

# Essay

## Of Embassy Guards and Rock Stars: Why the Department of State Should Provide Compensation for Torts Committed by Embassy Guards Abroad

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### *Introduction*

Teofil Peter was a bass player for the Romanian band Compact.<sup>1</sup> On December 4, 2004, at approximately 4:30 a.m., Christopher VanGoethem, a Marine embassy guard, collided with Peter's taxi while driving a sport-utility vehicle in Bucharest, Romania.<sup>2</sup> Peter ultimately died as a result of the collision.<sup>3</sup> At the time of the accident, VanGoethem was the commander of the security detachment at the U.S. Embassy in Romania.<sup>4</sup> He could not be prosecuted in Romania because of his diplomatic immunity, and he left the country immedi-

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<sup>1</sup> See Gayle S. Putrich, *Marine Cleared in Romanian Rock Star's Death*, MARINE CORPS TIMES, Feb. 13, 2006, at 12.

<sup>2</sup> Vince Crawley, *U.S. Military Law Expert Explains Verdict in Romanian Death*, AMERICA.GOV, Feb. 16, 2006, <http://www.america.gov/st/washfile-english/2006/February/20060217154542MVyelwarC0.3975946.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

ately following the accident.<sup>5</sup> Peter's death provoked an outpouring of grief and outrage among the Romanian people.<sup>6</sup>

The Marine Corps filed charges against VanGoethem, the most serious of which was a charge of negligent homicide.<sup>7</sup> He was then subject to a court-martial, but was ultimately cleared of the negligent homicide charge, although he was found guilty of the lesser offenses of making false statements and obstructing justice.<sup>8</sup> He ultimately received only a formal letter of reprimand for his actions on the night of the collision.<sup>9</sup>

The Romanian people were dissatisfied with the outcome of VanGoethem's court-martial, particularly the finding that he was not guilty of negligent homicide.<sup>10</sup> Peter's son remarked, "[m]y dignity has been trampled on, as has the dignity of Romanians."<sup>11</sup> The Romanian Prime Minister indicated that he would support Peter's family in filing a civil suit in the United States.<sup>12</sup>

A court-martial, regardless of satisfaction with its outcome, is a criminal proceeding and it provides no civil relief to those actually injured.<sup>13</sup> Indeed, particularly because of the close relationship between the United States and Romania,<sup>14</sup> it would be prudent for Peter's estate to be given some remedy. For reasons discussed below, however, Peter's family will be unable to file suit in a judicial forum in the United States to obtain relief for Peter's death. Relief *outside* of a judicial forum, however, may be available for Peter's family and others like them through the settlement authority of various govern-

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<sup>5</sup> *U.S. Marine Charged in Star's Death*, SEATTLE TIMES, Apr. 21, 2005, at A11.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Crawley, *supra* note 2.

<sup>9</sup> See *id.* (reporting that a U.S. military law expert noted that VanGoethem's felony conviction and his letter of reprimand will put his continued Marine Corps career at risk).

<sup>10</sup> See U.S. Dep't of State, *Review of European Security Issues: Base Agreement Signed with Romania*, AMERICA.GOV, Feb. 3, 2006, <http://www.america.gov/st/washfile-english/2006/February/20060203174054mvyelwarc0.623028.html> (noting the "widespread public reaction in Romania" after VanGoethem's acquittal on the negligent homicide charge).

<sup>11</sup> *Romania Damns Acquittal of US Soldier*, MORNING STAR, Feb. 2, 2006.

<sup>12</sup> See U.S. Dep't of State, *supra* note 10 (reporting that Romanian Prime Minister Tariceanu referred to the sentence as "astonishing and bizarre").

<sup>13</sup> 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 BYU L. REV. 371, 408.

<sup>14</sup> U.S. Dep't of State, *supra* note 10 ("[O]n December 6, 2005, Secretary of State Condoleezza Rice signed a basing agreement in Romania allowing U.S. troops to use military facilities in that Black Sea country.").

mental agencies such as the Department of State and the Department of Defense.<sup>15</sup>

This Essay argues that the Department of State should be responsible for redressing injuries caused by Marine guards at embassies, such as Peter's death, through its statutorily designated settlement power. While the Marine Corps is unquestionably an arm of the Department of Defense,<sup>16</sup> the specific functions of the Marine guards at embassies across the world are primarily diplomatic and, thus, the Department of State should be responsible for compensation.

