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Methods of Compensating Victims of War: Combating the Problems of an Enduring System

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Methods of Compensating Victims of War: Combating the Problems of an Enduring System

On the wall in chalk is written
"They want war"
He who wrote it has already fallen.

Bertolt Brecht
German Playwright

I. INTRODUCTION

War may simply be defined as "an act of violence intended to compel our opponent to fulfill our will."¹ Throughout history, the human race has repeatedly engaged in armed combat to produce this result. In the process, however, lives and property have been destroyed with immeasurable magnitude.

The gas chambers and sadistic medical experiments of the Nazi regime succeeded in torturing millions during World War II. Recently, several countries have taken steps to compensate these individuals: West Germany paid \$438 billion to Israel in 1988;² East Germany agreed to pay \$100 million to surviving Jewish victims of the Holocaust;³ and Austria paid \$6.5 million in similar reparations.⁴ Several German corporations also have paid nearly \$12 million to those forced to labor in their factories during the Nazi war effort.⁵ In another part of the world, South Korean diplomats are requesting \$2.3 billion from Japan for Korean survivors of the U.S. atomic bombings of Hiroshima and Nagasaki.⁶

In the United States, more than 500,000 battle deaths were recorded from the American Revolution through the Vietnam con-

1. 19 ENCYCLOPEDIA BRITANNICA 543 (15th ed. 1977) (in the words of Prussian military theorist Carl von Clausewitz, who "cogently defines war as a national instrument of foreign policy").

2. Reuter Libr. Rep., June 6, 1988 (AM cycle).

3. *Id.*

4. L.A. Times, Mar. 24, 1988, § 1, at 2, col. 1.

5. *Id.*, June 12, 1988, § 1, at 9, col. 4.

6. *Id.*, Aug. 15, 1989, § 1, at 2, col. 1.

flict.⁷ These wars cost the United States over \$1.3 billion, with much of this cost allocated to compensating the victims.⁸ Even today, the Vietnam saga continues as 34,000 veterans exposed to the defoliant Agent Orange⁹ receive a \$240 million settlement from the U.S. government.¹⁰

Presently, the Bush Administration is working on a plan to compensate the families of the 290 victims killed when an American naval vessel, the *U.S.S. Vincennes*, destroyed an Iranian airliner over

7.	<u>War</u>	<u>Casualties</u>
	American Revolution (1775-1783)	* 4,000
	War of 1812 (1812-1814)	* 2,000
	Mexican War (1846-1848)	* 13,000
	Civil War (1861-1865)(Union forces only)	140,414
	Indian Wars (Approx. 1860-1898)	* 1,000
	Spanish-American War (1898-1902)	385
	World War I (1917-1918)	53,402
	World War II (1940-1947)	291,557
	Korean Conflict (1950-1955)	33,629
	Vietnam (1957-1976)	47,378
		<u>586,765</u>

* Reflects an approximation of the total deaths in service, including both combat and non-combat related deaths resulting from accidents or disease.

38 U.S.C.A. § 1, XXXI - XXXIII (West 1979) (table no. 2); BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 1140, Series Y 856-903 (Bicentennial ed. 1975); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989, at 336 (109th ed. 1989) (table no. 48).

8.	<u>War</u>	<u>Cost (in dollars)</u>
	American Revolution	\$ 190,000.00
	War of 1812	158,000.00
	Mexican War	147,000.00
	Civil War (Union forces only)	12,952,000.00
	Spanish-American War	6,460,000.00
	World War I	112,000,000.00
	World War II	664,000,000.00
	Korean Conflict	164,000,000.00
	Vietnam	352,000,000.00
		<u>\$1,311,907,000.00</u>

BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 1140, Series Y 856-903 (Bicentennial ed. 1975); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989, at 336 (109th ed. 1989)(table no. 48).

9. Agent Orange, a herbicide, was sprayed on the jungles of Vietnam to uncover the Vietcong as they prepared to ambush American and South Vietnamese troops. J. HENDERSON & A. TWERSKI, PRODUCTS LIABILITY PROBLEMS AND PROCESS 206 (1987). Vietnam veterans brought a class action against the Agent Orange manufacturers, claiming that it contained trace amounts of dioxin which caused cancer, birth defects, and neurological disorders. *Id.*; see also *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

10. L.A. Times, July 6, 1988, § 1, at 2, col. 3.

the Persian Gulf during the Iran-Iraq war.¹¹ The Administration also sought \$29.6 million from Iraq for the May 17, 1987 attack on a frigate, the *U.S.S. Stark*, which killed 37 Americans.¹²

In each of these examples, victims of war are, or likely will be, receiving remuneration. The purpose of this comment is to discuss the various means by which such victims are compensated, and to analyze the problems which frequently arise therein.¹³ Section II de-

11. N.Y. Times, March 22, 1989, § A, at 10, col. 3. On June 3, 1988, the United States cruiser *Vincennes* fired two missiles at Iran Air Flight 655. Reuter Libr. Rep., August 15, 1989 (AM cycle). The *Vincennes* was cruising the Persian Gulf at the time in an effort to maintain neutral shipping during the Iran-Iraq war. *Id.* All 290 passengers and 15 crew members on board the aircraft died. *Id.* Iran brought suit at the United Nations International Court of Justice [hereinafter ICJ] against the United States claiming that it had violated international air traffic regulations. *Id.* Iran requested that the ICJ censure the United States and determine the amount of damages it must pay for the loss of the plane, and its passengers and crew. *Id.* The United States argued that it had not committed a violation of international law, but instead, acted in self-defense after repeatedly warning the plane's crew. *Id.*

The United States nevertheless offered to pay \$250,000 to the families of wage-earning victims, and \$100,000 to all other victims. Nat'l L.J., Sept. 4, 1989, at 3, col. 1. This formula could vary depending on the number of dependents the victim has, and the dependent's relationship to the victim. Wash. Post, July 18, 1989, § 1, at 14. However, no compensation will be paid to the Iranian government, or for the loss of the plane. Nat'l L.J., Sept. 4, 1989, at 3, col. 1. The United States State Department added that this compensation process will take considerable time due to the extensive negotiations between the United States, foreign ministries, and lawyers for the victims' families. *Id.* The United States also has insisted on the appointment of an acceptable mediator, such as another government, a charitable organization or an insurance company, to distribute the money, rather than giving it to the Iranian government for distribution. Chicago Tribune, July 18, 1989, at 10.

In addition to the ICJ case, over 200 relatives of the victims have filed suit in California state and federal courts. *Id.*, July 15, 1989, at 3. The plaintiffs allege a products liability claim against the defense contractors for the defective design of the Aegis Weapons System Radar used in destroying the plane. Nat'l L.J., Sept. 4, 1989, at 3, col. 1. The plaintiffs also seek damages from the United States government under the Federal Tort Claims Act. *Id.* The latter claim, however, appears to be invalid because the government may elect not to be sued under the Act. *Id.*

12. N.Y. Times, March 22, 1989, § A, at 10, col. 3. The families of the 37 United States sailors were each paid \$737,000 by Iraq. Propriety to the United Press Int'l, July 18, 1989, BC cycle. The United States government has been criticized for the sizeable difference between the *Vincennes* and *Stark* compensation figures. *Id.* The United States maintains that the *Vincennes* acted in self-defense in mistakenly destroying the Iranian airplane during an attack by Iranian gunboats. *Id.* The Iraqi pilot who fired upon the *Stark*, however, was not acting in self-defense according to the United States, and had twice been warned that he was nearing a United States warship. *Id.*

13. This comment is limited to compensatory methods applicable to war victims. For a discussion regarding the laws of war, see generally 2 G. SCHWARZENBERGER, THE LAW OF ARMED CONFLICT (1961); M. MCDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION (1961); Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764 (1981); Van Dyke, *The Riddle of Establishing Clear and Workable Rules to Govern Armed Conflicts*, 3

finer who is a victim of war. Section III examines the statutory remedies available in the United States and Section IV addresses the use of legal actions in United States courts for obtaining redress. Finally, Section V discusses the various international methods of remuneration and protection of victims of war.

II. DEFINING THE "VICTIM OF WAR"

Defining the victim of war is a necessary precursor to disbursing payment. Determining who will and who will not be compensated, and how much compensation will be paid, involves an examination of several criteria.

The initial query is: What is the status of the purported victim? The individual may have suffered death, physical or mental injury, captivity, internment, or damage or seizure of property. Each class defines a separate victim of war and the rate of compensation.

