THE ECONOMIC EFFICIENCY OF THE ARMY'S MANEUVER DAMAGE CLAIMS PROGRAM: COARSE, BUT NO CIGAR

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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54TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 2006

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It is my belief that the failure of economists to reach correct conclusions about the treatment of harmful effects cannot be ascribed simply to a few slips in analysis. It stems from basic defects in the current approach to problems of welfare economics. What is needed is a change of approach.[1]

I. Introduction

The U.S. Army Claims Service, Europe employs Mr. Craig Walmsley, a civilian engineer who coordinates and investigates maneuver damage claims. During the preparation for a scheduled training maneuver by a cavalry squadron stationed in Germany, Mr. Walmsley contacted the commander to discuss steps that could be taken to reduce the maneuver damage costs.[2] Mr. Walmsley indicated that the damage caused by the tracked vehicles could be dramatically reduced if the squadron would replace their worn track pads[3] with new track pads.[4] The squadron commander was willing to replace the track pads, as the cost to replace the track pads was marginal when compared with the high costs of the damage that the tracked vehicles likely would have caused without the replacement.[5] Although this

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[1] Ronald Coase, *The Problem of Social Cost*, 60 J.L. & ECON. 1, 21 (1960). Professor Ronald Coase received the Nobel Prize in Economic Sciences in 1991 "for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure and functioning of the economy." The Bank of Sweden Nobel Prize in Economic Sciences in Memory of Alfred Nobel 1991, http://nobelprize.org/economics/laureates/1991/ (last visited Mar. 3, 2006).

[2] Telephone Interview with Aletha Friedel, Chief, Eur. Torts Branch, U.S. Army Claims Serv., Eur., in Mannheim, F.R.G. (Jan. 28, 2006) [hereinafter Friedel Interview].

[3] Track pads are the rubberized part of a tracked vehicle's metal track, which makes contact with the ground or road. If the rubberized track pad is not present, the metal will cause more damage to the ground or road. *See generally* Red River Army Depot, Rubber Products Operations, https://www.redriver.army.mil/Rubber/RRADRubberProducts.htm (discussing track shoes, track pads, and the replacement process) (last visited Feb. 15, 2006).

[4] Friedel Interview, *supra* note 2.

[5] *Id.*

example had a positive outcome, it shows a flaw in the current overseas maneuver damage claims process. Commanders are not necessarily aware of the costs imposed by their maneuvers. Because they do not pay for those costs, they are not required to take the damage into consideration when they plan their maneuvers. In this case, because Mr. Walmsley found a reasonable commander who was willing to spend his unit funds to save another part of the Army from spending even more,[6] a more efficient outcome occurred. This is not always the case.[7] Commanders, whether during an overseas training maneuver or a deployed operational maneuver, do not always take into consideration all the costs of their maneuvers.[8] Regardless of whether the failure to take the costs into consideration is the result of a lack of information or is intentional, the result is often an inefficient allocation of resources.

This paper proposes to modify the source of funding for overseas maneuver damage claims from the U.S. Army Claims Service (USARCS) to the unit responsible for causing the damage. Law and Economic theory supports this proposed change. The underlying Law and Economic theory, relying heavily on the Coase Theorem,[9] will be discussed. Then the underlying statutory mechanisms for paying overseas maneuver damage claims will be outlined. Historic trends and Army doctrine related to maneuvers will be presented. Finally, the Law and Economic theory will be applied to the overseas maneuver damage claims mechanisms. The outcome of this analysis is that if overseas maneuver damage claims were

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[6] Currently, funds to pay for maneuver damages come from the U.S. Army Claims Service, not from the unit that caused the damage. *See* discussion *infra* Part III.D.

[7] Friedel Interview, *supra* note 2.

[8] *Id.*

[9] *See* discussion *infra* Part II.A.2.

to be paid with funds directly from the Operations and Maintenance[10] budget of the maneuvering unit, rather than from USARCS funds, commanders would have to take those costs into consideration, resulting in a more efficient outcome.

II. Law and Economic Analysis and the Coase Theorem

Law and Economics[11] is a well-established part of economics that continues to generate substantial interest from both economists and legal practitioners.[12] Scholarship in this area has expanded beyond the study of issues with an obvious economic bent, such as antitrust law, to such far-reaching legal fields as criminal law, family law, and constitutional law.[13] Law and Economics employs economic analysis of the law for three purposes: first, to predict the effects of the law; second, to evaluate the economic efficiency of the law; and third, to determine what legal rules will be implemented due to voter preferences.[14] These objectives show the potential value that Law and Economic analysis holds for policy makers. Policy makers will have the tools to draft better law if they are able to predict the law's effects, its efficiency, and voters' preferences. At the center of the Law and Economics

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[10] The annual Operations and Maintenance appropriation is the primary source of funding for a maneuver unit to undertake training and operations. *See, e.g.,* 10 U.S.C. § 116 (2005) (establishing annual Operations and Maintenance reporting requirements for the recommended number of training days for Army Combat Battalions by the Secretary of Defense).

[11] *See generally* Thomas R. Ireland, *The Interface Between Law and Economics and Forensic Economics*, 7 J. LEGAL ECON. 60, 63 (1997) ("[L]aw and economics can be defined as the analysis of the impact of law on the behavior of individuals, and thus on the allocation of resources.")

[12] *Id.* at 60.

[13] John E. Noyes, *An Introduction to Law and Economics*, 59 N.Y.U. L. REV. 410, 410 (1984) (reviewing A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983)).

[14] *See* Ireland, *supra* note 11, at 63 (citing NEW PALGRAVE DICTIONARY OF ECONOMICS 3:144 (1987)).

universe is the widely-recognized Coase Theorem.[15] The Coase Theorem has been so wide-reaching that Richard Posner calls it "basic to the whole economic analysis of law."[16] Coase's groundbreaking article, *The Problem of Social Cost*,[17] is at or near the top of the most highly cited articles by the legal community.[18] The Law and Economics community has widely-embraced the Coasian approach to dealing with actions that have harmful effects.[19]

A. Overview of the Coase Theorem

1. The Pigouvian Approach to Welfare Economics

An understanding of the Coase Theorem begins with Arthur C. Pigou's *The Economics of Welfare*.[20] Pigou was the chair of Political Economy at Cambridge when he wrote *The Economics of Welfare*.[21] Consistent with his predecessors at Cambridge, Pigou espoused economic theories that intended to maximize societal welfare through legal or

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[15] *See* Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397, 397 (1997) ("[I]f there is anything that can be described as the canon of 'law and economics,' the Coase Theorem is at the heart of it.").

[16] RICHARD A. POSNER, OVERCOMING LAW 406 (1995), *quoted in* Farber, *supra* note 15, at 399.

[17] Coase, *supra* note 1, at 1.

[18] Farber, *supra* note 15, at 399; Stewart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1189 n.5 (1989) (outlining the broad impact of Coase's article).

[19] Farber, *supra* note 15, at 400. *But cf.* Daniel H. Cole, *Taking Coase Seriously: Neil Komesar on Law's Limits*, 29 LAW & SOC. INQUIRY 261, 261 (2004) ("[F]ew legal scholars [have] taken seriously Ronald Coase's call for comparative institutional analyses to comprehend and resolve problems of social cost."). This paper is an attempt to answer Professor Coase's call by undertaking a comparative institutional analysis of the overseas maneuver damage claims system.

[20] ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1932).

[21] A. W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53, 63 (1996).

governmental mechanisms, such as taxes.[22] Pigou's approach to welfare economics[23] and the effect of tort liability rules has been illustrated by using a hypothetical example.[24] In this example, pollution from a cement factory injures the property of a neighboring landowner.[25] The amount of damages to the landowner is $2000. If the tort liability rules hold the cement factory owner liable for the damages to the landowner, then the factory owner will only produce cement if her profits exceed $2000.[26] Any profit less than $2000 would result in a net loss to the factory owner after compensating the landowner. However, if the cement owner has profits in excess of $2000, then it will be profitable to produce the cement and pay the landowner for the pollution damages. Therefore, according to Pigou, establishment of tort liability rules by the government will lead to an economically efficient result.[27]

This example contains several important economic principles related to welfare economics. First, in economic theory, a "perfectly functioning market" produces an

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[22] *See id.* at 64.

[23] Welfare economics is defined as:

> "the branch of study which endeavors to formulate propositions by which we can say that the social welfare in one economic situation is higher or lower than in another," or equivalently as a means "by which we may rank, on the scale of better or worse, alternative economic situations open to society."

Louis Kaplow & Steven Shavell, *The Perils of Welfare Economics: Reviewing Fairness Versus Welfare*, 97 NW. U. L. REV. 351, 353 (2002) (quoting Y.K. NG, WELFARE ECONOMICS 2 (1979)).

[24] Farber, *supra* note 15, at 400.

[25] *Id.*

[26] *Id.*

[27] *Id.*

optimal[28] number of goods at a corresponding price.[29] Under the Pigouvian approach, the pollution case is an example of an imperfectly functioning market, because the social benefit of producing the good is not optimal relative to social costs.[30] Economists today refer to this kind of market behavior as an externality.[31] The pollution generated by the cement factory, which injures the landowner, is a negative externality.[32] This is because the factory owner's activity imposes a cost on the landowner for which the factory owner is not charged by the market economy's pricing system.[33] In other words, the cost is external to the pricing

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[28] The term "optimal" is defined as "the quantity (and corresponding price) at which the social cost of producing one more unit of a good exceeds the social benefit of that unit." Richard Morrison, *Price Fixing Among Elite Colleges and Universities,* 59 U. CHI. L. REV. 807, 828 (1992) (citation omitted).

[29] *Id.* (citing ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 279 (1989). The Pigouvian approach theorized that government intervention was necessary in the case of an externality to ensure the market produced at an efficient level. *See* Coase, *supra* note 1, at 12.

[30] Coase, *supra* note 1, at 12.

[31] The term externality has been defined as "a cost or benefit that the voluntary actions of one or more people imposes or confers on a third party or parties without their consent." ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 45 (1988).

[32] Externalities may be positive or negative. The polluting factory owner causing harm to a neighboring landowner is a classic example of a negative externality. *See supra* note 25 and accompanying text. An example of a positive externality would be when a homeowner paints his house, causing an increase of the value in the other homes in the neighborhood.

[33] John F. Duffy, *Intellectual Property Isolationism and the Average Cost Thesis*, 83 TEX. L. REV. 1077, 1081 (2005). *See generally* George J. Stigler, *Economic Theory: Price*, BRITANNICA (15th ed. 1998), *available at* http://www.britannica.com/nobel/macro/5001_98_11.html (discussing this Nobel Prize winning economist's views of the theory related to a market economy's pricing system) (last visited Feb. 24, 2006).

> The price system, as it exists in western Europe and the Americas, is a means of organizing economic activity. It does this primarily by coordinating the decisions of consumers, producers, and owners of productive resources. Millions of economic agents who have no direct communication with each other are led by the price system to supply each other's wants. In a modern economy the price system enables a consumer to buy a product he has never previously purchased, produced by a firm of whose existence he is unaware, which is operating with funds partially obtained from his own savings.

Id.

system.[34] Generally, Pigou's view was that government-imposed tort liability rules, or some form of tax on the producer of the negative externality, are necessary to force the factory owner to internalize the pollution costs in order to remedy the market inefficiencies caused by a negative externality.[35] It is this result that Coase attacks.

2. *The Coasian Alternative*

In *The Problem of Social Cost*, Coase refers to the pollution example described above and concludes that the Pigouvian "suggested courses of action are inappropriate, in that they lead to results which are not necessarily, or even usually, desirable."[36] Coase demonstrated that Pigou failed to consider an alternative to forced cost internalization that would prevent the predicted market inefficiencies.[37] The option that Pigou failed to consider was the prospect that the landowner and the factory owner may bargain with each other for an economically efficient outcome, even without tort liability or another forced internalization.[38] Coase demonstrated his position by using a hypothetical case involving a rancher who owns cattle that have a tendency to stray into a neighbor's crops.[39] However, his point can be demonstrated by continuing with our landowner and polluting factory owner. Let us assume there is no tort liability and the factory owner's profits will be less than the $2000 in damages

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[34] Duffy, *supra* note 33, at 1081.

[35] *See id.* at 1081-82.

[36] Coase, *supra* note 1, at 1.

[37] Farber, *supra* note 15, at 400-01.

[38] *Id.* at 401.

[39] Coase, *supra* note 1, at 2-8.

that the pollution causes to the landowner. Pigou would argue that only government intervention would force the factory owner to internalize the costs and make an economically efficient production decision.[40] But what would stop the landowner from offering to pay the cement factory owner to not pollute? Using Coase's analysis, if the cement factory owner's profits were $1000 and the landowner's damages were $2000, then the landowner could offer the cement factory owner $1500 to not pollute.[41] This would result in an economically efficient outcome that is advantageous to both parties, without requiring government intervention.[42]

Coase's hypothetical demonstrates an important outcome called the Coase Theorem. It provides that regardless of any tort liability rule in effect, if the parties to a potential agreement are able to bargain without costs related to bargaining, they will reach an agreement that results in "an increase in economic efficiency,"[43] if such an outcome is possible.[44] This has also been expressed as follows: "Given perfect knowledge about all alternatives to any problem, and assuming transaction costs are zero, disputants will always rearrange their rights, liabilities, and entitlements in a manner which produces a net gain in

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[40] *See supra* note 35 and accompanying text.

[41] Farber, *supra* note 15, at 401.

[42] *Id.*

[43] Richard S. Markovits, *On the Relevance of Economic Efficiency Conclusions*, 29 FLA. ST. U. L. REV. 1, 2-3 (2001) (stating three different definitions of "an increase in economic efficiency" are used by economists. First, a Pareto-superior outcome is one that "makes somebody better off while making nobody worse." Second, a "potentially Pareto-superior" outcome is one that if it occurred with a zero transaction cost transfer of resources, it would result in a Pareto-superior outcome. Third, a "monetized" outcome results in an increase in economic efficiency "if it gives its beneficiaries the equivalent of more dollars than it takes away from its victims.").

[44] Michael I. Swygert & Katherine Earle Yanes, *A Primer on the Coase Theorem: Making Law in a World of Zero Transaction Costs*, 11 DEPAUL BUS. L.J. 1, 1 (1998).

their combined well-being."[45] The Coase Theorem lies at the center of Coase's criticism of Pigou.

Coase stated his theorem not for the sake of the theorem itself, but as support for his larger contention that the traditional Pigouvian approach to negative externalities should be reexamined.[46] The purpose of Coase's illustration was to establish the following thesis:[47]

> If we are to discuss the problem in terms of causation, both parties cause the damage. If we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect (the nuisance) into account in deciding on their course of action. It is one of the beauties of a smoothly operating system that, as has already been explained, the fall in the value of production due to the harmful effect would be a cost for both parties.[48]

Coase's illustration included two important assumptions. First, transaction costs are assumed to be zero.[49] Second, perfect information is assumed to be available to the participants.[50]

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[45] *Id.* at 4.

[46] Farber, *supra* note 15, at 418-21.

[47] *Id.*

[48] RONALD COASE, THE FIRM, THE MARKET, AND THE LAW 13 (1988), *quoted in* Farber, *supra* note 15, at 417-18.

[49] Swygert & Yanes, *supra* note 44, at 4. Swygert and Yanes refer to several definitions of transaction costs to illustrate the concept of transaction costs, which may be difficult to grasp. *Id.* at 21-22. These definitions of transaction costs are:

> 1. Costs that occur "when trading partners attempt to identify and contact one another (identification costs), when contracts are negotiated (negotiation costs), and when the terms of the contracts are verified and enforced." 2. The costs of bringing bargainers together, maintaining and revising the agreement, and the capital required to effect the agreement. 3. The costs "like those of getting large numbers of people together to bargain, and costs of excluding free loaders." 4. The three classes of "search and information costs, bargaining and decision costs, policing and enforcement costs . . . [which] reduce to a single one . . . [the] resources losses due to lack of information."

Although the perfect information assumption is not as widely discussed with regard to the Coase Theorem,[51] the zero transaction costs assumption has generated substantial discussion in academic circles.[52] Coase recognized the assumption of zero transaction costs was not realistic.[53] He used the zero transaction cost assumption to establish three points.[54] The first point was to illustrate the "reciprocal nature" of a negative externality situation.[55] Coase looked at the action of both the tortfeasor and the "victim" in response to various incentives.[56] The second purpose for the zero transaction cost assumption was as a tool to analyze institutional behavior.[57] This allowed the comparison of a world where all parties could agree on an outcome that happens to be economically efficient, with the world of transaction costs.[58] The third point was to show that government intervention is not the only

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Id. (footnotes omitted).

[50] *Id* at 4.

[51] Joseph Farrell, *Information and the Coase Theorem*, 1 J. ECON. PERSP. 113, 117-21 (1987). One possible reason that the perfect information assumption has generated less attention may be the view that perfect information is directly related to the zero transaction cost assumption. *See* Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 304 (1992) (stating "an assumption of zero transaction costs implies that information is perfect.")