This Essay first addresses the judicial bar prohibiting Peter's family from bringing a civil suit in the United States. Next, this Essay discusses the various statutes and regulations that enable the Department of State and the Department of Defense to redress claims such as those that may be made by Peter's family. Finally, this Essay argues that the Department of State, and not the Department of Defense, should be responsible for the actions of Marine guards at embassies.

### *I. The Foreign Country Exception to the Federal Tort Claims Act*

Although Peter's family may deserve to be compensated for their loss, they will be unable to bring a claim against either the United States or VanGoethem in a United States court. Under the doctrine of sovereign immunity, the United States, "as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction."<sup>17</sup> In other words, the United States cannot be sued unless it so consents.<sup>18</sup> Further, any waiver of immunity must be "unequivocally expressed."<sup>19</sup>

In 1946, Congress enacted the Federal Tort Claims Act<sup>20</sup> ("FTCA") as a waiver of sovereign immunity for torts committed through the "negligent or wrongful acts or omissions of federal employees acting within the scope of their employment or office."<sup>21</sup> The

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<sup>15</sup> See 10 U.S.C. §§ 2733, 2734, 2734a (2000) (authorizing the Secretary of Defense to administratively settle claims against the United States); 28 U.S.C. §§ 2669, 2672 (2000) (authorizing the Secretary of State to administratively settle claims against the United States).

<sup>16</sup> See Office of the Secretary of Defense, Military Departments, <http://www.defenselink.mil/odam/omp/pubs/GuideBook/Pdf/MilDeps.PDF> (showing the Commandant of the Marine Corps under the ultimate authority of the Secretary of Defense).

<sup>17</sup> *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> 28 U.S.C. § 1346 (2000).

<sup>21</sup> Borrowman, *supra* note 13, at 378.

FTCA specifically applies to “injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”<sup>22</sup> The statute also states that such remedy is “exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim.”<sup>23</sup> This provision effectively prohibits Peter’s family from personally suing VanGoethem if his acts were deemed to have occurred “while acting within the scope of his office or employment.”<sup>24</sup>

The broad language of the FTCA appears to apply to a claim stated by Peter’s family against the United States; the statute, however, contains a number of exceptions to its waiver of immunity. One such exception, the “foreign country exception,”<sup>25</sup> states that the FTCA does not apply to “[a]ny claim arising in a foreign country.”<sup>26</sup> According to one court, “[t]he rationale [for the exception] is that since claims under the Act are governed by the law of the place where the accident occurred . . . Congress has been unwilling to subject the United States to liabilities depending on foreign laws.”<sup>27</sup> Therefore, because the car accident took place in Romania, Peter’s estate could not bring a suit in a United States court under the FTCA.

## *II. Governmental Agency Settlement Authority*

### *A. Department of State Settlement Authority*

While the FTCA may bar a civil claim against VanGoethem and the United States by Peter’s family, there is still the opportunity to obtain relief. Under 28 U.S.C. § 2672:

The head of each Federal agency or his designee . . . may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States . . . would be liable to the claimant in accor-

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<sup>22</sup> 28 U.S.C. § 1346(b)(1).

<sup>23</sup> *Id.* § 2679(b)(1).

<sup>24</sup> *Id.*

<sup>25</sup> *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 701 (2004).

<sup>26</sup> 28 U.S.C. § 2680(k).

<sup>27</sup> *Gerritson v. Vance*, 488 F. Supp. 267, 268 (D. Mass. 1980).

dance with the law of the place where the act or omission occurred.<sup>28</sup>

In addition to this general grant of settlement authority, Congress enacted 22 U.S.C. § 2669 to explicitly allow the Secretary of State to use available funds to “pay tort claims . . . when such claims arise in foreign countries *in connection with Department of State operations abroad.*”<sup>29</sup> These two sections taken together “authorize administrative resolution of tort claims arising in connection with State Department operations abroad,” regardless of the fact that such claims would be barred under the FTCA.<sup>30</sup> The language of the statute, however, does “not give a claimant the right to demand either payment of tort claims or procedures for the consideration of such claims.”<sup>31</sup>

