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THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 3 2010

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The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Madam Speaker:

In accordance with section 1230 of the National Defense Authorization Act for FY 2010, I enclose the DoD report on "the feasibility and the desirability of establishing general uniform procedures and guidelines for the provision by the United States of monetary assistance to civilian foreign nationals for losses, injuries, or death... incident to combat activities of the United States Armed Forces."

This report addresses each of the specific issues posed by section 1230. It includes a description of current laws, current and historic practices, to include Operations Enduring Freedom and Iraqi Freedom. It also includes a description of DoD guidance and procedures for the provision of monetary assistance, and an explanation and analysis of the advantages and disadvantages of certain uniform procedures and guidelines enumerated in section 1230.

Sincerely,

Enclosure:
As stated

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OSD 07828-10





THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 3 2010

The Honorable Joseph R. Biden, Jr.
President of the Senate
United States Senate
Washington, DC 20510

Dear Mr. President:

In accordance with section 1230 of the National Defense Authorization Act for FY 2010, I enclose the DoD report on "the feasibility and the desirability of establishing general uniform procedures and guidelines for the provision by the United States of monetary assistance to civilian foreign nationals for losses, injuries, or death... incident to combat activities of the United States Armed Forces."

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Enclosure:
As stated



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THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 3 2010

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In accordance with section 1230 of the National Defense Authorization Act for FY 2010, I enclose the DoD report on "the feasibility and the desirability of establishing general uniform procedures and guidelines for the provision by the United States of monetary assistance to civilian foreign nationals for losses, injuries, or death... incident to combat activities of the United States Armed Forces."

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Sincerely,

Enclosure:
As stated

cc:
The Honorable John McCain
Ranking Member



OSD 07828-10





THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 3 2010

The Honorable Ike Skelton
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

In accordance with section 1230 of the National Defense Authorization Act for FY 2010, I enclose the DoD report on "the feasibility and the desirability of establishing general uniform procedures and guidelines for the provision by the United States of monetary assistance to civilian foreign nationals for losses, injuries, or death... incident to combat activities of the United States Armed Forces."

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Sincerely,

Enclosure:
As stated

cc:
The Honorable Howard P. "Buck" McKeon
Ranking Member



OSD 07828-10





THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 3 2010

The Honorable Daniel K. Inouye
Chairman
Committee on Appropriations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In accordance with section 1230 of the National Defense Authorization Act for FY 2010, I enclose the DoD report on "the feasibility and the desirability of establishing general uniform procedures and guidelines for the provision by the United States of monetary assistance to civilian foreign nationals for losses, injuries, or death... incident to combat activities of the United States Armed Forces."

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Sincerely,

Enclosures:
As stated

cc:
The Honorable Thad Cochran
Ranking Member



OSD 07828-10



THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

AUG 3 2010

The Honorable David R. Obey
Chairman
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

In accordance with section 1230 of the National Defense Authorization Act for FY 2010, I enclose the DoD report on "the feasibility and the desirability of establishing general uniform procedures and guidelines for the provision by the United States of monetary assistance to civilian foreign nationals for losses, injuries, or death... incident to combat activities of the United States Armed Forces."

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Sincerely,

Enclosure:
As stated

cc:
The Honorable Jerry Lewis
Ranking Member



OSD 07828-10



REPORT TO CONGRESS

IN RESPONSE TO

SECTION 1230 OF THE NATIONAL

DEFENSE AUTHORIZATION ACT

FOR FISCAL YEAR 2010

JULY 2010

This report is submitted in response to Section 1230 of the National Defense Authorization Act for Fiscal Year 2010 providing that the "Secretary of Defense shall submit to Congress a report on the feasibility and the desirability of establishing general uniform procedures and guidelines for the provision by the United States of monetary assistance to civilian foreign nationals for losses, injury, or death... incident to combat activities of the United States Armed Forces."

As documented in this report, the Department of Defense (DoD) has developed and published guidance and procedures for providing such assistance. DoD has revised the guidance on several occasions due to the evolving nature of the experience of military commanders in the field as they seek to provide effective and appropriate monetary assistance in difficult conflict environments where it is often difficult to investigate a particular event fully. There are several authorities underlying DoD's ability to provide assistance in such cases, as detailed in Section I below, but the common factor among them is that these payments are ex-gratia; that is, they are made without DoD recognizing any legal obligation to provide such assistance. Claims paid pursuant to the Foreign Claims Act-- under which claims for damage, injury, or death resulting from combat activities are not authorized-- are also ex gratia. The Commanders' Emergency Response Program, under which condolence payments are authorized in Iraq and Afghanistan, enables U.S. forces to respond to urgent humanitarian relief and reconstruction requirements to assist the population, while solatia payments are expressions of sympathy paid to a victim or a victim's family where the local culture has such practice.

The following are the pillars, which take into account empirical factors, underlying DoD's existing guidance and procedures, and have proven to be sound and effective but which DoD seeks to improve, as warranted:

- Statutory authority to provide condolence and solatia payments, as appropriate, when it is in the national interest to do so and consistent with the goal of achieving a sound relationship with the local population and the country's government;
- The ability to adapt guidance depending on the facts and circumstances of a particular conflict, including by not providing such payments where the population of a country as a whole is at war against the United States or where such payments may be used for efforts harmful to the United States;
- The discretionary authority of a military commander in providing such monetary assistance following an investigation and report and based on the developed and published guidance;

- The provision of consistent and timely monetary assistance based on the developed and published guidance; and
- A record of each payment made and overall review of payment programs.

DoD acknowledges the significant value that the Commanders' Emergency Response Program (CERP), under which condolences payments are made, has brought with regard to operations in Afghanistan and Iraq. In Iraq, during fiscal year 2009, about \$2,000,000 was distributed for CERP battle damage awards, and almost \$2,000,000 was distributed in CERP condolence payments. In Iraq, for fiscal year 2008 approximately \$5,500,000 was distributed for CERP battle damage awards, and about \$10,000,000 in CERP condolence payments. In Afghanistan, in fiscal year 2009, just over \$1,000,000 was distributed in CERP battle damage awards, and about \$750,000 was distributed in CERP condolence payments. In Afghanistan, for fiscal year 2008, approximately \$600,000 was distributed for CERP battle damage awards, and just over \$300,000 was distributed in CERP condolence payments. (Attachment 1)

The CERP is authorized by section 1202 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163; 119 Stat. 3455)(FY 2006 NDAA), as amended, and section 9005 of the Department of Defense Appropriations Act, 2010 (Public Law 111-118). On May 10, 2010, the Deputy Secretary of Defense established a CERP Steering Committee to be chaired by the Under Secretary of Defense for Policy and the Under Secretary of Defense Comptroller to oversee the policy and strategic equities in the implementation of the CERP, and for ensuring coordination and transparency among all organizations responsible for processes related to the CERP.

I. A description of the authorities under laws in effect as of the date of the enactment of this Act for the United States to provide compensation, monetary payments, or other assistance to civilians who incur harm due directly or indirectly to the combat activities of the United States Armed Forces.