[52] *See, e.g.*, Farber, *supra* note 15, at 404-05 ("[A] 'transaction cost' is something more than a label for failure to reach a bargain. Instead, it seems to refer to measurable costs of entering into transactions.")

[53] Coase, *supra* note 1, at 7.

[54] Farber, *supra* note 15, at 418.

[55] *Id.*

[56] *Id.* If transaction costs were present in Coase's hypothetical, there is no guarantee that the parties would reach an agreement. The transaction costs may have prevented the parties from reaching agreement. *Id.*

[57] *Id.*

[58] *Id.*

option to address a negative externality. [59] This last point was a direct attack on the Pigouvian approach to externalities, which stresses government intervention.[60]

Coase described the problem encountered in addressing negative externalities.

> The problem which we face in dealing with actions which have harmful effects is not simply one of restraining those responsible for them. What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm.[61]

Coase offered three alternative courses of action for dealing with negative externalities when transaction costs are enough to prevent a transaction that would have occurred in a zero transaction cost world.[62] First, a single firm could purchase the entities involved, such as a polluting firm purchasing the real estate of those injured by the pollution.[63] This would allow them to internalize the costs and reach an economically efficient outcome.[64] The second option has the government acting as a "super-firm" and forcing cost internalization.[65] This is normally done through administrative regulation of an industry that requires the industry to employ specific production methods or by limiting the geographic area where the industry

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[59] *Id.*

[60] Simpson, *supra* note 21, at 64.

[61] Coase, *supra* note 1, at 11.

[62] Farber, *supra* note 15, at 419.

[63] Coase, *supra* note 1, at 8, *construed in* Farber, *supra* note 15, at 419.

[64] *Id.*

[65] *Id.* at 9.

may operate.[66] The third option is to do nothing, thereby avoiding all the administrative costs resulting from options one and two.[67] These courses of action represent the available options for addressing negative externalities.

The choice of a course of action requires "a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects."[68] Courts, or other government actors, are often required to decide how resources are to be used in cases of negative externalities.[69] Coase argues that a "better approach would seem to be to start our analysis with a situation approximating that which actually exists, to examine the effects of a proposed policy change and to attempt to decide whether the new situation would be, in total, better or worse than the original one."[70] Coase's desired outcome has been succinctly described as follows: "That institutional and organizational structure is best that, under the circumstances, minimizes on transaction costs in order to maximize the social product (or social welfare)."[71]

B. The Coase Theorem and Government Generated Negative Externalities

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[66] *Id.*

[67] *Id.* at 10.

[68] COASE, *supra* note 48, at 18.

[69] *See id.* at 27.

[70] *Id.* at 43, *quoted in* Farber, *supra* note 15, at 420.

[71] Cole, *supra* note 19, at 262.

The Coasian comparative institutional analysis described above does not specifically address a case in which the government is the actor producing the negative externality. Does the analysis change if the government produces the negative externality? Under the Coase Theorem, is the outcome still efficient for government produced negative externalities? To make this determination, the analysis must compare the social benefit derived from the government production with any social harm caused by the negative externality.

1. Public Goods and National Defense

The social benefit derived from maneuvers[72] is national defense. Undertaking this analysis relies on an additional economic concept, namely the concept of a public good.[73] Like other externalities,[74] a public good is an instance when the market is not functioning perfectly.[75] In the case of a public good, the market provides less than an optimal quantity of the public good.[76] This underproduction is due to the unique characteristics of a public good, namely being "both nonrival and nonexclusive."[77] A nonrival good is one that, once

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[72] U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 4-4 (14 June 2001) [hereinafter FM 3-0] ("Maneuver is the employment of forces, through movement combined with fire or fire potential, to achieve a position of advantage with respect to the enemy to accomplish the mission. Maneuver is the means by which commanders concentrate combat power to achieve surprise, shock, momentum, and dominance.").

[73] Public goods are distinguished from other goods by their unique characteristics. Public goods are defined by two characteristics, namely, being nonrival and nonexclusive. Morrison, *supra* note 28, at 828; *see also infra* notes 76-80 and accompanying text.

[74] *See supra* notes 31-32 and accompanying text.

[75] Morrison, *supra* note 28, at 828; *see also* Herbert Hovenkamp, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, 27 IOWA J. CORP. L. 519, 519-20 (2002) (discussing neoclassical and Coasian markets).

[76] Morrison, *supra* note 28, at 828.

[77] *Id.*

produced for the initial consumer, costs nothing to provide to an additional consumer.[78] A good is nonexclusive if the producer cannot exclude it from other consumers after providing it to the initial consumer.[79] In other words, the benefits of a nonexclusive good cannot be limited to the purchaser.[80] National defense is the archetypical example of a public good, because once made available to one consumer, the neighbors cannot be stopped from enjoying the protection provided at no expense.[81] For example, assume Bill Gates were in the market to purchase a missile defense system. The system costs a total of $10 billion, but he will only gain a personal benefit of $5 billion from the missile defense system. If he were to purchase the system, he could not stop his neighbors from enjoying its protection for a benefit of $15 billion, which they would reap without cost. The total social welfare, or social benefit, of the missile defense system would be $20 billion, with a resulting surplus in social welfare of $10 billion.[82] Under these facts, Mr. Gates would not purchase the missile defense system for himself, as its $10 billion price tag is more than his $5 billion personal benefit. He could purchase the system and attempt to sell the right to missile defense protection to individuals in an effort to pay for the cost in excess of his personal benefit. However, no rational[83] consumer would pay for the protection once Mr. Gates had purchased it, as the

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[78] *Id.* For example, a banana, a private good, is rival because it can only be consumed by the initial consumer. In contrast, a radio broadcast is nonrival, because additional consumers can tune in without adding any cost to the initial consumer.

[79] *Id.* A banana is exclusive because its benefits can be limited to the purchaser. A fireworks display would be an example of a good that cannot be excluded, at least in the local area.

[80] *Id.*

[81] *See id.*

[82] *Id.*; *see also* Hovenkamp, *supra* note 75, at 522 (discussing surplus social welfare of public goods).

[83] *See generally* Hovenkamp, *supra* note 51, at 293 (discussing the importance of the rationality assumption in law and economics).

consumer would enjoy the protection even without paying, due to its nonexclusive nature.[84] The consumer exhibiting this behavior related to a nonexclusive good is called a "free-rider."[85] The free-rider problem stands as a barrier to bargaining in the public good market.[86] The free-rider problem caused by the non-exclusive nature of the good "imposes substantial transaction costs."[87]

Returning to the hypothetical, a further option would be for the consumers, to include Mr. Gates, to attempt to pool their resources to purchase the missile defense system. A rational consumer, armed with perfect information and free from transaction costs external to the free-rider problem, will desire to achieve the surplus social benefits from the missile defense system.[88] Further, any outcome that results in an agreement to pay for the missile defense system would be Pareto efficient,[89] as it would realize the social benefit surplus.[90] However, if the possibility exists to enjoy the benefits of the missile defense system without incurring any personal costs, the consumer will opt out of the agreement, hoping to enjoy the

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[84] Morrison, *supra* note 28, at 828.

[85] Francesco Parisi, *The Market for Votes: Coasian Bargaining in an Arrovian Setting*, 6 GEO. MASON. L. REV. 745, 754 (1998).

[86] *Id.*

[87] *Id.*

[88] *See supra* note 82 and accompanying text.

[89] *See supra* note 43 (defining Pareto efficiency).

[90] *See* Hovenkamp, *supra* note 75, at 524 (discussing the role of transaction costs on stability in Coasian markets.)

benefit while the other consumers incur the costs.[91] Thus, the free-rider appeal will again stand as a barrier to participation.[92] In this hypothetical example, because the $10 billion cost exceeds what any individual would be willing to pay, the system would not be purchased. This result would be an underproduction in national defense and a loss of $10 billion dollars in surplus social benefit.[93] This illustrates the problem of underproduction of public goods. Economists have argued that government production is required to overcome the market's underproduction of public goods, specifically national defense.[94] Accordingly, the economic justification for government production of national defense is that the market will not produce an efficient amount. In fact, the market will produce too little national defense.[95] By increasing the production of national defense over the level produced by the market, the U.S. government attempts to realize the surplus in social welfare.[96]

2. *Classifying Government Generated Negative Externalities: Tort versus Taking*

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[91] The assumption of zero transaction costs external to the free-rider problem may actually lead to instability that prevents consumers from reaching an agreement. Hovenkamp, *supra* note 75, at 524 ("If transacting is costless, the costs of one new proposal that increases the proponents' wealth (zero) are always equal to or less than anticipated gains (zero or something more). But once transacting is costly, then the cost of a further proposal may exceed anticipated gains and equilibrium may eventually be reached.").

[92] *See supra* notes 84-86 and accompanying text.

[93] *See* Morrison, *supra* note 28, at 828-29.

[94] *Id.* at 829; *see also* Hovenkamp, *supra* note 75, at 522 ("[G]overnment intervention may be warranted in Coasian markets with large numbers of players, provided that the government can do better than private bargainers.").

[95] *See supra* notes 76-81 and accompanying text.

[96] *See supra* notes 82, 90 and accompanying text.

The next issue is to examine procedures for addressing social harm caused by government generated negative externalities. Law and Economics literature has addressed negative externalities from a number of perspectives.[97] There are numerous ways in which the government can generate negative externalities. These include eminent domain takings, taxes, and negative externalities generated through the exercise of the police power, which have been labeled the "takings triangle."[98] A tort is another form of government generated negative externality.[99] The legal system in the United States does not require compensation in all cases of government generated negative externalities.[100] Various legal rules determine which negative externalities are compensable and which are not. For example, the negative externalities generated by taxes and the exercise of the police power are not compensable, as those forms of government action are constitutionally authorized.[101] The Constitution also authorizes the government to exercise its eminent domain power, but requires compensation for the taking.[102] However, the government has no power to commit a tort, and given various waivers of sovereign immunity,[103] is required to provide compensation for the negative externalities generated by government torts.[104] An overview of the Law and Economic

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[97] *See e.g.*, Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 284 n.20 (2001) (analyzing government takings as a generator of externalities, both positive and negative).

[98] *Id.* at 284.

[99] *Id.* at 284 n.20.

[100] *Id.* at 284.

[101] *See id.*

[102] *See id.*

[103] *See, e.g.*, Federal Tort Claims Act, 10 U.S.C. § 1346(b) (2005); Military Claims Act, 10 U.S.C. § 2733 (2005); Foreign Claims Act, 10 U.S.C. § 2734 (2005) (containing partial waivers of sovereign immunity).

[104] Bell & Parchomovsky, *supra* note 97, at 284 n.20.

rationale behind government takings and government caused torts provides useful background in the discussion of proper procedures for addressing government generated negative externalities.

a. Government Takings

One approach to addressing government generated negative externalities is to provide compensation for a government taking.[105] A taking of property occurs "when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property."[106] Scholars and the courts have grappled with establishing appropriate rules for compensating government takings under the Fifth Amendment's Takings Clause.[107] The mechanisms employed by the government to provide compensation for a taking have been criticized for their inefficiencies.[108] The high transaction costs required to gain compensation for a taking are a factor that causes an inefficient outcome.[109] As transaction costs are high, some individuals will not seek compensation because the cost will be too high relative to the probability of receiving compensation.[110] Another inefficient outcome results when the government fails to compensate parties due to the nature of the takings compensation

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[105] *Id.* at 280.

[106] BLACK'S LAW DICTIONARY 1454 (6th ed. 1990) [hereinafter BLACK'S] (citing Brothers v. United States, 594 F.2d 740, 741 (9th Cir. 1979)).

[107] Bell & Parchomovsky, *supra* note 97, at 278 (discussing the difficulty in establishing standards for regulatory takings).

[108] *Id.* at 280.

[109] *Id.* at 299. The cost of litigating a taking is an example of these high transaction costs.

[110] *See id.* at 290.

rules.[111] Additional factors that lead to inefficiencies include a lack of government information regarding the social costs of the negative externalities they generate, as well as the identity of those harmed.[112] These outcomes are inefficient as they allow the government to externalize costs that result in what has been characterized as "inaccurate assessments of the cost effectiveness and desirability of government policies."[113] A taking is efficient only when the net social benefits exceed the net social costs.[114] By requiring compensation, the government must internalize "the cost of its action to private property owners--a cost it could otherwise ignore."[115] An instance when the government is not required to internalize the social costs of its negative externalities is called "fiscal illusion," because it "operates under the illusion that its actions are costless."[116] The inefficiencies that result from takings compensation procedures also appear in other mechanisms designed to address government generated negative externalities, such as torts.

b. Government Torts

A tort is "[a] private or civil wrong or injury, including action for bad faith breach of contract, for which the court will provide a remedy in the form of an action for damages."[117]

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[111] *Id.*

[112] *Id.* at 281.

[113] *Id.* at 280.

[114] *Id.* at 290.

[115] *Id.*

[116] *Id.* at 291 n.53.

[117] BLACK'S, *supra* note 106, at 1489 (citing K Mart Corp. v. Ponsock, 732 P.2d 1364, 1368 (Nev. 1987)).

The primary Coasian justification for tort law is negligence liability. [118] According to this view, "[l]iability is to be assessed only for harms resulting from those actions for which the social costs exceed the social benefits. This promise of liability is understood to inform the actor of the costs that will be charged him in the event of harm, so that he is able to assess these, discounted by the probability of their eventuation, against the cost of precautions to be taken against them." [119]

Guido Calabresi is a well know scholar who eventually accepted the application of the Coase Theorem's reciprocity assumption as a justification for tort liability theory.[120] Calabresi also accepted Coase's conclusion that, in the absence of transaction costs and with perfect information, the original assignment of legal responsibility for social costs from a negative externality is irrelevant to the final outcome, which will be efficient.[121] Calabresi used these underlying principles from the Coase Theorem as grounds for a normative argument on how tort systems should operate.[122] Calabresi applied this Law and Economic

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[118] Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV 919, 931 (1994).

[119] *Id.*

[120] Donald H. Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. CAL. L. REV. 711, 722 (1983). Although Calabresi's tort theories are based in part on the Coase Theorem, some scholars have distinguished Calabresi's approach with the Coasian approach. *See, e.g.*, Weston, *supra* note 118, at 926-42 (noting their common assumptions and background, but distinguishing their approach to tort theory).

[121] Gjerdingen, *supra* note 120, at 722; *see supra* notes 43-45 and accompanying text.

[122] Gjerdingen, *supra* note 120, at 722.

analysis to tort law, with the primary purpose of "reduc[ing] the sum of the costs of accidents and the costs of avoiding accidents."[123]

Recognizing that the zero transaction cost and perfect information assumptions are rarely, if ever, present, Guido Calabresi and Douglas Melamed have advocated the employment of the following principles in establishing property entitlement rules for torts.[124] First, economic efficiency requires a system that awards property entitlements based on knowledgeable choices regarding social benefits and costs, and any related transaction costs.[125] Second, the transaction costs should be assigned to the party who is in the best position to make a cost-benefit analysis regarding costs and benefits.[126] Third, that costs be assigned to the party who can most efficiently reduce them.[127] Fourth, if it is unclear who that party is, the costs should be assigned to the party that enjoys the lowest transaction costs for correcting an "error in entitlements."[128] Fifth, and finally, a choice may need to be made between the efficiency of market transactions or "collective fiat."[129] This approach to analyzing a tort liability system where transaction costs are present will not guarantee Pareto

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[123] *Id.* (quoting GUIDO CALABRESI, THE COSTS OF ACCIDENTS 26 (1970)).

[124] Guido Calabresi & Douglas A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089, 1096-97 (1972), *construed in* Gjerdingen, *supra* note 120, at 722-23.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

optimality,[130] but it will maximize the efficiency of a tort liability system.[131] Calabresi used these criteria to support his argument in favor of strict products liability.[132] Subsequent neoclassical law and economic scholars, such as Richard Posner, challenged this result.[133] Nevertheless, the criteria still seem to be a valid mechanism for analyzing a system designed to address inefficiencies resulting from government generated negative externalities. These criteria employ principles of Coasian Law and Economic analysis.[134] They also match many concerns of scholars who have analyzed takings law through a Law and Economics framework.[135]

III. Mechanisms for Compensating Overseas Maneuver Damage

Having outlined the principal Law and Economic theories for addressing government generated negative externalities, section III explores the existing statutory mechanisms for addressing overseas maneuver damages. There are four primary statutory mechanisms in place for the payment of damages caused during maneuvers:[136] the Federal Tort Claims Act

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[130] *See supra* note 43 (defining economic efficiency).

[131] Calabresi & Melamed, *supra* note 124, at 1096.

[132] James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 275, 307-16 (1997).

[133] *Id.* at 317-21.