If the victim died "as the result of injury or disease incurred in or aggravated by active military, naval, or air service, in line of duty, during a period of war,"¹⁴ only the "surviving spouse, child or children, and dependent parent or parents"¹⁵ of the victim are entitled to compensation.¹⁶ The rate of death compensation paid to the survivor(s) depends upon their relationship to the decedent.¹⁷ Survivors may also receive a pension depending upon their age, and the particular war in which the decedent served.¹⁸

If the victim became disabled, the rate of compensation depends upon the nature¹⁹ and extent²⁰ of the disability. A pension for non-service related disability also is available,²¹ provided the individual

U.C.L.A. PAC. BASIN L.J. 34 (1984). For a discussion regarding compensation of terrorist victims, see generally Hostage Relief Act of 1980, 5 U.S.C. § 5561 (1982); Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 4 U.S. CODE CONG. & ADMIN. NEWS 1865 (1986); Note, *Compensating Victims of Terrorism: The Current Framework in the United States*, 22 TEX. INT'L L.J. 383 (1987). For an overview regarding other impacts of war on the economy, see generally 78 AM. JUR. 2D War §§ 74-146 (1975); 93 C.J.S. *War and National Defense* §§ 7, 17, 50, 68-201 (1956).

14. 38 U.S.C.A. § 321 (West 1979).

15. *Id.*

16. *Id.*; see *infra* notes 38-39 and accompanying text.

17. 38 U.S.C.A. § 322 (West 1979); see *infra* note 40 and accompanying text. The rate of death compensation for veterans who died before January 1, 1957, during peacetime service is the same as for wartime service. See 38 U.S.C.A. §§ 341-342 (West 1979).

18. See generally 38 U.S.C.A. §§ 531-543 (West 1979) (compensation rates paid to survivors of American veterans who served in the Civil War, the Indian War, the Spanish-American War, the Mexican Border Conflict, World War I, World War II, the Korean Conflict, and the Vietnam era).

19. 38 U.S.C.A. §§ 301, 310, 312-313 (West 1979 & Supp. 1989); see *infra* notes 41-47 and accompanying text.

20. 38 U.S.C.A. §§ 311, 312, 314 (West 1979 & Supp. 1989); see *infra* notes 41-47 and accompanying text. The rate of disability compensation for peacetime service is the same as for wartime service. See 38 U.S.C.A. §§ 334-335 (West 1979 & Supp. 1989).

21. 38 U.S.C.A. §§ 501-562 (West 1979 & Supp. 1989). See generally *In re McCor-*

has not been imprisoned for a felony or misdemeanor.²² However, an individual will not be deemed a victim of war and entitled to disability compensation "if the disability is the result of the veteran's own willful misconduct."²³

Captured or missing military personnel are also considered victims of war. The Missing Persons Act²⁴ provides for the continuation of pay and allowances to such individuals,²⁵ unless they negligently contributed to their own capture.²⁶ Internees may likewise be war victims, with compensation commensurate to the individual's age, disability, if any, and contributions by a collateral source.²⁷

The class of war victims also includes those who have had their property seized or destroyed.²⁸ Compensation, however, depends upon where the property is located,²⁹ and whether or not the purported victim is a resident alien enemy of the United States.³⁰ If American citizens or allies have their property seized, damaged, or destroyed abroad, the United States may provide compensation.³¹ Moreover, remuneration may be paid for a citizen's property taken within the territorial boundaries of the United States, if it is used to further the war effort.³² No compensation need be paid, however, for enemy property seized, damaged or destroyed within the United States.³³

mick's Estate, 169 Misc. 672, 8 N.Y.S.2d 179 (1938); 11 FED. PRACT. MANUAL *Acts of Discrimination "During" Employment* § 16897B (West Supp. 1989).

22. 38 U.S.C.A. § 505 (West 1979).

23. *Id.* § 310. Thus, if the individual intentionally shot himself in the leg, for example, he would not be entitled to disability compensation under this statute.

24. 50 U.S.C.A. app. §§ 1001-1012 (West 1951 & Supp. 1989) (current version at 37 U.S.C.A. §§ 551-560 (West 1988)).

25. 37 U.S.C.A. §§ 552-553 (West 1988); 50 U.S.C.A. app. § 2005 (West 1951); 6 C.J.S. *Armed Services* § 111 (1975 & Supp. 1989); *see infra* notes 102-06 and accompanying text.

26. 6 C.J.S. *Armed Services* § 111 (1975 & Supp. 1989).

27. 50 U.S.C.A. app. § 2004 (West 1951); *see infra* notes 121-48 and accompanying text. *See generally* 78 AM. JUR. 2D *War* § 38 (1975) (congressional prerogative to detain or intern those United States citizens who, due to their hostile origin or association, pose a threat to public safety or national security).

28. *See* Trading With the Enemy Act, 50 U.S.C.A. app. §§ 1-44 (1917).

29. *Id.* § 7.

30. *See* Stadtmuller v. Miller, 11 F.2d 732, 739-40 (2d Cir. 1926) (determination based upon the individual's residence or commercial domicile, not nationality); *see also* Behn, Meyer & Co. v. Miller, 266 U.S. 457, 472-73 (1925); 3A AM. JUR. 2D *Aliens and Citizens* §§ 2023, 2026 (1986).

31. 50 U.S.C.A. app. § 32(a) (1968).

32. *Id.* § 9. *See generally* Jackson v. Irving Trust Co., 311 U.S. 494 (1941); Becker Steel Co. v. Cummings, 296 U.S. 74 (1935); Henkels v. Sutherland, 271 U.S. 298 (1926).

33. *See* Diaz v. United States, 222 U.S. 574, 577-78 (1912); *see also* Silesian-Ameri-

The victims of war discussed thus far have been clearly delineated by a number of criteria. Determining who and how much to compensate depends upon (1) the status of the victim; (2) whether death or disability occurred during service; (3) whether the injury stemmed from willful misconduct or contributory negligence; (4) the nature and extent of the disability; (5) the relationship to the decedent or injured party; (6) when the victim served; or, if property is involved, (7) where that property is located, and (8) what the victim's relationship is to the United States.³⁴

There are other victims of war, however, who are not as clearly defined. The sorrow of war often extends beyond the battlefield to reach those individuals close to the victim. Family, friends, associates, and the community are all notably affected by the loss or disability of a loved one.³⁵ As one writer describes it: "In most families, the man was [a husband, companion, father, handy man, and protector] . . . and these folks . . . missed him hourly and longed for his return."³⁶ While federal law authorizes compensation for individuals closely related to the victim, many of these indirect victims of war have suffered injuries that are not compensable.³⁷

can Corp. v. Clark, 332 U.S. 469, 475-77 (1947) (policy of preparing for war dictates whether the United States government should exercise its right to confiscate property of alien enemies). See generally *Herrera v. United States*, 222 U.S. 558 (1911); *J. Ribas y Hijo v. United States*, 194 U.S. 315 (1904).

34. See *supra* notes 14-33 and accompanying text.

35. R. HILL, *FAMILIES UNDER STRESS: ADJUSTMENT TO THE CRISIS OF WAR SEPARATION AND REUNION* 57 (1949).

36. *Id.*

37. Cf. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES: DAMAGES-EQUITY RESTITUTION* § 8.1, at 544 (1973). Individuals who suffer personal injury may, in certain circumstances, recover reasonable compensatory damages for pain, suffering, and mental anguish. *Id.* at 544-45. Family members and other indirect victims of war may also experience pain, suffering and mental anguish resulting from the death or disability of a loved one during military service. However, these indirect claimants may not recover damages for acts committed against their loved ones unless the defendant knew with a high degree of probability that the plaintiff would suffer extreme emotional distress following a violent attack, yet proceeded with intentional disregard of this probability. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 12, at 65-66 (5th ed. 1984). Where the defendant is a belligerent or the United States government, recovery appears unlikely under this theory. In the former case, the belligerent rarely confronts the direct victim, much less the indirect victim. In the latter case, the United States government is generally immune from liability for intentional tort or negligence claims. See 28 U.S.C.A. § 1346 (West 1976 & Supp. 1989); Federal Tort Claims Act, 28 U.S.C.A. §§ 2671-2680 (West 1965 & Supp. 1989); see also *United States v. Shearer*, 473 U.S. 52 (1985); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977); *Feres v. United States*, 340 U.S. 135 (1950). See generally Comment, *Intramilitary Tort Immunity: A Constitutional Justification*, 15 PEPPERDINE L. REV. 623 (1988).

III. STATUTORY REMEDIES

A. *The Veterans' Benefits Act*

1. Death and Disability Benefits

The Veterans' Benefits Act (VBA) expressly entitles a veteran's "surviving spouse, child or children, and dependent parent or parents"³⁸ to compensation if the veteran died in military service prior to January 1, 1957.³⁹ Monthly rates of death compensation are specified under this statute.⁴⁰

In the case of disability, the VBA entitles a veteran to a specified rate of monthly compensation if willful misconduct is not involved.⁴¹ The rate of compensation increases in proportion to the extent of disability.⁴² For example, if the veteran is thirty percent disabled, the

38. 38 U.S.C.A. § 321 (West 1979).

39. *Id.*

40. *Id.* § 322(a). Section 322(a) provides that:

(a) The monthly rates of death compensation shall be as follows:

(1) Surviving spouse but no child, \$87;

(2) Surviving spouse with one child, \$121, (with \$29 for each additional child);

(3) No surviving spouse but one child, \$67;

(4) No surviving spouse but two children, \$94 (equally divided);

(5) No surviving spouse but three children, \$122 (equally divided)(with \$23 for each additional child, total amount to be equally divided);

(6) Dependent parent, \$75;

(7) Both dependent parents, \$40 each.