Although legal authorities exist to provide assistance for battle damage or through condolence payments, these legal authorities are limited and exist outside the formal claims adjudication process. The basic authorities for providing such payments are the CERP under which condolence payments are made, and 10 U.S.C. § 2242, under which *solatia* payments are made.

A fundamental principle embodied in the relevant U.S. claims statutes, the Foreign Claims Act (FCA), 10 U.S.C. § 2734, is that damage from combat activities generally is not compensable, whether resulting from action by an enemy or from the direct or indirect act of U.S. forces in combat. This stems from the common law principle that a

sovereign is immune from liability for its actions, except to the extent the sovereign waives that immunity. As a sovereign, the United States has exercised a limited waiver of its immunity, or authorized compensation under certain circumstances, such as prescribed in the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680), the Military Claims Act (10 U.S.C. §1733), and the Foreign Claims Act (10 U.S.C. § 2734). The United States specifically retained its immunity with regard to its exercise of military force in combat operations. In general, domestic law and the law of war do not require the United States to assume liability and compensate individuals for injuries to their person or personal property caused by its lawful military combat operations.

The Foreign Claims Act (10 U.S.C. § 2734). The Foreign Claims Act (FCA) applies only outside the United States and is the most widely used statute to pay claims in connection with noncombat foreign activities of U.S. military forces. Under the FCA, compensation is authorized for property loss and injury or death caused by service members or a civilian component of U.S. forces “[t]o promote and maintain friendly relations” with the receiving state. (10 U.S.C. § 2734(a)). The FCA does not authorize payment for claims arising from losses that result directly or indirectly from combat activities. If the claimant is the “national of a country at war with the United States or an ally of that country,” the claimant must be determined to be friendly to the United States. Claims arising from “action by an enemy” are also not payable under the FCA.

The U.S. Army has issued guidance for Iraq and Afghanistan in light of the asymmetric nature of warfare in those countries. The guidance defines combat activities narrowly, as follows: “Combat activities include actions by an enemy as well as those by the armed forces of the United States in combat, including maneuver into and out of combat by military ground forces. Combat involves hostile fire, and periods without hostile fire when U.S. forces and enemy forces occupy positions from which they can and will engage each other if presented the opportunity, such as lulls in hostile fire for weapons reloading, caring for wounded, improving a current fighting position, and maneuvering to obtain a better position. Combat activities include activities by snipers looking to acquire targets, and by patrols who, due to intelligence gathered prior to or during the patrol, expect to encounter a hostile force. Combat activities include U.S. forces engaging unknowns at vehicle and other security checkpoints per the rules of engagement. Combat activities can take place irrespective of a formal declaration of war.” The Army is currently training all Foreign Claims Commissions using this definition of combat activities, which will be included in the forthcoming revision to the Army Regulation 27-20.

Under the FCA, claims must be presented within two years of accrual. Army Regulations require that the claims be reduced to writing, and, in general, stated in the local currency. An FCA claim is adjudicated, in large part, under the liability and damages laws, as well as customs, of the host country in which it arose. A claimant is given an opportunity to submit additional information prior to a final decision and to

request reconsideration of a final decision. A written settlement agreement is entered into upon acceptance of an award. (*See generally* U.S. DEPARTMENT OF THE ARMY, REG. 27-20, CLAIMS.) As a general rule, the FCA does not apply in foreign countries where the United States has another agreement that “provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of an armed force of the United States,” e.g., a Status of Forces Agreement (SOFA)(10 U.S.C. Section 2734a)

FCA claims are thoroughly evaluated through the establishment of one to three-member Foreign Claims Commissions (FCCs), as needed. (See attachment 2 for charts on FCA payments in Iraq, Afghanistan and Haiti.) Military members, typically military attorneys, are appointed to FCCs, normally from among personnel who deploy with units and assist commanders on the ground. This arrangement provides maximum familiarity with the unit operations, commanders, and local population. Accidents and incidents can be quickly identified, rapidly investigated, and resolved in a timely fashion. On-scene commanders use their FCCs as an effective tool to maintain good relations with the local government and population.

In foreign countries where the Army is responsible for paying claims, including Iraq and Afghanistan, a single FCC has the authority to pay claims up to \$15,000; three-member FCCs are appointed to pay claims up to \$50,000; the Commander of the Army Claims Service can pay claims up to \$100,000; and the Secretary of the Army (or his designee) approves payment of claims in excess of \$100,000. The Navy and Air Force have similar hierarchical adjudication authorities.

The FCA does not authorize payment for certain claims, including harm caused by the acts of claimant negligence, events wholly covered by insurance or contract, payments deemed not in the best interests of the United States or that are contrary to the intent of the statute, claims for real estate, and, most significantly, claims directly arising out of combat operations (the combat exclusion).

Although there is scant legislative history on the combat exclusion, Federal courts have analyzed it in various contexts over the years. In doing so, they have reasoned that the primary purpose and operational justification for exempting combatant activities from claims in tort is because such activities should be free from the hindrance of possible civil suit for damages. *Johnson v. U.S.*, 170 F.2d 767,769 (9th Cir. 1948). All of the traditional rationales for tort law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors – are singularly not applicable in combat situations. The policy embodied by the combatant activities exception is the elimination of the tort from the battlefield, to preempt state or foreign regulation of federal wartime conduct, and to free military commanders from the burdens of risk of civil suit.

Solatia Payments (10 USC § 2242, AR 27-20, AFI 51-501, and JAGINST 5800.7D). Solatia payments are made to a victim or a victim's family to express sympathy for injury or loss sustained. They are limited, separate from the CERP, and are funded from unit operations and maintenance (O&M) funds. Solatia payments are immediate and generally nominal. Prompt payment is intended to ensure the goodwill of the local population. For solatia payments to be authorized, 10 U.S.C. § 2242 requires the payments be in accordance with local custom. Military Department regulations therefore require evidence of local custom that establishes an expectation of such payments. The custom may establish an expectation of payment, even if, by western legal standards, the injured party was the primary or even the sole cause of the injury or death.

In 2001, the U.S. Central Command (USCENTCOM) Staff Judge Advocate requested a "finding" from the DoD General Counsel that solatia payments are customary in the USCENTCOM area of responsibility. The DoD Office of the General Counsel (OGC) did not make such a finding, but did state in a memorandum of November 24, 2001 that it interposed no objection to the payment of solatia in Iraq and Afghanistan in appropriate cases. The memorandum states:

Prior to determining whether to make a solatia payment in any particular instance, however, commanders should be reminded that the amount and manner of such payments must indicate that they are token or nominal payments made in accordance with local custom as an expression of remorse or sympathy toward a victim of his/her family, that they are not an admission of legal liability or fault and are typically made soon after the injury or damage is incurred. Commanders also should be reminded that such payments are not authorized to be made from claims expenditure allowances, but may be made from local operation and maintenance funds. (See, 10 USC § 2242, AR 27-20, AFI 51-501, and JAGINST 5800.7D).

Commanders' Emergency Response Program (CERP). The primary purpose of the CERP is "to enable commanders in Iraq and Afghanistan to respond to humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist" the population. (Section 1202(e) of FY 2006 NDAA.) In Iraq, the CERP was originally funded with captured Iraqi assets. However, since FY 2004, Congress has appropriated funding for the Iraq CERP and a similar program in Afghanistan.