[134] *See supra* notes 120-22 and accompanying text.

[135] *See supra* Part II.B.2.a.

[136] Article 139 of the Uniform Code of Military Justice also allows for the payment of claims for intentional damage cause by a servicemember. UCMJ art. 139 (2005). An Article 139 claim results in the individual servicemember responsible for intentionally causing the damage paying the claim. *Id.*; *see also* Colonel R. Peter Masterton, *Managing a Claims Office*, ARMY LAW., Sept. 2005, at 46, 63. This result is consistent with the responsible servicemember internalizing the social costs caused by the negative externality of their conduct.

(FTCA);[137] the Foreign Claims Act (FCA);[138] the Military Claims Act (MCA);[139] and the International Agreements Claims Act (IACA).[140] The FTCA does not apply outside the United States, making it inapplicable to foreign maneuver damage claims.[141] Claims filed under the FCA, the MCA, and the IACA are processed by the armed service that has been assigned single-service claims responsibility for the country where the incident occurred.[142]

A. The Foreign Claims Act

The first form of legislation used to provide compensation for negative externalities that result from Army overseas maneuvers is the FCA.[143]

1. Origin and History of the Foreign Claims Act

On 27 May 1941, President Roosevelt declared that the Nazi aggression in Europe constituted a national emergency.[144] Shortly thereafter, on 1 July 1941, Iceland issued a

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See supra notes 61-64 and accompanying text. Nevertheless, as Article 139 claims relate to damages caused by the intentional conduct of a servicemember and not a decision of a commander, a further discussion of Article 139 claims is outside the scope of this topic. Similarly, the Non-Scope Claims Act is also beyond the scope of this paper as it is based on activities that do not occur within the scope of duties. Non-Scope Claims Act, 10 U.S.C. § 2737 (2005).

[137] Federal Tort Claims Act, 10 U.S.C. § 1346(b) (2005).

[138] Foreign Claims Act, 10 U.S.C. § 2734 (2005).

[139] Military Claims Act, 10 U.S.C. § 2733 (2005).

[140] International Agreements Claims Act, 10 U.S.C. § 2734a (2005).

[141] 10 U.S.C. § 1346.

[142] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 1-20, (1 July 2003) [hereinafter AR 27-20].

[143] 10 U.S.C. § 2734.

formal invitation to the United States to send U.S. forces to Iceland.[145] After this invitation, the Secretary of the Navy asked Congress to provide a statutory waiver of sovereignty immunity and a mechanism for the payment of claims that resulted from the deployment of Marines to Iceland.[146] Congress passed the FCA on 2 January 1942, shortly after the beginning of World War II.[147] The statute was retroactive to President Roosevelt's 27 May 1941 national emergency declaration and was intended to only apply for the duration of the national emergency.[148] Congress extended the FCA multiple times, until Congress made it a permanent statutory waiver of sovereign immunity in 1956.[149]

The purpose of the FCA was to promote "friendly relations" between host nations and U.S. forces.[150] The FCA initially authorized the compensation of a friendly inhabitant of a friendly foreign state.[151] Compensation was limited to $1,000 and contained a one year statute of limitations.[152] The FCA was amended in 1943 to increase the amount of

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[144] Proclamation No. 2487, 55 Stat. 1647 (1941), *cited in* U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 10.1 (8 Aug. 2003) [hereinafter DA PAM. 27-162].

[145] Message from the Prime Minister of Iceland to the President of the United States, U.S.-Ice., July 1, 1941, E.A.S. No. 232, *cited in* DA PAM. 27-162, *supra* note 144, at para. 10.1.

[146] DA PAM. 27-162, *supra* note 144, at para. 10.1.

[147] Foreign Claims Act, Pub. L. No. 77-393, 55 Stat. 880 (1941) (codified as amended at 10 U.S.C. § 2734).

[148] *Id.*

[149] Foreign Claims Act, Pub. L. No. 84-769, 70 Stat. 703 (1956) (codified as amended at 10 U.S.C. § 2734).

[150] 10 U.S.C. §2734; Scott J. Borrowman, *Sosa v. Alvarez-Machain and Abu Ghraib - Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 B.Y.U. L. REV. 371, 376.

[151] 55 Stat. at 880 (codified as amended at 10 U.S.C. § 2734).

[152] *Id.*

compensation to $5,000.[153] The scope of the FCA was further expanded in the 1956 amendment to apply to maritime claims.[154] Prior to the 1956 amendment, only claims that arose in a foreign country were valid.[155] That same amendment broadened the definition of proper claimants to include any person who resided permanently outside of the United States.[156] The prior version required a claimant to inhabit the country where the claim arose.[157] Congress further amended the FCA to increase the amount payable by designees of the Service Secretary to $100,000.[158] The FCA remains an important tool for commanders in any deployed environment, as well as when on maneuvers or in garrison overseas.[159]

2. *Chapter 10, AR 27-20 and Chapter10, DA Pam 27-162*

Army procedures for processing claims under the FCA are contained in *Army Regulation 27-20*[160] and *Department of Army Pamphlet 27-162.*[161] The U.S. Army Claims

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[153] Foreign Claims Act, Pub. L. No. 78-393, 57 Stat. 66 (1943) (codified as amended at 10 U.S.C. § 2734).

[154] 70 Stat. at 703. However, the authority to settle a maritime claim under the FCA has been withheld to the Commander, U.S. Army Claims Service. AR 27-20, *supra* note 142, at para. 10.2(c).

[155] 55 Stat. at 880; 57 Stat. at 66; DA PAM. 27-162, *supra* note 144, at para. 10.1.

[156] 70 Stat. at 703; *see also* DA PAM. 27-162, *supra* note 144, at para. 10.2(a) (providing detailed guidance on eligible claimants).

[157] 57 Stat. at 66.

[158] Foreign Claims Act, Pub. L. No. 98-564, 98 Stat. 2918 (1984) (codified as amended at 10 U.S.C. § 2734).

[159] *See* Captain Karin Tackaberry, *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 39 (describing compensation in Operation Iraqi Freedom using the Foreign Claims Act); *see also,* Masterton, *supra* note 136, at 62 (explaining the application of the FCA to in garrison tort claims); Major Jody M. Prescott, *Operational Claims in Bosnia-Herzegovina and Croatia*, ARMY LAW., June 1998, at 1 (describing compensation under the Dayton Status of Forces Agreement using the FCA).

[160] AR 27-20, *supra* note 142.

Service, the proponent of the claims regulation and claims pamphlet, provides detailed guidance to claims personnel through both publications. Each chapter in these two claims publications deals with the same topic. For example, chapter two of both publications provides extensive general guidance on investigating and processing tort and tort related claims.[162] Chapter ten deals specifically with the FCA, causing many Army claims personnel to refer to claims processed under the FCA as "chapter ten claims." Chapter ten outlines the statutory authority and history of the FCA,[163] its scope in terms of proper claimants,[164] claims that are and are not payable, as well as the law that is applicable under the FCA.[165]

The FCA allows the payment of claims for property damage, personal injury, and death caused by Soldiers or civilian employees, when the death, injury or damage was a result of the Soldier's or civilian employee's wrongful act or omission.[166] The FCA does not require the act or omission to be within the scope of the Soldier's or civilian employee's employment.[167] Claims for property damage, personal injury, or death, are also payable when

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[161] DA PAM. 27-162, *supra* note 144.

[162] AR 27-20, *supra* note 142, at ch. 10; DA PAM. 27-162, *supra* note 144, at ch. 10.

[163] *See supra* notes 144-59 and accompanying text.

[164] *See supra* note 156 and accompanying text.

[165] AR 27-20, *supra* note 142, at ch. 10, § 1; DA PAM. 27-162, *supra* note 144, at ch. 10, § 1.

[166] Foreign Claims Act, 10 U.S.C. § 2734 (2005).

[167] *Id. But see* DA PAM. 27-162, *supra* note 144, at para. 10.3 (explaining the scope of employment rules for non-U.S. citizen employees who are locally hired).

they are the result of a "noncombat activity."[168] The Army claims regulation defines noncombat activities as:

> Authorized activities essentially military in nature, having little parallel in civilian pursuits, which historically have been considered as furnishing a proper basis for payment of claims. Examples are practice firing of missiles and weapons, training and field exercises, maneuvers that include the operation of aircraft and vehicles, use and occupancy of real estate, and movement of combat or other vehicles designed especially for military use. Activities excluded are those incident to combat, whether in time of war or not, and use of military personnel and civilian employees in connection with civil disturbances.[169]

Claims for noncombat activities require no wrongfulness or negligence on the part of the Soldier or civilian employee; only causation is required.[170] The FCA does not allow for the payment of claims caused incident to combat activities.[171] Claims under the FCA are adjudicated using the law and custom of the state where the claim arose.[172] This can be one of the most difficult aspects in applying the Foreign Claims Act, as claims personnel are not always, or even often, experts in the local law.

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[168] 10 U.S.C. § 2734.

[169] AR 27-20, *supra* note 142, at glossary.

[170] 10 U.S.C. § 2734; AR 27-20, *supra* note 142, at para. 3.3.

[171] 10 U.S.C. § 2734. The FCA provides:

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

Id.

[172] *Id.*; AR 27-20, *supra* note 142, at para. 10.5.

Authority to pay claims under the FCA is assigned to Foreign Claims Commissions (FCCs).[173] Judge Advocates or civilian claims attorneys normally constitute FCCs, which are composed of one or three members.[174] A one member FCC can approve and deny claims up to $15,000.[175] A three member FCC can approve claims up to $50,000, and may deny a claim in any amount.[176] The Judge Advocate General, the Assistant Judge Advocate General, and the Commander, USARCS, may approve or deny claims up to $100,000.[177] Claims in excess of $100,000 may only be approved by the Secretary of the Army or his designee.[178] Up to $100,000 for any claim will be paid from U.S. Army claims funds.[179]

Foreign Claims Commissions are responsible for investigating, adjudicating, negotiating, and settling foreign claims.[180] Although FCCs may ask for assistance in the investigation from units and organizations in the area of operations, they are not required to coordinate their activities with the command that is the source of the act or omission that is at the heart of a claim.[181] The FCC is also independent of the command in adjudicating the

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[173] 10 U.S.C. § 2734.

[174] AR 27-20, *supra* note 142, at para. 10.8.

[175] *Id.* at para. 10.9.

[176] *Id.*

[177] *Id.*

[178] 10 U.S.C. § 2734.

[179] *Id.*; *see also* AR 27-20, *supra* note 142, at para. 10.9 (providing that any amount in excess of the first $100,000 will be reported to the Treasury Department for payment); *infra* note 270 and accompanying text.

[180] AR 27-20, *supra* note 142, at para. 10.6.

[181] *See id.* at para. 10.6.

claim.[182] The appointment of a Unit Claims Officer is one aspect of the Foreign Claims process in which the command is involved.[183] Unit Claims Officers are involved in the investigative process and are an important asset for FCCs.[184] This is especially true when the FCC has difficulties investigating claims due to logistical limitations, which often arise in a deployed environment.[185] While the Unit Claims Officer is a part of the command that is the source of the claim causing activity, they do not adjudicate the claim.[186] Based on these procedures, the level of required command involvement in the Foreign Claims process is limited.

B. The Military Claims Act

The MCA is the second form of legislation used to provide compensation for negative externalities that result from overseas Army maneuvers.[187]

1. Origin and History of the Military Claims Act

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[182] *Id.* at para. 10.9.

[183] *Id.* at paras. 2.1 to 2.4.

[184] *Id.* at para. 10.9.

[185] *See* Tackaberry, *supra* note 159, at 40.

[186] AR 27-20, *supra* note 142, at para. 10.9.

[187] Military Claims Act, 10 U.S.C. § 2733 (2005).

On 3 July 1943, approximately six months after the passage of the FCA,[188] Congress enacted the MCA.[189] Like the FCA,[190] the MCA applied retroactively to President Roosevelt's 27 May 1941 proclamation[191] that declared an unlimited national emergency.[192] Congress designed the MCA as a companion statute to the FCA and provided a mechanism for compensating injuries and property damage caused by the large number of servicemembers stationed throughout the United States during World War II.[193] The MCA applies to those injured by acts due to a Soldier's or civilian employee's negligence or other wrongful acts or omissions, or as a result of noncombat activities.[194] Unlike under the FCA,[195] the conduct must be within the scope of duty to be compensable.[196] The MCA replaced the statutory system of compensation that was in place at the time of its

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[188] *See supra* notes 144-47 and accompanying text.

[189] Military Claims Act, Pub. L. No. 78-112, 57 Stat. 372 (1943) (codified as amended at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 144, at para. 3.1.

[190] *See supra* note 148 and accompanying text.

[191] Proclamation No. 2487, 55 Stat. 1647 (1941).

[192] 57 Stat. at 372 (codified as amended at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 144, at para. 3.1.

[193] *See id.*

[194] *Id.*; *see also* note 169 and accompanying text.

[195] *See supra* note 167 and accompanying text.

[196] 57 Stat. at 372 (codified as amended at 10 U.S.C. § 2733).

enactment.[197] The limited waiver of sovereignty created by Congress is an administrative remedy without judicial review.[198]

Although Congress's initial primary purpose for the MCA was to compensate claimants in the United States,[199] the MCA has always had jurisdiction over incidents both at home and abroad.[200] The MCA remained the primary method for compensating those injured by acts that were due to a Soldier's negligence or other wrongful acts in the United States until Congress implemented the FTCA as a part of the Legislative Reorganization Act of 1946.[201] The FTCA became the primary source for compensation of such wrongful acts within the United States, but it did not repeal the MCA.[202] As the FTCA does not apply overseas and does not cover noncombat activities,[203] the MCA remained applicable to overseas claims not covered by the FCA[204] and to noncombat activities in the United States.[205] Today, the majority of claimants under the MCA are overseas dependents or other

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[197] *Id.* (repealing Act of August 24, 1912, 37 Stat. 586, and Act of June 23, 1910, 36 Stat. 630, 676), *cited in* DA PAM. 27-162, *supra* note 144, at para. 3.1.

[198] *Id.*; DA PAM. 27-162, *supra* note 144, at para. 3.1.

[199] DA PAM. 27-162, *supra* note 144, at para. 3.1.

[200] 57 Stat. at 372 (codified as amended at 10 U.S.C. § 2733); DA PAM. 27-162, *supra* note 144, at para. 3.2.

[201] Legislative Reorganization Act of 1946, §§ 401-24, Pub. L. No. 79–601, 60 Stat. 842 (codified as amended as the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (2005)).

[202] §§ 401-24 , 60 Stat. at 842 (codified as amended as 28 U.S.C. §§ 2671-80).

[203] 28 U.S.C. §§ 2671-80.

[204] *See supra* note 156 and accompanying text.

[205] Military Claims Act, 10 U.S.C. § 2733 (2005); *see also* note 169, 194 and accompanying text.

U.S. residents who are not covered by the FCA or a Status of Forces Agreement, or claimants in the United States who file claims resulting from noncombat activities.[206]

2. Chapter 3, AR 27-20 and Chapter 3, DA Pam 27-162

Settlement authority, or the authority to pay or deny a claim, under the MCA rests at varying levels, depending on the amount of the claim and the size of the settlement.[207] A Staff Judge Advocate may settle a claim under the MCA up to $25,000, and may make a final offer or deny a claim for $25,000 or less.[208] Claims for more than $25,000 that cannot be settled for $25,000 or less are forwarded to the Commander, USARCS, who has settlement authority up to $25,000, but may deny a claim in any amount.[209] The Judge Advocate General or The Assistant Judge Advocate General may deny a claim under the MCA in any amount and may settle a claim for up to $100,000.[210] The Secretary of the Army or his designee, to include the Army General Counsel or another designee, may settle claims in excess of $100,000.[211] As with the FCA,[212] claims officials may investigate and

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[206] DA PAM. 27-162, *supra* note 144, at para. 3.2(c).

[207] AR 27-20, *supra* note 142, at para. 3.6.

[208] 10 U.S.C. § 2733(g); AR 27-20, *supra* note 142, at para. 3.6.

[209] AR 27-20, *supra* note 142, at para. 3.6.

[210] 10 U.S.C. § 2733; AR 27-20, *supra* note 142, at para. 3.6.

[211] 10 U.S.C. § 2733(a); AR 27-20, *supra* note 142, at para. 3.6.

[212] *See supra* notes 180-86 and accompanying text (detailing the role of FCCs in overseas maneuver damage claims).

adjudicate a claim under the MCA without consultation with the unit that is responsible for the conduct that resulted in the claim.[213]

The MCA initially limited payments to $500 per claim for medical, hospital, or burial expenses.[214] The maximum increased to $1,000 during times of war.[215] Over time, Congress increased the maximum amount until it eventually abolished the maximum.[216] Historically, USARCS paid the first $100,000 for a claim and submitted the amount in excess of $100,000 to Congress for an additional appropriation.[217] Currently, a claimant is paid with the first $100,000 coming from USARACS[218] and any excess amount coming from the Judgment Fund.[219]

C. The International Agreements Claims Act

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[213] AR 27-20, *supra* note 142, at para. 3.6. Other than producing a scope of duty statement, the commander of the Soldier or civilian employee responsible for causing the damage is not required to be consulted in the adjudication of the claim. *See* DA PAM. 27-162, *supra* note 144, at para. 2.34.