Id. Additional compensation is permitted if the payee is in a nursing home, or is helpless, blind, or in need of assistance. *Id.* § 322(b).

41. *Id.* § 310.

42. *Id.* § 314 (West Supp. 1989). Section 314 provides in pertinent part:

For the purposes of section 310 of this title-

(a) if and while the disability is rated 10 percent the monthly compensation shall be \$73;

(b) if and while the disability is rated 20 percent the monthly compensation shall be \$138;

(c) if and while the disability is rated 30 percent the monthly compensation shall be \$210;

(d) if and while the disability is rated 40 percent the monthly compensation shall be \$300;

(e) if and while the disability is rated 50 percent the monthly compensation shall be \$426;

(f) if and while the disability is rated 60 percent the monthly compensation shall be \$537;

(g) if and while the disability is rated 70 percent the monthly compensation shall be \$678;

(h) if and while the disability is rated 80 percent the monthly compensation shall be \$784;

(i) if and while the disability is rated 90 percent the monthly compensation shall be \$883;

veteran would be entitled to \$210 in monthly compensation;⁴³ eighty percent disability would result in monthly payments of \$784,⁴⁴ with \$1,468 paid for total disability.⁴⁵ In addition, the loss of certain body parts will result in supplemental benefits.⁴⁶ Further remuneration also is provided for dependents if the veteran is more than thirty percent disabled.⁴⁷

2. Statutory Military Insurance

The VBA is important not only because of its provisions regarding death and disability benefits, but also because it creates three insurance plans for all military personnel.⁴⁸ The purpose of statutory military insurance is to protect war victims and their families from financial hardship,⁴⁹ and to provide insurance to military personnel at a reasonable rate.⁵⁰ The policies are construed liberally in favor of the insured to provide the maximum amount of protection available under the statute.⁵¹ Moreover, anyone who passes the mental and physical exam for war service is conclusively presumed to be insurable.⁵² Congress also has provided for automatic insurance protection

(j) if and while the disability is rated as total the monthly compensation shall be \$1,468.

Id.

43. *Id.* § 314(c).

44. *Id.* § 314(h).

45. *Id.* § 314(j).

46. *Id.* § 314(k)-(s). These subsections provide for supplemental compensation ranging from \$63 to \$2,559 per month for the anatomical loss or loss of the use of one or more creative organs, feet, hands, buttocks, eyes, ears, arms, legs, or an inability to communicate by speech, or an absence of air and bone conduction. *Id.*

47. *Id.* § 315. Section 315 provides in pertinent part:

(1) If and while rated totally disabled and [the veteran]-

(A) has a spouse but no child, \$88;

(B) has a spouse and one or more children, \$148 plus \$46 for each child in excess of one;

(C) has no spouse but one or more children, \$61 plus \$46 for each child in excess of one;

(D) has a parent dependent upon such veteran for support, then, in addition to the above amounts, \$71 for each parent so dependent.

Id. Section 315(1)(E) provides \$161 per month in compensation if the veteran's spouse is in a nursing home, or is helpless and blind, and section 315(1)(F) provides \$136 per month if the veteran has a child over eighteen years of age who is still in school. *Id.* § 315 (1)(E)-(F).

48. *Id.* §§ 701-708 (West 1979 & Supp. 1989).

49. See *United States v. Williams*, 302 U.S. 46, 50, *reh'g denied*, 302 U.S. 779 (1937); *United States v. Kaminsky*, 64 F.2d 735, 736 (5th Cir. 1933).

50. See *Kontovich v. United States*, 99 F.2d 661, 664 (6th Cir. 1938), *cert. denied*, 306 U.S. 651 (1939).

51. See *Howard v. United States*, 28 F. Supp. 985, 987 (N.D. Wash. 1939). See also *Wissner v. Wissner*, 338 U.S. 655 (1950) (federal law providing that military personnel may name whomever they wish as a beneficiary under the policy preempts community property law which characterizes proceeds from a policy earned during the marriage as community property).

52. See *United States v. Patryas*, 303 U.S. 341, 343 (1938) (Congress intended that

in the statutory insurance plans which becomes effective when the victim dies or becomes totally and permanently disabled during active military duty.⁵³

The first insurance plan is the National Service Life Insurance.⁵⁴ It furnishes between \$1,000 and \$10,000 in insurance coverage⁵⁵ and offers a variety of payment plans.⁵⁶ The premium rate is based upon mortality tables and an annual interest rate of only three percent.⁵⁷ The United States Government Life Insurance is the second plan.⁵⁸ It also provides between \$1,000 and \$10,000 of insurance coverage,⁵⁹ but it has a number of conversion options⁶⁰ and a premium rate based upon an annual interest rate of three-and-a-half percent.⁶¹ The third plan is the Servicemen's Group Life Insurance.⁶² This plan authorizes its administrator "to purchase from one or more life insurance companies a policy or policies of group life insurance to provide the benefits"⁶³ to military personnel. It also automatically provides up to \$50,000 of insurance protection against death, unless the insured elects not to be so insured, or specifies some lesser amount, divisible by \$10,000, in writing.⁶⁴ All of these plans include an automatic insurance protection clause.⁶⁵

While these statutory insurance plans may appear attractive to military personnel, each contains serious drawbacks. Not only does the United States government act in its sovereign capacity when providing military insurance,⁶⁶ but both the government's liability under the policy and the claimant's right to sue are strictly statutory.⁶⁷

statutory insurance policies be issued without regard to the applicant's health following mental and physical examination for service).

53. See *United States v. Preece*, 85 F.2d 952, 953 (10th Cir. 1936), *cert. denied*, 300 U.S. 660, *reh'g denied*, 300 U.S. 687 (1937).

54. 38 U.S.C.A. §§ 701-724 (West 1979 & Supp. 1989).

55. *Id.* § 703.

56. *Id.* §§ 704, 706, 708. Such plans include "[f]ive-year level premium term, ordinary life, twenty-payment life, thirty-payment life, twenty-year endowment, endowment at age sixty, and endowment at age sixty-five." *Id.* § 704(a).

57. *Id.* § 702.

58. *Id.* §§ 740-760.

59. *Id.* § 741.

60. *Id.* § 742.

61. *Id.* § 743.

62. *Id.* §§ 765-779.

63. *Id.* § 766.

64. *Id.* § 767.

65. *Id.*

66. See *United States v. Lewis*, 202 F.2d 102, 104 (5th Cir. 1953).

67. See *Brown v. United States*, 65 F.2d 65, 67 (9th Cir. 1933); *Spaulding v. United States*, 261 F. Supp. 232, 236 (W.D. Okla. 1966).

Thus, although the United States is contractually obligated under the policy, neither the insured nor the beneficiaries have a cause of action against the government without its consent.⁶⁸ In practical terms, this may leave an aggrieved claimant not only without the insurance proceeds upon which he or she may be dependent, but also without an adversary and forum in which to litigate the claim. This, combined with the extremely low interest rates, significantly reduces the appeal of these policies.

3. Miscellaneous Provisions

Finally, the VBA provides several miscellaneous methods of compensating American war victims and their families. These include providing hospitals, nursing homes, domiciliaries, and medical care,⁶⁹ burial benefits,⁷⁰ and special loans.⁷¹ The VBA also assists the victim in readjusting to civilian life by furnishing special housing, vehicles, and equipment for disabled veterans,⁷² vocational rehabilitation,⁷³ educational assistance,⁷⁴ and job counseling, training, and placement services.⁷⁵ These benefits provide invaluable assistance to the disabled in learning to cope with their handicap.

B. *The Trading With the Enemy Act*

Under general principles of international law, a belligerent nation has the right to seize and confiscate enemy property within its jurisdiction.⁷⁶ Each sovereign power generally decides for itself, or by treaty, whether compensation will be paid in this situation, or in the case of seized or destroyed property outside its jurisdiction. The Trading With the Enemy Act⁷⁷ (TWEA) defines the United States government's position concerning these matters. Regarding enemy property used, seized, damaged, or destroyed by the federal government within United States territory, Congress is under no constitu-

68. See *Chavez v. United States*, 74 F.2d 508, 509 (10th Cir. 1934); *McLaughlin v. United States*, 74 F.2d 506, 507 (10th Cir. 1934). Similar concerns arise in the area of intramilitary tort immunity. For a discussion of these concerns, see Comment, *The Feres Doctrine: Has it Created Remediless Wrongs For Relatives of Servicemen?*, 44 U. PITT. L. REV. 929, 952-53 (1983) (restricting the words "incident to service" to require an ad hoc determination of whether the policies behind the *Feres* doctrine are advanced by invoking the defense of sovereign immunity).

69. 38 U.S.C.A. §§ 601-620 (West 1979 & Supp. 1989).

70. *Id.* §§ 901-908.

71. *Id.* §§ 1801-1827.

72. *Id.* §§ 801-806, 1901-1904.

73. *Id.* §§ 1501-1511.

