CERP SOP states that the “CERP family of funds can be used to assist the Iraqi people [by providing] condolence payments to Iraqi civilians for the death or injury resulting from US, coalition, and supporting military operations.” The only other mention made of condolence payments in the 55-page document is at paragraph 5.c.7.d. These paragraphs are reprinted here in their entirety:

(d) Condolence Payments and Battle Damage Payments.

1. References A, H, and I authorized the payment of condolence payments for death, injury, or battle damage in the amounts up to \$2,500. This means for each death, each injury, and each incident of property damage CERP funds can be used to pay the family. For example, two members of the same family are killed in a car when the car is hit by U.S. forces. The head of that household could receive a maximum of \$7,500 in CERP condolence payments - \$2,500 for each death (\$5,000) and \$2,500 for the damage to the vehicle. The Brigade commander is the approval authority for each \$2,500 payment.

2. Condolence payments can be paid to express sympathy and to provide urgently needed humanitarian relief to individual Iraqis and the Iraqi people in general. Condolence payments are different from claims and are not an admission of fault by the U.S. Government. It is crucial to remember that when a Commander uses CERP funds, it is not an acknowledgement of any moral or legal responsibility for someone's death, injury, or damaged property. The difference is that these are meant only as symbolic gestures, rather than to compensate someone for a loss.

CERP condolence payments are not Solatia payments and will not be referred as such. In addition, condolence payments are only for Coalition/US Force/ISF caused incidents.

3. The Commander may choose to make multiple condolence payments against one DA3953/DD1149, in amounts up to \$50,000. The Project Purchasing Officer will obtain approval from the Commander.

4. Upon Commander's approval, and MSC Comptroller certification, the Paying Agent may go to the Finance Office and use the DA3953/DD1149 for a bulk draw of cash.

5. The Paying Agent makes disbursement using a roster that provides the name of the recipient, the amount, and their signature. The Project Purchasing Officer and Paying Agent will certify each roster that it represents the actual payments made to Iraqi individuals or heads of household for condolence payments.

6. The Project Purchasing Officer will prepare a memorandum providing a description and explanation for the condolence payments. This will include the date(s) that the incident occurred, city and province where incident occurred, and a detailed description of the extent of the incident. The Commander will sign this memorandum.

7. The memorandum and all rosters will become part of the project file.

8. Condolence payments are the only authorized use of bulk funds.

9. Any payments for battle damage cannot be identified as claims. Claims for damage caused by combat are specifically not payable under the Foreign Claims Act. However, in addition to condolence payments for battle damage, Commanders have the discretion and may authorize individual repair projects paid by U.S. appropriated CERP and managed by a Project Purchasing Officer. Each repair project will be treated as a separate CERP project.

IV. PROBLEMS ASSOCIATED WITH CONDOLENCE PAYMENTS UNDER THE CERP FUND

A. NON-UNIFORM APPLICATION

CERP Funds are described in the CERP SOP as a “non-lethal weapons system” for commanders to use in Iraq.⁶ Using CERP Funds for condolence payments is gratuitous; that is, nothing requires a commander to utilize this “weapons system.” A commander may choose to make condolence payments, or to not make them. Different units take different approaches on when and how often to make condolence payments. This wide birth of discretion creates great disparity in the application of the program. Some units choose to pay only high profile cases and not lesser-known cases. However, some units will pay any valid claim as long as the unit possesses sufficient funds. The nature of this system leads to drastically different results for different civilians who suffer

⁶ HEADQUARTERS, MULTI-NATIONAL CORPS – IRAQ, CERP FAMILY OF FUNDS: FISCAL POLICIES, PROCESSES, AND STANDARD OPERATING PROCEDURES (29 June 2005).

the same casualties, but in different regions of the combat zone. These conflicting outcomes cause negativity to intensify and nullify any goodwill produced by the condolence payment program.

Another example of incongruous application is that some units will not pay claims when a different unit caused the damage. This is troublesome when one considers how frequently units change over and how slow the current system operates and how long it can take a claimant to file. Many times victims live in different areas from where they suffer their injury, and the unit in their area denies their claim because the injury occurred elsewhere. Many civilians do not have the resources to travel great distances to file their grievance with the “appropriate” unit, and the current program is not institutionalized well enough so that units can forward the claims to other units themselves. Conversely, under the Foreign Claims Act a claimant is deemed to have properly filed simply by submitting the claim in writing to any foreign claims commission, regardless of the area of responsibility of the claims officer who receives the claim. Requiring Iraqis to submit their claims to specific units is an unconscionable requirement.