### *B. The Department of Defense Settlement Authority*

There are three ways to redress a claim with the Department of Defense outside of the FTCA: the Foreign Claims Act,<sup>32</sup> the International Agreements Claims Act,<sup>33</sup> and the Military Claims Act.<sup>34</sup> As is the case with the Department of State settlement authority, none of the statutes establish a legal right for an individual to seek relief—they merely allow for discretionary payments.<sup>35</sup> Further, judicial review is not available for actions taken pursuant to these statutes.<sup>36</sup>

#### *1. Foreign Claims Act*

The Foreign Claims Act (“FCA”) was enacted in 1942 after U.S. troops were sent to Iceland in response to Nazi aggression in Eu-

<sup>28</sup> 28 U.S.C. § 2672.

<sup>29</sup> 22 U.S.C. § 2669(f) (2000) (emphasis added).

<sup>30</sup> *Gerritson*, 488 F. Supp. at 268.

<sup>31</sup> *Tarpeh-Doe v. United States*, 904 F.2d 719, 723 (D.C. Cir. 1990). The court goes on to note that regulations promulgated by the Secretary of State at the time the case was decided did constrain the Secretary of State to the extent that they so required. *Id.* The regulations at issue in *Tarpeh-Doe*, however, are no longer in force. See 22 C.F.R. § 31.6 (1990) (no longer in force) (current regulations at 22 C.F.R. ch. 1 (2007) (setting forth regulations governing Department of State)).

<sup>32</sup> 10 U.S.C. § 2734 (2000).

<sup>33</sup> *Id.* § 2734a.

<sup>34</sup> *Id.* § 2733.

<sup>35</sup> *Niedbala v. United States*, 37 Fed. Cl. 43, 46 (1996).

<sup>36</sup> See 10 U.S.C. § 2735 (“Notwithstanding any other provision of law, the settlement of a claim under section 2733, 2734, 2734a, 2734b, or 2737 of this title is final and conclusive.”); see also *Niedbala*, 37 Fed. Cl. at 50–51 (finding no judicial review under these statutes except in a case where a constitutional right is asserted).

rope.<sup>37</sup> It was designed to ensure good relations between the armed forces and the host countries.<sup>38</sup> The statute states:

To promote and to maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned . . . may appoint . . . one or more claims commissions . . . to settle and pay in an amount not more than \$100,000, a claim against the United States for . . . personal injury to, or death of, any inhabitant of a foreign country . . . if the . . . personal injury, or death occurs outside the United States . . . or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction . . . .<sup>39</sup>

These claims “must arise in foreign countries from the acts or omissions of U.S. armed forces personnel abroad.”<sup>40</sup> There is no requirement that the act or omission be made within the scope of the employee’s employment.<sup>41</sup> In fact, foreign nationals frequently bring claims for damages “caused by off-duty military personnel in traffic accidents and similar incidents.”<sup>42</sup> Because the settlement process works through claims commissions, which are often established in places where the U.S. military has a significant presence, foreign claimants do not have to travel to the United States to obtain compensation.<sup>43</sup> In theory, this statute is arguably “the most straightforward route to seeking compensation from the U.S. government.”<sup>44</sup> The Departments of the Army, Air Force, Navy, and the Coast Guard have thus far promulgated regulations implementing this statute, making it almost universally applicable in the military context.<sup>45</sup>

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<sup>37</sup> Jerrett W. Dunlap, Jr., *The Economic Efficiency of the Army’s Maneuver Damage Claims Program: Coase, But No Cigar*, 190/191 MIL. L. REV. 1, 19 (2006/2007).

<sup>38</sup> Christopher M. Ford, *The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting for the Cycle, and All Aspects of a Full Spectrum Practice*, ARMY LAW., Dec. 2004, at 22, 34.

<sup>39</sup> 10 U.S.C. § 2734(a).

<sup>40</sup> *Niedbala*, 37 Fed. Cl. at 46.

<sup>41</sup> *Aaskov v. Aldridge*, 695 F. Supp. 595, 597 (D.D.C. 1988) (“[T]he Foreign Claims Act may be invoked for torts committed beyond the scope of official duty . . .”).

<sup>42</sup> R. Peter Masterton, *Managing a Claims Office*, ARMY LAW., Sept. 2005, at 45.

<sup>43</sup> Laura N. Pennelle, *The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?* 36 CAL. W. INT’L L.J. 303, 339 (2006).

