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Article

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Lieutenant Colonel Victor M. Hansen

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The Judge Advocate General's Legal Center and School

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Walking on Unfamiliar Ground: A Primer for Defense Counsel Representing Clients in an Inspector General Investigation

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Introduction

In the course of a two-year assignment as a trial defense counsel (TDC), most defense attorneys are likely to represent numerous Soldiers at courts-martial and administrative separation proceedings. Likewise, most TDCs routinely assist Soldiers who are the subject of commander's inquiries² and investigations under *Army Regulation* (AR) 15-6.³ The formal and informal training TDCs receive, focuses on these aspects of their practice. Because of this emphasis and the volume of cases, most TDCs develop a good working knowledge of criminal investigations, AR 15-6 investigations, and commander's inquiries. There is another type of investigation, however, that most defense counsel may only see once or twice over the course of a two-year assignment—Army Inspector General (IG) investigations.

Inspector general investigations come with their own set of rules and procedures.⁴ Like other investigations, they can adversely impact the Soldier under investigation. Many aspects of an IG investigation are similar to the other investigations that TDCs work with on a regular basis. There are, however, several unique aspects of an IG investigation.⁵ This article explains the IG investigation process and provides a primer that will assist defense attorneys to understand their role in protecting the interests of a client under investigation. The article will discuss investigations conducted at both the installation and command level as well as investigations conducted by the Department of the Army Inspector General (DAIG). The paper will first examine the rules of the IG investigative process. Next, it will consider the process. The article will also provide suggestions and highlight particular areas for TDCs to consider. The article concludes with some observations about the due process issues at stake.

Background

Before discussing IG investigations as they relate to a particular client, it is important to understand the IG's regulatory role and the IG's responsibilities in the context of an investigation or investigative inquiry.⁶ Most judge advocates (JA) are familiar with many of the local IG office's day-to-day functions. One of the IG's most important functions is to conduct inspections.⁷ These inspections are intended to help leaders assess their organization's ability to accomplish its wartime and peacetime missions.⁸ Another function is the IG's responsibility to provide assistance to Soldiers, family members, civilian employees, and retirees in resolving problems.⁹ These functions are not the focus of this article.

The function with which most JAs are less familiar is the IG's investigative responsibility. The Secretary of the Army (SA), the Under Secretary of the Army (USofA), the Chief of Staff of the Army (CSA), the Vice Chief of Staff of the Army (VCSA), the Inspector General (TIG), and commanders can direct that the IG conduct investigations or investigative inquiries.¹⁰ The stated purpose of investigations is to "provide the directing authority a sound basis for decisions and actions.

¹ Before assignment as Executive Officer, United States Army Claims Service, the author served as the Regional Defense Counsel for Region I, United States Army Trial Defense Service. In that assignment, the author represented several senior officers who were named as subjects and suspects of Department of the Army Inspector General (DAIG) investigations.

² U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 5-8 (13 May 2002).

³ U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996) [hereinafter AR 15-6].

⁴ U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Mar. 2002) [hereinafter AR 20-1].

⁵ For example, the rules differ based on the rank and status of the client. *See id.* para. 8-3(i) (setting out special procedures for investigating senior officers).

⁶ Lieutenant Colonel Craig Meridith, *The Inspector General System*, ARMY LAW., July/Aug. 2003 (providing a complete overview of the IG system).

⁷ AR 20-1, *supra* note 4, paras. 1-4 a(11)(c) and 1-4b(4).

⁸ *Id.* para. 6-1a.

⁹ *Id.* para. 1-4a(10)(a). These problems can range from pay issues, to retirement benefits or other areas where the complainant is experiencing problems with the Army system.

¹⁰ *Id.* para. 1-4b(5)(a) and para. 1-4a(12).

Inspector general investigations normally address allegations of wrongdoing by an individual and are authorized by written directive.”¹¹ The purpose of investigative inquiries is “to gather information needed to address allegations of impropriety against an individual that can accomplish the same objectives of an IG investigation.”¹² It is clear from these provisions that the IG uses investigations and investigative inquiries to look into allegations of individual misconduct.

Type of Investigation

Generally, investigations conducted by the command IG at the direction of a local commander are investigative inquiries. Investigative inquiries are less formal than investigations.¹³ Investigative inquiries typically involve witness statements and a review of documents. Witness statements are not required to be sworn or recorded verbatim.¹⁴ At the conclusion of the inquiry, a report of investigative inquiry (ROII) must be completed, and a legal review is required for any substantiated allegation.¹⁵ The directing authority must approve the ROII, and the subject or suspect of the investigation must be notified in writing of any substantiated allegation.¹⁶

Investigations involve a more formal procedure and are typically conducted at the DAIG level. An investigation is a formal fact finding process. The investigation will include a formal directive from the directing authority and a notice to the subject or suspect and to the appropriate commander that an investigation is being conducted.¹⁷ Sworn witness statements and verbatim transcripts of interviews; a report of investigation (ROI); a formal legal review of the ROI; and notification to the subject or suspect, the respective commander, and the complainant of the results of the investigation, are all requirements of a formal investigation.¹⁸

Inspector General Action Request

Investigations and investigative inquiries are most often triggered by someone making an Inspector General Action Request (IGAR). An IGAR is “[a] complaint, allegation, or request for information or help presented or referred to an IG. An IGAR may be submitted in person, over the telephone, through written communication, by electronic communications, or through the DOD Hotline referral.”¹⁹ A complaint is “[a]n expression of dissatisfaction or discontent with a process or system”²⁰ A complainant is “[a]ny person or organization submitting an IGAR. The person can be a [S]olider, family member, member of another Service, Government employee, or member of the general public. The organization can be any public or private entity.”²¹ Finally, an allegation is “a statement or assertion of wrongdoing by an individual”²² Taken together, these definitions show that any person or any organization can bring information of suspected wrongdoing or misconduct by a military individual in virtually any form, including anonymous tips, and that information may trigger an investigation or investigative inquiry.

¹¹ *Id.* para. 8-1b(1).

¹² *Id.* para. 8-1b(2).

¹³ *Id.* para. 8-4c.

¹⁴ *Id.* para. 8-4c(2).

¹⁵ *Id.* para. 8-4c(3).

¹⁶ *Id.* paras. 8-4c(1)-(5) and 8-4d. Note that the regulation also states that subjects and suspects have the right to address unfavorable information against them. *Id.* para. 8-4d. That right, however, is not clear and the cross-reference to para. 4-10 says nothing about the right to address unfavorable information. *See id.* para. 4-10.

¹⁷ *Id.* para. 8-4 b(1)-(7).

¹⁸ *Id.*

¹⁹ *Id.* Glossary, sec. II, terms, “Inspector General Action Request.”

²⁰ *Id.* Glossary, sec. II, terms, “Complaint.”

²¹ *Id.* Glossary, sec. II, terms, “Complainant.”

²² *Id.* Glossary, sec. II, terms, “Allegation.”

Who Conducts the Investigation?

The IG can conduct its investigative functions in a number of ways. At the local level, the commander can direct the command IG to conduct an investigative inquiry.²³ Because the IG system is not a stovepipe organization, the local command IG works for and reports to the local commander.²⁴ The DAIG includes the combined offices of the Office of the Inspector General (OTIG) and the U.S. Army Inspector General Agency.²⁵ At the direction of the SA, USofA, CSA, VCSA, or TIG, the Investigations Division of the DAIG can also conduct investigations and investigative inquiries.²⁶

Often, the local command's IG will conduct the investigation or investigative inquiry. Depending on the rank of the client under investigation, however, the DAIG may also be involved. For investigations involving allegations against a master sergeant (MSG), sergeant major (SGM), command sergeant major (CSM), or any officer in the grade of major through colonel, the command IG is required to forward an action request to the DAIG within two working days of receipt of the allegation.²⁷ While the command IG may still be responsible for the investigation, the Assistance Division of the DAIG will provide oversight.

Allegations against general officers, brigadier general selectees, and members of the senior executive service (SES) must be reported directly to TIG within two days of receipt of the allegations.²⁸ The Investigations Division of the DAIG conducts all investigations or investigative inquiries involving these officials.²⁹

The Investigator's Role

Regardless of whether the investigation is an investigative inquiry or a more formal investigation, IG investigators view their role as that of an independent fact finder who has no stake in the ultimate disposition of the case.³⁰ The analogy that many investigators like to use is that they are like the umpire at a baseball game.³¹ Their responsibility is simply to call balls and strikes, find the facts, and not be concerned with the final score. There is some regulatory support for this analogy. The regulation makes clear that results of investigations will not be used as a basis for adverse actions against the individuals being investigated.³² There is, however, an exception to this rule. The regulation permits using the investigation as a basis for adverse actions against the subject or suspect with the approval of the SA, USofA, CSA, VCSA, or TIG.³³

Scope of Investigations

The IG does not have unlimited jurisdiction to conduct investigations. Inspector generals should not normally investigate when: "[t]he alleged impropriety is of a nature that, if substantiated, would likely constitute criminal misconduct";³⁴ "[s]ubstantiation of allegations appears certain at the outset of the IG analysis of the [Inspector General

²³ *Id.* para. 8-3d.

²⁴ *Id.* para. 1-6d.

²⁵ *Id.* para. 1-8c.

²⁶ *Id.* para. 1-4a(11)(c).

²⁷ *Id.* para. 1-4b(5)(b).

²⁸ *Id.* para. 1-4(5)(c).

²⁹ *Id.*

³⁰ *Id.* para. 8-2a(5).

³¹ This assertion is based on the author's recent professional experiences as the Regional Defense Counsel for Region I, United States Army Trial Defense Service, from 10 June 2002 to 15 July 2004 [hereinafter Professional Experiences].

³² AR 20-1, *supra* note 4, para. 3-3a.

³³ *Id.*

³⁴ *Id.* para. 8-3b(1). The regulation further states:

While many allegations of acts or omissions can theoretically be seen as criminal insofar as they could be phrased as a dereliction of duty, violation of a regulation, or conduct unbecoming an officer, this does not necessarily preclude an investigation or inquiry by an

Action Request], and it appears certain adverse actions against individuals will occur”;³⁵ “[t]he Army has established means of redress”;³⁶ “[t]he chain of command decides to address the issues and allegations”;³⁷ “[t]he allegations involve professional misconduct by an Army lawyer, military or civilian”;³⁸ or “[t]he allegations involve mismanagement by a member of the Judge Advocate Legal Service serving in a supervisory capacity.”³⁹ If an individual is being investigated by the IG, it is likely to involve relatively minor misconduct. The command may also be uncertain of what the individual did and can use the IG investigation to develop facts, which they can then use to launch a different type of investigation.