The CERP authorizes condolence payments and assistance for battle damage. CERP payments may be used for damage caused by U.S. or coalition forces. These types of payments are typically not authorized by the FCA, and they are intended as sympathy payments or to meet immediate humanitarian needs. The CERP is administered by commanders. Generally, locally imposed orders govern the use of CERP funds (for

example, permitting brigade commanders and division commanders to authorize payments up to specified amounts). The CERP is not required to be administered by the same persons who administer FCA claims.

II. A description of the practices in effect as of the date of enactment of this Act for the United States to provide ex gratia, solatia, or other types of condolence payments to civilians who incur harm due directly or indirectly to the combat activities of the U.S. Armed Forces.

Ex-Gratia Payment-- An *ex-gratia* payment is made without the giver recognizing any liability or legal obligation. Payments are made *ex-gratia* when a government is prepared to recognize an injurious event to a victim, but is not willing to admit governmental liability for causing the event or to compensate for it. Solatia payments and condolence payments under CERP are *ex-gratia* as are battle damage payments funded by the CERP. Claims payments under the FCA-- under which claims for injury, death, or damage as a result of combat are not authorized-- are *ex-gratia*.

Solatia Payments-- Solatia payments are payments made in money or in-kind to a victim or victim's family as an expression of sympathy or recognition of a loss. Solatia is based upon an existing common local custom.

In a deployed setting, it must first be determined what the local customs and laws concerning solatia are, and then whether such payments may be authorized. Prior to CERP, solatia payments were made in Iraq and Afghanistan. They are not claims payments and are not based upon any aspect or acceptance of legal liability by the United States.

Commanders' Emergency Response Program (CERP)-- Condolence payments for civilians injured or killed by U.S. forces are an expressly authorized use of CERP funds, as are funds for reconstruction purposes. The current operational guidance on the use of CERP in Iraq is the United States Forces-Iraq (USF-I) CJ8 Standard Operating Procedure (SOP), Money As A Weapon System (MAAWS), dated March 1, 2010. Similarly, the current operational guidance on the use of CERP in Afghanistan is U.S. Forces-Afghanistan (USFOR-A) PUB 1-06, Money As A Weapon System-Afghanistan (MAAWS-A), dated December 2009. These publications define "Condolence Payments" as "[p]ayments to individual civilians for the death or physical injury resulting from U.S., coalition, or supporting military operations not compensable under the Foreign Claims Act" and "Battle Damage Repair" as "[p]rojects to repair, or make payments for repairs, of property damage that results from U.S., coalition, or supporting military operations and is not compensable under the Foreign Claims Act." (USFI, MAAWS, March 1, 2010, at B-14).

The MAAWS guidance requires close coordination to ensure funds are applied consistently to achieve desired results. It provides detailed procedures for ensuring that CERP funds are used appropriately, and that payments under CERP are reported accurately to higher headquarters.

Condolence payments under CERP are not solatia payments and should not be referred to as such. CERP payments in Iraq and Afghanistan are appropriated by Congress and, like solatia payments, are paid out of a unit's operations and maintenance account. These are not claims payments and are not based upon any aspect or acceptance of legal liability by the United States. Moreover, since 2006 in Iraq and Afghanistan, condolence payments under CERP have been the primary means by which monetary assistance is paid to individual civilians for death or physical injury caused by U.S. forces.

Other Source of Payments-- Congress created the Marla Ruzicka Iraqi War Victims Fund and a similar fund in Afghanistan. (See the Emergency Supplemental Appropriations Act for Fiscal Year 2004, the Global War on Terror, and Tsunami Relief, 2005 (Public Law 109-13), and Sec. 2108 of the Emergency Supplemental Appropriations Act for Defense) The purpose of these funds is to provide humanitarian aid and assistance to families of victims of conflict and to provide aid to their communities. To date, \$50 million has been appropriated for Iraq and \$44 million appropriated for Afghanistan. The Funds are administered by the U.S. Agency for International Development (USAID).

III. A discussion of the historic practice of the United States to provide compensation, other monetary payments, or other assistance to civilian foreign nationals who incur harm due directly or indirectly to combat activities of the United States Armed Forces.

Typically, under domestic law and the law of war, aliens may not claim compensation for belligerent actions during combat. Beginning in 1896, the Department of State opined that "while a state was not obliged to make compensation . . . indemnities had in many cases been voluntarily paid . . . to the effect that a sovereign ought to show an equitable regard for suffering by the ravages of war" (J. Walterstein, Note, Coping With Combat Claims: An Analysis of the Foreign Claims Act's Exclusion, Cardozo, J. Conflict Resolution 11:1, 319-52, citing John Bassett Moore, A Digest of International Law Section 1032 (1906)). Congress has authorized the payment of claims for harm incident to combat on an ad hoc basis at various times throughout history.

General Pershing advocated a claims statute for compensation for foreigners during World War I who were injured or had property damage from motor vehicle

accidents and other causes. In April 1918, Congress passed The Indemnity Act (American Forces Abroad), ch. 57, Pub. L. No. 65-133, 40 Stat. 532 (1918), *repealed by* Act of Apr. 22, 1943, 57 Stat. 66, § 5 (1943) permitting claims for property damage, personal injury, or wrongful death by French citizens and other Europeans not at war with the United States. In 1941, the United States offered to help defend Iceland from German encroachment, but Iceland required that the United States agree to provide compensation to its nationals for damage caused during the defense. In 1942, Congress enacted the Armed Forces Damages Settlement Act (Pub. L. No. 77-393, 55 Stat. 880 (1942)) “[t]o provide for the prompt settlement of claims for damages occasioned by Army, Navy, and Marine Corps forces in foreign countries,” specifically authorizing claims in Iceland. Later that year, the claims statute was expanded to include all of the European Theater of Operations. Under this statute, combat claims were routinely denied. In April 1943, Congress specifically amended the law, stating “no claim resulting from action by the enemy or resulting directly or indirectly from any act by our armed forces engaged in combat, shall be allowed under this Act.” The FCA was codified in 1956 with the combat exclusion in place.

In Vietnam, the military used “assistance in kind” funds, similar to CERP, to pay claims excluded by the combat exception. In Grenada, the Army Claims Service, in conjunction with Department of State (DoS) and USAID, implemented a program to settle combat damage claims outside the FCA with USAID funds similar to the Marla Ruzicka fund noted above. In Panama, the DoS provided \$200,000 in funds to the new Panamanian government to settle claims barred by the combat exception.

The CERP was enacted in 2004 for use in Iraq in response to the immediate humanitarian and infrastructure needs following the invasion. It was initially funded by the capture of millions of dollars in Baath Party funds, and later continued through congressional authorization and funding.

Therefore, at several critical junctures, including during World War I, World War II, and the Vietnam War, the United States has recognized that providing monetary assistance for combat-related claims can promote the principal goal of obtaining and maintaining the support of the local population during major conflicts, low intensity conflicts and other operations.