74. *Id.* §§ 1601-1643, 1650-1698, 1700-1766.

75. *Id.* §§ 2001-2008, 2011-2014.

76. See 93 C.J.S. *War & National Defense* § 26 (1956 & Supp. 1989); see also *Silesian-American Corp. v. Clark*, 332 U.S. 469, 475-77 (1947).

77. 50 U.S.C.A. app. §§ 1-44 (West 1968 & Supp. 1989).

tional duty to compensate the enemy owner.⁷⁸ The TWEA authorizes the seizure of enemy-owned property to be held in custody by an Alien Property Custodian or the Attorney General.⁷⁹ The primary purpose of this statute is to protect American creditors by transferring possession of such property to the Custodian for administration.⁸⁰ Although the Custodian is under no constitutional obligation to return the property following the war, the TWEA nevertheless has been interpreted to suggest such a return after all claims against the property have been settled.⁸¹

The Custodian is explicitly authorized to return property owned by United States citizens or alien friends which was confiscated during the war.⁸² Section 9 of the TWEA reserves the right of any claimant who is neither an enemy nor an ally of the enemy to file a suit in equity to recover the claimant's property.⁸³ Whether the claimant will succeed, therefore, largely depends upon the individual's relationship to the United States during the war.⁸⁴ However, the claimant will not have a cause of action against the Alien Property

78. See *Silesian-American Corp.*, 332 U.S. at 475-77; *Cummings v. Deutsche Bank und Disconto-Gesellschaft*, 300 U.S. 115, 120-21 (1937); *Woodson v. Deutsche Gold und Silber Scheideanstalt Vormals Roessler*, 292 U.S. 449, 453-54 (1934); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 11 (1926) (Congress may constitutionally authorize the confiscation of enemy property within the United States without compensating the owners).

79. 50 U.S.C.A. app. § 6 (West 1968 & Supp. 1989). The President of the United States may appoint an Alien Property Custodian. This individual is "empowered to receive all money and property in the United States due or belonging to an enemy, or ally of [sic] enemy, which may be paid, conveyed, transferred, assigned or delivered to said custodian under the provisions of this Act." *Id.*; see also 93 C.J.S. *War & National Defense* § 26(3) (1956 & Supp. 1989).

80. See *Zittman v. McGrath*, 341 U.S. 471, 473-74 (1951) (Custodian took possession of funds in alien enemy's American bank account to oversee distribution to enemy's creditor, who had obtained a judgment and attachment against the property).

81. See *Cummings*, 300 U.S. at 122-24 (Court determined that Congress had the discretion to return German property held within the United States following World War I to the former alien enemy owners).

82. See 50 U.S.C.A. app. § 9 (West 1968 & Supp. 1989); *Jackson v. Irving Trust Co.*, 311 U.S. 494, 500-01 (1940).

83. 50 U.S.C.A. app. § 9(a) (West 1968 & Supp. 1989). The claimant is required under the statute to file a notice of the claim with the Alien Property Custodian. Thereafter, the President may order that the money or property held by the Custodian be returned to the claimant. *Id.*; see also *id.* § 32.

84. Section 2 of the TWEA defines the term "enemy" as any individual, group of individuals, partnership, or corporation, residing, doing business, domiciled, or incorporated in the territory of any nation with which the United States is at war. *Id.* § 2(a). This includes the government of any "nation with which the United States is at war," or any other individual or entity which the President so designates as an enemy of the United States. *Id.* § 2(b).

Custodian for erroneously seizing property believed to be owned by an enemy.⁸⁵

While Congress may requisition property of United States citizens or non-enemy aliens during wartime,⁸⁶ the statutes permitting such action also generally require that compensation be paid to the owner.⁸⁷ The general rule is that compensation will be paid by the government even in cases of great need or imminent danger to the public.⁸⁸ The measure of recovery is normally restitution,⁸⁹ plus the income from that property while it was in the Alien Property Custodian's possession, including dividends and interest earnings.⁹⁰ However, the victim may not recover interest on the property merely because it was in the Custodian's possession for a period of time.⁹¹

C. *The War Claims Act and Prisoners of War*

The War Claims Act (WCA) was enacted primarily to handle claims from prisoners of war following World War II.⁹² It established a War Claims Commission to receive and investigate the claims,⁹³ and a War Claims Fund consisting of assets covered under the TWEA to pay for the claims.⁹⁴

International law recognizes the right of belligerent nations to capture and detain opposing military personnel.⁹⁵ Congress has defined a "prisoner of war" as a member of the United States Armed Services held captive by any nation with whom the United States has been at war subsequent to December 7, 1941.⁹⁶ If an individual qualifies for prisoner of war status, that person is entitled to have the War

85. Section 7(c) of the TWEA authorizes the Alien Property Custodian to seize property which, in his or her discretion, is enemy-owned; no judicial determination is necessary prior to sequestration, and such a seizure is lawful even though the Custodian's determination was incorrect. *Id.* § 7(c).

86. *See International Paper Co. v. United States*, 282 U.S. 399, 406-08 (1931); 78 AM. JUR. 2D *War* § 23 (1975).

87. *See International Paper Co.*, 282 U.S. at 408; *Marian & Rye Valley Ry. Co. v. United States*, 270 U.S. 280, 284-85 (1926). This requirement also finds support in the no-taking clause of the Fifth Amendment, which generally prohibits the taking of private property for public use without just compensation. U.S. CONST. amend. V.

88. *But see Sardino v. Federal Reserve Bank of N.Y.*, 361 F.2d 106, 113 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966) (exception to awarding compensation to non-enemy aliens when the United States seeks to protect its nationals in a foreign country by seizing the assets of that country's nationals held in the United States).

89. *See* 78 AM. JUR. 2D *War* § 25 (1975).

90. *Id.* § 64.

91. *Id.* § 25.

92. 50 U.S.C.A. app. §§ 2001-2017 (West 1951 & Supp. 1989).

93. *Id.* §§ 2001-2002.

94. *Id.* § 2012.

95. U.N. Doc. A/32/144, Anns. I, art. 44 (1977), *reprinted in* 16 AM. SOC'Y OF INT'L L., INT'L LEGAL MATERIALS 1391, 1410-11 (1977) [hereinafter ILM]; *see also* 93 C.J.S. *War & National Defense* § 24(c)(2) (1956 & Supp. 1989).

96. 50 U.S.C.A. app. § 2005(a) (West 1951).

Claims Commission adjudicate claims regarding the quantity or quality of food provided, or inhumane treatment, by the enemy government.⁹⁷ If the Commission finds that the American prisoner was not provided the appropriate quantity or quality of food while in captivity, the prisoner will be compensated at the rate of \$1 to \$2 per day by the United States government depending on the war during which the individual was imprisoned.⁹⁸ For each day the prisoner suffered inhumane treatment by the enemy government, \$1.50 to \$3 also will be paid.⁹⁹ In addition, the individual's military status regarding pay and allowances is not affected by the captivity.¹⁰⁰ Therefore, that person will continue to receive the same salary and benefits as was received prior to capture.¹⁰¹

D. The Missing Persons Act and Prisoners of War

The Missing Persons Act¹⁰² (MPA) also provides for the continuation of salary and allowances to missing persons and prisoners of war.¹⁰³ The MPA creates a savings fund to which an individual may apportion his salary and allowances plus accrued interest while classified as a missing person.¹⁰⁴ A Secretary is appointed to oversee the management and distribution of funds to the missing person's dependents for as long as that individual remains missing.¹⁰⁵ The Secretary is accorded "extensive and flexible" discretion in discharging the

97. See generally *id.* § 2005 (West 1951 & Supp. 1989).

98. *Id.* § 2005(b), (e)(2), (f)(2). Thus far only prisoners of the Vietnam War have received \$2 per day.

99. *Id.* § 2005(d)(3), (e)(3), (f)(3). Thus far, only prisoners of the Vietnam War who were inhumanely treated have received \$2 per day.

100. See 6 C.J.S. *Armed Services* § 111 (1956 & Supp. 1989). However, the prisoner of war will not maintain pre-captivity military status if he or she was contributorily negligent in failing to follow orders or carry out assigned duties. *Id.*

101. *Id.*; see also *Cherry v. United States*, 640 F.2d 1184 (Ct. Cl. 1980), *aff'd*, 697 F.2d 1043 (Fed. Cir. 1983).

102. 37 U.S.C.A. §§ 551-559 (West 1988).

103. *Id.* § 552. The MPA provides other indirect methods for compensating prisoners of war. It authorizes payment for transportation of "household and personal effects" of an American soldier "officially reported as dead, injured, ill, or absent for a period of more than 29 days in a missing status." *Id.* § 554. It also permits an income tax deferral for missing personnel. *Id.* § 558.

104. *Id.* § 559(b).