If the client is a senior official—general officer, a brigadier general select, or a senior civilian employee—the DAIG has greater involvement. It is Army policy to forward “any and all allegations of impropriety or misconduct” (including criminal allegations) against senior officers to the DAIG.⁴⁰ If, in an ongoing collateral investigation, senior officials become the suspects or subjects of an allegation, the command must “halt the inquiry or investigation as it regards any specific allegations against a senior official and report any and all such allegations directly to DAIG’s Investigations Division for determination of further action.”⁴¹ If a collateral investigation, such as a criminal investigation, was initiated, that collateral investigation is to “halt the inquiry or investigation as it regards any specific allegations against a senior official and report any and all such allegations directly to DAIG’s Investigations Division for determination of further action.”⁴² The IG “will not conduct any fact-finding into the nature of the allegations unless authorized by TIG, DTIG, or Chief, Investigations Division, DAIG.”⁴³ For senior officers, the DAIG investigation is likely to be the primary investigative tool.

Status of the Client

Regardless of the type and scope of the investigation, the client’s status will fall into one of three categories: witness, subject, or suspect. Witnesses are not the subject of the investigation. They are someone “who saw, heard, knows, or has something relevant to the issues being investigated and who is not a subject or a suspect.”⁴⁴ A subject is someone being investigated for non-criminal allegations such as violations of non-punitive regulations.⁴⁵ A suspect is in the most serious category and “is a person against whom criminal allegations have been made.”⁴⁶ Although it does not appear in the regulation, it is also the DAIG’s policy to treat all senior officers being investigated as suspects.⁴⁷

IG. The directing authority may still direct the IG to conduct an investigation or inquiry. Coordination or consultation with the appropriate legal advisor will be conducted in such cases as this and with USACID officials if appropriate.

Id. para. 8-3b(1).

³⁵ *Id.* para. 8-3b(2).

³⁶ *Id.* para. 8-3b(3).

³⁷ *Id.* para. 8-3b(4).

³⁸ *Id.* para. 8-3b(5).

³⁹ *Id.* para. 8-3b(6).

⁴⁰ *Id.* para. 8-3i(2).

⁴¹ *Id.* para. 8-3i(1).

⁴² *Id.*

⁴³ *Id.* para. 8-3i(2).

⁴⁴ *Id.* para. 8-5a.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Interview with Lieutenant Colonel Craig Meredith, former Deputy Legal Advisor, United States Army Inspector General Agency, in Alexandria, Va. (Feb. 21, 2003).

Sources & Confidentiality

The IG will undertake extensive measures to protect the identity of witnesses and, especially, complainants.⁴⁸ The IG will not disclose the name of the complainant to anyone without the complainant's consent.⁴⁹ The regulation also establishes a privilege for IG records.⁵⁰ The IG applies the Freedom of Information Act (FOIA)⁵¹ exemptions broadly in order to limit disclosure of information.⁵² The IG will not allow witnesses, subjects, or suspects to independently record their testimony given to the IG investigator.⁵³ The IG regulation also provides that the IG will ask all witnesses, subjects, and suspects not to disclose their testimony with anyone other than the IG without the IG's permission.⁵⁴

Standards and Burden of Proof

It is important to know what standards the IG uses and the burden of proof required in order to substantiate an allegation. The violations investigated fit into three categories: non-punitive violations of regulatory guidance, punitive violations of law, and violations of established policies, SOPs, or standards.⁵⁵ The investigative standards come from the issues being investigated and are analogous to the elements of the offense. For example, if a client is being investigated for allegations of adultery, the standards or elements are based on a punitive violation of the law and come from Article 134, UCMJ.⁵⁶ If, on the other hand, the client is being investigated for improperly receiving a gift from a foreign source, the standards may come from the Joint Ethics Regulations⁵⁷ or a departmental policy. Inspector generals are also directed to word allegations in such a way that a substantiated allegation represents an impropriety.⁵⁸ The regulation states that “[p]reponderance of credible evidence is the standard of proof IGs use to substantiate or not substantiate allegations. Preponderance is defined as ‘superiority of weight.’”⁵⁹

Conducting the Investigation

The IG will gather evidence, talk to witnesses and conduct the leg work of the investigation similar to how other investigations are conducted. One unique aspect of IG investigations, particularly those conducted by the DAIG, is that they

⁴⁸ See generally AR 20-1, *supra* note 4, para. 1-12.

⁴⁹ *Id.* para. 1-12a(1).

⁵⁰ *Id.* para 3-1b. This paragraph states that “[i]nspector general records are privileged documents and contain sensitive information and advice.” *Id.* While there is no specific privilege for unclassified IG records in the Military Rules of Evidence (MRE), MRE 507 can protect the identity of an informant. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 507 (2002) [hereinafter MCM]. It is possible that this privilege could be asserted in a court-martial to protect the identity of an informant. The MRE privilege is not so broad, however, as to protect all IG documents and records. When the IG report is being used as a basis for adverse administrative actions, the IG protects these records under exemptions in the FOIA.

⁵¹ 5 U.S.C. § 552 (2000).

⁵² AR 20-1, *supra* note 4, para. 3-2 b. This paragraph states the following:

[w]hen IG records are released outside IG channels, they will be marked, “This document contains information EXEMPT FROM MANDATORY DISCLOSURE under the FOIA. Exemption(s) (number(s)) apply.” The following exemptions may apply to IG records: (1) Inspection reports – Exemption 5. (2) Reports of Investigation – Exemptions 5,6, and 7. (3) Reports of Investigative Inquiry – Exemptions 5,6, and 7. (4) Inspector General Action Requests – Exemptions 5, 6, and 7.

Id. See also *id.* para. 3-7e (stating that discovery requests for IG records by a defense counsel in a judicial proceeding will be reviewed and the IG will redact what they deem as nonrelevant information and information exempted under the FOIA before releasing the records. Only after the presiding judge does an in camera review and signs a protective order, will the IG release complete unredacted copies of IG records to a defense counsel).

⁵³ *Id.* para. 8-4h.

⁵⁴ *Id.* para. 8-4i.

⁵⁵ *Id.* para. 4-4 d.

⁵⁶ UCMJ art. 134 (2002).

⁵⁷ U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (JER) (30 Aug. 1993).

⁵⁸ AR 20-1, *supra* note 4, para. 8-2 a(3).

⁵⁹ *Id.*

proceed slowly. More specific details about the actual conduct of the investigation are discussed in the subsequent sections of the article.

Concluding the Investigation

After the evidence is gathered, the IG will write up the report of investigation or investigative inquiry. The report will most often consist of an executive summary and the main body of the investigation. For every allegation investigated there will be a consideration of the relevant evidence, testimony, and statements; an analysis; and a conclusion stating whether the allegation was substantiated or unsubstantiated.

Once the report is complete, it enters the review process. In the case of a DAIG, there will be a legal review before the report leaves the IG office. In all reports of investigation and investigative inquiries where there has been a substantiated allegation, a legal review by the supporting JA is required.⁶⁰

After many weeks or months, the report will be complete. In the case of a DAIG investigation, TIG and the VCSA will review the report as part of the final review process if the VCSA was the appointing authority. For investigations conducted at the local level, the local inspector general and the commander who directed the investigation will normally approve or disapprove the report. The subject will then be notified, usually in writing, of the results of the investigation.

The Process/The Client/The Defense Counsel

With this general understanding of the rules and structure of the IG investigative system, the article will now focus on how the process may work for an individual client and how the defense counsel can get involved to best protect their client's interests. The general structure is the same, regardless of the rank of the client. There will be some variations, which this section will discuss, if the client is a senior officer.

The Step by Step Process

The regulation sets forth seven steps to an IG Investigation. The IG must "obtain a written directive from the directing authority . . ."⁶¹ The IG must "[v]erbally notify appropriate commanders or supervisors and the subjects or suspects of the investigation and inform them of the nature of the allegations."⁶² The IG will "[d]evelop an investigative plan."⁶³ The IG will "[g]ather evidence and take sworn and recorded testimony."⁶⁴ After collecting the evidence, the IG will "[e]valuate the evidence and write the report of investigation."⁶⁵ The IG will "[o]btain a written legal review of the report of investigation from the supporting judge advocate."⁶⁶ Finally, the IG will "notify the appropriate commanders or supervisors, complainant (only allegations directly pertaining to the complainant), and subjects or suspects of the approved results of the investigation in writing . . ."⁶⁷ Investigative inquiries are less formal than investigations, but are conducted in a similar manner as investigations.⁶⁸ While there is a logical flow to these steps, there is no regulatory requirement to follow them in sequential order, and some steps may proceed simultaneously. For example, the IG could begin formulating the investigative plan before contacting the subject(s) or suspect(s) of the allegations. Likewise, after a legal review, there may be a need for the IG to interview or re-interview certain witnesses or collect additional evidence.

⁶⁰ *Id.* para. 8-7c(1)(a).

⁶¹ *Id.* para. 8-4b(1).

⁶² *Id.* para. 8-4b(2).

⁶³ *Id.* para. 8-4(3).

⁶⁴ *Id.* para. 8-4(4).

⁶⁵ *Id.* para. 8-4(5).

⁶⁶ *Id.* para. 8-4(6).

⁶⁷ *Id.* para. 8-4b(7).

⁶⁸ *Id.* para. 8-4(c).

The Beginning

The process begins after the IG receives an IGAR. At this stage, the client may not be aware that an IGAR has been made. The client is generally made aware of the investigation or investigative inquiry after being informed by their chain of command or the IG of the investigation and the allegations. In the case of senior officers, the Deputy IG or TIG will likely contact the officer and tell him that an investigative inquiry or a formal investigation has been initiated. The client will be told, in general terms, the allegations being investigated, but the IG will not share any detailed information. Notification of investigations conducted by the command's IG may vary, but the end result will be the same—the client will know in very general terms that the IG is investigating him.

Once an investigative inquiry or investigation is opened, the client, particularly a senior client may suffer significant adverse impacts, even if the allegations are never substantiated. Senior officers will essentially be flagged during this process.⁶⁹ As a result, the client will not be able to: apply for retirement without DA approval; take a new command; or, be promoted, if on a promotion list.⁷⁰ Senior officers in the grade of O-9 and O-10 will not be able to apply for time in grade waivers while the investigation is pending. This is often a source of extreme frustration for the client, especially if the investigation goes on for several months or even years.