<sup>44</sup> *Id.* The author goes on to conclude, however, that “anecdotal evidence” from the claims commission in Iraq has shown that the “system is inadequate.” *Id.*

<sup>45</sup> See 32 C.F.R. pt. 536 (2007) (Army); 32 C.F.R. pt. 750 (2007) (Navy); 32 C.F.R. pt. 842 (2007) (Air Force); 33 C.F.R. pt. 25 (2007) (Coast Guard).

## 2. *International Agreements Claims Act*

In 1951, a number of countries signed the North Atlantic Treaty Status of Forces Agreement (“NATO SOFA”), which was subsequently ratified by the United States in 1953.<sup>46</sup> In 1954, the International Agreements Claims Act (“IACA”) was enacted to implement the claims provisions of the NATO SOFA.<sup>47</sup> In subsequent years, the IACA has expanded to implement claims provisions in other SOFA agreements between the United States and foreign countries.<sup>48</sup> The IACA states that:

When the United States is a party to an international agreement which provides for the settlement or adjudication and cost sharing of claims against the United States arising out of the acts or omissions of a member or civilian employee of an armed force of the United States done in the performance of official duty, or arising out of any other act, omission, or occurrence for which an armed force of the United States is legally responsible under the law of another party to the international agreement, and causing damage in the territory of such party, the Secretary of Defense or the Secretary of Transportation . . . may (1) reimburse the party to the agreement for the agreed pro rata share of amounts . . . in accordance with the agreement; or (2) pay the party to the agreement the agreed pro rata share of any claim . . . in accordance with the agreement.<sup>49</sup>

The purpose of the statute is to implement treaties that include a cost-sharing procedure between the United States and the foreign country to redress injuries caused by members of the U.S. military abroad.<sup>50</sup> Claims must arise from actions occurring within the scope of employment and the United States must be liable under the law of the nation where the act occurs.<sup>51</sup> Claims resulting from “non-scope” or private actions of members of the U.S. military must be pursued under the FCA.<sup>52</sup> Ultimately, it is the agreement between the United

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<sup>46</sup> Dunlap, *supra* note 37, at 26.

<sup>47</sup> *Id.* at 27.

<sup>48</sup> *Id.*

<sup>49</sup> 10 U.S.C. § 2734a(a) (2000).

<sup>50</sup> Niedbala v. United States, 37 Fed. Cl. 43, 47 (1996).

<sup>51</sup> Dunlap, *supra* note 37, at 27.

<sup>52</sup> Jody M. Prescott, *Operational Claims in Bosnia-Herzegovina and Croatia*, *ARMY LAW.*, June 1998, at 1, 2.

States and the host country that will govern the investigation and settlement or denial of claims.<sup>53</sup>

### 3. *The Military Claims Act*

The Military Claims Act (“MCA”) was enacted in 1943 as a way of compensating injuries that were caused by members of the military stationed in the United States during World War II.<sup>54</sup> The MCA gives the Secretary of the Army, Navy, Air Force, or Defense the ability to settle and pay a claim against the United States for “personal injury or death; either caused by a civilian officer or employee of that department . . . or a member of the . . . Marine Corps . . . acting within the scope of his employment, or otherwise incident to noncombat activities of that department.”<sup>55</sup> The individual injured does not need to show fault or even negligence.<sup>56</sup> A claim, however, can only be addressed under this section if it is not covered by the FCA or the FTCA.<sup>57</sup>

The statute authorizes the Secretary concerned to prescribe regulations for such claims,<sup>58</sup> and the Secretaries of the Army, the Air Force, the Navy, and the Coast Guard have promulgated such regulations.<sup>59</sup> While the primary purpose of the MCA is to provide relief for claimants injured in the United States,<sup>60</sup> the implementing regulations make clear that the foreign country exception of the FTCA does not apply to claims under the MCA.<sup>61</sup> The regulations also make clear, however, that inhabitants of foreign countries are not proper claimants under the MCA.<sup>62</sup> The typical MCA claimants are family mem-

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<sup>53</sup> *Id.* at 1.

<sup>54</sup> Dunlap, *supra* note 37, at 24.

<sup>55</sup> 10 U.S.C. § 2733(a)(3) (2000).