105. *Id.* § 556; see also *id.* § 553(e). Section 553(e) provides that the Secretary may, "in the interest of the member, his dependents, or the United States, direct the initiation, continuance, discontinuance, increase, decrease, suspension, or resumption of payments of allotments from the pay and allowances of a member entitled to pay and allowances under section 552 of this title." *Id.*

duties of that office.¹⁰⁶

This wide discretion, however, has created some problems in the handling of those funds. In *Cherry v. United States*,¹⁰⁷ Cherry was flying a combat mission over North Vietnam when his plane was shot down. He remained a prisoner of war for eight years. Although the Air Force believed he was still alive, they were unable to communicate with him. During that period, the Secretary of the Air Force disbursed to Cherry's wife and four children nearly all of the approximately \$147,000 accrued in his account. When Cherry returned, he learned that his wife had given birth to another man's child while she was receiving support from Cherry's military pay.

The *Cherry* court held that, while the Air Force should have at some point investigated Mrs. Cherry's claims and perhaps discontinued the disbursements, the Secretary still must be given wide discretion in such cases.¹⁰⁸ The court reasoned that wide discretion allows the Secretary to provide for the prisoner's dependents under changing circumstances while the prisoner is away.¹⁰⁹ As is apparent from this case, however, such wide discretion may be exercised contrary to the prisoner's wishes.

Another shortcoming of the MPA is its restrictions on who has standing to sue on behalf of the war victim. Under the statute, only the missing person's dependents are entitled to sue.¹¹⁰ This narrow class often precludes claims of emotional distress by those closest to the victim, or claims which the victim may have wanted filed in his absence.

106. See, e.g., *Cherry v. United States*, 640 F.2d 1184, 1186 (Ct. Cl. 1980), *aff'd*, 697 F.2d 1043, 1048-49 (Fed. Cir. 1983); cf. *Luna v. United States*, 810 F.2d 1105 (Fed. Cir. 1987) (Secretary of Defense did not abuse his discretion in permitting four emergency withdrawals from the Uniformed Service Savings Deposit Program account by the plaintiff's wife); *Pitchford v. United States*, 666 F.2d 533 (Ct. Cl. 1981) (Air Force did not abuse its discretion in disbursing payments to the faithful spouse of a Vietnam prisoner of war).

107. 697 F.2d 1043 (Fed. Cir. 1983).

108. *Id.* at 1048. The court held that the Secretary nevertheless abused his discretion at that point when an investigation should have begun into Mrs. Cherry's needless and excessive expenditures and her serious misconduct. *Id.* at 1049-50.

109. *Id.* at 1048-49. The dissent in the *Cherry* court of claims case argued that "[the Secretary] did abuse his discretion in a most deplorable way, to plaintiff's great disadvantage. The character of his abuse was gross negligence . . . in failing to evaluate the demands of plaintiff's wife for access to his accumulating pay and allowances while he was a prisoner of war." *Cherry*, 640 F.2d at 1191. Characterizing the Secretary's abuse of discretion as gross negligence meant that he was immune from tort liability under the Federal Tort Claims Act. *Id.*

110. 37 U.S.C.A. § 551 (West 1988). Section 551 states in pertinent part: "(1) The term 'dependent' . . . means—(a) his spouse; (b) his unmarried child (including an unmarried dependent stepchild or adopted child) under 21 years of age; (c) his dependent mother or father; (d) a dependent designated in official records; and (e) a person determined to be dependent by the Secretary concerned, or his designee." *Id.*

In *Fors v. Lehman*,¹¹¹ Fors' plane was shot down over Laos in 1967. He and another individual were spotted ejecting from the plane. Fors was placed on "missing in action" status and his pay, allowances and subsequent promotion were placed in an interest bearing account pursuant to the Uniformed Services Savings Deposit Program.¹¹² In 1979, the Marines changed Fors' status to "killed in action". His non-dependent parents filed suit as his limited guardians. They claimed that the change in status denied their son due process by making the recovery of his estate more difficult should he return after its distribution. They also claimed mental anguish on their own behalf stemming from their son's reclassification as killed in action.

The *Fors* court denied both claims.¹¹³ It first held that procedural due process was satisfied in this case¹¹⁴ under the requirements set forth in *McDonald v. McLucas*.¹¹⁵ The court then stated that Fors, not his parents, was the real party in interest, and that he could file his own claim should he return.¹¹⁶ The court also noted that the parents' mental anguish claim should fail because it was not an interest protected by either the MPA or the due process clause.¹¹⁷ The *Fors* court in effect precluded both Fors and his parents from redress. While Fors may sue to recover his property upon his return, this may be impractical once his estate has been distributed.¹¹⁸ The court prevented Fors' parents from protecting their son's interests simply because they were not his dependents under the statute.¹¹⁹ However,

111. 741 F.2d 1130 (9th Cir. 1984).

112. See 10 U.S.C. § 1035 (West 1988).

113. *Fors*, 741 F.2d at 1134.

114. *Id.* at 1133.

115. 371 F. Supp. 831, 836 (S.D.N.Y.), *aff'd*, 419 U.S. 987 (1974). The *McDonald* court held that "due process required that next-of-kin of servicemen missing in action be given notice of the status review, a reasonable opportunity to attend the review with a lawyer, access to the information upon which the reviewing board would act, and the opportunity to present information which they considered relevant." *Fors*, 741 F.2d at 1133 (construing *McDonald*, 371 F. Supp. at 836).

116. *Fors*, 741 F.2d at 1133-34; see also *Hopper v. Carter*, 572 F.2d 87 (2d Cir. 1978) (relatives of servicemen captured or missing in action were denied injunctive relief against a determination of death under the Act); *Crone v. United States*, 538 F.2d 875 (3d Cir. 1976) (relatives of missing servicemen whose status changed from "missing in action" to "killed in action" were denied standing).

117. *Fors*, 741 F.2d at 1134. The *Fors* court never decided this issue because the parents failed to assert any monetary injury.

118. The *Fors* court sidestepped this concern by noting that the United States government makes a concerted effort to determine what actually happened to the individual before distributing his estate. *Id.* However, this does not address the real problem which occurs when the government is wrong and the individual returns to find his possessions distributed to several different and potentially distant locations.

119. See *supra* note 110 and accompanying text.

Fors had no statutory dependents to protect his interest during his absence. His parents' emotional anguish claim failed for the same reason.¹²⁰ This inequitable result is exacerbated whenever the missing person and non-dependent claimants have a close relationship. The latter may not recover if they do not fall within the narrow definition of a dependent under the MPA.

IV. LEGAL ACTIONS IN UNITED STATES COURTS

The majority of recent litigation in this country concerning war victims may be divided into three categories: (1) actions to recover for internment during World War II, (2) suits on the proceeds of war risk insurance policies, and (3) claims under the TWEA for property held or destroyed. The cases described below are the most important in these areas and illustrate the typical problems war victims will continue to face in seeking redress.

A. *Internees—Japanese-Americans During World War II*

Congress may, within its war powers, authorize the internment of citizens whom it believes pose a threat to national security or public safety.¹²¹ Internment is subject to review by the courts¹²² given the restraints on certain constitutionally guaranteed individual liberties.¹²³

The most important cases regarding Congressional power to intern United States citizens occurred during World War II. During this time, citizens of Japanese ancestry were evacuated from designated military areas and detained at relocation centers situated throughout the country.¹²⁴ In *Korematsu v. United States*,¹²⁵ an American citi-

120. See *supra* note 117 and accompanying text.

121. See, e.g., *Ex Parte Mitsuye Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945). Congress is further permitted under its war powers to impose curfews to guard against sabotage and espionage, which may more easily occur during the night, and to exclude or evacuate citizens from certain military areas for similar reasons without violating constitutional guarantees. See 78 AM. JUR. 2D *War*, §§ 39, 40 (1975). Such infringements on individual liberties are comparable to "the police establishment of fire lines during a fire, or the confinement of people to their houses during an air raid alarm—neither of which could be thought to be an infringement of constitutional right." *Id.* § 39.

122. See *Mitsuye Endo*, 323 U.S. at 304-07.

123. The Fourteenth Amendment of the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV.

124. Residents of the Aleutian and Pribilof islands also were relocated to camps in isolated regions of Southeast Alaska following a Japanese attack on those islands in 1942. N.Y. Times, Aug. 5, 1988, § A, at 10, col. 1. Although the United States government took such action to protect the Aleuts, Aleutian property was either damaged or destroyed by the United States without compensation. L.A. Times, Aug. 11, 1988, § 1,

zen of Japanese descent was convicted of violating an Act of Congress¹²⁶ prohibiting such persons from entering the West Coast area after May 9, 1942. Korematsu argued that the 1942 Act unconstitutionally discriminated against citizens of Japanese ancestry, and that it also impermissibly extended the war powers of Congress, the President, and the military.¹²⁷

The United States Supreme Court held otherwise. It concluded that the Act was constitutional, and that the war powers were properly invoked to exclude Korematsu from the West Coast.¹²⁸ The Court, in an opinion by Justice Black, reasoned that the exclusion and internment was necessary to protect the country from sabotage and espionage in an area particularly vulnerable to Japanese attack.¹²⁹ The Court further noted that while many Japanese Americans were loyal to the United States, an indeterminate number were disloyal.¹³⁰ Time was short, and the Court concluded that immediate action was required, even though this meant causing hardship to many.¹³¹

Several other Japanese-Americans filed suit during World War II arguing that they were, in effect, war victims at the hands of the United States government. In *Hirabayashi v. United States*,¹³² the Court held that a curfew imposed on Japanese-Americans requiring

at 1, col. 1. In 1988, Congress provided for the payment of \$12,000 to approximately 450 Aleuts who were forced to relocate during this period. See 50 U.S.C.A. app. § 1989(c) (West Supp. 1989).