[214] Military Claims Act, Pub. L. No. 78-112, 57 Stat. 372 (1943) (codified as amended at 10 U.S.C. § 2733).

[215] *Id.*

[216] Military Claims Act, Pub. L. No. 79-67, 59 Stat. 225 (1945); Military Claims Act, Pub. L. No. 79-466, 60 Stat. 332 (1946); Military Claims Act, Pub. L. No. 82-450, 66 Stat. 334 (1952) (codified at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 144, at para. 3.1.

[217] Act of 10 August 1956, ch. 1041, § 1, 70A Stat. 153 (1956) (codified as amended at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 144, at para. 3.1.

[218] Military Claims Act, Pub. L. No. 98-564, 98 Stat. 2919 (1984) (codified as amended at 10 U.S.C. § 2733); DA PAM. 27-162, *supra* note 144, at para. 3.1.

[219] 31 U.S.C. § 1304 (2005). The Judgment Fund is a permanent appropriation designed to fund judgments authorized under other statutes, such as the FTCA, FCA, and the MCA. Trout v. Garrett, 892 F.2d 333, 335 (D.C. Cir. 1989); *see infra* notes 270-72 and accompanying text.

The third and final primary piece of legislation used to provide compensation for negative externalities that result from Army maneuvers is the IACA.[220]

1. Origin and History of the International Agreements Claims Act

The member states signed the North Atlantic Treaty Status of Forces Agreement (NATO SOFA) in London on 19 June 1951.[221] The Senate advised ratification on 15 July 1953, which the President did the same month.[222] The treaty entered into force on 23 August 1953.[223] The original signatories of the NATO SOFA were: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States.[224] In 1954, Congress passed, and the President signed, legislation that, while not specific to the NATO SOFA, allowed for implementation of the NATO SOFA's claims provisions.[225] The general language of the overseas provision of the IACA applies to international agreements between the United States and other states that provide for "settlement or adjudication and cost sharing of claims against the United States."[226] In addition to the cost sharing requirement, the claims must arise from acts or

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[220] International Agreements Claims Act, 10 U.S.C. § 2734a (2005).

[221] North Atlantic Treaty Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA].

[222] *Id.* at 1792.

[223] *Id.*

[224] *Id.* at 1822-25.

[225] International Agreements Claims Act, Pub. L. No. 87-651, 76 Stat. 512 (1962) (codified as amended at 10 U.S.C. §§ 2734a-b). Section 2734a applies to claims arising overseas, whereas section 2734b applies to claims arising within the United States. 10 U.S.C. §§ 2734a-b.

[226] 10 U.S.C. § 1034a.

omissions of servicemembers and civilian employees within the scope of duty, which occur in the host nation and for which the United States is responsible under the host nation law.[227] As with the FCA,[228] claims under the IACA may not be the result of combat activities.[229] When an international agreement provides for a claims mechanism that meets these requirements, the IACA allows the Department of Defense to reimburse the host nation for the pro rata share stated in the agreement.[230] The IACA, while originally used to implement the NATO SOFA claims provisions, eventually became the authority for the payment of claims under several SOFAs,[231] to include the U.S. SOFAs with Iceland,[232] Japan,[233] Korea,[234] and Australia.[235] Because the IACA was designed as implementing legislation for the NATO SOFA,[236] the NATO SOFA is an appropriate model to describe how the IACA functions.

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[227] *Id.*

[228] *See supra* note 171 and accompanying text (detailing the FCA's combat exception).

[229] 10 U.S.C. § 1034a ("[A] claim arising out of an act of an enemy of the United States or arising, directly or indirectly, from an act of the armed forces, or a member thereof, while engaged in combat may not be considered or paid under this section.").

[230] *Id.*

[231] DA PAM. 27-162, *supra* note 144, at para. 7.1.

[232] Annex on the status of United States personnel and property, May 8, 1951, U.S.-Ice., 2 U.S.T. 1533.

[233] Treaty of Mutual Cooperation and Security, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1652.

[234] Agreement under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of the United States Armed Forces in the Republic of Korea, July 9, 1966, U.S.-S. Korea, 17 U.S.T. 1677.

[235] Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, U.S.-Austl., 14 U.S.T. 506.

[236] *See supra* note 225 and accompanying text.

2. *Article VIII, NATO SOFA*

Article VIII of the NATO SOFA deals with claims.[237] The Army Claims regulation provides for the payment of claims under Article VIII "arising from any act or omission of soldiers or members of the civilian component of the U.S. Armed Services done in the performance of official duty or arising from any other act or omission or occurrence for which the U.S. Armed Services are responsible."[238] Article VIII breaks claims into three areas: intergovernmental claims; third-party scope claims; and third-party non-scope claims.[239] An intergovernmental claim is a claim that arises from one NATO member state against another NATO member state.[240] Intergovernmental claims must have a NATO connection to fall under Article VIII.[241] These intergovernmental claims are largely waived.[242] An intergovernmental claim for damage to military property or personnel is waived.[243] An intergovernmental claim for damage to non-military property is limited to $1,400.[244]

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[237] NATO SOFA, *supra* note 221, art. VIII.

[238] AR 27-20, *supra* note 142, at para. 7.10.

[239] NATO SOFA, *supra* note 221, art. VIII.

[240] *Id.*

[241] *Id.*, *construed in* DA PAM. 27-162, *supra* note 144, at para. 7.2.

[242] *Id.*

[243] *Id.*

[244] *Id.*

The second category of Article VIII claims are third-party scope claims.[245] Individuals or entities, to include state or local governments, which are not NATO member states are third parties under the NATO SOFA.[246] The procedures under which a third party may file a claim for damage arising from a servicemember's or civilian employee's duty-related act or omission are established in Article VIII, paragraph five.[247] These claims are called "scope claims" because they arise within the scope of duty of the servicemember or civilian employee.[248] The sending state[249] is responsible for making the determination of whether the incident was within the scope of duty, although local law is used to make the legal responsibility determination.[250] If the sending state determines the incident arose from a servicemember's or civilian employee's act or omission that was out of the scope of duty, then the sending state categorizes the claim as a third-party non-scope claim.[251] An FCC adjudicates and pays third-party non-scope claims as *ex gratia* claims[252] under the FCA.[253]

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[245] *Id.*

[246] *Id.*, *construed in* DA PAM. 27-162, *supra* note 144, at para. 7.2.

[247] NATO SOFA, *supra* note 221, art. VIII(5).

[248] *See* DA PAM. 27-162, *supra* note 144, at para. 7.2.

[249] The NATO member that has deployed forces to a foreign country is called the "sending state." *Id.* at para. 7.1.

[250] NATO SOFA, *supra* note 221, art. VIII, *construed in* DA PAM. 27-162, *supra* note 144, at para. 7.2.

[251] *Id.*

[252] *Id.*; *see also* AR 27-20, *supra* note 142, at glossary, II.a ("Ex Gratia: 'As a matter of grace." In the case of ex gratia claims under the NATO SOFA, Article VIII, paragraph six, a claim considered by the grace of the sovereign or sending State without statutory obligation (under the Foreign Claims Act) to do so.").

[253] DA PAM. 27-162, *supra* note 144, at para. 7.2; *see supra* Part III.A.2. *Ex gratia* claims fall outside the scope of this topic, as they do not arise within the scope of duty and are not a negative externality within a commander's control.

Third-party scope claims are filed with the NATO host nation,[254] also called the receiving state,[255] using the same procedures that would be used if the receiving state's forces had caused the injury.[256] For example, a claim filed by a German national for damages caused during a maneuver by U.S. Army Soldiers would be filed with German authorities, not an Army claims office.[257] The German authorities would conduct an initial investigation to help in determining which unit was involved and would then forward the claim to the U.S. Army Claims Service, Europe (USACSEUR).[258] The U.S. Army Claims Service, Europe, would then conduct its own investigation by contacting the unit and gathering information needed to make a determination of whether the incident was within the scope of duty.[259] If USACSEUR determined that the incident was within the scope of duty, they would issue a scope certificate for that claim to the German authorities.[260] The German authorities would then adjudicate the claim under German law and pay the claimant.[261] The adjudication by the

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[254] Although claims are properly filed with the receiving state, they may also be filed against the servicemember or civilian employee directly under local law. DA PAM. 27-162, *supra* note 144, at para. 7.2. Although the servicemember or civilian employee may be subject to personal judgment, they are immune from enforcement proceedings for any judgment that arose out of the performance of official duties. *Id.*

[255] *Id.* at para. 7.1.

[256] NATO SOFA, *supra* note 221, art. VIII, *construed in* DA PAM. 27-162, *supra* note 144, at para. 7.2.

[257] DA PAM. 27-162, *supra* note 144, at para. 7.2; Major David J. Fletcher, *The Lifecycle of a NATO SOFA Claim*, ARMY LAW., Sept. 1990, at 44, 46-47.

[258] *See* Fletcher, *supra* note 257, at 46-47.

[259] *See id.*

[260] *See id.*

[261] NATO SOFA, *supra* note 221, art. VIII; *see also* DA PAM. 27-162, *supra* note 144, at para. 7.2 (describing procedures for claims adjudication under the NATO SOFA); Fletcher, *supra* note 257, at 47 (describing the adjudication of a NATO SOFA claim in Germany.)

receiving state is considered an exclusive remedy by U.S. courts.[262] After payment is made, USACSEUR reimburses the German government under the provisions of the NATO SOFA, which is usually seventy-five percent of the amount paid.[263]

As this example demonstrates, the involvement of the responsible unit is even more limited than under the FCA[264] and the MCA.[265] The involvement of the unit is limited to providing input on whether the servicemember was acting within the scope of duty.[266] This decision is not made by the unit, and the final adjudication and payment are made by the receiving state. The United States is typically not involved in claims adjudication and payment after issuing a scope certificate until reimbursement is made.[267]

D. Funding Overseas Maneuver Damage Claims

The preceding statutory mechanisms for the payment of overseas maneuver damage have varying procedures for the payment of claims when the Army has been assigned single-

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[262] *Dancy v. Department of Army*, 897 F. Supp. 612, 614 (D.D.C. 1995); *Aaskov v. Aldridge*, 695 F. Supp. 595, 597 (D.D.C. 1988), *cited in* AR 27-20, *supra* note 142, at para. 7.11.

[263] NATO SOFA, *supra* note 221, art. VIII; *see also* Fletcher, *supra* note 257, at 46-47 (describing the payment of NATO SOFA claims in Germany).

[264] *See supra* notes 181-86 and accompanying text.

[265] *See supra* notes 212-13 and accompanying text.

[266] *See supra* note 259 and accompanying text.

[267] Fletcher, *supra* note 257, at 47. The exception to this general rule is the "scope exceptional" claim. *Id.* A scope exceptional claim is a reservation by USACSEUR of the right to remain involved in the adjudication of the claim, which usually occurs in high value claims, such as environmental damage claims. Friedel Interview, *supra* note 2.

service claims responsibility.[268] The procedures for the payment of claims under the FCA require the Army to assign FCCs to adjudicate and pay claims.[269] Up to $100,000 for any claim will be paid from U.S. Army claims funds, with the remainder coming from the Judgment Fund.[270] Similarly, USARCS pays the first $100,000 of a MCA[271] claim with any excess amount coming from the Judgment Fund.[272] The same funds are used for claims paid under the FCA, the MCA, and the IACA.[273]

The U.S. Army Claims Service has established procedures for the payment of foreign tort claims.[274] These procedures include the maintenance of a fund from which foreign tort claims are paid, called the Claims Open Allotment.[275] Department of the Army Operating Agency Twenty-two is allotted funds each year as a part of the Department of Defense's Congressional appropriation.[276] Each month, Operating Agency Twenty-two provides USARCS with Open Allotment funds, which USARCS uses to pay claims from fifteen

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[268] AR 27-20, *supra* note 142, at para. 2-62.

[269] *See supra* note 173-76 and accompanying text.

[270] AR 27-20, *supra* note 142, at para. 10.9; DA PAM. 27-162, *supra* note 144, at para. 2.100; *see supra* note 179 and accompanying text (describing funding sources for the FCA).

[271] DA PAM. 27-162, *supra* note 144, at para., 3.1.

[272] 31 U.S.C. § 1304 (2005).

[273] DA PAM. 27-162, *supra* note 144, at para. 2.100.

[274] *Id.* at para. 13.11.

[275] *Id.*

[276] *See, e.g.,* Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148,119 Stat. 2680, 2682-83 (2005) (providing the Army Operations and Maintenance appropriation for fiscal year 2006); *see also* DA PAM. 27-162, *supra* note 144, at para. 13.11 (describing Operating Agency Twenty-two's role in funding claims).

separate accounts.[277] The U.S. Army Claims Service then establishes a Claims Expenditure Allowance for every claims approval authority.[278] This allowance is used to track the amount of claims that have been paid and the amount that are available to be paid, which are reported on a monthly basis.[279] The U.S. Army Claims Service uses the data from the monthly reports to determine the amount needed for each fiscal year's Claims Open Allotment.[280] In additional to historical data, these estimates consider "projected Army strength, the number of expected permanent change of station moves, planned major maneuvers, exercises, and deployments, base and unit realignment, and other information from field claims offices."[281] In essence, data flows from field claims offices through the Department of the Army, the Department of Defense, and then to Congress, to determine the size of the appropriation required. However, nothing in these statutes and procedures requirement the maneuver units take the cost of maneuver related claims into consideration in planning their maneuvers.

IV. Army Maneuver Training Exercises and Operations

Having outlined the statutory mechanisms and procedures in place to provide compensation for damages caused during maneuvers, the historic trends and doctrine concerning Army maneuver training and operations will now be explored.

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[277] DA PAM. 27-162, *supra* note 144, at para. 13.11.

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.*

A. Trends in Overseas Maneuver Training Exercises and Operations

During the Cold War, the Army conducted numerous training exercises. These included massive exercises directed by the Chairman, Joint Chiefs of Staff, as well as smaller unit level exercises.[282] During the mid-1980s, over 1,000 maneuvers were conducted by U.S. forces on private and public land in Germany each year.[283] During the same timeframe, the largest exercise was traditionally Team Spirit, a Republic of Korea-U.S. Combined Forces Command exercise that involved over 200,000 forces, 60,000 of which were U.S. forces.[284] Another major exercise which began in 1968, REFORGER,[285] took place each year in Germany.[286] The 1986 REFORGER involved the deployment of over 17,000 forces based in the continental United States to Germany for a field training exercise with European based forces.[287] But even as massive as the 1986 REFORGER was, planners had nevertheless taken the costs and public outcry from maneuver damage into consideration in determining the size and nature of the exercise.[288]

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[282] CENTER FOR ARMY HIST., DEPARTMENT OF THE ARMY HISTORICAL SUMMARY: FY 1980 (1983) 52, *available at* http://www.army.mil/cmh/books/DAHSUM/1980/ch03.htm#b4.

[283] Major Horst G. Greczmiel, *Maneuver Damage Claims May Never Be The Same*, ARMY LAW., May 1988, at 60.

[284] CENTER FOR ARMY HIST., DEPARTMENT OF THE ARMY HISTORICAL SUMMARY: FY 1986 (1995) 36-37 [hereinafter HISTORICAL SUMMARY: FY 1986], *available at* http://www.army.mil/cmh/books/DAHSUM/1986/ch03.htm.

[285] REFORGER stands for Return the Forces to Germany. Fletcher, *supra* note 257, at 44 n.1.

[286] HISTORICAL SUMMARY: FY 1986, *supra* note 284, at 36-37.

[287] *Id.*

[288] *Id.*

> In recent years, actual maneuver in the field-training phases of REFORGER has been scaled back due to environmental considerations. Adverse weather often makes the potential costs of maneuver damage claims unacceptable. To prepare for REFORGER 86, a combined U.S.-Federal Republic of Germany team traveled to the United States and provided damage prevention training. Field commanders made decisions during the exercise to scale down the scope of activities and reduce movements of heavy vehicles. This sensitivity to the host nation's needs has paid dividends in the reduction of claims costs, but also has reduced training opportunities.[289]

It is apparent that the officials who were responsible for funding the exercise took the costs of maneuver damage claims into consideration when they determined the extent of the exercise.[290]

During the mid-1980s, annual reimbursement of the German government for maneuver related claims averaged between seventy-five and eighty-five million Deutschmark,[291] or between thirty to thirty-five million dollars.[292] As the U.S. dollar weakened in currency exchange markets, these costs increased dramatically.[293] These high

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[289] *Id.*

[290] *See id.*

[291] Greczmiel, *supra* note 283, at 60.