<sup>56</sup> *Lundeen v. Dep’t of Labor & Indus.*, 469 P.2d 886, 889 (Wash. 1970).

<sup>57</sup> 10 U.S.C. § 2733(b)(2).

<sup>58</sup> *Id.* § 2733(a).

<sup>59</sup> 32 C.F.R. pt. 536 (2007) (Army); 32 C.F.R. pt. 750 (2007) (Navy); 32 C.F.R. pt. 842 (2007) (Air Force); 33 C.F.R. pt. 25 (2007) (Coast Guard).

<sup>60</sup> Dunlap, *supra* note 37, at 24.

<sup>61</sup> *See* 32 C.F.R. § 536.136(b) (provision in Army regulations stating that “[c]laims arising in foreign countries will be settled under the MCA if the injured party is an inhabitant of the U.S.”); 32 C.F.R. § 750.41(c) (provision in Navy regulations stating that “[t]here is no geographical limitation on the application of the MCA”); 32 C.F.R. § 842.51(a)(2) (provision in Air Force regulations addressing the applicable law for “claims arising in a foreign country”).

<sup>62</sup> *See* 32 C.F.R. § 536.34(d) (finding in Army regulations that “[c]laims by foreign inhabitants, arising in a foreign country . . . fall exclusively under the FCA”); 32 C.F.R. § 750.45 (finding in Navy regulations that “[i]nhabitants of foreign nations” cannot file a claim under the MCA); 32 C.F.R. § 842.48 (finding in Air Force regulations that “inhabitants of foreign countries” are not proper claimants).



bers of individuals in the military who live abroad, U.S. residents not able to recover under the FCA or a SOFA agreement, or persons injured in the U.S. as a result of noncombat activities.<sup>63</sup> In summary, the MCA applies “to overseas claims not covered by the FCA and to noncombat activities in the United States, because the FTCA does not apply overseas and does not cover noncombat activities.”<sup>64</sup>

### *III. The Department of State Should Be Responsible for the Acts of Marine Embassy Guards*

The circumstances surrounding Peter’s death highlight the use of members of the Marine Corps for partly diplomatic functions. In 1948, the Marine Corps and the State Department entered into a relationship whereby Marines would provide security for diplomatic missions in foreign countries.<sup>65</sup> The Marine embassy guards are an elite branch of the Marine Corps; most guards are experienced corporals or sergeants.<sup>66</sup> Further, all guards must obtain top security clearance and must remain unmarried during their time abroad.<sup>67</sup> As part of their training, the guards must learn appropriate social and diplomatic behavior.<sup>68</sup>

Today, there are approximately 1,240 Marine guards who provide security for 131 missions in 121 countries.<sup>69</sup> These guards are trained by the Department of Defense and provide the “innermost ring of security” in an embassy; they are essentially the last line of defense.<sup>70</sup> The guards, however, have no authority outside of the embassy.<sup>71</sup> Because the role of Marine guards is to provide internal security, they can fire their weapons only in self-defense or on the orders of the diplomats.<sup>72</sup> If an embassy is attacked, the guards’ job is to delay the attack long enough for the embassy to destroy important material.<sup>73</sup> They are then expected to wait for the host government to perform the ultimate rescue.<sup>74</sup>

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<sup>63</sup> Dunlap, *supra* note 37, at 25.

<sup>64</sup> *Id.*

<sup>65</sup> See Marine Guards Adapt to Deal with International Terrorism, Federal Department and Agency Documents (Oct. 10, 2002).

<sup>66</sup> See Melinda Beck & Jerry Buckley, *Marines on Guard*, NEWSWEEK, Dec. 24, 1979, at 37.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Marine Guards Adapt to Deal with International Terrorism, *supra* note 65.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See Beck & Buckley, *supra* note 66.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* A Newsweek poll conducted in 1979 showed that seventy percent of Americans

Peter's family has various options through which they can attempt to pursue relief. They could file a claim under 22 U.S.C. § 2669 with the Department of State and argue that the allegedly tortious act was made "in connection with Department of State operations abroad."<sup>75</sup> Alternatively, Peter's family could pursue a claim through the Department of Defense under either the FCA or the IACA.<sup>76</sup> If the claim were to be pursued under the FCA, Peter's family could argue that his death was "incident to noncombat activities" of the Marine Corps.<sup>77</sup> Because Romania is a party to the NATO SOFA,<sup>78</sup> however, the claim would have to be adjudicated under that agreement.<sup>79</sup>