IV. A discussion of the practice of the United States in Operation Enduring Freedom and Operation Iraqi Freedom to provide compensation, other monetary payments, or other assistance to civilian foreign nationals who incur harm due directly or indirectly to the combat activities of the United States Armed Forces, including the procedures and guidelines used and an assessment of its effectiveness. This discussion will also include estimates of the total amount of funds disbursed to civilian

foreign nationals who have incurred harm since the inception of Operation Iraqi Freedom and Operation Enduring Freedom. This discussion will also include how such procedures and guidelines compare to the processing of claims filed under the Foreign Claims Act.

DoD has developed and published guidance and procedures for making and documenting solatia and CERP condolence and battle damage payments in Iraq and Afghanistan, and that guidance has been revised over time. (See References cited for such guidance documents.) In accordance with that policy guidance, commanders exercise broad discretion for determining whether a payment should be made and the appropriate payment amount. When determining whether to make payments and payment amounts, commanders consider the severity of injury, type of damage, and property values based on the local economy as well as any other relevant cultural considerations.

The Government Accountability Office (GAO) studied DoD's Operation Iraqi Freedom and Operation Enduring Freedom practices and its findings through 2007 are in GAO Report 07-699, *The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan*. The GAO reported favorably on two findings:

- DoD has established guidelines for making and documenting solatia and condolence payments, and that guidance has changed over time;
- Within parameters established by guidance, commanders exercise broad discretion for determining whether a payment should be made and the appropriate payment amount.

The GAO also made two recommendations: 1) to provide greater transparency on the use of CERP funds for condolence payments; and 2) that the Secretary of Defense direct the Under Secretary of Defense (Comptroller) to do the following:

- Revise CERP guidance to clarify the definitions as to what is reported in the two CERP categories: (1) condolence payments and (2) battle damage payments;
- Require that document reference numbers be provided for payments to allow DoD to determine whether expenditures of CERP funds are appropriately categorized and to permit DoD to obtain detailed information for analysis and reporting, as appropriate.

DoD concurred with both recommendations by revising the Office of the Under Secretary of Defense (Comptroller) CERP guidance in 2007. DoD continually updates CERP guidance in response to internal reviews and audit recommendations.

Operation Iraqi Freedom-- From 2003 until 2006, guidance for making solatia payments became more specific in terms of payment amounts in Iraq. In 2003, \$2,500 was the maximum payment level regardless of type of harm. In 2004, maximum payment levels were based on type and degree of harm: death (\$2,500), disabling injuries resulting in permanent disability or significant disfigurement (\$1,500), and minor injuries (\$200+).

The March 1, 2010 MAAWS authorizes condolence payments under CERP for death, injury, or battle damage in amounts up to \$2,500 for each death, injury, and incident of property damage. For example, two members of the same family are killed in a car when the car is struck by U.S. Forces. The head of that household could receive a maximum of \$7,500 in payment - \$2,500 for each death and \$2,500 for the vehicle.

The \$2,500 payment authority resides with the Brigade Level Commander, and may be delegated. Extraordinary cases involving payments from \$2,500 up to \$10,000 must be approved by the first General Officer in the chain of command. Condolence payments over \$10,000 may be approved by the Deputy Commanding General for Operations (DCG-O), U.S. Forces-Iraq (USF-I). These authorities may not be delegated and are for "extraordinary cases." What constitutes an "extraordinary case" is not defined but is properly within the discretion of the approval authority.

Upon commander approval for the condolence payment, the pay agent may draw cash in Iraqi dinar or U.S. dollars, if justification is provided. The recipient of the condolence payment will sign a roster specifying the nature of the payment made. The project purchasing officer will prepare a memorandum providing a description and explanation for the condolence payment. The report will include the date that the incident occurred, the city and province where the incident occurred, and a detailed description of the incident. The commander then signs this memorandum, and all of the records are maintained as part of the project file. (*See Generally* MAAWS, March 1, 2010).

Operation Enduring Freedom--In Afghanistan, guidance for making and documenting solatia payments has become more descriptive in terms of processes and roles and responsibilities, but payment amounts have not changed over time.

The MAAWS-A CERP guidance for Afghanistan is similar to that of Iraq. Condolence payments, and payments for battle damage, up to \$2,500 may be authorized by an O-5 Battalion Level Commander. Payments between \$2,500 and \$5,000 must be authorized by an O-6 Brigade Level Commander, and payments between \$5,000 and \$10,000 must be authorized by the first General Officer in the chain of command; this authority may not be delegated. Payments over \$10,000 require approval of the Deputy Commanding General - Sustainment (DCG-S) or Regional Command-East Commander.

The MAAWS-A provides that Afghan and U.S. dollar currencies may be used to make payments. There is a strong preference, however, for Afghan currency. Payments of over \$5,000 should be made in Afghan currency. Payments may be made through cash, electronic funds transfer, or a check drawn against a limited depository account.

Upon a commander's approval of the condolence payment, the pay agent may draw cash in Afghan or U.S. dollar currencies, if justification is provided. The recipient of the condolence payment will sign a roster specifying the nature of the payment made. The project purchasing officer will prepare a memorandum providing a description and explanation for the condolence payment. The report will include the date that the incident occurred, city and province where the incident occurred, and a detailed description of the incident. The commander then signs this memorandum, and all of the records are maintained as part of the project file. (*See Generally* MAAWS-A, December 2009).

As discussed above, the FCA has been used to a great extent in Operation Iraqi Freedom and Operation Enduring Freedom to compensate local nationals. DoD procedures for making FCA claims payments are detailed in the Section I, above. The attached charts show the amounts paid under the FCA and the CERP in Iraq and Afghanistan by the Army during the past five years.

- V. A discussion of the positive and negative effects of using different authorities, procedures, and guidelines to provide monetary assistance to civilian foreign nationals, based upon the culture and economic circumstances of the local populace and the operational impact on the military mission. This discussion will also include whether the use of different authorities, procedures, and guidelines has resulted in disparate monetary assistance to civilian foreign nationals who have incurred substantially similar harm, and if so, the frequency and effect of such results.**

Positive effects of using different authorities, procedures, and guidelines to provide monetary assistance to civilian foreign nationals:

Having multiple, fiscally sound assistance procedures provides commanders the needed flexibility to accomplish the mission. As demonstrated in Iraq with the authorization of CERP funds, different assistance authorities can be created and tailored to suit a specific operational environment. Condolence payments under the CERP and solatia payments are not interchangeable, however, and the assistance authorities utilized to date in different theaters generally complement one another, and have not led to a disparity in results.

In areas where local custom recognizes such payments, solatia is a ready (and historically validated) means for U.S. Forces to build good will. Solatia payments are available in certain circumstances that condolence payments under CERP are not. For example, solatia payments may be made even when there is uncertainty regarding the cause of the damage. Further, condolence payments under the CERP are only authorized for use in Afghanistan and Iraq, whereas solatia payments may be made wherever local custom supports its use.

Condolence and battle damage payments under the CERP are available in many situations where solatia payments are not. Solatia payments are limited to nominal or token payments, whereas in certain circumstances condolence payments under the CERP can surpass \$10,000.

Creating a single compensation system designed to apply equally across all operational environments could prove to be unresponsive and cumbersome, and could prevent the U.S. forces from having the necessary flexibility as they move from one operational environment to another.