After the client is notified that an investigation is opened, he may make his first attempts to contact a trial defense attorney. It is rare that the client will seek assistance from trial defense counsel before this stage, and often the client will wait until much later in the process. If the client contacts a defense attorney at this stage, it is important to advise the client not to act on his frustrations. For example, the client may want to find out who submitted the IGAR and talk with that person in hopes of resolving the issue. The client should be advised against this. One issue the IG takes an intense interest in is protecting a complainant against reprisal actions.⁷¹ Even if the client's intent in finding and contacting a complainant is motivated by a genuine desire to resolve an issue, the complainant and the IG may not see it that way. If the IG perceives the client as attempting to take a reprisal action against the complainant, additional allegations will likely be added and investigated.

In the case of DAIG investigative inquiries and formal investigations, the investigators will not typically contact the client for an interview immediately. Instead, the investigators will conduct a background inquiry to gather facts about the allegation.⁷² The IG will interview witnesses and gather documentary or other evidence.⁷³ Only after the IG spends considerable time and effort gathering relevant information on the case, will they approach the subject or suspect for an interview.⁷⁴

Defense Counsel Involvement

Typically, one will not contact a defense counsel until after receiving notification that an investigation or investigative inquiry is being conducted or after being contacted by the IG for an interview. In most cases, the defense counsel gets involved well after the process is underway and after the IG has collected a significant amount of evidence.

Once the client is aware that the investigative inquiry or investigation is being conducted and contacts the defense attorney for advice, it is very important to advise the client not to do anything to assert himself in the investigative process. For example, the client may have the best of intentions for contacting witnesses and gathering information; however, it is important for the defense counsel to conduct evidence gathering and contact witnesses because the IG could interpret the client's action as an attempt to influence the investigation. It can be particularly difficult to convince senior officers to sit on

⁶⁹ The IG regulation does not state that individuals will be flagged or otherwise adversely impacted while the investigation is ongoing. That is the practical reality, however, in the case of senior officers. The Secretary of the Army generally delegates the authority to adjudicate non-criminal investigations of general officers to the VCSA. From the beginning of the investigation, the VCSA will be aware of the subject of the allegations, and usually serves as the appointing authority for IG investigations against general officers. Because of the potential consequences that a substantiated allegation may have on the general officer and on the Army, the leadership is usually unwilling to give further assignments or take any favorable action until the investigation is complete. Professional Experiences, *supra*, note 31.

⁷⁰ Theoretically, an investigation cannot proceed indefinitely against an officer on an approved promotion list. Promotion cannot be delayed more than six months without SA approval, and in no case can a promotion be delayed more than eighteen months. See 10 U.S.C. § 624 (2000).

⁷¹ See AR 20-1, *supra* note 4, para. 8-9c.

⁷² *Id.* para. 8-4(b)

⁷³ *Id.* para. 8-4b(4).

⁷⁴ *Id.* para. 8-4b(5).

their hands while the IG is investigating, but it is important to prevent the client from doing anything the IG could interpret unfavorably.

After the client contacts a defense attorney, the attorney should immediately contact the IG office conducting the investigation or inquiry. The attorney should talk to the individual conducting the investigation and gather as much information as possible about the scope and nature of the investigation. Typically, the investigator will only provide the defense attorney with the general nature of the allegations and the regulatory, statutory, or other standards the client is alleged to have violated.⁷⁵ Press for details, however, focusing on specific issues, such as the time frame of the alleged misconduct, the locations where the misconduct is alleged to have taken place, and the standards that were violated.

The investigator may only provide very general information, such as “between 1998 and 2000 while stationed at Fort Swampy, BG Blank improperly used official military travel.” Clearly, such general information is not very helpful or informative, which may be the IG’s intent. Occasionally, the investigator may be willing to share more specific information and, on even rarer occasions, the investigator may be willing to discuss the allegations in detail with the defense attorney. It is always worth the effort to at least ask.

During the initial contact with the IG, the defense counsel should notify the investigator that the attorney represents the client under investigation and all future contact with the client should be coordinated through the defense counsel. A sample notification and client release is at appendix A.

If the investigator has already contacted the client for an interview, the attorney should get the interview postponed in order to review the information and fully prepare the client. In the case of senior officers, the DAIG is typically willing to delay the interview until the defense counsel has had an opportunity to meet with the client and prepare for the interview. On occasion, an investigator may press for an immediate interview. The defense attorney should remind the investigator that the client has a right to be represented at the interview and the opportunity to comment on any unfavorable information during the interview process.⁷⁶ Failing to give the client the opportunity to prepare for the interview would deny the client these important rights. In most cases, that should be enough to convince the investigator to delay the interview. Since the investigator will have done extensive investigation prior to the interview, it is critical not to let the client be rushed into the interview before he is fully prepared.

Client Meeting

The defense counsel must also meet with the client. Meeting with a client under IG investigation will be similar in many respects to the initial meetings a defense counsel has with any client. The client should come prepared to discuss the allegations in as much detail as possible. The defense counsel will not have the benefit of a charge sheet or other similar documentation describing the allegations. Therefore, it is important to press the client for as many details as possible about the matters being investigated.

Encourage the client to bring any documents, records, vouchers or other physical evidence that are in his possession and related to the allegations. As in other cases, the client is often the best source of initial evidence. Senior clients may have very detailed records of activities, which may be very helpful. It is also important for the client to provide names and contact information of persons who may have relevant information.

At the meeting, the defense counsel should answer the client’s questions about the IG process and explain the potential consequences of an IG investigation. Walk the client through these consequences at the initial meeting and throughout the investigation process. In the case of senior clients, approval is routinely granted to use investigations as the basis for adverse actions. Investigators at the DAIG are aware that their investigation will likely serve as the basis for disciplinary action against a senior official if the allegations are substantiated. Accordingly, these investigations can become prosecutorial in their tone and nature. The investigators often spend significant time building a case against the client before an interview. At the interview, the investigators may then confront the client with adverse information that they have collected and then gauge his response. The defense attorney should explain this to the client during the first meeting so the client can be better informed when making critical decisions about his case.

⁷⁵ While this information may be the same information the IG provided to the client at the initial notification, it is important that the defense counsel gather this information directly from the IG. Often times, the client will have been caught off guard when the TIG, DTIG, or other IG official provided him the initial notification and he will be vague as to what specifically the IG is investigating.

⁷⁶ AR 20-1, *supra* note 4, para. 8-6.

After the initial meeting with the client, the defense attorney will need to investigate the case. The IG regulation states that investigators will not disclose names of witnesses to defense counsels and that defense counsels must find witnesses “through their own procedures.”⁷⁷ The IG’s unwillingness to provide any information about the investigation to a defense counsel is one of the most frustrating aspects of these investigations. Unlike a criminal investigation, a commander’s inquiry, or other investigations conducted under AR 15-6, the defense has no legal authority to view the entire investigative file. Also, before the investigation is complete, the client has no legal authority to view any of the investigative files.

Information from the client often provides the only basis the defense may have for beginning a review of the facts. It is then up to the defense counsel to contact witnesses, obtain evidence, and review information. There is no short cut for this kind of legwork, and it is essential in order to develop a good understanding of the case.

There may often be roadblocks throughout this process. The most common roadblock is a witness’s unwillingness to talk with the defense counsel because of the witness’s belief that he cannot discuss the matter with anyone other than the IG investigator. The IG routinely asks witnesses not to discuss the matters under investigation with anyone unless they get permission from the IG.⁷⁸ The IG, however, has no legal authority to prevent witnesses from talking to defense counsel about the investigation. The regulation states, “[i]nspectors general will not withhold permission for defense counsel to interview witnesses about matters under investigation.”⁷⁹ On most occasions, the IG will not inform witnesses that they have permission to talk to the defense counsel and sometimes an inspector will not even be aware of the provision regarding defense counsel’s access to witnesses.⁸⁰ The impression often left with witnesses is that they cannot discuss the matters under investigation with anyone other than the IG. It is important to have this provision of the regulation accessible so that witnesses understand that it is appropriate for them to talk to the defense counsel.

Interviewing witnesses for an IG investigation is no different than other witness interviews that defense counsel routinely conduct. The skills of listening, asking detailed follow-up questions, and thoroughly preparing will serve the attorney well. The one additional advantage that the defense counsel may have is that witnesses are often willing to provide information that will assist the client once they realize they can talk to the defense counsel. This is often the case with senior clients who have established a good name and strong reputation in their years of service. Use the client’s good name to his advantage. Once the witness understands that the defense attorney is there to help the officer under investigation, he may be more willing to help and may also put the defense in contact with others who may have relevant information.

The IG will likely have interviewed most of the relevant witnesses before the defense gets involved in the case; however, the defense should not assume that all the witnesses have been interviewed or that the IG knows everything. In some cases, the defense attorney may beat the investigator to the witness or uncover witnesses that the IG knows nothing about. If those witnesses have relevant and helpful information, it is important to get a statement and lock the witnesses in on the facts. It may also be advisable to request a sworn statement from the witness.⁸¹ After the IG interviews the client and asks him if there is any additional information or witnesses relevant to the investigation, the client can provide a copy of the sworn statement. Providing the IG with sworn statements supporting the information provided by the client can be very helpful in getting the allegations unsubstantiated.

Contacting witnesses is not the only method for gathering information. Collecting documents may also be important. Here again, the defense may be at a significant disadvantage. There is no legal authority the defense counsel can use to compel individuals or organizations to provide documents while the investigation is ongoing. Often, the client’s good name will persuade individuals to provide copies of relevant documents. Frequently, the best source of documentary evidence is the client and his staffs’ records. The defense counsel can assist the client in getting these documents organized and catalogued and should explain to the client the relevance for each document or piece of evidence.

⁷⁷ *Id.* para. 8-4i.

⁷⁸ *See Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* app. E, fig. E-1. This appendix is the interview guide used by investigators during the interview. Under step 11, “Wrap-up,” the guide states, “TO KEEP THIS CASE AS CONFIDENTIAL AS POSSIBLE YOU WILL BE ASKED NOT TO DISCUSS YOUR TESTIMONY WITH ANYONE WITHOUT OUR PERMISSION.” No mention is made that the IG will not withhold permission to talk with the defense counsel of the individual being investigated.

⁸¹ Contrary to IG investigations, in criminal investigations it may not always be advisable for a defense counsel to take sworn statements during witness interviews because the statements may be discoverable and the defense attorney may become a witness at trial.