[292] Based on an exchange rate of 2.4540 U.S. dollars per German Deutschmark, the exchange rate for the first day of REFORGER '86, 21 January 1986. FXHistory, Historical Exchange rate, http://www.oanda.com/convert/fxhistory (last visited Jan. 24, 2006).

[293] Greczmiel, *supra* note 283, at 60. For example, the exchange rate on 21 January 1988 had dropped to 1.65980 U.S. dollar per German Deutschmark. *See* FXHistory, Historical Exchange rate, http://www.oanda.com/convert/fxhistory (last visited Jan. 24, 2006). At that exchange rate, 85 million Deutschmark are valued at $51,210,989.28.

maneuver damage costs attracted attention from the General Accounting Office and other agencies, which resulted in pressure to reduce these costs. [294]

As the Cold War ended, the drawdown in the size of the U.S. Armed Forces and the change in the focus of Army doctrine resulted in a decrease in the size and number of training exercises.[295] Although the number of Chairman, Joint Chiefs of Staff directed exercises continued to increase in number, the focus of these exercises changed. [296] In 1993, for example, the focus of REFORGER was changed to simulate a deployment of forces in support of an combined operation, inspired by the fighting in Bosnia-Herzegovina.[297] That was the last REFORGER exercise[298] and proved to be prophetic regarding the pending increase in contingency operations for U.S. forces.

As U.S. forces deployed in support of numerous contingency operations during the 1990s, overseas maneuver damage claims played an important role.[299] By 1998, U.S. FCCs had paid over one and one half million dollars in claims in Bosnia-Herzegovina and

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[294] Greczmiel, *supra* note 283, at 60.

[295] *See* CENTER FOR ARMY HIST., DEPARTMENT OF THE ARMY HISTORICAL SUMMARY: FY 1993 (2002) 7 (describing the objective to reduce Army forces by thirty-two percent by FY97) *available at* http://www.army.mil/cmh/books/DAHSUM/1993/ch02.htm#n1.

[296] *See id.* at 49 (stating that the Army participated in approximately 50 Chairman, Joint Chiefs of Staff sponsored exercises in FY 93).

[297] *See id.* at 50.

[298] *See id.*

[299] *See* Masterton, *supra* note 136, at 68.

Croatia.[300] In fact, U.S. forces were deployed on over twenty-five contingency operations between 1990 and 1998 alone.[301] The increase in contingency operations following the end of the Cold War and Operation Desert Shield /Desert Storm also resulted in a change in training practices, with an increased focus on employing role-players at Army training centers.[302]

Simultaneous to the increase in contingency operations, NATO began an eastward expansion. First, the Partnership for Peace expanded the number of combined training exercises in Eastern Europe in which the Army participated.[303] As NATO added new member states, U.S. forces began to train with these new forces in several training exercises.[304] Although this shift revived the number of training exercises conducted off of training areas, they in no way compared with the massive Cold War era training exercises.[305]

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[300] Prescott, *supra* note 159, at 8.

[301] Major Karen V. Fair, *Environmental Compliance in Contingency Operations: In Search of a Standard?*, 157 MIL. L. REV. 112, 113 (1998).

[302] Lieutenant Colonel Jody M. Prescott & Captain Jerry Dunlap, *Law of War and Rules of Engagement Training for the Objective Force: A Proposed Methodology for Training Role-Players*, ARMY LAW., Sept. 2000, at 43.

[303] *See generally* Partnership for Peace, http://www.nato.int/issues/pfp/index.html (last visited Mar. 25, 2006) (describing the purpose and development of the Partnership for Peace).

[304] For example, Victory Strike is a large annual V Corps aviation training exercise conducted both on and off Polish training areas. GlobalSecurity.Org, Victory Strike, http://www.globalsecurity.org/military/ops/victory-strike.htm (last visited Mar. 25, 2006).

[305] Friedel Interview, *supra* note 2. The following figures from USASEUR for fiscal year 2005 demonstrate the current level of claims paid under the FCA, MCA, and IACA in USASEUR's area of responsibility: FCA $369,000; MCA $281,000; IACA $6,300,000. E-mail from Joanne Roe, Budget Analyst, U.S. Army Claims Service, to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Mar. 7, 2006, 07:17 EST) (on file with author).

The most recent and perhaps most dramatic shift in maneuver damage is a direct result of the Global War on Terror. The deployment of forces to Afghanistan and Iraq has resulted in a dramatic increase in the number of maneuver damage claims that have been paid.[306] All of these factors resulted in a substantial decrease in the number of maneuver damage claims that were the result of training exercises, but increased the number of deployment related maneuver damage claims.[307]

B. Maneuver Training Doctrine and Objectives

As the previous discussion detailed, field training exercises were the traditional means through which the Army provided combat training to Soldiers and maneuver units.[308] As the Army's training doctrine developed, and in an effort "to ensure affordable training in the future," an emphasis was placed on capitalizing on technology to promote a "synthetic environment consisting of live, virtual, and constructive simulation."[309] The desired situation must:

> (1) Provide environmentally sensitive, accessible, cost-effective training that provides the necessary fidelity. (2) Replicate actual operational conditions so

[306] *See* Tackaberry, supra note 159, at 39. As of 22 February 2006, 19,086 claims had been filed in Iraq since the beginning of Operation Iraqi Freedom. Of those, 13,574 had been paid, for a total of $20,491,467. E-mail from Joanne Roe, Budget Analyst, U.S. Army Claims Service, to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Mar. 7, 2006, 13:01 EST) (on file with author).

[307] Friedel Interview, *supra* note 2.

[308] U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND EDUCATION para. 1-20 (4 Sept. 2003) [hereinafter AR 350-1 (2003)], *updated by* U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT (13 Jan. 2006) [hereinafter AR 350-1 (2006)].

[309] *Id.*

> soldiers can operate in the synthetic environment as they could expect to operate under wartime conditions. (3) Ensure leaders have needed technical and tactical skills and knowledge. (4) Support the Army as it executes operations at the tactical, operational, and strategic levels. (5) Support training for contingency missions.[310]

Given this desired situation, a call was made for "continuing research into unit training strategies [to provide] an empirical basis for developing unit training strategies for the Army. Validated training methods determine optimal mixes of [training aids, devices, simulators, and simulations], live fire, and field maneuver exercises."[311] Simulation based training became the standard for training brigades, divisions, and corps, due to increased operational tempo, costs, safety concerns, and concerns over environmental damage caused by maneuver training.[312]

Army training doctrine continues the focus on developing the optimal mix of training platforms, while "[e]xploiting emerging technology to offset restrictions imposed upon live and weapons training because of safety considerations, environmental sensitivities, and higher training costs."[313] Army doctrine intends that commanders reach the optimal mixture of training methods and locations, while considering factors that include costs, safety and

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[310] *Id.*

[311] *Id.*

[312] *Id.*

[313] AR 350-1 (2006), *supra* note 308, at para. 1-8.

environmental factors. These safety and environmental factors are negative externalities, because they are costs imposed on others that are a result of the unit's maneuver training.[314]

V. Law and Economic Analysis of Overseas Maneuver Damage Claims

Now that the Law and Economic principles regarding the efficient treatment of negative externalities have been outlined, and the mechanisms and doctrine related to maneuver damage have been explained, these two areas will be combined in an attempt to improve the efficiency of the maneuver damage claims process.

A. Application of the Coase Theorem to Overseas Maneuver Damage Claims

Recall that the thesis of Professor Coase's *The Problem of Social Cost* is that optimum resource allocation can be obtained in an economic activity affected by a negative externality by requiring the involved parties "to take the harmful effect (the nuisance) into account in deciding on their course of action."[315] The decision to be made is "whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm."[316] The available courses of action are: first, that one of the parties internalize the cost by purchasing the entities involved; second, that the government force cost internalization; or third, that nothing be done.[317] This

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[314] *See supra* notes 31-34 and accompanying text.

[315] COASE, *supra* note 48, at 13.

[316] Coase, *supra* note 1, at 11; *see supra* note 61 and accompanying text.

[317] Coase, *supra* note 1, at 8-10; *see supra* notes 63-67 and accompanying text.

is the decision that must be made to optimize resource allocation with regard to maneuvers, and the courses of action available to reach this objective.

1. Social Benefits: Determining the Social Benefit from Maneuvers

Maneuver in both a training and operational environment is a key component of combat readiness, which directly contributes to national defense.[318] Commanders are responsible for ensuring the combat readiness of their unit through training.[319] Once deployed, commanders are responsible for defeating the enemy by effectively employing the elements of combat power, the first of which is maneuver.[320] As national defense is a public good, it is subject to underproduction by the market without government intervention.[321] Given their authority and responsibility, commanders are placed in the ideal position to measure the benefits that a particular maneuver will have on accomplishing their mission.[322] This is true regardless of whether the maneuver is a part of a training exercise or an operation.[323] As commanders have the authority to direct the use of the resources in their unit,[324] and are responsible for how those resources contribute to mission accomplishment,

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[318] FM 3-0, *supra* note 72, at paras. 1-1 to 1-4.

[319] *Id.* at para. 3-35.

[320] *Id.* at para. 3-14 (listing the elements of combat power as "maneuver, firepower, leadership, protection, and information").

[321] *See supra* Part II.B.1.

[322] *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 2-1(b) (15 July 1999).

[323] *See id.*

[324] Of course a commander does not have unfettered discretion in directing how to expend resources in their unit. Directives from higher headquarters, budget restraints, and other factors may limit a commander's discretion. *See supra* note 294 and accompanying text.

commanders are in the best position to measure how a particular maneuver will contribute to national security.

2. *Social Costs: Classifying Negative Externalities Resulting from Overseas Maneuvers*

The negative externalities resulting from maneuvers, in both a training and operational context, do not fit neatly into a classification as either a tort or a taking.[325] At first glance, the nature of the negative externality seems to resemble a tort.[326] For example, if while on maneuvers, an M1A2 Abrams main battle tank caused damage to a farmer's field, the resulting negative externality shares many elements with the tort of trespass.[327] Nevertheless, the entry onto the farmer's field is not unlawful because some form of legal authorization exists.[328] The underlying legal authorization makes this particular hypothetical maneuver-related negative externality more analogous to a government taking than a tort.[329] However, if while on maneuver, the M1A2 tank negligently crushes a parked car due to the inattention of the driver, the resulting negative externality would not enjoy the same legal

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[325] *See supra* Part II.B.2.

[326] *See supra* note 117 and accompanying text.

[327] *See* BLACK'S, *supra* note 106, at 1502 ("Any unauthorized intrusion or invasion of private premises or land of another.") (citations omitted).

[328] The form of legal authorization varies depending on the context of the maneuver. For example, a training maneuver in Germany is authorized by a Maneuver Right, granted by the German government. *See* Greczmiel, *supra* note 283, at 60. When maneuvers conducted in Poland did not have a legal mechanism for a government granted Maneuver Right, planners obtained contracts for individual Maneuver Rights from the property owners. Friedel Interview, *supra* note 2. Maneuvers conducted in Afghanistan and Iraq are conducted based on authorizations from United Nations Resolutions. S.C. Res. 1623, ¶ 2, U.N. Doc. S/RES/1623 (Sept. 13, 2005). S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004).

[329] *See supra* Part II.B.2.a.

authorization and may be classified a tort.[330] The statutory mechanisms for overseas maneuver damage claims apply to both takings-like and tort-like government action.[331] Accordingly, the Law and Economic analysis applied to both government takings and tort rules applies to the statutory mechanisms for compensating overseas maneuver damages.

3. Applying the Calabresi and Melamed Factors to the Overseas Maneuver Damage Claims Process

As noted above, scholars have criticized government takings compensation mechanisms for inefficiencies.[332] The inefficiencies are caused by a lack of government information regarding the social costs of the negative externalities. Without this accurate information, the government will suffer from fiscal illusion and will underestimate the social costs of its actions.[333] Calabresi's and Melamed's factors for evaluating the efficiency of a tort compensation scheme address the same concerns.[334] Their factors value a system that provides compensation based on informed choices regarding social benefits and costs, and transaction costs.[335] The transaction costs should fall on the party who can best make a cost-

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[330] Bell & Parchomovsky, *supra* note 97, at 284 n.20 ("[I]t cannot be said that there is a government 'power' to commit torts.").

[331] *See, e.g., supra* notes 166-70 (demonstrating that claims under the FCA are payable for both government negligence and non-combat activities, where no government negligence is required).

[332] *See supra* notes 108-13 and accompanying text (describing the inefficiencies present in takings compensation schemes).

[333] *See supra* notes 115-16 and accompanying text (detailing the fiscal illusion pneumonia).

[334] *See supra* notes 124-29 and accompanying text (listing Calabresi's and Melamed's factors).

[335] Calabresi & Melamed, *supra* note 124, at 1096-97; *see supra* note 125 and accompanying text.

benefit analysis regarding social costs and social benefits, and who can reduce transaction costs.[336]

Changing the funding source for maneuver damage claims from USARCS to the Operations and Maintenance funds of the responsible commander will maximize the efficiency of the overseas maneuver damage claims process.[337] This conclusion is supported by applying Guido Calabresi's and Douglas Melamed's five principles [338] to this proposed change. First, a command-funded maneuver damage claims process would be efficient because the commander would then be in the best position to make knowledgeable choices regarding social benefits[339] and costs,[340] including any related transaction costs.[341] Second, the commander would be in the best position to make a cost-benefit analysis regarding costs and benefits.[342] Third, as the commander is in control of costs,[343] he would be the party who could most efficiently reduce them.[344] As it is clear that the commander is in the best position to reduce costs, the fourth and fifth principles would not need to be applied.[345]

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[336] Calabresi & Melamed, *supra* note 124, at 1096-97; *see supra* notes 126-28 and accompanying text.

[337] *See* Calabresi & Melamed, *supra* note 124, at 1096.

[338] *See supra* notes 125-29 and accompanying text (detailing Calabresi's and Melamed's factors).

[339] *See supra* Part V.A.1 (describing the social benefits to National Security derived from maneuvers).

[340] *See supra* Part V.A.2 (describing the costs generated by maneuvers).

[341] *See* Calabresi & Melamed, *supra* note 124, at 1096; *see also supra* notes 318-24 and accompanying text (discussing command responsibility and authority).

[342] *See supra* Part IV.A.1-2.

[343] *See supra* note 324 and accompanying text (outlining a commander's authority and responsibilities).

[344] *See* Calabresi & Melamed, *supra* note 124, at 1096-97.

[345] *See id.* at 1097.

Nevertheless, an examination of the fourth and fifth principles demonstrates that the commander is the appropriate party to ensure the most efficient outcome. Fourth, as the commander determines how a maneuver is to be conducted, he will have the lowest transaction costs for correcting an "error in entitlements."[346] Fifth, and finally, as the preceding factors point to the commander, a choice does not need to be made between the efficiency of market transactions and "collective fiat."[347] Commanders are uniquely situated to balance the social benefits generated by their actions with the social costs of their actions. If commanders were required to internalize the negative externality costs, they would be in the best position to ensure resources were used in an optimal manner.[348] This result is consistent with Professor Coase's second option, namely that that the government force cost internalization, uniquely, onto itself.[349]

B. The Inefficiencies Encouraged by the Current Overseas Maneuver Damage Claims Process

1. Failure to Internalize Maneuver Damage Costs May Result in an Inefficient Allocation of Resources

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[346] *Id.*

[347] *Id.*

[348] COASE, *supra* note 48, at 13.

[349] Coase, *supra* note 1, at 8-10; *see supra* notes 65-66 and accompanying text (describing Professor Coase's options for internalizing negative externalities).

The current overseas maneuver damage claims process suffers many of the same inefficiencies that impact takings and tort compensation schemes.[350] Under current procedures, commanders are not directly involved in the maneuver damage claims process.[351] Funds to pay maneuver damage claims come from USARCS or the Judgment Fund; not from a unit's Operations and Maintenance funds.[352] Because maneuver unit commanders are not required to pay for maneuver damage claims, they are not forced to internalize those costs, which may lead to an inefficient allocation of resources.[353]

A hypothetical example may help illustrate how the current system may result in an inefficient outcome.[354] Assume that a maneuver will produce a benefit of $100,000 through increased national defense.[355] Now assume that there are two options for executing the maneuver: Option A takes the unit through a farmer's field. Option B is a more direct route through a forested area. Option B has the advantage of being more direct, which would save the commander $1,000 in reduced fuel and vehicle maintenance in comparison to traveling through the farmer's field. Option A would cost the unit $51,000 for personnel, fuel, and maintenance, and would cause $40,000 in damage to a farmer's field. Option B would cost the unit $50,000 for personnel, fuel, and maintenance, and would cause $60,000 in damage to

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[350] *See supra* Part II.B.2.

[351] *See supra* notes 181-86, 212-13, 264-67 and accompanying text.