For the many reasons underlying the combat exclusion in the FCA, payments for harm incident to combat are not always advisable. Symbolic expressions of sympathy or condolence payments may be inappropriate for future operations because of mission objectives, geographic location, local populace attitudes, or U.S. policy considerations. A statutory requirement to make such payments would be problematic in such a situation.

Negative effects of using different authorities, procedures, and guidelines to provide monetary assistance to civilian foreign nationals:

Having various authorities to make sympathy payments can sometimes lead to discrepancies in payments and the timeliness of payments. To mitigate these potential negative effects, uniform and consistently applied guidance should govern the evaluation of certain categories of injury or damage. Records should be kept so that future claimants' allegations can be searched to safeguard against duplication, and for purposes of review and comparison so as to ensure and improve appropriate payment amounts. Additional points with respect to record keeping are noted at Section VII, below.

Through the development of guidance and procedures, DoD has taken measures to ameliorate possible discrepancies that may arise; for instance, through the setting of thresholds for certain types of injuries. DoD has not found the use of different authorities to cause problems in its operations in Iraq and Afghanistan.

VI. A discussion of the positive and negative effects of establishing general uniform procedures and guidelines for the provision of such assistance, based

upon the goals of timely commencement of a program of monetary assistance, efficient and effective implementation of such program, and consistency in the amount of assistance in relation to the harm incurred. This discussion will also include whether the implementation of general uniform procedures and guidelines would create a legally enforceable entitlement to “compensation” and, if so, any potential significant operational impact arising from such an entitlement.

Positive effects of establishing general uniform procedures and guidelines for the commencement of a program of monetary assistance:

Establishing general uniform procedures and guidelines would promote consistency and predictability. A uniform approach would eliminate the potential negative effect associated with disparate payment amounts or processing times or procedures.

Negative effects of establishing general uniform procedures and guidelines for the commencement of a program of monetary assistance:

Creating a one-size-fits-all set of additional or uniform criteria or standards could to be counter-productive or unwieldy.

Because monetary payments for harm incident to combat may be harmful in many situations, e.g., by having the practical effect of funding the enemy, by encouraging the enemy to act indiscriminately, or by placing excessive emphasis on the damages that could result from military action (making increasing difficult command decision-making), uniform procedures and guidelines could well result in endangering the mission while simultaneously failing to benefit the individuals that the assistance is intended to help.

It is appropriate to provide general guidance at the Departmental-level to commanders, e.g., guidance as to appropriate payment amounts. Commanders need the discretion, however, to determine whether the provision of monetary assistance is appropriate given the facts and circumstances they find.

It is unclear whether the implementation of general uniform procedures and guidelines would create a legally enforceable entitlement to “compensation”. However, were a legally enforceable entitlement to compensation to arise, the potential for adverse operational effects arising from such an entitlement would be significant. The rationale underlying the combat-exclusion in the FCA remains viable, and establishing a legally enforceable entitlement to “compensation” would be a de facto override of the FCA exclusion.

See also the positive and negative effects described in Sections V and VII.

VII. Assuming general uniform procedures and guidelines were to be established, a discussion of the following:

a. Whether such assistance should be limited to specified types of combat activities or operations, e.g., such as during counterinsurgency operations.

Assistance to local nationals should not be limited to specified types of combat activities or operations.

We do not believe it advisable to seek to distinguish among different types of combat activities as a basis to establish uniform procedures and guidelines. It would be difficult for DoD to establish and define different types of combat activities, and it would be difficult for military personnel to apply these standards. This is especially true where diverse operations are conducted in areas heavily populated by civilians, e.g., reconstruction, peacekeeping operations, and humanitarian missions.

We should avoid the establishment of typologies and distinctions among and between different types of combat. Indeed, such parsing may well unintentionally create more confusion than clarity. Breaking out "combat activities" into "counterinsurgency," "counterterrorism," "offensive," or "defensive" could cause confusion, even within the U.S. Military Departments, and likely lead to allegations of uneven treatment among recipients of awards.

b. Whether such assistance should be contingent upon a formal determination that a particular combat activity/operation is a qualifying activity, and the criteria, if any, for such a determination.

A formal determination could be time consuming and impractical given combat constraints. Several definitions are available to aid the commander's interpretation of "combat activity".

Army Regulation 27-20 defines combat activities as "activities resulting directly or indirectly from action by an enemy, or by the U.S. Armed Forces engaged in, or in immediate preparation for, impending armed conflict." The Military Claims Act (10 U.S.C. §2733) provides exemplary categories of activities that would be considered "combat" activities.

c. Whether a time limit from the date of loss for providing such assistance should be prescribed.

Establishing a time limit may be appropriate. The Federal Tort Claims Act and the Military Claims Act set a two-year statute of limitations. An unlimited time period would expose the United States to complaints remote in time from the alleged events and accompanying investigation and verification difficulties, particularly as harm that occurs within "combat" operations is difficult to investigate.

DoD policy allows military commanders the discretionary authority to waive the time limit when circumstances warrant. Therefore, an administrative review rather than a statutory limit may be more appropriate as it would provide more flexibility.

d. Whether only monetary or other types of assistance should be authorized, and what types of nonmonetary assistance, if any, should be authorized.

Commanders should have the flexibility to provide monetary or other types of assistance, as appropriate. Repair-in-kind may be preferable to monetary payments in certain situations. The military has found this flexibility useful, e.g., the DoD Rewards Program allows commanders to compensate those providing information with monetary payments or payments-in-kind, as the circumstances warrant.

Different currencies should be available for monetary assistance because differing operational environments may make one type of currency preferable to another. For example, solatia payments in Iraq were initially made in U.S. dollars, not Iraqi dinars. At that time the U.S. dollar was more readily available for distribution, and the Iraqis preferred the reliability and acceptability of the U.S. dollar in the local economy. As the operational environment shifted, CERP guidance evolved so that Iraqi dinar and U.S. dollar currencies were available, but that the Iraqi dinar was a preferred method of payment to decrease Iraqi reliance on the U.S. dollar.

Commanders may be able to dispose of excess unit property to claimants as a form of assistance. This is occurring in Iraq as we draw down our forces.

In-kind payments should be available as some property is more readily ascribed a value in-kind, especially where local custom dictates livestock or other in-kind item as the appropriate condolence/solatia form of monetary assistance, as opposed to competing judgments as to a monetary value (for example, date-producing palm trees or a camel).

The use of other options for expressing sympathy should be available. For example, in the death of a very wealthy sheikh, the payment of \$2,500 dollars was irrelevant and potentially insulting, so the military commander considered such alternatives as a plaque on a local school in his name, a public works project, and a simple medallion and certificate ceremony to recognize the significant loss of the sheikh to the local community.

- e. **Whether monetary value limits should be placed on the assistance that may be provided, or whether the determination to provide assistance and, if so, the monetary value of such assistance, should be based, in whole or in part, on a legal advisor's assessment of the facts.**

There should be administrative monetary value limits on the assistance that may be provided. DoD has found the monetary limits established through its policy helpful and adequate. These limits may need to be changed from conflict to conflict and from theater to theater, however.