The defense counsel should be cautious and discrete in conducting the investigation. First, the defense would not want to inadvertently taint the reputation of the client under investigation by disclosing information too freely or with people who do not have a need to know this information. Also, the IG is usually given a very specific charge as to the areas of investigation. If, however, other potential related or unrelated misconduct is discovered, the investigator can obtain authority to investigate those additional matters.⁸² Defense counsel must be cautious not to do or say anything which would give the IG reason to broaden the investigation's scope.

Defense attorneys must also research the relevant law, policy, regulations, and standards that the client is alleged to have violated. It is important for the attorney to have a strong understanding of the legal standards at issue. This often requires research into such areas as employment law, contract and procurement law, operational law, finance and travel regulations, joint ethics regulations, and a potential host of other legal standards. There is simply no short cut for this work, and the attorney must be willing to invest the time and effort to become well versed in the relevant subject areas.

Developing an Interview Strategy

After the defense counsel has had an opportunity to talk to the client, interview witnesses, and review documents and other evidence, the counsel should be ready to meet with the client and formulate an interview strategy. The first question to answer is whether the client should participate in the interview. Counsel must assume the IG knows or will obtain all the relevant facts. Defense counsel must also explain to the client that the IG will follow-up on whatever the client tells the investigators. If there is any suspicion that the client attempted to mislead or lie to the investigators, the client's situation will only get worse. The best option, under some circumstances, is to advise the client not to participate in an interview. If the client does not participate, however, he forfeits the opportunity to provide input and it will be difficult for him to later on inject himself into the process. The client should also understand that the decision not to participate in an interview is likely to be viewed negatively by the IG and the decision makers who will ultimately decide what, if any, action to take against the client.

If the defense counsel and the client determine that participating in an interview and providing information to the IG is in the client's best interest, it is important to fully prepare the client for the interview. Senior clients may believe that because of their intelligence and experience in the Army, and because they have nothing to hide, they can handle the interview with little or no preparation. The defense counsel must disabuse the client of that notion. While the client may be very experienced, and very smart, few of them have been in this situation before. They will be on unfamiliar turf and any misstep can have adverse consequences. The defense counsel can relate to past experiences with other clients. In some cases, the defense attorney may even do a mock interview, to help the client understand the importance of preparation. Senior clients are typically going to be very busy, but they must understand that preparing for the interview is a priority.

Often the investigator will tell the client that the interview is his "day in court." The courtroom analogy works well only if the attorney and the client understand that there have been numerous "court sessions" before the interview. The defense will not know what was discussed in those sessions. There will most likely be other sessions after the interview, which the defense is unlikely to know anything about either. During the client's "day in court," the defense counsel and the client must understand that the IG investigator is the prosecutor, judge, and jury. The investigator holds all the evidence, makes the rules, and only allows the defense counsel and the client to see selected portions of the evidence that the investigator wants to show. The defense counsel must prepare the client for this "day in court," and the client must go into the interview with his eyes wide open.

Have a Theme

Just like preparing for any trial, it is important to have a theme or set of themes when preparing for the interview. The theme can guide the client throughout the interview process, and it allows him to return to safe ground and keep the interview focused on a message. For example, assume the client is being investigated for misusing official travel for personal or family use. After the defense counsel's review of the facts, the counsel determines that some of his use of official travel was a close call. The vast majority of the travel, however, was properly reviewed, coordinated, and executed.

In such a case, the theme may be that the client is careful about his use of official travel as evidenced by his past behavior. The client will need to be prepared to explain why there may have been some discrepancies with the travel in question; however, the client should take every opportunity to explain the process he goes through in getting official travel reviewed and approved, and that he is careful to do things the right way. Developing a theme allows the client to convey his

⁸² AR 20-1, *supra* note 4, para. 8-4e.

message, put specific conduct in a broader context, and provide him with a safe harbor to return to during the course of the interview.

Details are Important

One of the most challenging aspects of the DAIG investigative process, particularly with senior clients, is that the issues being investigated are rarely recent. In many cases, the incidents took place several months or even several years ago. Because of the time lag and the client's busy and ever-changing schedule, it is often difficult for the client to recall facts and information in the level of detail that the interviewer will want. This presents a challenge for the defense counsel.

In order to meet that the challenge, the client must become as familiar with the facts as possible through the pre-interview investigation. The defense must get as much detailed information as possible from witnesses. The counsel should always ask if there is documentation, such as e-mails, legal opinions, or other written evidence, to verify whatever information the witness is providing. Documents, e-mails, written legal advice and similar items can be very helpful in refreshing the client's specific recollection.

During pre-interview preparation, other methods can be used to help refresh the client's recollection. For example, create a time line for the client that includes relevant dates and facts or provide the client with a list of key individuals and a synopsis of their involvement in the matters under investigation. Finally, provide the client with any documents or other evidence in an indexed fashion, so that he can quickly refer to and access important information during the interview. The interview is not a court proceeding, and the rules of evidence do not apply.⁸³ It is completely appropriate for the client to take all documentary evidence and other information into the interview and refer to the information as necessary. Before the interview, defense counsel can also discuss with the client whether the documents should be provided to the IG.

Finally, emphasize to the client that if they cannot recall a specific fact or detail the interviewer is asking about, the best response is likely, "I do not remember." As with any other situation where a client is interviewed, it is never a good idea for the client to guess or speculate.

Have Documents Ready

During the pre-interview meeting with the client, all relevant documents and other evidence should be catalogued, indexed, and ready to use. In most cases, the IG will have already seen everything the defense gathers and brings to the interview. In some situations, however, the client may have key evidence that the IG has not seen. This evidence may be what turns the table in the client's favor.

Even if the IG has already seen and has copies of all the relevant documents, bringing a complete set of documents to the client's interview is important. The client's command of the facts, collection and organization of documentary evidence, and preparation for the interview positively impacts the investigator. The client's preparedness may even change the dynamic of the interview by sending a clear message that the client is well versed and prepared to discuss the issues. It can also serve as a subtle warning to the investigator not to overstate facts and inferences when questioning the client.

Along with documents, it is also important for the client to have a list of witnesses that the IG should interview. At the end of every interview, the IG will ask the client if there are other people that the IG should contact. The client should provide the IG with a witness list containing the witnesses' names and contact information and a brief synopsis of the witnesses' expected testimony. As mentioned above, the client may also want to provide sworn statements if the statements help the client and the IG has not yet interviewed the witnesses. Even if the IG has talked to every witness on the client's list, providing the list to the IG may reinforce the point that the client has done his homework.

Give the Client a Product

At the conclusion of the pre-interview meeting, the defense counsel and the client will have covered a lot of ground. It may be difficult for the client to remember everything. Moreover, senior clients are used to receiving executive summaries

⁸³ MCM, *supra* note 50, Mil. R. Evid. 1101(a) and (d) (providing that the MRE are applicable in courts-martial and do not apply to proceedings not listed in the section).

and similar documents from their staff officers, which summarize key points of briefings and meetings. The defense counsel should provide the client with a product that summarizes the things that were discussed. This packet can also include more general advice about how the client should conduct himself during the interview.⁸⁴ This general boilerplate advice can be modified for each individual client. The packet should be clearly labeled as attorney-client privileged material and the client should be cautioned on protecting the contents of the packet. The client can look over this information in the days leading up to the interview and use it as a means to refresh his memory. Senior clients in particular are very busy and may only have limited time to prepare for the interview. These written products can help clients focus their attention and energy on preparing for the interview in a short time with a minimum of distractions. The written product provided to the client should be clearly marked as attorney-client communication and the client should be reminded not to share the information with others.

Mechanics of the Interview

One final point to discuss with the client prior to the interview is how the IG will conduct the interview. The process may vary, depending upon which IG office is conducting the interview. The DAIG process is the most formal and can serve as a baseline.

Interviews conducted by the DAIG will always include at least two interviewers. In some cases, the legal advisor may be present for the interview or some portions of the interview. Typically, one investigator will do most of the questioning; however, any member of the IG team may ask questions. The client should be aware that he will face a team of interviewers who may “tag team,” allowing each interviewer to take a break from questioning while the client remains on the hot seat.

If the client is a suspect, an interviewer will read the client his rights and have him sign a rights waiver before beginning the interview. It can be unsettling for the client to have his rights read to him. The defense counsel should prepare the client for this event and be prepared to answer the client’s questions and reassure him when the rights warnings are given.

The defense attorney should also carefully look over the rights warning document to get a clear understanding of the specific allegations against the client. The wording of the allegation must always represent an impropriety.⁸⁵ This requirement can make for some very tortured allegations that defy logic. For example, the allegation may read, “BG Blank wrongfully failed to ensure that all safety requirements were adhered to.” An allegation such as this seems to presuppose a failure on the client’s part, the only issue being whether the client’s failure was wrongful. Clarify with the interviewer if the language of the allegation is in any way unclear and force the IG to articulate to the client specifically what impropriety he is alleged to have committed.

Before the actual interview begins, the interviewer will provide a pre-taped briefing. “The pre-tape briefing essentially explains the investigative procedure, the IG investigator’s role, the ground rules for the interview, and other administrative elements of the interview prior to starting.”⁸⁶ One of the key ground rules is that while the client can have an attorney present, the attorney cannot participate in the interview.⁸⁷ Other ground rules are that the client cannot record the interview; the client cannot see copies of statements given by other witnesses, and the client cannot have a copy of his statement before the investigation is complete.⁸⁸ Finally, the interviewer will ask the client if he wants his statement released outside official

⁸⁴ The following is an example of general advice provided to clients by defense counsel:

There are some general guidelines to keep in mind throughout the course of the interview. Answer the questions asked; do not guess or speculate. If you do not know the answer or cannot remember, say so. If you are not sure of an answer, qualify your response with phrases like “to the best of my recollection,” and “I can’t be completely sure, but” Do not let the interviewer put words in your mouth such as “could it be possible” Naturally, time causes a loss of detail. If your memory is vague, tell them so, though try to be consistent with any earlier statements you made on the subject. Be polite, but confident. Look the questioner in the eye. Choose your words precisely. Be short and to the point, but if you need to explain a particular answer, by all means do so. Do not be afraid to take frequent breaks. It is important that you remain fresh and focused. Breaks will also provide us an opportunity to discuss any possible issues of concern.

Professional Experiences, *supra* note 31.

⁸⁵ See AR 20-1, *supra* note 4, para. 8-2a(3).

⁸⁶ *Id.* para. 8-4 and fig. E-1.