[352] *See supra* Part III.D (detailing the current procedures for funding overseas maneuver damage claims).

[353] *See supra* notes 315-17 and accompanying text (summarizing Professor Coase's views on addressing negative externalities).

[354] *See supra* notes 315-17 and accompanying text.

[355] *See supra* Part II.B.1 (explaining the social benefit derived from national defense).

a forested area. Based on these factors alone, the commander would choose option B, as the surplus benefit to the commander is $50,000 for option B, which exceeds the surplus benefit of $49,000 for option A.[356] This would be an inefficient allocation of resources.[357] The unit's costs of $50,000, combined with the $60,000 that would be paid by USARCS for the maneuver damage claim,[358] results in $110,000 in total costs from the maneuver.[359] As the total costs are greater than the $100,000 social benefit through increased national security, the result is inefficient.[360]

The argument could be made that even though commanders are not required to internalize the costs of the negative externalities caused by their maneuvers, they may still voluntarily take those costs into consideration when they make maneuver decisions.[361] This argument is supported by the fact that Army doctrine requires commanders to "[p]rovide environmentally sensitive, accessible, cost-effective training."[362] Additionally, the payment of overseas maneuver damage claims often acts as a force multiplier for deployed

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[356] *See supra* note 82 and accompanying text (describing the hypothetical social benefit derived from a hypothetical missile defense system).

[357] *See supra* note 43 and accompanying text (defining economic efficiency in resource allocation).

[358] *See supra* notes Part III.D (detailing the funding of overseas maneuver damage claims).

[359] The $60,000 in damage to the forested area and the $50,000 in direct costs to the unit total $110,000.

[360] *See supra* note 43 and accompanying text.

[361] *See* Bell & Parchomovsky, *supra* note 97, at 291.

[362] AR 350-1 (2003), *supra* note 308, at para. 1-20. The example of Mr. Walmsley and the Cavalry squadron commander in the introduction also provides some support to this contention. *See supra* Part I.

commanders,[363] as it promotes friendly relations with a local population.[364] A variation of the hypothetical described above may help demonstrate how this argument would play out. The commander's inefficient choice of Option B[365] may change if the commander voluntarily considered external costs. For example, if the commander places more than $1,000 value on following the guidance to provide "environmentally sensitive" training,[366] then the commander would choose the efficient Option A.

Although it is possible that a commander may voluntarily consider the costs of negative externalities, there is no mechanism to ensure that he will. As the cost of undertaking the "environmentally sensitive" option increases, the commander's incentive to minimize costs makes it less likely that he will choose that option.[367] The point of this illustration is to indicate that a commander is not required to internalize the negative externalities of their maneuvers, and although at times an efficient outcome may occur, the current structure for overseas maneuver damage claims does not produce an incentive for commanders to reach this efficient outcome.[368] Scholars have replied to arguments that the

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[363] *See generally* Tackaberry, *supra* note 159, at 39 (describing the benefits of using the FCA in efforts to rebuild Iraq).

[364] *See supra* note 150 and accompanying text (outlining the purpose of the FCA).

[365] *See supra* note 356 and accompanying text.

[366] AR 350-1 (2003), *supra* note 308, at para. 1-20.

[367] *See supra* note 310 and accompanying text (detailing Army guidance to provide "environmentally sensitive" and "cost-effective" training).

[368] *See supra* note 43 and accompanying text (defining economic efficiency).

government will voluntarily internalize negative externalities by claiming that those arguments are at best "Pollyannaish" and cannot be relied upon.[369]

Recently, a nonscientific survey of company commanders from a mechanized brigade combat team stationed overseas was conducted.[370] The survey attempted to obtain anecdotal evidence regarding the impact of potential environmental harms and other damages caused during a maneuver on a commander's decision making process. After identifying that Army doctrine requires commanders to "[p]rovide environmentally sensitive, accessible, cost-effective training,"[371] the survey poised two questions.[372] The first question was: "To what degree does potential harm to the environment or other damage caused by maneuvers impact your decisions on planning and executing maneuver training?"[373] The commanders were asked to choose one of four potential responses: "1- Most important factor in planning and executing maneuver training; 2- Significant factor in planning and executing maneuver training. 3- Minor factor in planning and executing maneuver training. 4- Not a factor in planning and executing maneuver training."[374] All of the respondents indicated that potential

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[369] Bell & Parchomovsky, *supra* note 97, at 291.

[370] In an effort to encourage candid responses, the commanders were informed that their names and units would remain confidential. E-mail from MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, to company commanders (Feb. 25, 2006, 06:52 PM EST) [hereinafter E-mail from MAJ Jerrett W. Dunlap, Jr.] (on file with author).

[371] AR 350-1 (2003), *supra* note 308, at para. 1-20.

[372] E-mail from MAJ Jerrett W. Dunlap, Jr., *supra* note 370.

[373] *Id.*

[374] *Id.*

harm to the environment or other damage caused by training maneuvers was a minor factor in planning and executing maneuver training.[375]

The survey contained a second question, similar to the first, but related to operational maneuvers, instead of training maneuvers.[376] The question was: "To what degree does potential harm to the environment or other damage caused by operations impact your decisions on planning and executing operations?"[377] The commanders were again asked to choose one of four potential responses: "1- Most important factor in planning and executing an operation; 2- Significant factor in planning and executing an operation; 3- Minor factor in planning and executing an operation; 4- Not a factor in planning and executing an operation."[378] The vast majority of the respondents indicated that potential harm to the environment or other damage caused by operations was a minor factor in planning and executing operations, with one respondent indicating it was not a factor at all.[379] Unsolicited comments from some of the commanders indicate that they believed that host nation environmental regulations were so restrictive, that those restrictions overrode any consideration of actual environmental damage.[380] In essence, the only environmental factor considered by the commander was the environmental restrictions, not the negative externality

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[375] E-mails from company commanders to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Feb. 25-27, 2006) [hereinafter E-mails from company commanders] (on file with author).

[376] E-mail from MAJ Jerrett W. Dunlap, Jr., *supra* note 370.

[377] *Id.*

[378] *Id.*

[379] E-mails from company commanders, *supra* note 375.

[380] *Id.*

caused by the maneuver.[381] This survey, although by no means a scientific sampling of commanders, lends anecdotal support to the contention that commanders do not consider damages caused during training maneuvers or operations to be a significant factor during planning or execution.[382]

Although Army doctrine requires commanders to consider costs, safety, and environmental considerations,[383] only the costs paid from the commander's Operations and Maintenance budget must be internalized. Furthermore, the argument that commanders may voluntarily consider external costs only points to some possible incentives for commanders to consider the costs of the negative externalities produced by their maneuvers.[384] These policy driven incentives have no mechanism to force cost internalization. A rational[385] commander will only voluntarily consider the costs of the negative externalities if it is in his best interest, which may not always be the case.

2. The Current Overseas Maneuver Damage Claims Process Promotes Imperfect Information by Commanders

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[381] *See id.*

[382] *See supra* note 353 and accompanying text (arguing that the failure of unit commanders to pay for maneuver damage claims leads to inefficient resource allocation).

[383] *See supra* note 310 and accompanying text (detailing Army training guidance).

[384] *See supra* note 361 and accompanying text.

[385] *See generally* Hovenkamp, *supra* note 51, at 293 (discussing the importance of the rationality assumption in law and economics).

An additional problem is that Army policy alone does nothing to remedy the lack of information that commanders may have regarding the extent of the negative externality costs caused by their maneuvers.[386] This lack of information exists because commanders are not directly involved in the compensation process and will have to expend additional resources to become involved.[387] Transaction costs under the current procedure for the adjudication of maneuver damage claims are high because a third party, either an FCC,[388] U.S. Army claims personnel,[389] or a sending state's claims office,[390] is responsible for adjudicating and paying for maneuver damages. Therefore, even if a commander would otherwise be inclined to take the costs of the negative externalities into consideration when making maneuver-related decisions, the commander would still be subject to fiscal illusion problems due to the lack of information regarding those costs.[391] By requiring the commander responsible for the negative externality-causing maneuver to pay for the costs, he will be forced to internalize not only the costs of the negative externality, but also will have an incentive to gain more information on how he can lower those costs. This gained information is what will

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[386] *See supra* notes 1115-16 and accompanying text (explaining the "fiscal illusion" created when the government fails to internalize costs related to government generated negative externalities).

[387] It should be noted that imperfect information would still exist in a command funded overseas maneuver damage claims system. However, the proposed system should create incentives to improve information flow. *See infra* note 392 and accompanying text.

[388] *See supra* note 173 and accompanying text (describing claims approval authority under the FCA).

[389] *See supra* notes 207-11 and accompanying text (describing claims approval authority under the MCA).

[390] *See supra* notes 261-63 and accompanying text (describing claims approval authority under the NATO SOFA).

[391] *See supra* notes 115-16 and accompanying text (explaining fiscal illusion).

encourage more efficient decisions and resource allocations.[392] This analysis applies equally to maneuvers during a training exercise or during an operation.

C. The Advantages of a Command-Funded Overseas Maneuver Damage Claims Process

Empirical evidence supports the contention that commanders who pay the costs of maneuver damage claims, and therefore internalize those costs, do factor those costs into their decisions regarding maneuvers.[393] The high costs of maneuver damage claims from REFORGER exercises in the mid-1980's resulted in a reevaluation of maneuver training and ultimately efforts to reduce the costs.[394] The proposed changes were not made at the lower level commands, even though those commands were most familiar with the exercise, as they were the direct participants.[395] The decision to reform REFORGER was made at a very high level, because the funds were paid by USARCS at the Department of Army level.[396] The fact that the push for reform came at the Department of the Army level or higher, namely the bill-payer, supports the contention that efforts to achieve optimum resource allocation will only occur at the level where negative externalities are internalized.[397] By shifting the source of

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[392] *See supra* notes 315-17 and accompanying text (summarizing Professor Coase's views on addressing negative externalities).

[393] *See supra* note 337 and accompanying text (arguing that requiring responsible commanders to use Operations and Maintenance funds to pay for maneuver damage claims will maximize the efficiency of maneuver related resource allocations).

[394] *See supra* notes 288-90 and accompanying text.

[395] *See supra* notes 288-90 and accompanying text.

[396] *See supra* Part III.D.

[397] *See supra* note 337 and accompanying text.

funding to the maneuver unit responsible for making the determination on how to conduct the maneuver, the negative externalities will fall on the commander in the best position to allocate resources.[398]

1. The Impact of a Command-Funded Overseas Maneuver Damage Claims Process on Training and Unit Readiness

A potential criticism of this proposed change in funding is that it would result in a decrease in training that would, in turn, damage unit readiness. However, optimal resource allocation will result in more, not fewer, resources being available for training.[399] Returning to the original hypothetical example of the maneuver, recall that if USARCS paid for the maneuver damage claims, the commander would choose the inefficient option B.[400] However, if the $60,000 were diverted from USARCS to the unit's Operations and Maintenance funds, and the unit were required to pay for maneuver damage claims caused by their maneuvers, the result would be different. Under option B, the unit would have $50,000 in unit costs and $60,000 in costs for the maneuver damage claims,[401] for a total of $110,000 in total costs from the maneuver. The commander would not choose option B, as the total costs are greater than the $100,000 benefit through increased national security.[402] The commander would choose option A, with $ 51,000 in direct unit costs and $40,000 in

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[398] *See supra* notes 345-48 and accompanying text.

[399] *See supra* note 43 and accompanying text.

[400] *See supra* note 356 and accompanying text (describing why the commander would choose option B).

[401] *See supra* note 355-56 and accompanying text.

[402] *See supra* note 355 and accompanying text.

maneuver damage claims costs, or $91,000 in total costs from the maneuver.[403] As the $100,000 benefit to national security exceeds the $91,000 in total costs, option A results in a surplus of $9,000 and is therefore optimal.[404] The difference between option A and option B would result in the unit having $19,000 more than it would have had to expend on training under the current system.[405] By choosing the more efficient option A, the unit commander would have more funds to expend on training and unit readiness.

This illustration assumes that the commander knows the actual costs of the negative externalities that will be caused by his unit's maneuver prior to executing the maneuver.[406] Of course this assumption is inaccurate, as a commander cannot predict the future. The best that a commander could do would be to estimate the costs of the negative externalities based on past experience and available intelligence. The result would be an imperfect estimate of the costs that would not necessarily result in an efficient allocation of resources.[407] Nevertheless, the current system suffers from this same lack of information regarding the actual costs of the negative externalities.[408] Just as a unit commander cannot predict the future, USARCS is not able to predict perfectly the amount of maneuver damage claims.

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[403] *See supra* notes 355-56 and accompanying text.

[404] *See supra* note 43 and accompanying text (defining economic efficiency).

[405] The unit would have its initial $50,000 from unit Operations and Maintenance funds, plus the additional $60,000 diverted from USARCS, totaling $110,000. After expending $91,000 for direct costs and maneuver damage claims, the unit would have $19,000 remaining.

[406] *See supra* notes 402-03 and accompanying text.

[407] *See supra* notes 43, 130-31 and accompanying text (describing how results may increase economic efficiency without guaranteeing an optimal resource allocation).

[408] *See supra* Part V.B.2.

Each year USARCS is required to estimate the amount of maneuver damage claims based on available information regarding planned exercises and past experience.[409] The unit commander under the proposed change would have a distinct advantage over USARCS' current ability to prepare this estimate. The unit commander has a more intimate knowledge of the maneuver. The commander plans and executes the maneuver, whereas USARCS, at best, will receive a report on the exercise, which will not provide the same level of detailed information.[410] Although a commander does not have perfect information, he would have better information than USARCS and could make a better estimate of the maneuver related negative externalities.

It should be noted that by internalizing the negative externality costs, a commander will not necessarily always lower the amount, scale or size of maneuvers. Under the current system, a commander may overestimate the costs of the maneuver-related negative externalities due to his lack of information regarding those costs.[411] This possibility is made more likely due to the Army's policy on minimizing environmental damages and costs.[412] If a commander overestimated the costs of a negative externality, the result could be fewer maneuvers than optimal, which would also be inefficient.[413] Returning to the original

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[409] *See supra* notes 280-81 and accompanying text.

[410] *See supra* notes 280-81 and accompanying text.

[411] *See supra* Part V.B.2 (detailing how the current system promotes imperfect information).

[412] *See supra* note 310 and accompanying text (detailing Army training guidance regarding environmental sensitivity).

[413] *See supra* note 43 and accompanying text (defining economic efficiency).

hypothetical maneuver under the current system above helps illustrate this point.[414] Assume that the maneuver would still produce a $100,000 benefit through increased national security.[415] Option A still costs $51,000 in direct expenses to the unit and $40,000 in damages external to the unit.[416] Option B still costs $50,000 in direct costs to the unit, with $60,000 in damages external to the unit.[417] In this illustration, assume the commander places a very high priority on avoiding environmental damage.[418] The commander may consider that the guidance to provide "environmentally sensitive"[419] training is absolute and prohibits him from conducting the training under either option A or option B. This outcome would be a less than optimal outcome, because the potential surplus in national security would be lost. However, if the commander were required to pay the costs of the damage caused by his unit's maneuver, he would be forced to take the actual costs into consideration.[420] As the commander would not know the actual costs of the damage while planning the maneuver, the commander would have an incentive to develop a more accurate estimate of costs. Accordingly, the proposed system gives a commander an incentive to gain better information than under the current system.[421] By internalizing the costs of the negative externality

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[414] *See supra* notes 355-60 and accompanying text.

[415] *See supra* note 355 and accompanying text.

[416] *See supra* notes 355-56 and accompanying text.

[417] *See supra* notes 355-56 and accompanying text.

[418] *See supra* notes 365-66 and accompanying text (describing how a commander's consideration of Army guidance may affect his choices regarding maneuver planning and execution).

[419] *See supra* note 310 and accompanying text (detailing Army guidance regarding training).

[420] *See supra* notes 48, 315 and accompanying text (describing Professor Coase's view on addressing negative externalities).

[421] *See supra* Part V.B.2 (explaining how the current system promotes imperfect information).

generated by the unit's maneuver, the commander would make a determination that would be based on better information of costs; not based on vague directives or imperfect information that may cause fiscal illusion.[422]

2. *The Impact of a Command-Funded Overseas Maneuver Damage Claims Process on Combat Operations*

A similar criticism could be made that requiring commanders to pay for the maneuver damage claims caused during operations would make a commander less aggressive in combat operations. However, the same analysis applies to an operational setting as does to a training exercise.[423] The commander would still balance the advantage to be gained from a particular course of action with the costs of that course of action.[424] During an operation, the relative benefits to national security will probably be higher in comparison to maneuver damage costs than they would be in a training exercise.[425] Nevertheless, the commander would still be placed in a better position to choose an efficient course of action under this proposal, because he would have more information to base his decision upon.[426] The proposed change in funding source from USARCS to the maneuver unit would have no detrimental effect on overall training, unit readiness, or operational performance. As

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[422] *See supra* notes 415-19 and accompanying text.