The legal advisor's assessment of the facts is helpful. The legal advisor helps ensure that payments are made in accordance with applicable law, regulations, and orders authorizing or prohibiting such payment. They help maintain consistent application of solatia and condolence payment amounts for category and type of injury within an operational area.

- f. **Whether a written record of the determination to provide or not provide such assistance should be maintained and a copy made available to the civilian foreign national.**

A written record of the determination to provide or not provide such assistance should be maintained by the commander, and notice should be made available to the civilian foreign national, when appropriate. This record should be retained with the awarding unit for internal and higher reporting and consolidation of payment statistics, amounts, and data. The maintenance of records helps account for the appropriated funds spent, and helps ensure that future fraudulent "copies" of the same claim are not paid.

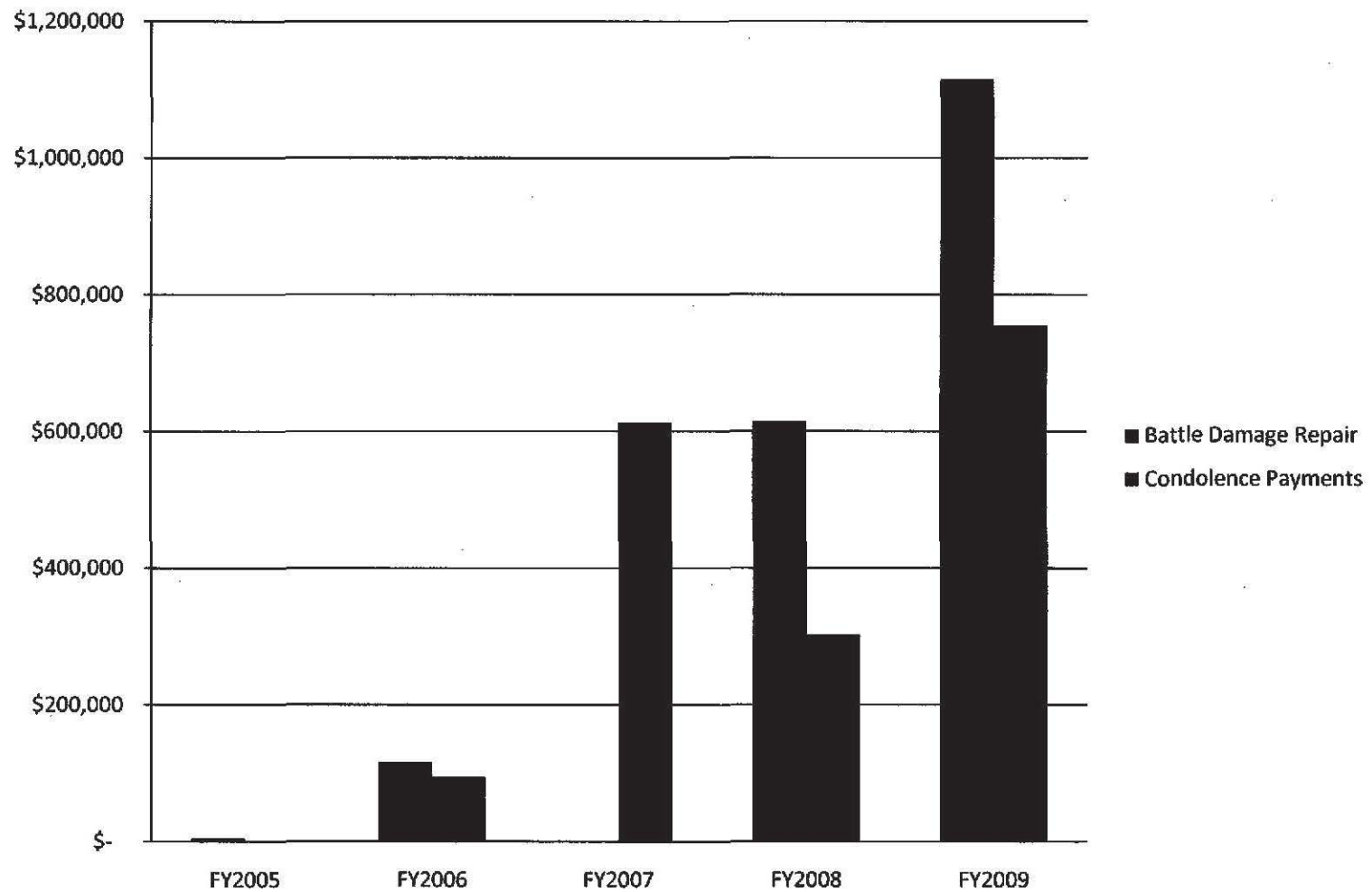
Copies of this written record should not be made available to the civilian foreign national, however. Portions of such records may contain classified information, and providing such a copy of the record could create additional bases for "appeal." Moreover, such a written record may well contain internal deliberative and candid assessments by attorneys and other U.S. officials. Providing a written record has previously provided an opportunity for forgery as well as providing the enemy an Information Operations ability to create the perception that the United States is wrongfully not compensating claims.

- g. **Whether in the event of a determination to not provide such assistance the civilian foreign national should be afforded the option of a review of the determination by a higher ranking authority.**