⁸⁷ Professional Experiences, *supra* note 31.

channels under the FOIA. Discuss this with your client in advance so he is not confused by the question. There is no real advantage to consenting to the release of the client's testimony. There may, however, also be a disadvantage because the complainant may then be able to obtain a copy of the client's interview.

Once the pre-taped briefing is completed, the tape recorder will start rolling and will likely remain rolling for the rest of the interview. The client must understand that even if there are conversations off tape, there are no communications with the IG that are off the record.⁸⁹ Tell the client in advance not to let his guard down and to avoid making any gratuitous statements about the matters being investigated after the tape recorders stop. As with any client in any proceeding, stress the importance of listening to the questions carefully and answering what is asked, truthfully and directly.

Once the tape recorder starts, the IG will do a formal read-in.⁹⁰ This is a short scripted reading where the IG informs the client of the allegations, who directed the investigation, the investigator's qualifications, and the persons present at the interview. At this time, the interviewer will also ask the client if he consents to the release of his statement outside of official channels.⁹¹

The next step will be the questioning phase of the interview.⁹² This will be the longest phase of the process. Prepare the client for a long day. Even in seemingly simple cases, the interview is likely to take two to three hours. Some interviewers will write out all of their questions and go through every question one at a time. Other interviewers will engage in a fluid questioning technique, letting the discussion move from one topic to another. Regardless of the technique used, the client must understand that every question has a purpose. It would be naive for the client to believe that the investigator comes to the interview with a completely open mind. By this time, the investigator may have spent months or even years on the investigation. He will undoubtedly have preconceived notions and will have definite ideas of where he wants to take the investigation. The client must be prepared for this in advance and use every opportunity to keep the interview focused on themes helpful to the client.

After the questioning, there will be a formal read-out.⁹³ This is much like the read-in and is a scripted process. During this phase, the client will be asked to provide the names of other people who may have relevant information on the issues being investigated. Finally, the client will be asked again if he consents to the release of his statement outside of official channels. That will conclude the interview. The attorney must prepare the client for each stage so that the client knows what to expect during the interview.

The Client's Role

After thorough preparation of the client and the case, the defense counsel and the client are ready for the interview. In spite of all the work and preparation, the client still may be uncomfortable. Senior clients are not used to being on the receiving end of these interviews. Some clients may find it very hard to be placed in a position where they have to justify their actions to a suspecting audience. There are some things the client can do in the interview to gain a greater degree of comfort and confidence so that the right impression and message are presented.

The client should consider giving an opening statement. This approach may be particularly effective when the defense has a very clear idea of the allegations being investigated. The statement should not be more than a couple of minutes. An opening statement helps give the client more control of the process. It can allow the client to focus the investigators quickly on the key issues, so that time is not wasted on irrelevant issues. An opening statement also gives the client the opportunity to introduce his theme of the case. Finally, an opening statement can demonstrate to the investigators that the client has a strong command of the facts, is engaged in the process, and is not going to be easily tricked or boxed into corners.

The client must then be prepared to answer questions. He will face some easy questions and some hard questions. In either case, the client must be as forthcoming as possible. If the client tries to cut corners or explain behavior in a way that is

⁸⁸ *Id.* para. 8-4h.

⁸⁹ *Id.* app. E, fig. E-6.

⁹⁰ *Id.* para. 8-4g(2) and fig. E-6.

⁹¹ *Id.*

⁹² *See id.* para. 8-4g(3).

⁹³ *See id.* para. 8-4g(4).

not credible or reasonable, the investigators will notice and may even include this observation in the report. If the defense attorney and the client participate in the interview, participation cannot be half-baked. In most cases the client can and should look forward to the opportunity to finally explain himself. With preparation, he will likely be more successful in looking the investigators in the eye and addressing the issues.

It is also important that the client does not guess on facts or go out on a limb on issues he is unsure of. It is much better for the client to say, "I do not know" or "I cannot recall" than to guess and be wrong. Even if the error is unintentional, the investigator may interpret the misstatement as an attempt by the client to deceive.

Make sure the client uses the investigators' questions to address his issues. The easiest way to ensure this happens is to give the client a list of talking points that he can take into the interview. The defense counsel should also have a copy of the list. Throughout the questioning, counsel can check off the points as the client discusses them with the investigators. Before the questioning leaves a certain topic, the attorney can ensure the client double checks his list to verify that he has discussed all of the relevant and helpful points on that issue.

While it is important for the client to answer the questions directly, the client can and should avoid irrelevant or repetitive questions. Many times, the investigator will ask the same question in a different number of ways in hopes of either getting a different answer or tripping up the client. The client should handle this by telling the investigator that he has already answered that question or set of questions. Usually, the investigators will move on to a different subject. This technique also works well in getting the investigators to move away from irrelevant questions.

The Attorney's Role

The defense counsel's role at the interview can be nebulous. While the regulation allows the defense counsel to be present during the interview,⁹⁴ the investigators will point out that the defense counsel has no official standing. The defense attorney is neither allowed to ask questions nor answer questions on behalf of the client.⁹⁵ In the IG's eyes, the defense counsel is nothing more than an interested observer.

In reality, a defense attorney's role depends on the investigator's personality. Some investigators will stop the tape any time the attorney tries to talk to prevent the attorney's comments or questions from becoming a part of the investigation. Other investigators will see the attorney and the client as a team and will be receptive to limited amounts of information that the attorney can inject into the process. Regardless of the investigator's personality, the defense counsel has an important role in the interview. Counsel must be vigilant to protect the client's interests.

Throughout the interview and the questioning, the defense attorney should be assessing the investigation's strengths and weaknesses. While the investigators will not reveal everything, the attorney can determine a great deal from the questions, the documents, other evidence presented, and the interview's overall direction and focus. Careful attention to these issues allows the attorney to give the client an honest and more complete assessment of the overall investigation and the possible outcomes.

Another very important task for the defense counsel is to consider all documents the investigators may introduce and review those documents with the client before the client answers questions about them. Even if the attorney and the client have seen the documents before, carefully examine all documents with the client before he begins answering any questions related to a document. If necessary, the attorney can call for a break and discuss any concerns the client may have before he begins answering questions about a document or set of documents.

To the extent that interviewers allow, the attorney can interject thoughts and viewpoints into the interview in order to help the client explain issues. If the client plans to introduce documents, statements, or other evidence during the interview, the attorney can have the evidence lined up and prepared for the client's use. Counsel can then pass the information to the client at the appropriate times so that the client can refer to it and introduce it in the interview. Defense counsel can also take written notes during the interview.

As stated earlier, one of the realities of IG interviews is that they can be very long and physically draining. The attorney needs to keep an eye on the client and assess his fatigue and frustration level. Request breaks as often as necessary to break

⁹⁴ *Id.* para. 8-5b.

⁹⁵ *Id.*

the rhythm of the interview, give the client an opportunity to gather his thoughts and prepare a response, allow the client to calm his temper, or give the client a short break. At a minimum, the attorney should call for a break every forty-five minutes to give the client an opportunity to discuss how things are going and prepare for the next phase of the interview.

After the interview is complete and the IG prepares a verbatim transcript of the interview, the attorney and the client have the opportunity to review the transcript.⁹⁶ The defense counsel should let the investigators know to contact him once the transcript is complete. The defense counsel and the client can then review the testimony. At that time, counsel can make the necessary notes without distractions.

During the interview, the defense attorney should ensure that all of the relevant and favorable information is part of the recorded interview. Some interviewers may engage in frequent discussions off the record. These discussions often address substantive matters, which may be helpful to the client. The counsel must make sure that these discussions are made part of the record after the tape is turned back on. This will prevent favorable information from being excluded or possibly ignored.

After the Interview (The Second Ice Age)

Once the interview is over, the client typically will want immediate feedback. It is important to provide some initial feedback, but it is not a good idea to enter into a lengthy discussion immediately after the interview. The defense counsel should take a few days to review notes and thoughts about the interview and have the client do the same. After careful reflection, the attorney is much better suited to provide the client an honest and accurate assessment of the interview and overall investigation.

It is helpful to review again the entire process with the client during the follow-up meeting because, now that the client has experienced the process, he is likely to be more attentive, focused, and realistic as to his expectations. Also during the post interview period, the client should quickly collect and provide any documents that the investigator asked for that were not available during the interview.

In some cases, the IG investigation may have been going on for several months before the client is interviewed. Now that the interview is complete, the client will be anxious to get the entire investigation behind him and move forward. While it may be the client's desire and in his interests to conclude the investigation quickly, a quick resolution is not very likely in most cases, particularly with investigations conducted at the DAIG level. The defense counsel has to prepare the client for a lengthy and prolonged conclusion to the investigative process.

In most cases, the investigators will be hesitant to estimate when the report will be complete. In a DAIG investigation, it is likely to be a minimum of two to three months. During this time, the investigator will be writing the report of investigation or investigative inquiry.⁹⁷

Once the report is complete, it enters the review process. The legal review process can take many months, and this long wait with seemingly no action on the case can be a great source of frustration for the attorney and the client.

In the case of DAIG investigations, the legal review is not a transparent process. Because the defense counsel and the client will not yet have access to the full report, the defense will not know what issues are receiving the greatest scrutiny or causing the most concern. It will be very difficult to advocate the client's position at this stage and in most cases, the client should rely upon the information provided in the interview as effectively conveying the client's points.

In some cases, however, it may be advantageous to contact the lawyers conducting the legal review and present the client's message to them. This is likely to meet with varying degrees of success, depending on what information the defense counsel can provide on behalf of the client. The most powerful information would be proof that the IG did not consider evidence favorable to the client. If the defense comes across such information, even after the interview, it is important to use this evidence as a way to continue to advocate the client's position.

Once the report is complete and approved, the client will be notified, usually in writing, of the results of the investigation. The report will either substantiate or unsubstantiate the allegations.⁹⁸ After a long period of waiting, this notification will trigger a number of actions by the defense counsel and the client.

⁹⁶ *Id.* para. 8-5h.

⁹⁷ *Id.* para. 8-4b(5).