Another of the most egregious examples of the ad hoc manner in which the program is implemented, is the statute of limitations-type requirements units impose. It appears that units are given leeway to establish such rules at their discretion. Some units are currently providing information to Iraqis that they will not accept any claims over three months old. The problems with such requirements are obvious: many times survivors simply cannot file within that time limit, the healing process will not afford them the ability to file. Also, claimants may not be able to discover the proper office to file their claim within that time limit. And it will generally take much longer than three months for the claimant to collect all of the necessary documents and evidence. It should be noted that the Foreign Claim Act has a two-year statute of limitation.

The lack of uniformity is also exemplified by the very creation of the solatia-like program in Iraq. There would have been no system for making condolence payments in Iraq if CJTF-7 had not built one in September 2003. Because there is no permanent system within the DoD, a mechanism was pieced together out of CERP. As long as there is not a permanent system in place, there will never be uniformity from one conflict to the next or from one unit to the next.⁷ For each conflict the command will decide if, and what system, they will build. It seems counterintuitive that an issue as important as providing condolence payments to innocent civilians should be so haphazard.

A major reason for this lack of uniformity is there are no guidelines provided to units or implementing officers. There are no guidelines because the system is not

⁷ See THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, *OPERATIONAL LAW HANDBOOK* (2005) page 162. The Operational Law Handbook provides an excellent history of condolence payments in previous engagements. In every major conflict since the Vietnam War, the U.S. military has implemented a means to work around the combat exclusion of the Foreign Claims Act. Each engagement created a unique system, thus, there has never been a system introduced which has been institutionalized like the Foreign Claims System for non-combat claims. For instance, in Grenada, the U.S. State Department initiated a program to pay combat claims, wherein the U.S. Army claims service paid the claims using USAID funds.

institutionalized within the DoD. Therefore, there is no substantive guidance on the standard of proof, rules of evidence, how to determine valuation, or examples of the types of claims to be paid. Without concrete guidance, brigades will not operate effectively or uniformly.

B. THE MONETARY LIMIT

Every death, injury, or incident of property damage is limited to a payment of \$2,500 (See section III above regarding discussion of the raising of potential awards to \$10,000). To put a price on these types of tragedies is impossible. The best that can be done is to make the amount respectable and not insulting. I attended numerous District Advisory Committee meetings in Karkh and Karadah and meetings with local Sheiks from Mahmudya and Iskandaria. Every Iraqi I spoke with on the issue expressed shock and disbelief I could only offer \$2,500 for the death of a human being. Not one Iraqi ever said the amount made sense, or was equitable. Under the FCA the full market value may be paid for a Toyota run over by a tank in the course of a non-combat related accident, but only \$2,500 may be paid for the death of a child shot in the crossfire.

Binding a brigade to \$2,500 in every case limits the unit's ability to adequately assist in the most egregious cases. The loss, both financial and psychological, some families suffer is greater than that of other survivors. But there is no way for a claims officer to react to such cases, everyone is limited to \$2,500. The artificial limit leaves survivors bitter and frustrated at the U.S. The payment of \$2,500 will provide little help if the individual killed was the sole breadwinner and leaves behind young children and a widow.

C. CONDOLENCE PAYMENTS TIED TO THE CERP FUND

A major problem during 2003 and 2004 in Iraq was that condolence payments are inherently under-used and often a forgotten tool because they are tied to the larger CERP fund. Brigade commanders are charged to use the CERP fund to provide money for reconstruction projects in their area of responsibility, and they clearly accept this mission. It is a known fact that commanders in the field believe the CERP fund is essential to the work they perform. They spend millions of dollars on hospitals, schools, sewers, etc. These are all projects that range in the hundreds of thousands of dollars. Condolence payments are miniscule in comparison. For each account opened, I had to wait until the subordinate units in the brigade made all of their expenditures for reconstruction projects, and I would get whatever small amount was left in the open account. It was almost as if the condolence system was an after-thought. The perception was that you get more "bang for your buck" by fixing a school and employing Iraqi contractors, than paying a widow for the loss of her husband. Unfortunately, that may be true, but that is why condolence payments should operate as a separate fund so it need not compete with reconstruction projects.⁸ There has been improvement in this area of the program since

⁸ Many times when several members of a family were killed and the survivors were entitled to several payments of \$2,500, I could not offer them the full allowance. I could only offer what was left in the account that week. Not only is the amount of \$2,500 inadequate for the death of a person, but only being

my tour of duty. Under the current system a unit may lump \$50,000 worth of claims together and receive bulk funds from their finance office once the commander has signed the appropriate documentation. Theoretically Judge Advocates should not have the problem I had in regards to access to money; as long as there is money in CERP they should be able to draw funds for condolence payments. However, because the program remains part of CERP and there are no specific guidelines issued on condolence payments the program is still over-shadowed by the larger reconstruction projects.