125. 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945).

126. Act of Mar. 21, 1942, ch. 191, 56 Stat. 173. The Act provides:

That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed . . . contrary to the restrictions applicable to any such area or zone . . . shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.

Id. A similar version of this act appears in Act of June 25, 1948, ch. 645, 62 Stat. 765, which formerly appeared as 18 U.S.C.A. § 1383, *repealed by* Act of Sept. 14, 1976, Pub. L. No. 94-412, 90 Stat. 1258. Those of Japanese ancestry were required to "(1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities." *Korematsu*, 323 U.S. at 222.

127. *Korematsu*, 323 U.S. at 217-18.

128. *Id.* at 219.

129. *Id.* at 218.

130. *Id.* at 218-19.

131. *Id.* at 219-20.

132. 320 U.S. 81 (1943).

them to remain in their homes from 8 p.m. to 6 a.m. was constitutional and necessary to protect the West Coast from a Japanese attack.¹³³ In *Ex Parte Mitsuye Endo*,¹³⁴ however, the Court held that once it has been determined that a citizen of Japanese ancestry is loyal to the United States, that citizen can no longer be detained or conditionally released.¹³⁵ As recently as 1987, constitutional, tort, and breach of contract and fiduciary duty claims were filed by interned Japanese-Americans against the United States.¹³⁶

Ironically, while these cases reflect current federal law regarding internment, Congress has allocated \$1.2 billion in compensation to an estimated 60,000 internees of World War II.¹³⁷ In 1988, Congress passed a law entitling internees to \$20,000 in compensation.¹³⁸ The first payments will be made in October 1990.¹³⁹ The fact that compensation will be paid implies that Congress is softening its stance on the internment issue and is becoming increasingly sensitive to preserving the fundamental rights of its citizens during wartime.¹⁴⁰

133. *Id.* at 95. The Court, in an opinion by Chief Justice Stone, noted that approximately 112,000 of the 126,000 Japanese-Americans in the United States resided in California, Oregon, and Washington, and that many of these individuals declined to assimilate with the white population. *Id.* at 96, 98. The Court feared that these circumstances could give rise to a propaganda campaign which would threaten the stability of the United States government. *Id.* at 98; *see also* *Yasui v. United States*, 320 U.S. 115 (1943) (Japanese-American who was born and raised in Oregon, received A.B. and LL.B. degrees from the University of Oregon, became a member of the Oregon bar and a second lieutenant in the United States Army Infantry Reserve, was also constitutionally held subject to the curfew).

134. 323 U.S. 283 (1944).

135. *Id.* at 302.

136. *See, e.g.,* *United States v. Hohri*, 482 U.S. 64 (1987), *on remand*, 847 F.2d 779 (Fed. Cir.), *cert denied*, 109 S. Ct. 307 (1988).

137. *L.A. Times*, Aug. 5, 1988, § 1, at 1, col. 5. While several national defense reasons were cited by the United States Supreme Court to justify the internment of Japanese-Americans during World War II, those reasons were baseless. The Commission of Wartime Relocation and Internment of Civilians established in 1980 determined that the real reasons for the internment were "racial prejudice, wartime hysteria and a failure of political leadership." *Id.*

138. *Id.*, Sept. 30, 1989, § 1, at 1, col. 4. This money now will be allocated over three years to the former internees. *Id.*

139. *Id.* Only those Japanese-Americans who were interned during World War II and who were still alive when the bill was signed into law will receive payments. *Id.*, Aug. 5, 1988, § 1, at 1, col. 5. Family members of a deceased internee are not entitled to compensation under the law. *Id.* Moreover, if an internee dies after the legislation is enacted, only the surviving spouse, children, or parents may continue to receive payments on behalf of the decedent. *Id.* Payments will go to the oldest victims first. *Id.*

140. Representative Norman Y. Mineta (D-San Jose) was removed from his San Jose home as a 10-year-old and interned with his parents at the Santa Anita race track. He later was moved to another camp in Wyoming, where he remained for a year-and-a-half. In reflecting on his internment, Mineta noted that "[p]eople said this was being done to protect us. . . . If that was so, why were the machine guns pointing at us?" *Id.*, Aug. 5, 1988, § 1, at 1, col. 5. He added, "Does our Constitution protect all of us—regardless of race or culture? Do our rights remain inalienable even in times of stress—and especially in times of stress? Passage of this legislation answers these questions—a resounding 'yes.'" *Id.*

Therefore, current internment case law appears antiquated.

Although \$1.2 billion has now been allocated to these victims of war, the legislative struggle to guarantee this money was hard fought indeed. First, the law initially required that Congress vote each year on whether to continue payments.¹⁴¹ If members of Congress chose to discontinue them, internees or their immediate families had no statutory recourse.¹⁴² Second, internee compensation would have had to compete with all the other items in the federal budget.¹⁴³ Future Congressional appropriations would have been unlikely, particularly since the budget deficit has become an increasingly embarrassing issue for many federal legislators.¹⁴⁴ Representative Robert T. Matsui (D-Sacramento), who was himself interned during World War II and was a primary supporter of the compensation bill, admitted in an interview, "Do you vote to provide funds for this program at the expense of something like AIDS research?"¹⁴⁵ Representative Gerald Solomon (R-N.Y.) added, "There are many dire emergencies we're dealing with in this country, but this program is not one of them. All of this happened 40 years ago, and I just don't see the hurry."¹⁴⁶

Another obstacle to compensating these war victims was the opposition in Congress. Some federal lawmakers felt that, while the internment may have been an error, an apology in the form of substantial monetary compensation was unwarranted.¹⁴⁷ Although these obstacles were eliminated when the legislation guaranteeing the reparations was signed into law by President Bush on November 21, 1989, one obstacle still remains. Some of these war victims may never be compensated simply because they are dying off. Given that the internment occurred over forty years ago, it is no surprise that approximately 16,000 internees are over 70, and over 200 die each month.¹⁴⁸ While future federal appropriations are now guaranteed,

141. *Id.*, May 7, 1989, § 1, at 1, col. 5.

142. *Id.*

143. *Id.*

144. President Bush was reluctant to commit to any substantial allocation under the reparations law. The Justice Department requested that President Bush seek \$500 million from Congress for 1990 to pay 25,000 internees. Bush, however, only requested \$20 million. This would have paid only 1,000 of the approximately 60,000 persons eligible for such payments. *Id.*, May 7, 1989, § 1, at 1, col. 5.

145. *Id.*

146. *Id.*

147. *Id.*, Aug. 5, 1988, § 1, at 1, col. 5.

148. *Id.*, May 7, 1989, § 1, at 1, col. 5.

many of these internees likely will not live long enough to receive their share.

B. Insurance Policies

Courts generally have construed statutory and private war risk insurance policies broadly to protect the insured.¹⁴⁹ The underlying public policy is to promote financial security for those who serve their country.¹⁵⁰ A difficult burden, however, is placed upon the insured under many war risk policies to prove the extent of their injuries. Failure to do so may result in a complete denial of recovery under the policy. Initially, a plaintiff was required to prove that he was totally and permanently disabled and unable to maintain any employment. The United States Supreme Court soon softened its interpretation of "total and permanent disability" due to the harsh consequences.

In *Berry v. United States*,¹⁵¹ Berry's war risk insurance policy required that he be totally and permanently disabled before payments could be made. While Berry was standing guard on the front line in France, a shell burst nearby, injuring him in several places. He was carried to a dugout for treatment, where another shell exploded killing several of the men in the dugout and nearly severing Berry's left leg. His leg eventually was amputated six inches below the knee. For the next thirteen years, Berry tried several jobs, but boils and abscesses would break out on the leg whenever he used it for any length of time.

The court of appeals denied Berry recovery on the grounds that he failed to show that his injuries prevented him from obtaining "any substantially gainful occupation."¹⁵² The court of appeals, in essence, required him to be "utterly without earning power" and "so bedridden and helpless that he required an attendant."¹⁵³ Because Berry

149. See 6 C.J.S. *Armed Services* § 194 (1975).

150. See *United States v. Patryas*, 303 U.S. 341, 343 (1938). In holding that the War Risk Insurance Act should be construed liberally to protect military personnel and their dependents, the *Patryas* Court noted that the express purpose of the Act itself is "to give every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents." *Id.* (emphasis in original); see also *United States v. Henning*, 344 U.S. 66, 71, *reh'g denied*, 344 U.S. 918 (1952). The *Henning* court stated that "Congress through war risk insurance legislation has long sought to protect from financial hardship the surviving families of those who had served under the nation's flag." *Id.*

151. 111 F.2d 615 (2d Cir. 1940), *rev'd*, 312 U.S. 450 (1941).