The best outcome is that the allegations are unsubstantiated. If the case is unsubstantiated, that will be the end of the issue. There will be no entry of the client's name in the IG database and that should conclude the representation. If, however, any allegations are substantiated, there are a number of adverse consequences, which may follow. Inspector general databases are reviewed anytime the Army conducts suitability or background screening on individuals selected for promotion or other favorable personnel actions.⁹⁹ The following are examples of when information regarding a substantiated allegation may be disclosed within Army channels: general officer nominations, promotions, and reassignments;¹⁰⁰ general officer retirements;¹⁰¹ vacation of promotion;¹⁰² promotion to colonel,¹⁰³ and, removal from the command list.¹⁰⁴

A substantiated report may also trigger other actions. In the case of senior officers, any adverse administrative actions will usually be taken by the VCSA. For other Soldiers, the command appointing the investigation may want to use the substantiated report as a basis for initiating action against the Soldier. The regulation, however, states, "Inspector General reports will not be used as a basis for adverse actions against individuals, military or civilians, by directing authorities or commanders, except when specifically authorized by SA, US of A, CSA, VCSA, or TIG."¹⁰⁵ The rationale for this prohibition seems to be the IG's desire to keep their reports and internal matters confidential.¹⁰⁶ Because of this prohibition, the defense counsel must remain alert for follow-on investigations or command attempts to take action against a client based upon the IG report without first obtaining authorization.

In the case of senior officers, authorization to use the IG report as a basis for adverse action is routinely granted. It is also unlikely that there will be a follow-on investigation. The types of adverse actions which the VCSA may take based on the IG's substantiated report include: a censure or memorandum of concern or a General Officer Memorandum of Reprimand (GOMOR)—filed locally or in the officer's Official Military Personnel File (OMPF).¹⁰⁷ On very rare occasions, the substantiated report may also serve as a basis for a nonjudicial punishment¹⁰⁸ or a court-martial. If either nonjudicial punishment or trial by courts-martial is contemplated, the case may be sent to a major command for evaluation and possible action.

By far, the most likely outcome of a substantiated IG report on a senior officer will be a censure or GOMOR¹⁰⁹. If the VCSA issues a GOMOR, it will most likely be filed in the client's OMPF. A GOMOR in a senior officer's OMPF can have a devastating effect on his career. The most obvious impact is a certain end to the officer's upward progression in the Army. A more serious and long-term impact, which may occur after the client submits a retirement request at some point in the future, is the initiation of an Army Grade Determination Review Board (AGDRB) under the provisions of Army Regulation 15-80.¹¹⁰ The possibility that the client could be retired at a lower rank is one of the most long lasting and severe consequences of a substantiated IG report and a follow-on GOMOR.

⁹⁸ *Id.* para. 8-4j.

⁹⁹ Meredith, *supra* note 6, at 24.

¹⁰⁰ U.S. DEP'T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS para. 1-15b and ch. 8 (30 Nov. 1994) [hereinafter AR 600-8-29].

¹⁰¹ Memorandum, Secretary of Defense, to Secretaries of the Army, Navy, and Air Force, Under Secretary of Defense (Personnel & Readiness), General Counsel, and Inspector General, subject: Processing Retirement Applications of Officers in the Grades of 0-7 and 0-8 (9 Oct. 1998) (on file with DAIG Legal Counsel). The author has represented general officer clients whose retirement grade has been reduced by the Secretary of the Army based solely on a substantiated DAIG report of investigation.

¹⁰² The President may vacate the promotion of an officer to Brigadier General if that officer has served in the rank for less than 18 months. *See* 10 U.S.C. § 625 (2000).

¹⁰³ AR 600-8-29, *supra* note 103, para. 1-15a.

¹⁰⁴ Meredith, *supra* note 6, at 24

¹⁰⁵ AR 20-1, *supra* note 4, para. 3-3a.

¹⁰⁶ *Id.* para. 3-3e (providing that if an IG report is used for disciplinary action, "only the minimum amount of evidence necessary will be used IG opinions, conclusions, and recommendations are not evidence and will not be used for adverse action.").

¹⁰⁷ The SA delegates to the VCSA the authority to adjudicate all non-criminal investigations and their findings. The VCSA then has the authority to take administrative actions against the client, such as issuing GOMORs. *See* U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986).

¹⁰⁸ UCMJ art. 15 (2002).

¹⁰⁹ Professional Experiences, *supra* note 31.

¹¹⁰ U.S. DEP'T OF ARMY, REG. 15-80, ARMY GRADE DETERMINATION REVIEW BOARD AND GRADE DETERMINATIONS (12 July 2002) [hereinafter AR 15-80].

Most retirement grade determinations are automatic by operation of law and do not require action by the AGDRB.¹¹¹ If, however, there is sufficient unfavorable information in a Soldier's file that demonstrates that the Soldier's service in that rank was unsatisfactory, the AGDRB may recommend to the SA or his designee that the Soldier be retired at a lower rank. One specific act of misconduct may serve as the basis for this determination.¹¹²

Because of the potential adverse consequences that can result from a substantiated IG report, it is essential that the defense counsel stay engaged in the process even after the interview is over. A client's right to receive a copy of the report under the FOIA is triggered by his notice that the investigation is complete.¹¹³ The regulation states:

Inspector General records will not be made available to individuals or their counsel for use in administrative actions, military justice actions or appeals, unless TIG determines that the individual has a right of access under minimum due process because the IG records are the basis for the action taken against the individual.¹¹⁴

Thus, if the IG report will serve as a basis for an adverse action, the client and the client's attorney have a right to the report under the FOIA.

On its face, this procedure appears fair and protective of the client's basic due process rights because of the client's opportunity to review the basis of the adverse information before any action is taken. In reality, however, this right is illusory because the client will only receive portions of the records that are releasable under the FOIA.¹¹⁵

Under the FOIA, there are nine categories of exemptions that an agency can assert to prevent disclosure.¹¹⁶ Not all categories apply to IG reports of investigation; however, there are several categories the IG asserts on a routine basis.¹¹⁷ One of the most frequent exemptions asserted by the IG is exemption (b)(7)(C).¹¹⁸ This provision exempts records or information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹¹⁹ The IG will use this exemption to redact the names and other personal information of witnesses who provided statements and other individuals contained in the report.

Another often used exemption is (b)(7)(D).¹²⁰ This provision allows the IG to exempt records or information compiled for law enforcement purposes, which; "could reasonably be expected to disclose the identity of a confidential source . . . and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . . information furnished by a confidential source."¹²¹ If the IG either explicitly or implicitly offers a promise of confidentiality to a witness,¹²² even the statements provided by that witness, which could allow the identity of the witness to be deduced,¹²³ can be exempted from disclosure.

¹¹¹ *Id.* para. 2-3.

¹¹² *Id.* para. 2-5c.

¹¹³ If the defense counsel attempts to get information from the IG report before the report is complete, the IG will assert the exemption under 5 USC § 522(b)(7)(A) (2000). The exemption, commonly known as 7A, exempts records or information compiled for law enforcement purposes, which "could reasonably be expected to interfere with enforcement proceedings." *Id.*

¹¹⁴ AR 20-1, *supra* note 4, para. 3-7e(9).

¹¹⁵ *Id.* para. 3-7e(9). This article is not intended to provide a complete explanation of the interface between the FOIA and IG investigations. The purpose of the FOIA discussion in this article is to make the practitioner aware that there is a significant interface between the FOIA and IG investigations, and that the use of the FOIA exemptions by the IG will often result in denying the defense counsel and the client important information.

¹¹⁶ 5 U.S.C. § 552 (2000).

¹¹⁷ AR 20-1, *supra* note 4, para. 3-2b(2) and (3) (stating that exemptions 5, 6, and 7 may apply to the release of reports of investigation and reports of investigative inquiry).

¹¹⁸ 5 U.S.C. § 552(b)(7)(C).

¹¹⁹ *Id.* § 552(b)(7)(C).

¹²⁰ *Id.* § 552(b)(7)(D).

¹²¹ *Id.* § 552(b)(7)(D). For the purpose of this clause, criminal law enforcement agencies include agency inspectors general. See *Ortiz v. U.S. Dep't of Health and Human Servs.*, 70 F.3d 729 (2d Cir. 1995).

¹²² See, e.g., *Williams v. FBI*, 69 F.3d 1155 (D.C. Cir. 1995); *Jones v. FBI*, 41 F.3d 238, (6th Cir. 1994); *KTVY-TV v. United States*, 919 F.2d 1465 (10th Cir. 1990).

Each witness who gives a statement or testimony during the IG investigation is told by the interviewer that the IG will protect his confidentiality and will not reveal sources of information.¹²⁴ The IG also asks witnesses if they agree to allow the IG to release their statement to members of the general public under the FOIA.¹²⁵ If the witness elects not to have the statement released, which is often the case, the IG will assert the (b)(7)(D) exemption and the entire statement will be redacted before the record is released. It is not unusual to receive an IG report pursuant to the FOIA with hundreds of blank pages and nothing more than the conclusions of the investigator. This can be extremely frustrating, since neither the attorney nor the client have much indication of what facts or factors the investigator used in reaching a decision to substantiate the allegations. More importantly, the client and the defense counsel do not have access to the evidence that the appointing authority may use in deciding what actions to take against the client. Without knowledge of the underlying facts, it is extremely difficult to rebut the allegations.

Even though the report that the defense receives under the FOIA may not be very helpful or enlightening, it is essential to submit a FOIA request for the client in every case in which the IG has substantiated the allegation, because the report may potentially contain some useful information. A sample FOIA request is attached at Appendix B. If the command is contemplating adverse administrative actions, such as a GOMOR, they typically give the client seven to fourteen days to submit a rebuttal before the commander makes a final decision. Unfortunately, it often takes several weeks or even months to receive a copy of an IG report pursuant to the FOIA. It is, therefore, important to submit a request for the report as soon as the client is notified that the investigation is complete, often before the command may have decided to take adverse action. It is also important to request the command to delay any contemplated action against the client until the defense has received a copy of the report and had an opportunity to respond. In the case of senior officers, the VCSA routinely grants a continuance for up to fourteen days after the defense receives a copy of the report¹²⁶. A copy of a request for continuance is enclosed at Appendix C.

It is important to remember that the defense counsel does not lobby the IG or the investigators regarding disciplinary actions. The IG and the investigators view themselves as independent umpires and they have no say in the consequences that may result from their report. The focus of the defense counsel's advocacy efforts at this point must be the decision maker or more likely, the lawyers who advise the decision maker.

The negotiation tactics and techniques will vary depending on the facts of the case and the needs of the client. In some cases, the counsel may attempt to negotiate the waiver of certain rights, such as the right to have the client's case reviewed by the AGDRB in order to protect the client's privacy and hopefully avoid more serious action. In another case, the defense may have enough information to attack the factual conclusions of the IG report and may be able to introduce evidence that was never considered by the investigators in hopes of convincing the decision maker to reach a different outcome. Regardless of the technique or tactic employed, it is important to stay engaged in the process and assist the client in facing the many potential collateral consequences that may result from a substantiated report.