Consider the MNC-I Commander's intent for the CERP Program, as defined in the CERP SOP: "[The] intent is to have CERP refocused on labor intensive and urgent humanitarian relief and reconstruction projects. Projects should be implemented rapidly to reinforce a positive perception upon the Iraqi economy and by providing employment opportunities to the Iraqi people." CERP SOP, para. (3)(b). Condolence payments do not fit within this intent. Condolence payments are focused on providing assistance and condolence to *individual* Iraqis; the payment has nothing to do with building the economy or infrastructure. The intent of condolence payments is unique, and unlike any other CERP project.

V. HOW CONDOLENCE PAYMENTS SHOULD WORK

A. BASIC REQUIREMENTS OF A SUCCESSFUL SYSTEM

Condolence payments must come from a military officer. Placing this requirement on the State Department or on a non-governmental organization, while maybe attractive for other reasons, does not achieve one of the major goals of this program. It is the military that engages in combat activity and causes innocent civilian casualties. Therefore, it is the responsibility of the military to take necessary steps to offer condolence for its actions. Making an apology to the victim or survivor is as important as the monetary payment, and the apology will mean more coming from someone in uniform. Additionally, the U.S. military prides itself on high-tech weaponry and expert training, which it says limits civilian casualties, when the military fails to live up to this standard, there is a duty for the military to recognize the failure, document the incident, and offer condolence to the victim. By establishing a permanent condolence payment system with internal controls and reporting requirements the military will be in a much greater position to maintain records and statistics on civilian casualties. Under the current program such reporting requirements are minimal. Currently, a simple one-paragraph memorandum vaguely mentioning the incident is all that is necessary for a commander to authorize payment. Contrast this with the foreign claims procedure where the Judge Advocate is required to collect all relevant evidence and forward that evidence with the file to the Claims Service at Fort Meade, Maryland upon final settlement. Similarly, under the FCA there is an affirmative duty for the military branches to staff FCCs to handle foreign claims. Although payment is gratuitous, there is a duty that the program operates and that it operates according to well-defined and published rules and procedures. A similar structure is absolutely necessary for condolence payments.

able to pay a couple of thousand dollars for the deaths of three or four family members is horrific to consider, but that is exactly what I was forced to do.

B. DOLLAR LIMIT AND APPEALS

The \$2,500 limit must be lifted. The program must contain a mechanism to provide a sliding scale of payments. One proposal would be a brigade officer may pay up to \$10,000, division up to \$25,000, corps up to \$100,000, and the Secretary must approve anything over \$100,000. This allows more money to be spent in deserving cases. The loss or suffering some experience is greater than the loss for other victims, and the military must have a system that allows for these factors to be considered when determining an appropriate amount. Similarly, the amount must be high enough to demonstrate genuine condolence and provide enough resources for the survivors to recover from the loss in the short-term.

Along with lifting the limit, a claimant must be able to appeal the decision of an officer when he or she feels the amount offered is inadequate. Similarly, if the claim is denied outright, the claimant must be offered the chance to file additional materials and appeal the denial to a higher authority. Transparency is essential in this process. It is important the system be fair and open. If a claim is denied, the claimant deserves to know the basis for the decision and have that decision provided to him or her in writing.

C. EFFECTIVE TRAINING

In order for the program to be successful, the implementer must be adequately trained. The Army provides abundant training to Judge Advocates (JAs) on how to pay claims under the FCA. This allows the claims program to run efficiently and uniformly. A program that does not operate efficiently and uniformly will not treat injured parties with respect. Therefore, the same efforts taken in training foreign claims commissioners should be used for the condolence program. The training must provide practical guidance on the applicable standard of proof and other evidentiary issues, as well as provide information on why the program is important and why the claims officer must show empathy towards victims.