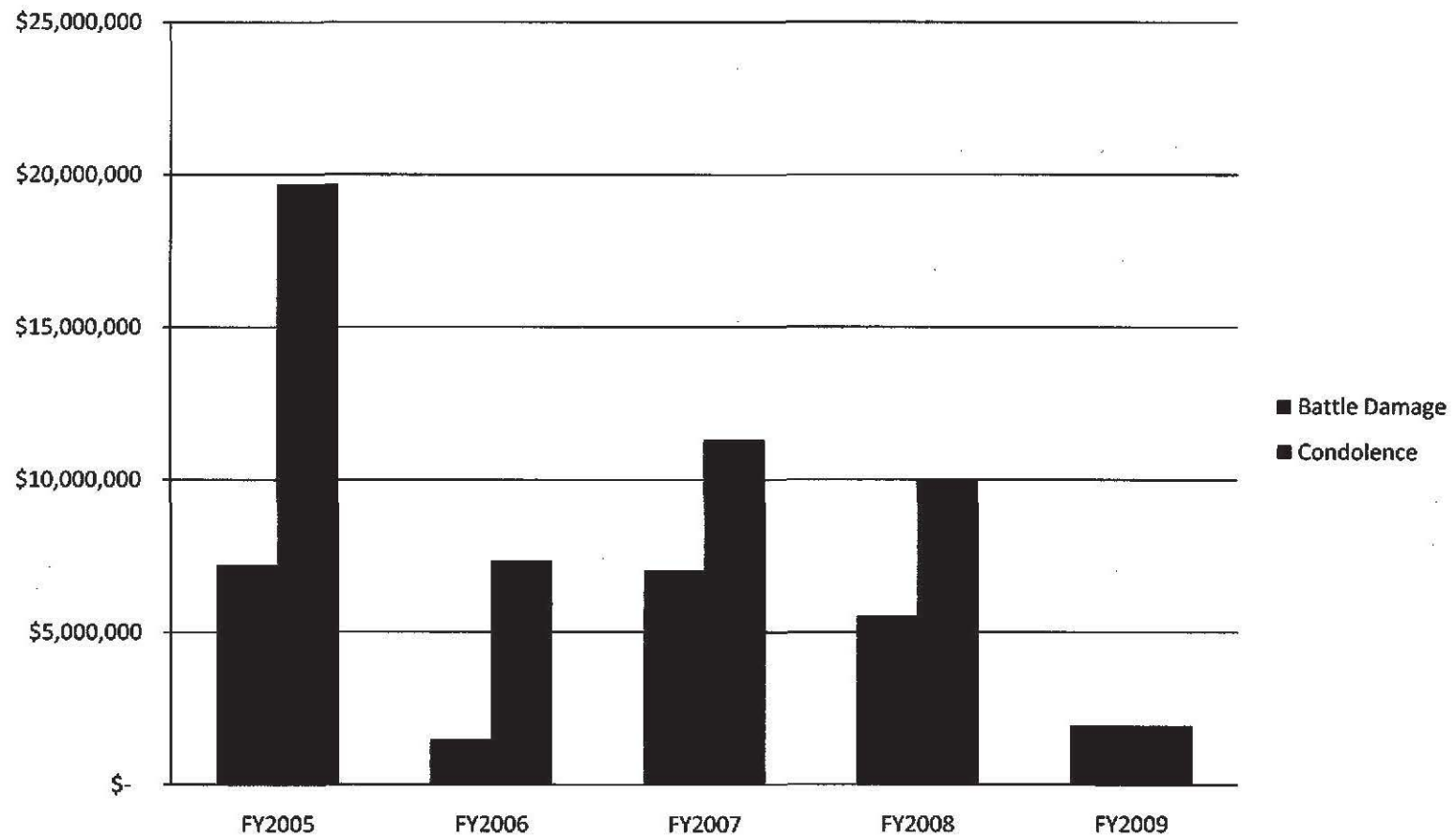
No. The FCA provides foreign nationals with an opportunity to request reconsideration. This is a helpful and value-added aspect of the FCA process. As part of its oversight duties, the CERP Steering Committee may wish to consider having a panel

in the field review payment awards as a means of ensuring consistency, transparency, and integrity of the system as a whole, but not necessarily a review for the purpose of an appeal by that civilian foreign national for that person's particular case.