152. *Berry*, 312 U.S. at 455-56 n.7; see also *Miller v. United States*, 294 U.S. 435, *reh'g denied*, 294 U.S. 734 (1935); *Lumbra v. United States*, 290 U.S. 551 (1934).

153. *Berry*, 111 F.2d at 617.

retained some mobility and could still use his hands, he was denied recovery.

Although the United States Supreme Court reversed the court of appeals' decision in *Berry*, the injured war victim still has the burden of proving the extent of his injuries.¹⁵⁴ The United States Supreme Court has interpreted "total and permanent disability" to mean "continuous disability".¹⁵⁵ A failure to prove continuous disability will result in a denial of recovery under the war risk policy.

Similarly, in *Meyer v. United States*,¹⁵⁶ a veteran who acquired tuberculosis after his service and lacked the stamina to perform any heavy work was denied recovery because he was not deemed totally and permanently disabled.¹⁵⁷ The claimant in *Le Blanc v. United States*¹⁵⁸ also suffered from tuberculosis acquired during his military service. He was unable to return to work as a freight handler following the war. Subsequent vocational training and job transfers proved useless because Le Blanc was often absent due to his deteriorating condition. The *Le Blanc* court nevertheless denied him recovery because he was not totally and permanently disabled.¹⁵⁹ Furthermore, the court in *Hicks v. United States*¹⁶⁰ held that although the question of whether the insured became totally and permanently disabled is one of fact for the jury to decide,¹⁶¹ this did not mean that Hicks was entitled to recovery following a jury verdict.¹⁶² Evidence of the plaintiff's condition, or of continuous work done by him demonstrating that he was not totally and permanently disabled, may still result in a directed verdict for the government.¹⁶³

154. See *Miller*, 294 U.S. at 440.

155. *Lumbra*, 290 U.S. at 559-60. "Total disability" does not mean helplessness or complete disability, but it includes more than that which is partial. 'Permanent disability' means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent." *Id.*; cf. *Galloway v. United States*, 319 U.S. 372, *reh'g denied*, 320 U.S. 214 (1943) ("total permanent disability" requires something more than a showing of occasional disability).

156. 65 F.2d 509 (5th Cir. 1933); see also *Keelen v. United States*, 65 F.2d 513 (5th Cir. 1933) (claimant denied recovery under the insurance policy because he was not adjudged totally and permanently disabled).

157. *Meyer*, 65 F.2d at 511.

158. 65 F.2d 514 (5th Cir. 1933).

159. *Id.* at 516.

160. 65 F.2d 517 (4th Cir. 1933).

161. *Id.* at 519.

162. *Id.*

163. *Id.*; see also *Miller v. United States*, 294 U.S. 435, *reh'g denied*, 294 U.S. 734 (1935) (inability to return to a former occupation after being injured during military service does not by itself constitute "total and permanent disability" under a war risk policy); *Lumbra v. United States*, 290 U.S. 551 (1934) (inexplicable delay in filing suit

Thus, while Congress and private companies liberally provide war risk insurance policies to those in the service, compensation often is withheld for failure to prove total and permanent disability. For many of these war victims, this means they are too injured to earn a sufficient living, but not injured enough to recover their insurance proceeds. Coupled with the high cost of private medical care, the resulting consequences are often inequitable.

C. *Recovery of Property—Iranian Assets Held During the Hostage Crisis*

On November 14, 1979, United States diplomats and other nationals were taken hostage in the American embassy in Teheran, Iran. President Carter declared a national emergency and barred the transfer or withdrawal of all property of the Iranian government within the United States. Several suits subsequently were filed to recover or attach the Iranian assets held in this country. Although no conventional warfare began, these cases illustrate the President's broad powers under the TWEA concerning claims by United States nationals during a national emergency.¹⁶⁴

In *Security Pac. Nat'l Bank v. Gov't & State of Iran*,¹⁶⁵ several corporations conducted business in Iran during the rule of the late Shah. After the Shah was overthrown, the subsequent government refused to perform certain duties owed to the corporations. The corporations then filed suit to attach a portion of Iranian assets frozen in United States banks. The United States, however, intervened to suspend the proceedings and vacate the attachments. The principle issue in the case was whether the President was constitutionally permitted to void the writs of attachment under the TWEA in order to reach a settlement between the governments and to resolve hostilities.

The court held that President Carter's actions did not deprive the plaintiffs of property without due process of law under the fifth amendment.¹⁶⁶ However, the President could not void the attach-

on war risk policy is strong evidence that the plaintiff was not "totally and permanently disabled" prior to the policy's expiration).

164. The International Emergency Economic Powers Act limits the executive powers previously granted by the TWEA in national emergencies, excluding war. See generally 50 U.S.C.A §§ 1701-1706 (1982). However, these limitations on the President's power to take title to foreign property, to seize records, and to regulate gold, bullion, or domestic transactions, are still available under the TWEA during wartime. See H.R. REP. NO. 459, 95th Cong., 2d Sess. 15 (1977).

165. 513 F. Supp. 864 (C.D. Cal. 1981).

166. *Id.* at 882. The court noted that settlement of the political dispute between the two countries did not necessarily mean that the plaintiffs would never recover. On the contrary, a \$1 billion fund established by the President over which Iran would have no control, likely would satisfy the majority of claims against Iran. *Id.* Moreover, Congress has the authority to provide future compensation to American plaintiffs through special legislation. *Id.*

ments without a court order, which never was obtained.¹⁶⁷ The court reasoned that the power to conduct United States foreign relations is vested in the President, who has the authority to represent American nationals in their claims against foreign governments.¹⁶⁸ The frozen Iranian assets, therefore, were subject to the President's foreign policy objectives, and could not be tampered with by the corporations seeking recovery.

In *Dames & Moore v. Regan*,¹⁶⁹ the United States Supreme Court was faced with the problem of how to handle the claims to those assets once the American hostages were released. In that case, the plaintiff filed suit against the Atomic Energy Organization of Iran (AEOI) claiming that it owed money for services performed under a contract.¹⁷⁰ The district court ordered a prejudgment attachment against the AEOI's property to secure any judgment possibly entered against it.¹⁷¹ In January 1981, the hostages were released pursuant to an agreement requiring the United States to void all judgments and attachments and to terminate all lawsuits against Iran, and to resolve such claims through international arbitration.¹⁷² Iranian assets then were transferred to the Federal Reserve Bank of New York.¹⁷³ Following this agreement, the United States Supreme Court affirmed the dismissal of the plaintiff's complaint.¹⁷⁴

In broadly construing the TWEA, the *Regan* Court permitted the President to continue maintaining the Iranian assets at his disposal.¹⁷⁵ The Court viewed the frozen assets as a "bargaining chip" for the President to use in resolving a major foreign policy dispute.¹⁷⁶ Congressional acquiescence, plus the President's authority to enter into executive agreements without the Senate's consent, supported this conclusion.¹⁷⁷ Once again, American claimants were

167. *Id.* at 881-82.

168. *Id.* at 871-72.

169. 453 U.S. 654 (1981).

170. *Id.* at 663-64.

171. *Id.*

172. *Id.* at 665; see also *Gibraltar Petroleum Corp. v. Bank Sepah*, 526 F. Supp. 560 (S.D.N.Y. 1981) (United States nationals could file claims against Iran solely with the Tribunal created by the Algerian Declaration, not United States courts).

173. *Dames & Moore*, 453 U.S. at 665-66.

174. *Id.* at 690.

175. *Id.* at 672-73.

176. *Id.* at 673.

177. *Id.* at 681-83. Writing for the majority, Justice Rehnquist pointed out that:

[T]here has . . . been a longstanding practice of settling such claims [of American nationals] by executive agreement without the advice and consent of the Senate. Under such agreements, the President has agreed to renounce or ex-

subordinated to the President's broad authority under the TWEA.

Similar actions under the TWEA have produced the same result. For example, in *Tran Qui Than v. Regan*,¹⁷⁸ the Secretary of the Treasury of the United States denied a Vietnamese claimant's access to funds after South Vietnam fell to the communist forces.¹⁷⁹ The court held that the Secretary's action was constitutional and within the scope of the TWEA.¹⁸⁰ The court in *Unidyne Corp. v. Government of Iran*¹⁸¹ also held that the President's authority to enter into an international agreement, such as with Iran, which provides for the transfer of foreign assets out of the United States, even though prejudgment attachments previously were issued in favor of American plaintiffs, was permissible under the TWEA.¹⁸² Thus, while claims by American nationals to foreign property held within the United States may indeed be valid, they nevertheless are subject to the foreign policy objectives of the executive branch.