Establishing guidelines for this program is obviously difficult. Valuation will always be subjective. However, guidance can be provided in the same way guidance is given to JAs in determining valuations under the FCA. A JA can be effectively trained to evaluate each case by its set of facts and circumstances to find an appropriate amount.

The training must also include guidance on the standard of proof and what evidence is required. Preponderance of the evidence is the ideal standard of proof. Given the chaos of a combat zone, requiring the victim to prove his or her case beyond a reasonable doubt or by clear and convincing evidence is untenable. Under the preponderance of the evidence standard, the officer would need to believe that it is more probable that the case is valid than it is not, in order for payment to be justified.⁹

⁹ Consider this hypothetical case: a father files a claim that his daughter kicked a metallic object in a field and the object exploded taking off one of the girl's legs. Seeing the girl, seeing a picture of the girl, or reading a copy of the medical records would all individually prove the injury. A statement from the girl or

D. CONDOLENCE PAYMENTS MUST BE ESTABLISHED AS A SEPARATE PROGRAM

To be effective, the condolence payment system must be established outside of the CERP Program. It must be funded separately so that funds are always available when needed. Also, CERP itself is not a permanent program, it will dissolve upon the cessation of combat in Iraq and Afghanistan, but the condolence payment must be made permanent like the FCA to avoid the problems reached in Iraq and Afghanistan. With a separate fund, a JA will never be required to limit or deny payments based on a lack of money. This will also ensure people receive payment in a timely manner. Timely payment is essential; often times a family's suffering continues growing exponentially when help is delayed. Also, freeing condolence payments from the CERP fund will give condolence payments more attention since they would not be overshadowed by larger reconstruction projects.

F. ESTABLISHING A UNIFORM SYSTEM

The single greatest achievement in instituting a permanent condolence payment system is that the program will be implemented uniformly. Permanence will allow the program to be established as quickly as the foreign claims commission is established at the start of any engagement—within two weeks instead of four to six months. A permanent program would necessarily be Armed Forces-wide, ensuring that it would be used the same way by all units throughout a combat zone. All victims would be treated equitably.

Without a permanent program the use of condolence payments will always be haphazard and arbitrary based on each commander's discretion. The senior commanders of an operation may or may not decide to institute a program—as CENTCOM prohibited solatia in 2003—or, senior commanders may piecemeal a new program together—as CJTF-7 did with solaitia-like. Systems put together haphazardly, without institutionalized knowledge, and without proper guidance will necessarily be implemented in a non-uniform manner. A permanent system will nullify this arbitrariness, which will demonstrate the U.S. is committed to treating innocent victims with dignity and respect and not based on the whims of certain individuals.

If a condolence payment program is not made permanent, we can expect our experience in Iraq to be repeated: months will go by before a program is introduced; some victims will not receive as much as they are entitled to; some victims will receive nothing; bitterness will fester; and, most importantly, innocent victims will continue to unnecessarily suffer beyond their initial combat-related injury.

a witness who saw the explosion would prove an explosion in a field caused the injury. Knowing that the U.S. Air Force regularly dropped cluster bombs all over Iraq and that many did not explode on impact proves the explosion was caused by a cluster bomb. Given the facts above, this case clearly meets the preponderance of the evidence standard and should be paid.

VII. CONCLUSION

Legislation is needed to institutionalize the program and provide uniformity in its application. By having a more equitable and efficient program, the U.S. will demonstrate its commitment to this issue. The reality of war is harsh, but it need not be totally unforgiving. The U.S. must know that occasionally its methods and tools of warfare result in death, injury, and destruction of property of innocent civilians. Changing that harsh reality is impossible. However, when reality strikes, and women, children, and men are sucked into the hellish results of war, there is a chance for compassion to offer a bit of light. Offering a victim or survivor the right to file a grievance allows that person to experience some measure of justice and allows the military to show empathy. When a claims officer listens to a victim express the horror of his or her suffering, the military allows that individual to feel they have a voice. The money offered will provide necessary and immediate aid, without which the victim's and survivor's suffering would multiply needlessly. With a strong condolence system, a victim will likely not view the alien Army as only the harbinger of death, but as herald of justice. Innocent civilians do nothing to bring about the ravages of war and when they suffer, they must be treated humanely. By ignoring innocent victims, the U.S. adds an unnecessary layer of animosity. The use of condolence payments will not only help the victims, it will also help the military's cause. It helps the unit gain the trust of the citizens and builds respect for America. It is an important tool that is currently misused, but one that can have far reaching effects should it be mandated in legislation and implemented wisely.