An event that occurred in 1986 shows the military and diplomatic convergence of interest in the functions and activities of Marine embassy guards. A Marine embassy guard at the United States Embassy in Moscow, Clayton J. Lonetree, was charged with conspiring to allow Soviet agents to enter the sensitive areas of the Embassy.<sup>80</sup> In response, "[b]ureaucratic warfare" broke out between the Department of Defense and the Department of State.<sup>81</sup> The Secretary of the Navy at the time accused the U.S. Ambassador to Moscow of being responsible for the security breach.<sup>82</sup> The Ambassador responded by saying that the Secretary was "talking through his hat," and the Secretary of State issued instructions forbidding the Secretary of the Navy from entering the State Department building.<sup>83</sup> Indeed, the fact that the

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believe that Marine guards should be permitted to "shoot back." *Id.* Military officials, however, claim that it is not possible to adequately protect an embassy against attack and, therefore, the host government must ultimately conduct the rescue. *See id.*

<sup>75</sup> 22 U.S.C. § 2669(f) (2000).

<sup>76</sup> Peter's family would not, however, be able to pursue relief through the MCA because of the foreign inhabitant exclusion. *See supra* Part II.B.3.

<sup>77</sup> 10 U.S.C. § 2734(a) (2000).

<sup>78</sup> *See* Army Medicine, NATO SOFA Members, <http://www.armymedicine.army.mil/hc/ip/nato.htm>.

<sup>79</sup> 10 U.S.C. § 2734(a).

<sup>80</sup> Don Oberdorfer, *Spy Scandal Snowballed, Melted Away*, WASH. POST, Jan. 17, 1988, at A1. The scandal was originally billed as the story of young Marine guards who fell prey to the seductions of Soviet women who worked at the Embassy. Molly Moore & Bill McAllister, *Marine Case Said to Be in Jeopardy*, WASH. POST, Apr. 27, 1987, at A1. The Marine guards allegedly were persuaded by these women to allow Soviet agents to enter the Embassy surreptitiously. *Id.* For a complete discussion of the events surrounding the spy scandal, see Pete Earley, *Spy Fiasco*, WASH. POST, Feb. 7, 1988, at W20.

<sup>81</sup> Oberdorfer, *supra* note 80.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* Despite the bureaucratic warfare and the sensational nature of the allegations, the spy scandal ultimately disappeared. *Id.* As the *Washington Post* noted:

Today, after extensive damage to the [E]mbassy's ability to function and after

Marine Corps, the Navy, the Department of State, and the Central Intelligence Agency were all involved in addressing the alleged security breach shows the multi-jurisdictional nature of the Marine guards.<sup>84</sup>

The issue of which agency should be liable for the actions of Marine embassy guards is a question of whether the acts of these guards are predominantly “in connection with Department of State operations abroad”<sup>85</sup> or are “otherwise incident to the noncombat activities of[ ] the armed forces.”<sup>86</sup> While the Marine Corps is unquestionably under the jurisdiction of the Department of Defense,<sup>87</sup> the specific functions of Marine guards are primarily diplomatic and, therefore, the Department of State should be liable for their actions.

First, and most importantly, it appears that the Marine embassy guards are supervised primarily by Department of State employees. Under 22 U.S.C. § 4802, the Secretary of State is explicitly responsible for developing and implementing policies to provide for the security of diplomatic operations, and these responsibilities include “[s]upervision of the United States Marine Corps security guard program.”<sup>88</sup> Further, Marine guards at embassies are not allowed to fire their weapons unless they are acting in self-defense or unless a diplomatic agent instructs them to do so.<sup>89</sup> The guards are explicitly forbidden from defending an embassy under attack and must await the host government’s arrival on the scene.<sup>90</sup> It appears that the actions of Marine guards are essentially controlled by the diplomatic agents that they serve and not by authorities at the Department of Defense.

In addition, as illustrated through the events that occurred after Peter’s death, Marine embassy guards are given some diplomatic immunity for the actions they take.<sup>91</sup> VanGoethem could not be prose-

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spending many millions of dollars to bring home and replace its sensitive equipment, the U.S. government organizations most directly involved have decided that Lonetree did not conspire with Bracy to bring Soviet agents into the Moscow Embassy after all.