Conclusion

Investigations conducted by the IG, either at the local level or at the DA level, come with their own set of rules. Most defense counsel may only come across these investigations once or twice in a two-year tour. The consequences and impacts an IG investigation may have on the client's career can be significant. An understanding of the rules guiding the IG process, and how the defense counsel can help the client through the process and advocate on the client's behalf during the process, will make the defense counsel a better, more effective, and more complete judge advocate. The hope is that this article will serve as a primer to get defense attorneys on the right path.

¹²³ See, e.g., *Ibarra-Cortez v. DEA*, 36 Fed. Appx. 598 (9th Cir. 2002); *Judicial Watch, Inc. v. FBI*, 2001 U.S. Dist. LEXIS 25732, at 14 (D.D.C. Apr. 20, 2001).

¹²⁴ AR 20-1, *supra* note 4, app. E, fig. E-1, at 1).

¹²⁵ *Id.* at 2.

¹²⁶ Professional Experiences, *supra* note 31.

Appendix A

**UNITED STATES ARMY TRIAL DEFENSE SERVICE
ATTN: ANME-JAT, 2257 HUBER RD
FORT GEORGE G. MEADE, MARYLAND 20755-5030**



**REPLY TO
ATTENTION OF:**

ANME-JAT (27-1)

Date

MEMORANDUM FOR Department of the Army, Office of The Inspector General, 1700 Army Pentagon, Washington, DC 20310-1700

SUBJECT: Release of Information

I, Lieutenant General I. M. Blank, authorize my attorney, CPT Good Attorney, USA Trial Defense Service, to request and receive information pertaining to me, and to otherwise act on my behalf, pertaining to information requested under the Freedom of Information Act, Privacy Act, Army Regulation 25-55, and any and all other applicable directives and regulations governing the release of information. I also authorize CPT Attorney to discuss matters pertaining to me with applicable DOD personnel and authorize those personnel to discuss information pertaining to me with CPT Attorney.

I.M. Blank
Lieutenant General, USA

Appendix B

**UNITED STATES ARMY TRIAL DEFENSE SERVICE
ATTN: ANME-JAT, 2257 HUBER RD
FORT GEORGE G. MEADE, MARYLAND 20755-5030**



**REPLY TO
ATTENTION OF:**

ANME-JAT (27-1)

Date

MEMORANDUM FOR Department of the Army, Office of The Inspector General, ATTN: Records Release Office (Ms. Reed), 1700 Army Pentagon, Washington, DC 20310-1700

SUBJECT: Freedom of Information Act (FOIA) Request – MG Blank

1. Pursuant to the FOIA as implemented in Army Regulation AR 25-55, Department of Defense (DOD) Regulations 5400.7-R and 5400.11-R, and DOD Directive 5400.7, I request on behalf of MG I.M. Blank a complete copy of the DAIG Report of Inquiry (ROI)/investigation, including exhibits, which inquired into allegations made against MG Blank regarding travel and leave/pass violations.
2. This information is required so that MG Blank may respond to a possible adverse action against him, which may be based on the DAIG ROI.
3. MG Blank is willing to pay any reasonable search or copying fees that you may legally charge. He asks, however, that you waive any fees. Such waiver will be consistent with the FOIA and Privacy Act and I understand that your office customarily waives fees from requesters in circumstances such as these.
4. A copy of MG Blank's authorization for me to seek this information on his behalf is enclosed.
5. Please contact me if you require additional information, (phone #).

Encl:
as

GOOD ATTORNEY
CPT, JA
Defense Counsel

Appendix C

UNITED STATES ARMY TRIAL DEFENSE SERVICE
ATTN: ANME-JAT, 2257 HUBER RD
FORT GEORGE G. MEADE, MARYLAND 20755-5030



REPLY TO
ATTENTION OF:

ANME-JAT (27-1)

Date

MEMORANDUM FOR Office of the Judge Advocate General, ATTN: DAJA-AL, 2200 Army Pentagon, Washington, DC 20310-2200

SUBJECT: Request for Extension

1. On 22 October 2003, GEN Doom signed a Memorandum of Reprimand directed to my client, Major General I.M. Blank. The memorandum gives MG Blank 14 days from receipt of that memorandum to submit any matters for consideration before a final filing decision is made. On behalf of MG Blank I request an extension of the time to submit matters.
2. We received notice on 25 August 2003 that The Inspector General substantiated three allegations against MG Blank. On that same day I requested a copy of the Inspector General Report of Investigation (ROI) pursuant to the Freedom of Information Act. I have not yet received any information pursuant to that request. We request a continuance of the deadline to submit matters until we receive a response from the Inspector General, so that MG Blank has an opportunity to review the evidence that serves as a basis for the memorandum of reprimand.
3. Please feel free to contact me if you have any questions at (phone #).

GOOD ATTORNEY
CPT, JA
Defense Counsel

TJAGLCS Practice Note

Lieutenant Colonel J Thomas Parker
Professor
Administrative and Civil Law Department
The Judge Advocate General's Legal Center and School, U.S. Army

Servicemembers Civil Relief Act (SCRA) and Uniformed Services Employment and Reemployment Rights Act (USERRA) Amendments and Updates

Background

For the third year in a row, Congress has amended the longstanding civil relief protections available to servicemembers. In 2002, the familiar rights and benefits of the Soldiers' and Sailors' Civil Relief Act (SSCRA)¹ were extended to National Guard personnel serving in a Title 32 status.² A year later, Congress made broad changes to the SSCRA, replacing it with the Servicemembers Civil Relief Act (SCRA).³ This last year saw the passage of the Veterans Benefits Improvement Act of 2004,⁴ which brought several changes to the SCRA.

This note examines the latest legislative amendments to the SCRA. It also considers some changes that Congress made to the Uniformed Services Employment and Reemployment Rights Act (USERRA),⁵ as well as additional activity relevant to that legislation.

Servicemembers Civil Relief Act Amendments and Changes

The Meaning of the Word "Judgment"

The first change adds the term "judgment" to the SCRA's definitions section, defining it as "any judgment, decree, order, or ruling, final or temporary."⁶ This provision was added so that the term, when used in the SCRA, would "be broadly construed and not be interpreted as limited to final judgments in cases."⁷

The SCRA uses the word "judgment" five times. The first usage is in the section extending certain protections "to a surety, guarantor, endorser, accommodation maker, comaker," or other like person.⁸ The second appears in the section

¹ Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. §§ 501-594 (2000) (current version at 50 U.S.C. app. §§ 501-596 (LEXIS 2004)).

² Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 305, 116 Stat. 2820, 2826-7 (codified as amended at 50 U.S.C. app. § 511(2) (LEXIS 2004)). The relevant portion of this legislation indicates that

[t]he term "military service" means . . . in the case of a member of the National Guard, . . . service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds.

50 U.S.C. app. § 511(2)(A)(ii) (LEXIS 2004).

³ Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 501-596 (LEXIS 2004)). For an overview of this legislation, see John Meixell, *Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*, ARMY LAW., Dec. 2003, at 38.

⁴ Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, 118 Stat. 3598. The Senate version of the legislation began on June 1, 2004, as Senate Bill 2486. See 150 CONG. REC. S6288-91 (daily ed. June 1, 2004) (statement of Sen. Specter). At that time, the legislation contained veterans housing, education, and employment benefits provisions not related to either the SCRA or the USERRA. Those provisions were added following a joint conference of the House and Senate Armed Services Committees. See *id.* at S10884 (statement of Sen. Frist). As it formed up, the Veterans Benefits Improvement Act of 2004 combined provisions from a number of bills from the Senate and the House of Representatives. *Id.* Chief among these was House of Representatives Bill 4658. See Servicemembers and Veterans Legal Protections Act of 2004, H.R. 4658, 108th Cong. (2004).

⁵ 38 U.S.C. §§ 4301-4333 (2000).

⁶ 50 U.S.C. app. § 511(9) (LEXIS 2005).

⁷ H.R. REP. NO. 108-683, at 14 (2004). This report accompanied House of Representatives Bill 4658 (HR 4658). The heart of HR 4658 contained the SCRA and the USERRA ultimately adopted. Servicemembers and Veterans Legal Protections Act of 2004, H.R. 4658, 108th Cong., § 101 (2004). See also *supra* note 4.

⁸ 50 U.S.C. app. § 513 (LEXIS 2005).

offering protection from default judgments.⁹ The third usage is in the section calling for stays of civil and administrative proceedings when the servicemember has notice.¹⁰ The fourth time is when a court stays a judgment when the servicemember's military service affects compliance.¹¹ The fifth time is within the section curtailing a servicemember's inappropriate use of the act.¹²

Waiver of Rights Under the SCRA

Servicemembers may waive their SCRA rights and protections after the right becomes applicable to them. To strengthen this protection, Congress now requires that the waiver be "in writing and . . . executed as an instrument separate from the obligation or liability to which it applies."¹³ Furthermore, "[a]ny waiver . . . that applies to a contract, lease, or similar legal instrument must be in at least 12 point type."¹⁴

Stay Provisions Applicable to Plaintiffs

One of the SCRA's primary procedural protections involves stays of civil proceedings.¹⁵ Under the SSCRA, this protection was available to both defendants and plaintiffs.¹⁶ The SCRA extended this protection to defendants only, but the 2004 amendments work to bring the protection back to servicemember plaintiffs who may need to prosecute a suit at a later time.¹⁷ As under the prior law, the current provision will probably be read more broadly still to "cover those who are petitioners, respondents, movants or intervenors."¹⁸

Residential and Automobile Leases

Perhaps the most significant developments concern the SCRA's protections for servicemembers who need to terminate a residential¹⁹ lease. The SCRA allows servicemembers to terminate their leases upon "entry into military service."²⁰ They can also terminate their leases when they "receive military orders for a change of permanent station or to deploy with a military unit, or as an individual in support of a military operation, for a period not less than 90 days."²¹ Under the SCRA as enacted in 2003, the deployment benefit was only for servicemembers mobilized with a unit. With its 2004 amendment, Congress acknowledged that individuals are often called to deploy as individuals and not as members of a unit.²²

⁹ *Id.* app. § 521.

¹⁰ *Id.* app. § 522.

¹¹ *Id.* app. § 524.

¹² *Id.* app. § 581.

¹³ *Id.* app. § 517.

¹⁴ *Id.*

¹⁵ *Id.* app. § 522. In general, a court "may on its own motion and shall, upon application by [a] servicemember, stay the action." *Id.* app. § 522(b)(1).