[423] *See supra* Part V.C.1 (describing the impact of a command-funded claims process on training).

[424] *See supra* notes 420-22 and accompanying text.

[425] Furthermore, as combat-related claims filed by those who do not ordinarily reside in the United States are not payable, a commander would pay relatively fewer claims during combat operations. Foreign Claims Act, 10 U.S.C. § 2734 (2005); International Agreements Claims Act, 10 U.S.C. § 2734a (2005); *see supra* notes 171, 229 and accompanying text (describing the FCA's and IACA's combat exception rule).

[426] *See supra* Part V.C.1.

commanders would have an incentive to use the Army's funds more efficiently, fewer funds would be expended on less than optimal maneuvers or operations.[427] This would make more funds available to be used for efficient training and operations. Under the proposed system, a commander would enjoy the same freedom to determine what training is best for his unit.[428] He would also enjoy the same freedom to determine how to undertake an operation. The ultimate outcome of this change would be to allow commanders to be better informed on actual social costs and social benefits, to make a more efficient determination.

The factors discussed in the preceding paragraphs lend support for the contention that a shift in the funding source of overseas maneuver damage claims from USARCS to the responsible unit is warranted. The Coase Theorem and the analysis advocated by Professor Coase support this result.[429]

D. Required Regulatory and Procedural Changes

Having established the analytical support for requiring unit commanders to pay for overseas maneuver damage claims from their unit funds, the specific changes that would have to be made are recommanded. The current statutory structure for the payment of overseas maneuver damage claims allows for the adjudication of overseas maneuver damage

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[427] *See supra* notes 400-05 and accompanying text (hypothetical demonstrating incentives for more efficient resources allocation under the proposed command-funded overseas maneuver damage claims process).

[428] *See supra* notes 322-24 and accompanying text (detailing a commander's authority and responsibilities).

[429] *See supra* Part II.A.2 (detailing the Coase Theorem).

claims by FCCs for FCA claims,[430] U.S. Army claims offices for MCA claims,[431] and sending states' claims offices for IACA claims.[432] This statutory structure would not need to be changed, as the statutory mechanisms only grant authority to adjudicate claims, but do not require that the claims be funded by USARCS, or any other particular agency.[433] A regulatory reallocation by Department of Army Operating Agency Twenty-two of funds from USARCS to maneuver units is all that is required to implement the funding change.[434] Instead of allocating the funds to USARCS each month to pay the claims,[435] the funds would be allocated to the Operations and Maintenance accounts of the maneuver units at the beginning of each fiscal year. Commanders would be required to incorporate anticipated claims into their annual planning and budget process.[436] This is the desired result, because it would cause commanders to balance the anticipated benefit of the maneuver with the anticipated social costs, to include maneuver damages, of the maneuver.[437]

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[430] *See supra* note 173 and accompanying text (describing claims approval authority under the FCA).

[431] *See supra* notes 207-11 and accompanying text (describing claims approval authority under the MCA).

[432] *See supra* notes 261-63 and accompanying text (describing claims approval authority under the NATO SOFA).

[433] *See* International Agreements Claims Act, 10 U.S.C. § 2734a (2005); Military Claims Act, 10 U.S.C. § 2733 (2005); Foreign Claims Act, 10 U.S.C. § 2734 (2005).

[434] *See supra* Part III.D (describing the current funding of overseas maneuver damage claims).

[435] *See supra* notes 277-78 and accompanying text (describing the current process for allocating funds for overseas maneuver damage claims from Operating Agency Twenty-two to USARCS).

[436] *See supra* notes 420-21 and accompanying text (hypothetical describing the incentives to gain information on maneuver related negative externalities).

[437] *See supra* notes 315-17 and accompanying text (describing Professor Coase's view on addressing negative externalities).

Under the current system, USARCS considers numerous factors in estimating the amount of funds that will be required to pay for maneuver damage claims.[438] If this proposal were to be implemented, USARCS would remain a valuable resource in determining the aggregate amount of estimated maneuver damage claims, based on its expertise in paying maneuver damage claims.[439] Although a unit commander would possess more information regarding a particular maneuver for his unit than USARCS,[440] USARCS would continue to play an important role in advising commanders regarding maneuver damage claims. When planning a particular maneuver under the proposal, a commander would have an incentive to work with claims personnel to estimate the amount of maneuver damage from a particular course of action.[441] The commander would recognize that the claims personnel are responsible for adjudicating any maneuver damage claims,[442] and would therefore be subject matter experts in maneuver damage claims. The incentive would come from the commander's desire to minimize maneuver damage costs, as he would be the bill-payer for such costs.[443] The shift in responsibility for paying for maneuver damage claims has the result of switching the motive to work together and share information. Under the current system, as illustrated by the example of Mr. Walmsley and the cavalry squadron commander, the incentive to share information and cooperate to lower maneuver damage costs fell on the

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[438] DA PAM. 27-162, *supra* note 144, at para. 13.11.

[439] *See supra* Part III.D (describing the procedures for the payment of overseas maneuver damage claims).

[440] *See supra* notes 407-10 and accompanying text (discussing the difficulty in estimating maneuver damage).

[441] *See supra* notes 407-10 and accompanying text.

[442] *See supra* Part III (describing the overseas maneuver damage claims process).

[443] *See supra* note 397 and accompanying text (arguing that, based on experiences from REFORGER, bill-payers are more likely to take efforts to minimize overseas maneuver damage costs).

bill-payer, USARCS.[444] Under this proposal, the incentive to share information and cooperate to lower maneuver damage costs would transfer to the unit commander. The obvious advantage of this change is that it shifts the incentive to cooperate to the party in control of how the negative externalities are generated.[445] Mr. Walmsley and other similarly-situated claims personnel have an incentive to work to lower maneuver damage costs because it is their job.[446] Under the proposal, that incentive would be shared. This new incentive to work more closely with claims personnel would ensure that commanders have greater information, which would reduce or eliminate the occurrence of fiscal illusion[447] and result in a more efficient allocation of resources.[448]

As proposed, the amount of funds that would be allocated to maneuver units each year would be determined by the Department of the Army, based on input from USARCS.[449] The same factors that USARCS uses under the current system would be considered to estimate an aggregate amount necessary for overseas maneuver damage claims.[450] Recall that these factors include historical data, as well as "projected Army strength, . . ., planned major maneuvers, exercises, and deployments, . . . and other information from field claims

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[444] *See supra* Part I.

[445] *See supra* Part V.A.3.

[446] *See supra* note 2 and accompanying text.

[447] *See supra* notes 115-16 and accompanying text (describing fiscal illusion).

[448] *See supra* note 43 and accompanying text (defining economic efficiency).

[449] *See supra* Part III.D.

[450] DA PAM. 27-162, *supra* note 144, at para. 13.1.

offices."[451] Accordingly, as is customary under the Army Planning, Programming, Budgeting, and Execution Process, Operations and Maintenance funds are budgeted based on input from Major Commands (MACOM) and their Major Subordinate Commands, and are then distributed back through MACOM channels.[452] These funds would then be distributed to maneuver units through their MACOMs. The amount of funds that an individual unit would receive would be based on numerous factors, to include type of unit, location, planned operations and exercises, and historic data regarding past maneuver damage claims.[453] As noted above, USARCS, together with the MACOMs, would help track and disseminate this information.[454] The MACOMs and Major Subordinate Commands would be responsible for allocating these funds to their tenant units. Ideally, similarly-situated units would receive the same amount of funds. Once allocated, the funds would be available for the payment of maneuver damage claims, or if not expended for maneuver damage claims, for any other authorized purpose considered appropriate by the unit commander.

A concern is whether wily a unit commander could manipulate the proposed system to pad his Operations and Maintenance account by overestimating the amount of maneuver damage claims and use the excess amount for other purposes. If that were the case, would the funds need to be fenced funds, only to be used to pay for maneuver damage claims? As

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[451] *Id.*

[452] *See generally* U.S. ARMY WAR COLLEGE, HOW THE ARMY RUNS, ch. 9 (2005) (outlining the Army Planning, Programming, Budgeting, and Execution Process).

[453] *See* DA PAM. 27-162, *supra* note 144, at para. 13.11.

[454] *See supra* notes 277-79 and accompanying text (outlining the current process for estimating and funding overseas maneuver damage claims).

proposed, the amount of funds that would be shifted to maneuver units for the payment of overseas maneuver damage claims would be determined from the top down.[455] Although the individual units would have input on the amount of Operations and Maintenance funds that they receive, ultimately the amount received would be determined by the unit's headquarters.[456] Although there is the possibility that a commander could overestimate his planned expenses and thereby receive more funds than he would spend, this risk seems to be the same risk that exists for other aspects of the Operations and Maintenance budgeting process.[457] If the funds were fenced funds, that is, only available for the payment of maneuver damage claims, the commander would lose the incentive to use the funds in an efficient manner, because he would not be able to use the funds for other purposes that would directly benefit his mission.[458] In fact, if the funds were fenced, there may be an incentive to spend all the budgeted funds to ensure that he would receive the same amount during the next fiscal year.[459] As the amount of funds allocated is based on historic data,[460] a commander could ensure the data shows a continuing requirement for maneuver damage claims funds by spending them during the fiscal year.[461] In a system where funds are limited to a specific

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[455] *See supra* notes 449-51 and accompanying text (detailing the proposed method for funding overseas maneuver damage claims).

[456] *See supra* notes 449-51 and accompanying text.

[457] *See supra* notes 449-51 and accompanying text.

[458] *See supra* Part V.C (describing the advantages of the proposed command-funded overseas maneuver damage claims process).

[459] *See supra* note 451 and accompanying text.

[460] DA PAM. 27-162, *supra* note 144, at para. 13.11.

[461] Interview with Major Michael L. Norris, Professor, Contract and Fiscal Law Department, The Judge Advocate General's Legal Center and School, in Charlottesville, Va. (Mar. 3, 2006) [hereinafter Major Norris Interview].

time period, there is occasionally an incentive to expend the funds on a lower priority item before they expire, because the funds cannot saved to be used for a higher priority expense during the following fiscal year.[462] This phenomenon is often related to so-called "end of year money."[463] Although the proposed change may suffer from this phenomenon, it would only be exacerbated if the funds were fenced, or limited to maneuver damage claims payments. In the fenced funds scenario, the commander has no other option than to use the funds for maneuver damage claims payments, which eliminates the incentive to choose more efficient resource allocation choices.[464] While the proposed system may suffer from inefficiencies, as the preceding discussion explains, those inefficiencies are less than the inefficiencies of the current system.

It is important to note that under this proposal, commanders would not be responsible for adjudicating the maneuver damage claims. This role would remain the responsibility of claims personnel authorized to adjudicate claims under the provisions of the FCA, MCA, and IACA.[465] If a commander were responsible for determining how much compensation was appropriate for a negative externality caused by his unit, there would be a strong incentive to award little or no compensation. This is because the commander would be able to use the funds for competing interests, such as more training. On the contrary, an FCC, or other claims personnel responsible for adjudicating a claim, has no inherent incentive to award a

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[462] *Id.*

[463] The problem of the "end of year money" phenomena is beyond the scope of this paper. However, it presents a potential incentive for inefficient spending in government.

[464] *See supra* Part V.C .

[465] *See supra* Part III (detailing the current overseas maneuver damage claims process).

less than appropriate amount. This is because claims personnel cannot use the funds for a purpose that benefits them.[466]

A concern is whether a commander's poor use of his Operations and Maintenance funds could result in a claimant not being paid. Under the proposal, a commander who does not have sufficient funds for maneuver related claims would be required to find the funds from another source. Available options would include requesting additional funds from the unit's higher headquarters or eliminating other planned expenses.[467] A commander's ability to program funds would be another factor that can be considered in their officer evaluation report, just as it is for other Operations and Maintenance expenditures. If a commander is unable to properly budget his funds and the readiness of his unit suffers, his superior officers will take action as is necessary to remedy this short coming.[468] An advantage of this proposed system is that it would result in command attention on maneuver damage throughout the chain of command. This is because there is the potential that the expense could impact the budget throughout the command.[469] Claims of over $100,000 would be submitted to the Judgment Fund.[470] The Judgment Fund would act as a cap that will protect units from catastrophic damages. Although there is some risk that the proposed change could

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[466] *See supra* Part III.

[467] Major Norris Interview, *supra* note 461.

[468] Available actions include counseling, a negative officer evaluation report, or even relief for cause.

[469] *See supra* note 452-54 and accompanying text (describing the proposed method of estimating and funding overseas maneuver damage claims through command channels).

[470] *See supra* notes 270-72 and accompanying text (describing the maximum amount of Army funds used to pay overseas maneuver damage claims and the role of the Judgment fund).

result in a delayed payment to a claimant, delays occur under the current system at the beginning and end of the fiscal year.[471]

VI. Conclusion

The Coase theorem's "frictionless" world without transaction costs[472] is indeed foreign territory for the combat arms commander, who trains to fight in a world occupied by the "friction of war."[473] Nevertheless, the positive economic analysis of systems designed to address negative externalities advocated by Professor Coase[474] has direct application to the compensation scheme designed to address negative externalities that result from maneuvers in the Army.[475] The statutory structures of the FCA,[476] MCA,[477] and IACA[478] are designed to remedy market inefficiencies related to negative externalities caused by overseas maneuvers by requiring the Army to internalize the costs of those negative externalities.[479] However, the costs are not truly internalized by the units responsible for causing the negative

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[471] E-mail from Aletha Friedel, Chief, European Torts Branch, U.S. Army Claims Service, Europe, to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Mar. 8, 2006, 04:09 EST) (on file with author).

[472] Weston, *supra* note 118, at 932.

[473] *See* CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds. and trans., 1976) at 122.

[474] Coase, *supra* note 1, at 21.

[475] *See supra* Part V.A.2.

[476] Foreign Claims Act, 10 U.S.C. § 2733 (2005); *see also supra* Part III.A (detailing the FCA).

[477] Military Claims Act, 10 U.S.C. § 2734 (2005); *see also supra* Part III.B (detailing the MCA).

[478] International Agreements Claims Act, 10 U.S.C. § 2734(a) (2005); *see also supra* Part III.C (detailing the MCA and Article VIII, NATO SOFA).

[479] *See supra* Part V.A.2.

externalities, because the costs of compensating the damage are paid by USARCS, a separate part of the Army.[480] If the Army were to implement this proposed change by requiring a maneuver unit to pay for the overseas maneuver damage claims they caused, the costs of the maneuver related negative externalities would actually be internalized.[481] A unit commander is uniquely situated to determine the advantage gained from a particular maneuver.[482] By making him aware of all maneuver related costs, he will make the most efficient decision regarding maneuvers.[483] This would result in a more efficient overall resource allocation, making more funds available for those maneuver units.[484] As the introductory example with Mr. Walmsley and the cavalry squadron commander demonstrates, if commanders are aware of the costs caused by their maneuvers, the Army will use its funds more efficiently and will minimize inefficient actions.[485] This will result in an increase in overall social welfare.[486] As Professor Coase stated, "[w]hat is needed is a change of approach."[487]

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[480] *See supra* Part IIII.D (describing the current method of funding of overseas maneuver damage claims).

[481] *See supra* Part II.B and V.A.5 (describing law and economic theory regarding internalization of negative externalities and how the proposed system would result in maneuver damage cost internalization).

[482] *See supra* note 324 and accompanying text (describing the authority and responsibilities of commanders).

[483] *See supra* Part V.C.

[484] *See supra* Part V.C.1.

[485] *See supra* Part I.

[486] *See supra* note 23 (defining welfare economics).

[487] Coase, *supra* note 1, at 21; *see supra* note 1 and accompanying text.

Appendix A. Proposed Changes to Army Regulation 27-20, Claims*

Section II
Responsibilities

1–9. The Commander, USARCS

The Commander, USARCS, will—

a. Supervise and inspect U.S. Army claims activities worldwide.

b. Formulate and implement claims policies and uniform standards for claims office operations.

c. Investigate, process and settle claims beyond field office monetary authority and consider appeals and requests for reconsideration on claims denied by the field offices.

d. Supervise the investigation, processing, and settlement of claims against, and in favor of, the United States under the statutes and regulations listed in paragraph 1–4, and pursuant to other appropriate statutes, regulations, and authorizations.

e. Designate ACOs, CPOs, and claims attorneys within DA and DOD components other than the Departments of the Navy and Air Force.

f. Designate continental United States (CONUS) geographic areas of claims responsibility.

g. Recommend action to be taken by the SA or the U.S. Attorney General, as appropriate, on claims in excess of $200,000 or the threshold amount then current under the FTCA, on claims in excess of $100,000 or the threshold amount then current under the FCA, the MCA, and the NGCA, and on other claims that have been appealed to the SA.

h. Operate the "receiving State office" for claims cognizable under Article VIII of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA), as implemented by 10 USC 2734b (see chap 7).

i. Settle claims of the U.S. Postal Service for reimbursement under 39 USC 411 (see DOD Manual 4525.6–M).

j. Settle claims against carriers, warehouse firms, insurers, and other third parties for loss of, or damage to, personal property of DA or DOD soldiers or civilians incurred while the goods are in storage or in transit at Government expense (chap 11).

k. Formulate and recommend legislation for Congressional enactment of new statutes and the amendment of existing statutes considered essential for the orderly and expeditious administrative settlement of noncontractual claims.

l. Perform post-settlement review of claims.

m. Prepare, justify, and defend estimates of budgetary requirements and administer the Army claims budget. **Coordinate with major Army commands (MACOMS) to determine supplemental budgetary requirements for the payment of maneuver claims from the Operations and Maintenance (O&M) funds of maneuvering units.**

n. Maintain permanent records of claims for which TJAG is responsible.