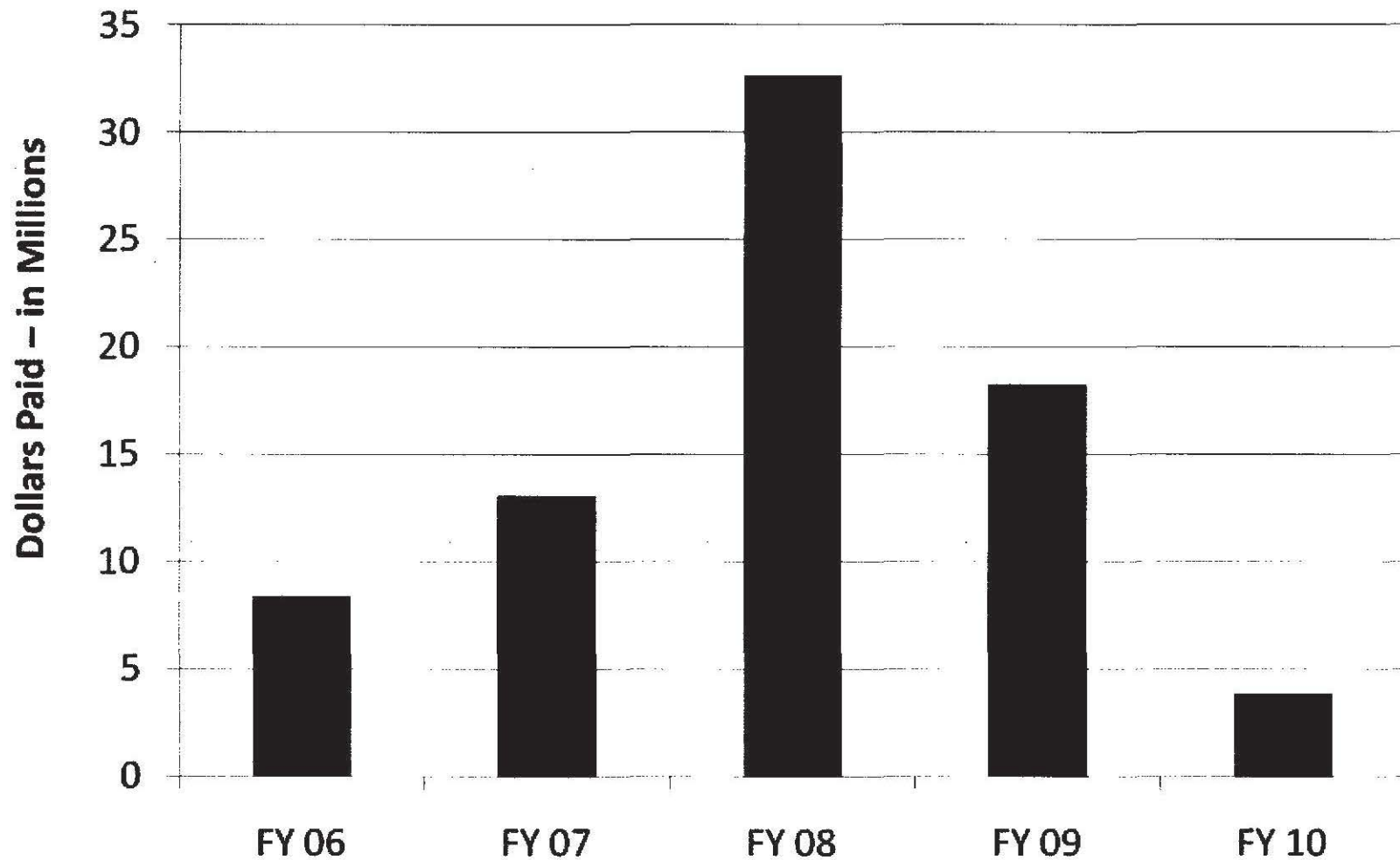
CERP BATTLE DAMAGE AND CONDOLENCE PAYMENTS IN AFGHANISTAN



CERP BATTLE DAMAGE AND CONDOLENCE PAYMENTS IN IRAQ

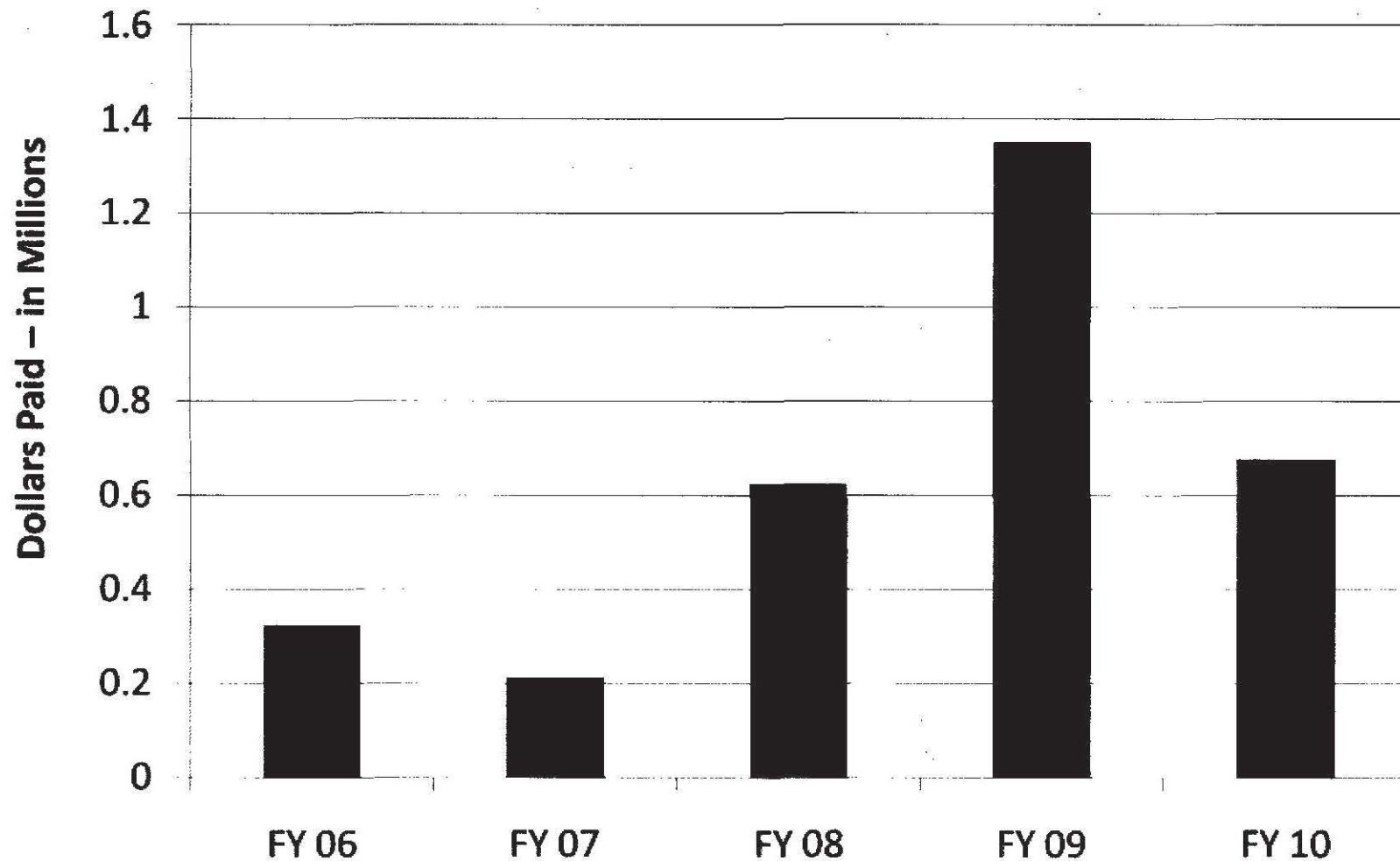


Foreign Claims Paid - Iraq



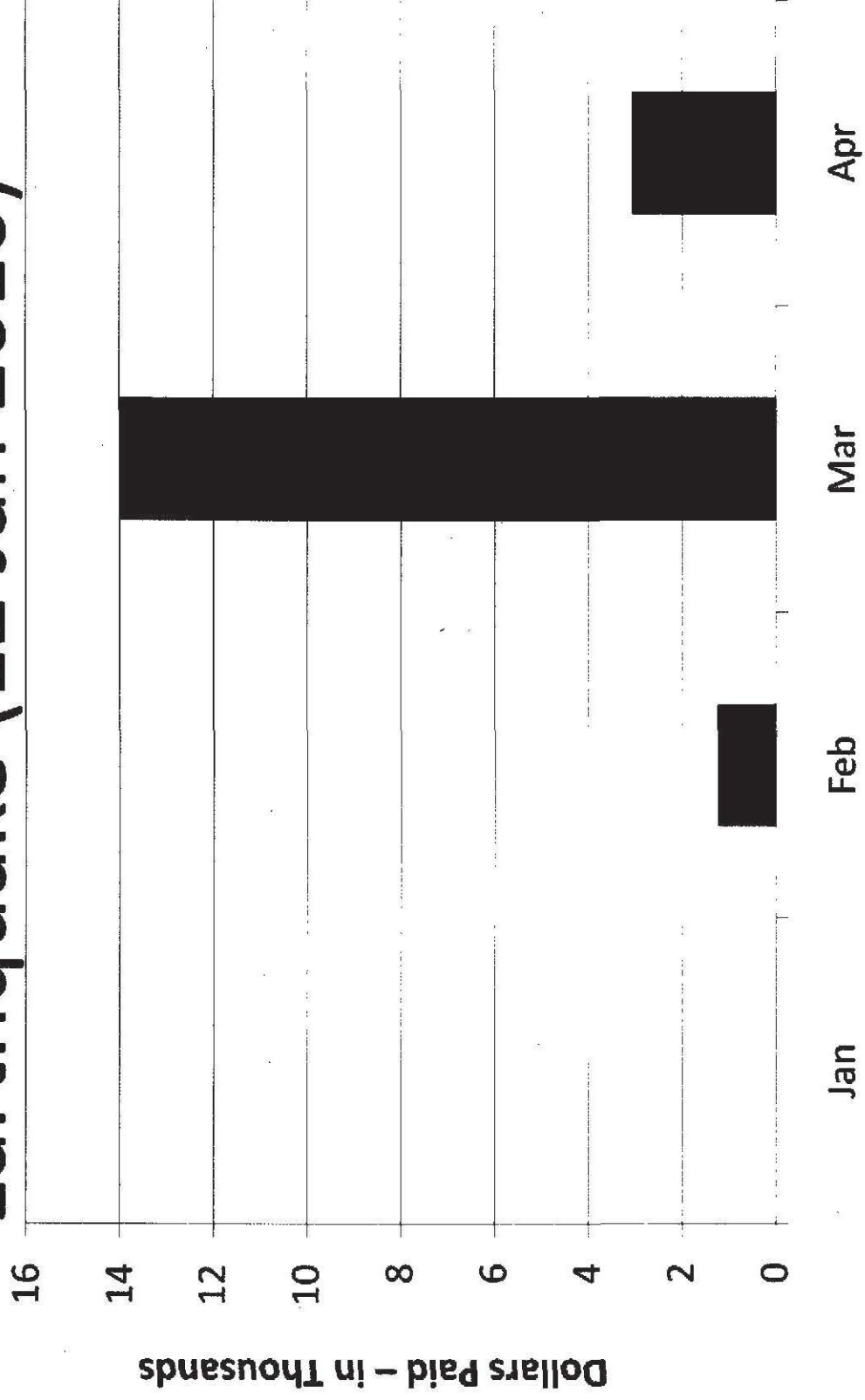
FY 10 figures represent claims through 31 Mar 10

Foreign Claims Paid - Afghanistan



FY 10 figures represent claims through 31 Mar 10

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