*Id.*

<sup>84</sup> Moore & McAllister, *supra* note 80.

<sup>85</sup> 22 U.S.C. § 2669(f) (2000).

<sup>86</sup> 10 U.S.C. § 2734 (2000); *see also* 10 U.S.C. § 2733(a)(3).

<sup>87</sup> *See* Office of the Secretary of Defense, *supra* note 16.

<sup>88</sup> 22 U.S.C. § 4802(a)(2)(B)(v).

<sup>89</sup> *See* Beck & Buckley, *supra* note 66.

<sup>90</sup> *See id.*

<sup>91</sup> *See* Marine Corps Embassy Security Group, The Mission of the Marine Corps Embassy Security Command, <https://www.msgbn.usmc.mil/?pg=company/pub/about/abtMission.htm> (not-

cuted in Romania because of his diplomatic immunity, and he left the country immediately after the accident that resulted in Peter's death.<sup>92</sup>

Second, while the Marine guards must operate under directions from the Department of State, the Department of State officials are in turn responsible for the actions of the Marine guards. During the 1986 Marine guard spy scandal, then-Secretary of State George Shultz accepted ultimate responsibility for the security breaches allegedly committed by the Marine guards at the Embassy.<sup>93</sup>

It is true that the Department of Defense disciplines Marine embassy guards, as is shown by VanGoethem's military court-martial.<sup>94</sup> In their day-to-day activities, however, they must answer to Department of State officials and these officials are ultimately responsible for them as well.<sup>95</sup> And, in return, Marine guards are given diplomatic immunity for their acts.<sup>96</sup> It is clear that the day-to-day supervision and ultimate responsibility for actions of the Marine embassy guards that is vested in the Department of State brings them within the category of "Department of State operations abroad."<sup>97</sup>

Third, although the Department of Defense trains the Marine guards,<sup>98</sup> their specialized training evinces their primarily diplomatic function. Marine guards must obtain a top level of security clearance and are trained in diplomatic and social graces.<sup>99</sup> The specialized training of Marine guards appears to be necessary because of the unique circumstances and situation of an embassy.<sup>100</sup> These specialized skills are those that are ordinarily associated with diplomatic, as opposed to military, applications. Therefore, they would appear to be needed "in connection with Department of State operations abroad."<sup>101</sup>

The supervision and responsibility for the actions of the Marine guards as well as the specialized training they receive shows that the

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ing that embassy guards "carry a certain level of diplomatic immunity in the performance of their official duties").

<sup>92</sup> *U.S. Marine Charged in Star's Death*, *supra* note 5.

<sup>93</sup> Ed Magnuson, *Crawling with Bugs: The Embassy Spy Scandal Widens, Affecting Marines and Diplomats*, *TIME*, Apr. 20, 1987, at 14.

<sup>94</sup> *See* Crawley, *supra* note 2.

<sup>95</sup> *See* Magnuson, *supra* note 93, at 14.

<sup>96</sup> *See* Marine Corps Embassy Security Group, *supra* note 91.

<sup>97</sup> 22 U.S.C. § 2669(f) (2000).

<sup>98</sup> *Marine Guards Adapt to Deal with International Terrorism*, *supra* note 65.

<sup>99</sup> *See* Beck & Buckley, *supra* note 66.

<sup>100</sup> *See id.* (noting that the Marine embassy guards "don't fit the image of storm-the-beach leathernecks").

<sup>101</sup> 22 U.S.C. § 2669(f).

Marine guards act primarily to further the needs and goals of the Department of State. Therefore, the Department of State, and not the Department of Defense, should be responsible for the actions of the Marine guards.

### *Conclusion*

Teofil Peter's death was a tragedy to both his own family and to the Romanian people. To provide some measure of relief and to secure the United States' strategic alliance with Romania,<sup>102</sup> Peter's family should be compensated for his death. Although Peter's family will be unable to obtain relief in a judicial forum, they will be able to file a claim with either the Department of State or the Department of Defense. Because VanGoethem performed mainly diplomatic functions as a Marine guard, the Department of State should be the agency to compensate Peter's family for their loss.

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<sup>102</sup> See U.S. Dep't of State, *supra* note 10.