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* Proposed changed are listed in bold. Headers are also in bold, but have not been modified from the original.

o. Assist in developing disaster and maneuver claims plans designed to implement the responsibilities set forth in paragraph 1–11*k*.

1–16. Commanders of major Army commands

Commanders of major Army commands (MACOM), through their SJAs, will—

a. Assist USARCS in monitoring ACOs and CPOs under their respective commands for compliance with the responsibilities assigned in paragraphs 1–11 and 1–12.

b. Assist claims personnel in obtaining qualified expert and technical advice from command units and organizations
on a nonreimbursable basis (although the requesting office may be required to provide TDY funding).

c. Assist TJAG, through the Commander, USARCS, in implementing the functions set forth in paragraph 1–9.

d. Coordinate with the ACO within whose jurisdiction a maneuver is scheduled, to ensure the prompt investigation and settlement of any claims arising from it.

***e.* Coordinate with USARCS for the preparation, justification, and defense of estimates of supplemental budgetary requirements for the payment of maneuver claims from the O&M funds of maneuvering units. Distribute supplemental O&M funds to maneuvering units for the payment of maneuver damage claims by the maneuvering unit. Ensure subordinate maneuver units track the expenditure of O&M funds for maneuver damage claims and coordinate through their servicing ACO.**

Section III
Operations, Policies, and Guidance

1–17. Operations of claims components

(4) *Special claims processing offices.*

(a) Designation and authority. The Commander, USARCS, the chief of a command claims service, or the head of an ACO may designate special CPOs within his or her command for specific, short-term purposes (for example, maneuvers, civil disturbances and emergencies). These special CPOs may be delegated the approval authority necessary to effect the purpose of their creation, but in no case will this delegation exceed the maximum monetary approval authority set forth in other chapters of this publication for regular CPOs. All claims will be processed under the claims expenditure allowance and claims command and office code of the authority who established the office or under a code assigned by USARCS. The existence of any special CPO must be reported to the Commander, USARCS, and the chief of a command claims service, as appropriate.

(b) Maneuver damage and claims office jurisdiction. A special CPO is the proper organization to process and approve maneuver damage claims, except when a foreign government is responsible for adjudication pursuant to an international agreement (see chap 7). Personnel from the maneuvering command should be used to investigate claims and, at the ACO's discretion, may be assigned to the special CPO. **The maneuvering command is responsible for budgeting for the payment of maneuver damage claims from the unit's O&M funds. Commanders should carefully plan and execute maneuvers in an effort to balance the advantages of the maneuver with estimated maneuver damage claims.**

Commanders should coordinate with the ACO or special CPO in developing an estimate of maneuver damage claims. The ACO will process claims filed after the maneuver terminates. The special CPO will investigate claims arising while units are traveling to or from the maneuver within the jurisdiction of other ACOs, and forward such claims for action to the ACO in whose area the claims arose. **The ACO will notify the resource manager of all approved claims to ensure unit funds are available for the payment of maneuver damage claims. Claims for maneuver damage not arising on private land that he Army has used under a permit will be paid from O&M funds specifically budgeted by the maneuver for the payment of maneuver damage claims.** Claims for damage to real or personal property arising on private land that the Army has used under a permit may be paid from funds specifically budgeted by the maneuver for such purposes in accordance with AR 405–15.

Section X
Payment Procedures

2–63. Sources of funds
a. To determine whether to pay a claim from Army or USACE funds or the Judgment Fund, a separate amount must be stated on each claimant's settlement agreement. A joint amount is not acceptable. A claim for injury to a spouse or a child is a separate claim from one for loss of consortium or services by a spouse or parent. The monetary limits of $2,500 set forth in chapter 4 and $100,000 set forth in chapters 3, 6, and 10, apply to each separate claim
b. A chapter 4, 5, or 7, section II, claim for $2,500 or less is paid from Army funds or, if arising from civil works, from USACE funds. The Department of Treasury pays any settlement exceeding $2,500 in its entirety, from the Judgment Fund.
c. The first $100,000 of a claim settled under chapters 3, 6, or 10 is paid from Army funds. Any amount over $100,000 is paid out of the Judgment Fund.
d. If not over $500,000, a claim arising under chapter 8 is paid from Army or civil works funds as appropriate. A claim exceeding $500,000 is paid entirely by a deficiency appropriation.
e. AAFES or NAFI claims are paid from nonappropriated funds, except when such claims are subject to apportionment between appropriated and nonappropriated funds. (See DA Pam 27–162, para 2–100*i*(2).)
***f.* The first $100,000 of a maneuver damage claim under chapter 3, section III of chapter 7, or chapter 10 is paid from O&M funds from the maneuvering unit. Any amount over $100,000 is paid out of the Judgment Fund.**

Section II
Monthly Claims Reporting System

13–7. General
a. A monthly status report of recovery actions and claims against the United States is prepared by the automation software in the Personnel Claims Management Program and the Tort and Special Claims Management Program. Use of the USARCS Claims Automation

Program is explained in DA Pam 27–162, chapter 13, and software instructions, as well as periodic updates provided by the USARCS Information Management Office.
b. The data contained in the USARCS Claims Automation Program and the automated monthly claims office status reports provides useful information for claims officers, heads of area claims offices, JAs and SJAs responsible for OCONUS command claims services, and the Commander, USARCS. The system provides a uniform method of assignment of claim file numbers, which permits easy identification and retrieval of individual claim files, identifies delays in claims processing, and permits worldwide management control of all claims against the Government. The automated monthly reports forwarded to USARCS from the databases are used to prepare claims budgetary status reports and periodic budget estimates to the Defense Finance Accounting Service (DFAS) and the Office of the Assistant Secretary of the Army (Financial Management and Comptroller). Claims office personnel will ensure that automated claims records are complete and accurate. **Maneuver damage claims paid from the O&M funds of the maneuvering unit will be tracked and reported using the USARCS Claims Automation Program. These reports will be used to assist MACOMS in preparing maneuver budget estimates.**
c. This section does not apply to the reporting of reimbursement obligations to foreign countries pursuant to the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) or other similar treaties or agreements.
d. The Commander, USARCS, will furnish software and documentation relating to the Personnel Claims Management Program, the Affirmative Claims Management Program, the Affirmative Potentials Program, and the Tort and Special Claims Management Program, with updated versions as required. These are the only programs authorized for recording and reporting claims in the Army Claims System. Local modification of these programs is not authorized.

13–8. Reporting requirements
In accordance with paragraph 13–7, each CONUS area claims office and OCONUS claims processing office with approval authority must submit a monthly claims data upload to USARCS. OCONUS area claims offices and foreign claims commissions with a supervising command claims service will submit monthly claims data uploads through their respective command claims service to USARCS.
a. The monthly data upload for each claims office (except USACE claims offices) consists of electronically transmitted automation data for tort claims and/or personnel claims. **The report will also track maneuver damage claims adjudicated by claims offices and paid with the maneuvering units O&M funds.** A copy of the two-page SJA report from the tort claims program is submitted directly to the Tort Claims Division, USARCS. For USACE claims offices that do not process personnel or affirmative claims, the monthly data upload will consist only of tort claims data.
b. The tort claims monthly data upload will be prepared by each claims office by the close of business of the last business day of the month. The personnel claims monthly data upload will be prepared by each claims office on the first working day of the month. The data upload will be forwarded to USARCS (or to the appropriate OCONUS command claims service in accordance with local directives) on the first working day of the month.

c. Claims offices are not required to send a monthly data upload for any of the two claims management programs if there are no data changes from the previous monthly data upload for that program. However, claims offices must send a written negative report so that USARCS can account for each claims office on a monthly basis. A short letter, memorandum, or electronic message will suffice.

Section III
Management of Claims Expenditure Allowance

13–10. Reserved
This section is reserved for future use.

13–11. General
Each claims settlement or approval authority who has been furnished a Claims Expenditure Allowance (CEA) by the USARCS budget office is responsible for managing that CEA. Sound fiscal management includes knowing at all times how much of the CEA has been obligated, its remaining balance, and assessing each month whether the balance will cover claims obligation needs in the local office for the remainder of the current fiscal year. **Claims offices responsible for adjudicating maneuver damage claims should assist the maneuvering unit in estimating and tracking the expenditure of the unit's O&M funds for maneuver damage claims. The claims office should assist the maneuvering unit in applying the same sound fiscal management that is required for a CEA.**

Appendix B. Proposed Changes to DA Pam 27-162, Claims Procedures

Section X
Payment Procedures

2–100. Fund sources
a. Military Claims Act.
1. Maneuver damage claims. **Amounts less than $100,000 are paid from the O&M funds of the maneuvering unit responsible for causing the maneuver damage. Amounts over $100,000 are paid by the Department of the Treasury Financial Management Service from the Judgment Fund (see figure 2-64, extract from 31 USC 1304). This monetary limit applies to each claim not to each incident within the maneuver.**
2. All other claims. Amounts less than $100,000 are paid from Army Claims funds and amounts over $100,000 are paid by the Department of the Treasury Financial Management Service from the Judgment Fund (see figure 2-64, extract from 31 USC 1304). This monetary limit applies to each claim, not to each claims incident. For example, one incident may give rise to a claim for personal injury and a claim by the injured party's spouse for loss of consortium. These are considered two separate claims even though they arise from one incident. The limit applies also to claims filed jointly. Thus, settlement of a joint claim must specify the settlement amount for each claimant.
b. Federal Tort Claims Act. FTCA settlements of $2,500 or less are paid from Army funds on all claims except civil works claims, which are paid from civil works funds at the USACE District level. FMS pays all settlements above $2,500 on all FTCA claims, including civil works claims, from the Judgment Fund. This monetary limit applies to each claim, not each claims incident. For example, a subrogee's claim for $3,000, which includes the subrogor's paid and fully subrogated $500 deductible, constitutes one claim and is payable by the FMS. If the insurer is merely acting as its insured's collection agent, however, and has not paid the deductible, both claims are payable from Army funds.
c. Non-Scope Claims Act. Claims brought pursuant to this statute are payable from Army funds, even though the aggregate payment for all claims resulting from one incident exceeds $2,500.
d. NATO Status of Forces Agreement. NATO Status of Forces Agreement (SOFA) claims arising in the United States are paid in the same manner as FTCA or MCA claims, 10 USC 2734b. After paying these claims, USARCS seeks reimbursement from the sending State for its 75 percent share in accordance with the treaty's terms. **Reimbursements for maneuver damage claims arising overseas are paid from the O&M funds of the maneuvering unit, up to the first $100,000, as under the MCA.**
e. Army Maritime Claims Settlement Act.
(1) Claims against the United States brought pursuant to this statute are paid from Army funds except where the claim arises out of civil works activities, in which case the claim is paid from civil works funds for amounts not to exceed $500,000. The Secretary of the Army certifies settlements greater than $500,000 in their entirety to Congress for payment.

(2) An AMCSA claim in favor of the United States is paid into the U.S. Treasury upon settlement but a claim arising from a civil works activity is paid into USACE operating funds at the USACE district level.

f. Foreign Claims Act. FCA claims payments are funded from the same source as are MCA claims. The methods for issuing these payments differ, however, as discussed in subparagraph *o* below. **FCA claims for maneuver damages are funded from the O&M funds of the maneuvering unit, up to the first $100,000, as under the MCA.**

o. Claims under Foreign Claims Act. The check will be drawn on the currency of the country in which payment is to be made in accordance with AR 27-20, paragraph 10-9, at the Foreign Currency Fluctuation Account exchange rate in effect on the date of approval action. If a payee requests payment in U.S. currency, or the currency of a country other than that of the payee's country of residence, obtain permission from the Commander, USARCS. Where payment must be approved at USARCS or a higher authority, USARCS will complete and sign the voucher and forward it to the original commission for local payment.

2–101. Payment documents

a. General. For tort claims paid from Army funds, submit the following documents to the appropriate DFAS:

(1) For all claims, a DA Form 7500 signed by a properly designated settlement or approval authority certifying payment. Figure 2-53 provides a suggested format for such a payment report. The DA Form 7500 serves as a settlement agreement and will be signed by the claimant unless a separate agreement is needed. A separate DA Form 7500 will be completed for each claimant, except in a structured settlement where the payee is the broker on behalf of all claimants. The proper accounting classification must be entered on the DA Form 7500 except for claims paid by NAF, AAFES, or USACE. **Overseas maneuver damage claims will be coordinated with the resource manager of the responsible maneuvering unit, to obtain the proper accounting classification.**

(2) Two copies of a settlement agreement when a separate settlement agreement is used in lieu of DA Form 7500. If a separate agreement is used, the claimant's attorney's signature may appear as acknowledgment of the settlement; the claimant's attorney may not sign as a party to the settlement.

(3) Two copies of the claim, usually a SF Form 95 (figures 2-6a and b), and proof of authority to sign (guardianship decree, attorney's representation agreement, documents authorizing a corporate officer or a representative of the estate to sign, as appropriate).

(4) Two copies of an action (figure 2-51) or a Small Claims Certificate (DA Form 1668), as appropriate.

(5) When the claim will be paid electronically to the DFAS via STANFINS, transmit the information listed in subparagraph (*b*) below. Then mail DA Form 7500 to DFAS and retain the documents listed above in the claim file. It is suggested that claims officers meet with their DFAS point of contact and review the payment report to ensure acceptance by DFAS.

b. Tort Claim Payment Report (figure 2-53).

(1) Block 1. Enter identification number of your servicing DFAS office.

(2) Block 2. Date document forwarded to DFAS for payment.

(3) Block 3. Name of claims office approving payment.

(4) Block 4. Number assigned by USARCS to a claims office with payment authority.

(5) Block 5. Mailing address of claims office approving payment of claim.
(6) Block 6. Self-explanatory.
(7) Block 7. Self-explanatory.
(8) Block 8. Total amount claimed by claimant.
(9) Block 9. Insert appropriate accounting citation.
(a) Accounting citation. Charging an approved claim against a particular accounting citation creates an obligation against the claims appropriation for the current fiscal year. Accordingly, the payment report will bear the correct account code for both the appropriation charged and the current fiscal year, regardless of the date the claim accrued or was filed. Confusion sometimes arises at the end of a fiscal year. For example, an approved claim is certified for payment on 28 September, but it is obvious that the payment will not actually be processed until the next fiscal year, beginning 1 October. At the time the check is issued, the accounting code will not be advanced to the next fiscal year. Only the accounting code for the fiscal year in which the funds were obligated and the claim was certified for payment (the payment report was signed) should be charged. **For overseas maneuver damage claims, coordinate with the resource manager of the responsible maneuvering unit, to obtain the proper accounting citation, as funds come from the O&M funds of the responsible unit.**
(b) Accounting codes. Each fiscal year, the AR 37-100 series publishes separate payment and refund codes for claims payments made pursuant to each chapter of AR 27-20. All elements of the accounting code for each type of claim, except the third digit, remain constant (unless otherwise notified by fiscal authorities)— the third digit represents the second digit of the fiscal year. For example, in the payment of an FY 03 FTCA claim, the FTCA payment code would appear as 2132020 22-0203 P436099.21-4200 FAJA S99999.
(10) Block 10. Name of claimant receiving payment.
(11) Block 11. Address of recipient of claims settlement check.
(12) Block 12. Enter Social Security number of payee or tax identification number if payee is a structured
settlement, broker, or business other than an individual claimant.
(13) Block 13. Amount approved for payment to claimant.
(14) Block 14. Enter either "PA"(advance payment) or "PF"(final payment.)
(15) Block 15. The routing number of the bank to which the electronic payment will be made.
(16) Block 16. The name of the person or business holding the account, and the account number.
(17) Block 17. Self-explanatory.
(18) Block 18. Self-explanatory.
(19) Blocks 19 & 20: To be dated and signed in original by claimant. Where another settlement acceptance
agreement has been executed, enter "See attached agreement".
(20) Blocks 21-23: To be completed by the CJA or claims attorney authorized to approve payment of settlement award.
(21) Block 24. Date that payment has been entered in the tort claims data base.