V. INTERNATIONAL METHODS OF COMPENSATING AND PROTECTING VICTIMS OF WAR

A. *International Methods of Compensation*

International law continues to be a dynamic body of rules governing the conduct of nations. While many view its growth as a necessary precursor to world order, the field has yet to develop a uniform and binding approach to compensating victims of war. As one writer bluntly describes the situation, "Remedies in international law are in a striking state of neglect."¹⁸³

1. The United Nations

The United Nations and its principal judicial organ, the International Court of Justice (ICJ), are perhaps the most important source

tinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. To be sure, many of these settlements were encouraged by the United States claimants themselves, since a claimant's only hope of obtaining any payment at all might lie in having his Government negotiate a diplomatic settlement on his behalf.

Id. at 679 (footnote omitted).

178. 658 F.2d 1296 (9th Cir. 1981), *cert. denied*, 459 U.S. 1069 (1982).

179. *Id.* at 1300.

180. *Id.* at 1304-06.

181. 512 F. Supp. 705 (E.D. Va. 1981).

182. *Id.* at 708-10; *see also* International Emergency Economic Powers Act, 50 U.S.C.A. §§ 1701-1706 (defining the scope of the President's power to handle property located in the United States in which a foreign government, or a national thereof, has an interest).

183. E. ZOLLER, ENFORCING INTERNATIONAL LAW THROUGH U.S. LEGISLATION 1 (1985).

of international law today.¹⁸⁴ The ICJ consists of a fifteen-member court whose function is to decide disputes submitted to it by the United Nations General Assembly or any state.¹⁸⁵ In reaching its decisions, the ICJ looks to rules established by international organizations or conventions, international custom, laws observed by civilized nations, and judicial commentary by those highly regarded in the field of international law.¹⁸⁶

The United Nations' Charter specifies the ICJ's role in resolving international claims. Article 94 of the Charter provides:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.¹⁸⁷

The biggest problem the ICJ has faced since its inception is enforcing its judgments. As yet, no one has appealed to the United Nations Security Council to devise a means of enforcing an order by the ICJ.¹⁸⁸ It still is unknown whether the Security Council may use force to compel a state to follow an ICJ order.¹⁸⁹

Nevertheless, the ICJ has been instrumental in resolving international political conflicts, and directing reparations to the victims of those conflicts.¹⁹⁰ In 1981, the ICJ entered a judgment concerning

184. For opinions issued by the ICJ, see generally 1-2 DIGEST OF THE DECISIONS OF THE INTERNATIONAL COURT (K. Marek ed. 1978); SECTION OF INT'L LAW, AMERICAN BAR ASS'N INTERNATIONAL COURT OF JUSTICE OPINION BRIEFS (1978). For a good discussion regarding the processes of establishing international law at the United Nations, see generally E. McWHINNEY, UNITED NATIONS LAW MAKING (1984).

185. See generally 1 A COMPREHENSIVE HANDBOOK OF THE UNITED NATIONS, 137-47, 180-94 (Min-Chuan Ku ed. 1978); DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 59-89 (S. Rosenne 2d ed. 1979) [hereinafter DOCUMENTS ON THE INTERNATIONAL COURT].

186. STATUTE OF THE INT'L COURT OF JUSTICE art. 38, para. 1, *reprinted in* DOCUMENTS ON THE INTERNATIONAL COURT *supra* note 185, at 79.

187. U.N. CHARTER art. 94, *reprinted in* DOCUMENTS ON THE INTERNATIONAL COURT, *supra* note 185, at 49.

188. SWEENEY, OLIVER & LEECH, THE INTERNATIONAL LEGAL SYSTEM 74 (3d ed. 1988).

189. *Id.*

190. See *supra* note 11 and accompanying text. In August, 1989, the United States government agreed to participate in ICJ proceedings with Iran at the Hague regarding alleged violations of international law. Nat'l L.J., Sept. 4, 1989, at 3, col. 1. Iran claimed that the United States violated the Chicago and Montreal conventions by shooting down an Iranian airliner over the Persian Gulf in July, 1987. Reuter Libr. Rep., Aug. 15, 1989 (AM cycle). The United States, however, contended that the ICJ lacks jurisdiction, and may refuse to abide by a decision which favors Iran. *Id.*

the release of the American hostages in Teheran.¹⁹¹ The decision required Iran to release the hostages and to compensate the United States in an amount to be determined later by the ICJ.¹⁹² Upon the release of the hostages, however, the United States withdrew its claims against Iran pending before the ICJ.¹⁹³

2. Other International Tribunals

There are other lesser known international courts throughout the world which are empowered to adjudicate claims by war victims. These include the Court of Justice of the European Community, the European Court of Human Rights of the Council of Europe, the Inter-American Court of Human Rights of the Organization of American States, and the Court of Justice of the Cartagena Agreement which serves Latin America.¹⁹⁴ In addition, international arbitration tribunals may be created for the same purpose. These judicial bodies, however, face problems similar to those of the ICJ.¹⁹⁵ Their judgments are enforceable merely to the extent that the parties to the agreement are willing to be bound by them. "It is a striking fact that States have seldom refused to carry out or abide by the decisions of international tribunals."¹⁹⁶ Moreover, disagreements over the judgment often can delay its implementation for several years.¹⁹⁷

B. International Methods of Protection

In addition to establishing procedures for adjudicating war claims, the United Nations has promulgated standards governing the conduct of hostilities. The Geneva Protocols of 1977 specifically define the actions belligerent nations may take against persons or property during a war.¹⁹⁸ While these standards may have universal appeal, they clearly are not universally applied.

In general, combatants are obliged to distinguish themselves from the civilian population during a military operation by wearing identi-

191. SWEENEY, OLIVER & LEECH, *supra* note 188, at 72-73.

192. *Id.* at 73-74.

193. *Id.* at 74.

194. *Id.* at 69-70.

195. As one writer points out, "The laws of war are, theoretically, at least, enforceable by international tribunal, but that means of enforcement is rare, as are the instances (most of them medieval) in which an accused citizen of one state is released to the custody of courts of another state for trial." P. KARSTEN, *LAW, SOLDIERS, AND COMBAT* 25 (1978).

196. HUDSON, *INTERNATIONAL TRIBUNALS: PAST AND FUTURE* 129 (1944).

197. SWEENEY, OLIVER & LEECH, *supra* note 188, at 74.

198. The texts of the two Protocols, U.N. Doc. A/32/144, Annexes I and II (1977), are reprinted in 197-98 *INT'L REV. OF THE RED CROSS* 3 (1977) and 16 *ILM*, *supra* note 95, at 1391, 1442. For a good discussion regarding these documents, see also Aldrich, *supra* note 13, at 764.

fiable clothing or carrying their weapons openly.¹⁹⁹ Neither civilians²⁰⁰ nor their property²⁰¹ are to be the subject of purposeful or indiscriminate attack, and places of worship,²⁰² cultural objects,²⁰³ and objects necessary to the survival of the civilian population²⁰⁴ are to be protected.

Finally, prisoners of war and internees are accorded fundamental guarantees regarding their physical and mental health, and personal dignity. Murder, torture, mutilation, forced prostitution, and hostage-taking are all prohibited acts.²⁰⁵ Moreover, no prisoner may be executed without a conviction by an impartial court applying generally recognized principles of law.²⁰⁶

VI. CONCLUSION

Combatants, property owners, civilians, prisoners, and internees may all become victims of war. Although they are entitled to compensation under the various methods discussed above, these methods are not always effective. Statutory remedies normally are broadly

199. U.N. Doc. A/32/144, Anns. I, art. 44, para. 3 (1977), *reprinted in* 16 ILM, *supra* note 95, at 1391, 1410-11.

200. U.N. Doc. A/32/144, Anns. I, art. 51, para. 3 (1977), *reprinted in* 16 ILM, *supra* note 95, at 1413-14.

201. U.N. Doc. A/32/144, Anns. I, art. 52, para. 3 (1977), *reprinted in* 16 ILM, *supra* note 95, at 1414.

202. U.N. Doc. A/32/144, Anns. I, art. 53, para. 3 (1977), *reprinted in* 16 ILM, *supra* note 95, at 1414.

203. *Id.*

204. U.N. Doc. A/32/144, Anns. I, art. 54, para. 3 (1977), *reprinted in* 16 ILM, *supra* note 95, at 1414.

205. U.N. Doc. A/32/144, Anns. I, art. 54, para. 3 (1977), *reprinted in* 16 ILM, *supra* note 95, at 1423. This article provides in pertinent part:

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

- (i) murder;
- (ii) torture of all kinds, whether physical or mental;
- (iii) corporal punishment; and
- (iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

- (c) the taking of hostages;
- (d) collective punishments; and

(e) threats to commit any of the foregoing acts.

Id.

206. U.N. Doc. A/32/144, Anns. I, art. 75, para. 4 (1977), *reprinted in* 16 ILM, *supra* note 95, at 1424.

construed to protect American soldiers and their dependents, yet they often provide inadequate compensation or leave the claimant without a cause of action. While legal recourse may be sought, difficult burdens of proof and the exercise of Presidential prerogative may preclude recovery. Finally, international judgments commonly are difficult to enforce unless the defendant agrees to abide by the decision. Even with all of these problems, however, compensating war victims is still necessary. As states persist in resorting to warfare to settle their disputes, such a framework always will remain.

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