¹⁶ *See* 50 U.S.C. app. § 521 (2000).

¹⁷ 50 U.S.C. app. § 521 (LEXIS 2005).

¹⁸ *See* *Shire v. Superior Court*, 162 P.2d 909, 912 (1945). *See also In re Burrell*, 230 B.R. 309, 312 n.1 (Bankr. D. Tex. 1999).

¹⁹ Actually, the premises include those "premises occupied, or intended to be occupied, by a servicemember or a servicemember's dependents for a residential, professional, business, agricultural, or similar purpose." 50 U.S.C. app. § 535(b)(1) (LEXIS 2005).

²⁰ *Id.* app. § 535(a)(1)(A). This is an obvious benefit to those who join the armed forces, but even more so to the thousands of reservists and guardsmen who have been voluntarily and involuntarily mobilized in the last few years.

²¹ *Id.* app. § 535(b)(1)(B).

²² H.R. REP. NO. 108-683 at 22 (2004).

The second change provides a great benefit to servicemembers who have joint leases. The SCRA's protections now extend to joint leases entered into by a servicemember and a servicemember's dependent.²³ This was added in order to assist those non-servicemember spouses (or other dependents) who were being held to a lease that they and their deployed spouse signed, but in a location where the non-servicemember spouse did not wish to reside without the servicemember.²⁴

The SCRA provides similar rights to servicemembers when they wish to terminate an automobile lease. Servicemembers are allowed to terminate their automobile leases when called to periods of active duty in excess of 180 days.²⁵ As with residential leases, there are provisions allowing for termination if the servicemember must "deploy with a military unit, or as an individual in support of a military operation."²⁶ In comparison to the residential leasing provisions, however, the deployment must be "for a period of not less than 180 days."²⁷

There are also provisions for the termination when a servicemember receives orders for a new assignment and a permanent change of station.²⁸ Finally, joint leases are protected.²⁹ The changes in automobile leases likewise involve the clarification that servicemembers can deploy with a unit or as individuals.³⁰ Additionally, when originally adopted the permanent change of station protection was for those who "receive[] military orders for a permanent change of station outside of the continental United States."³¹ This benefited servicemembers moving overseas from the continental United States, but it was of no consequence to similarly situated servicemembers moving from the United States and its territories back to the continental United States or another overseas location. In other words, it did nothing for those stationed in Alaska, Hawai'i and the like who were being transferred to an installation located in the contiguous forty-eight states. The new law makes it clear that the benefit is available to servicemembers being transferred in either direction.³² Those who are stationed in United States' territories are also covered because "[t]he term 'state' includes . . . a commonwealth, territory or

²³ 50 U.S.C. app. § 535(a)(2) (LEXIS 2005). Legal assistance practitioners undoubtedly think of a joint lease as one that is entered into by a servicemember and the servicemember's spouse. It is important to note, however, that the statute contemplates that the servicemember may be residing with a dependent—an elderly parent—who has entered into the lease. These joint leases would also be covered. *See id.*

²⁴ Again, the provisions most directly affecting the SCRA and USERRA began life in HR 4658. *See supra* note 4. When the original legislation's sponsor introduced the legislation, he had this to say:

Mr. Speaker, this morning I chaired a hearing of the Veterans' Affairs Committee to examine how well the federal statutes protecting our servicemembers rights were being enforced. Testifying before the Committee were several servicemembers and family members with personal experiences in which their rights were not properly protected under existing laws.

One witness, Ms. Tammy Kimmel whose husband served in the Army at Fort Hood in Texas, told the Committee that when her husband was ordered to a new duty location, her landlord refused to release her from their joint housing lease as required by law. The landlord claimed that the law required the servicemember to be released, but not the spouse

Regrettably, despite sixty years of federal case law, culminating with the passage last year of the Servicemembers Civil Relief Act, there are still some individuals, businesses, and organizations who cynically refuse to provide all the relief required by statute.

150 CONG. REC. E1226 (daily ed. Jun. 24, 2004) (statement of Rep. Smith). Mr. Smith made a similarly strong statement evincing Congress' intent a few months later. Speaking about the application of the law to joint leases he stated that "[t]his has always been the intent of Congress, but some landlords have recently tried to argue there is a loophole, leaving the servicemember's spouse liable if the servicemember is relieved from liability under the lease." *Id.* at H8387 (daily ed. Oct. 6, 2004) (statement of Rep. Smith).

²⁵ 50 U.S.C. app. § 535(b)(2)(A) (LEXIS 2005). In fact, the coverage is for "[a] lease of a motor vehicle, used, or intended to be used by a servicemember or a servicemember's dependents for personal or business transportation." *Id.* § 535(b)(2).

²⁶ *Id.* app. § 535(b)(2)(B)(ii).

²⁷ *Id.* Care needs to be taken when examining a problem with a residential or automobile lease. This is because Congress saw fit to keep the residential and automobile provisions in the same section. As simple as it may seem, one needs to avoid applying the timelines applicable to residential leases to those for automobile leases and visa versa.

²⁸ *Id.* app. § 535(b)(2)(B).

²⁹ *Id.* app. § 535(a).

³⁰ *Id.* app. § 535(b)(2)(B)(ii).

³¹ 50 U.S.C. app. § 535(b)(2)(B) (LEXIS 2004).

³² The revised section indicates that an automobile lease can be terminated for the following: "a change of permanent station- (I) from a location in the continental United States to a location outside the continental United States; or (II) from a location in a State outside the continental United States to any location outside that State." 50 U.S.C. app. § 535(b)(2)(B) (LEXIS 2005).

possession of the United States.”³³ For those stationed in the United States, but outside the continental United States, the opportunity to terminate the automobile lease is available wherever they are transferred.³⁴

Not to be overlooked in this area is one final clarifying definition that Congress added. As noted, many of the leasing benefits come up when a servicemember is ordered to a station or to deploy. To clarify and to make sure that servicemembers are given the benefit of doubt, “[t]he term ‘military orders,’ with respect to a servicemember, means official military orders, or any notification, certification, or verification from the servicemembers’ commanding officer, with respect to the servicemember’s current or future military duty status.”³⁵

Evictions

Although not a part of the recent Congressional activity, it is worth noting the annual change to eviction protection. When Congress passed the SCRA, it carried forward basic SSCRA protection from eviction absent a court order and a ninety day stay.³⁶ When the legislation was enacted, Congress set the limit for this protection on housing where the “monthly rent does not exceed \$2,400.”³⁷ Congress, however, indicated that this amount is to be adjusted for inflation.³⁸ This year, the amount is \$2534.32.³⁹

Uniformed Services Employment and Reemployment Rights Act Amendments and Developments

The Veterans’ Benefits Improvement Act of 2004 brought four changes to USERRA. Under USERRA, a mobilized guardsman or reservist is allowed to continue health care coverage “under a health plan in connection with [their] position of employment” for themselves and their dependents.⁴⁰ Congress extended the period for this coverage from eighteen to twenty-four months.⁴¹ If a servicemember chooses to take advantage of this benefit, the coverage will likely be in place for the full period of the mobilization.⁴²

Individuals who believe they have a claim against a private employer or a state may have their case reviewed by the Department of Labor (DOL). If the DOL is unable to resolve the matter and if they believe the case has merit, it can be referred to the Department of Justice (DOJ) for action.⁴³ If the individual is a federal employee, the case may wind up with the Office of Special Counsel (OSC).⁴⁴ The second legislative change requires that the Secretary of Labor return to issuing annual reports⁴⁵ about the numbers of cases the DOL reviews and the number of cases it refers to the DOJ or the OSC.⁴⁶

³³ *Id.* app. § 511(6)(A).

³⁴ *Id.*

³⁵ *Id.* app. § 535(i)(1).

³⁶ *See id.* app. § 531(b). The stay can be for more or less than ninety days if “justice and equity require.” *Id.* at app. 531(b)(1)(A). In addition to the stay and the court order, a court can “adjust the obligation under the lease to preserve the interests of all parties.” *Id.* at app. § 531(b)(1)(B). Also, when the court orders a stay, the landlord may also receive equitable relief. *Id.* at app. § 531(b)(2).

³⁷ *See id.* § 531(a)(1)(A)(ii).

³⁸ *See id.* § 531(a)(2).

³⁹ Publication of Housing Price Inflation Adjustment Under 50 U.S.C. App. § 531, 70 Fed. Reg. 2395 (Jan. 13, 2005).

⁴⁰ 38 U.S.C. § 4317(a)(1) (LEXIS 2005). In order to exercise this benefit, however, the employee “may be required to pay not more than 102 percent of the full premium under the plan.” *Id.* § 4317(a)(2).

⁴¹ *Id.* § 4317(a)(1)(A).

⁴² *See* H.R. REP. NO. 108-683 at 14 (2004) (stating that “[t]his change would bring eligibility for continued health care coverage in line with the period of time which a member of the Guard or Reserve may be involuntarily called to active duty”). *See also* 10 U.S.C. § 12302 (2000) (partial mobilization of up to 1,000,000 members of the reserves for up to 24 consecutive months); Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 18, 2001) (authorizing activation of Ready Reserve in response to terrorist attacks of September 11, 2001).

⁴³ 38 U.S.C. § 4323.

⁴⁴ *Id.* § 4324.

⁴⁵ When originally enacted, USERRA required a report from the Secretary of Labor from 1996 through 2000. 38 U.S.C. § 4332 (LEXIS 2004).

⁴⁶ 38 U.S.C. § 4332 (LEXIS 2005). The report, more specifically, must provide the following:

Next, the OSC is to undertake a “demonstration project” where it takes an active role in the initial investigation of complaints.⁴⁷

The fourth amendment to USERRA adds a new section to Title 38 requiring that employers notify employees about USERRA.⁴⁸ This provision also involves the DOL, because that agency is required to provide a model statement for employers’ use.⁴⁹ This subtle approach will hopefully work to educate employers and employees and ward off potential problems.⁵⁰

A final USERRA development concerns the DOL’s work to promulgate a proposed set of implementing regulations.⁵¹ In doing so, DOL opted for “the more personal style advocated by the Presidential Memorandum on Plain Language.”⁵² The result is a highly readable, yet comprehensive discussion of how USERRA works.⁵³

-
- (1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.
 - (2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, during such fiscal year.
 - (3) The number of complaints filed by the Attorney General pursuant to section 4323 during such fiscal year.
 - (4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).
 - (5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.

Id. The Secretary is also on notice to make other recommendations as appropriate. *Id.* In fact, during testimony before Congress, the Department of Justice explained that “[t]he number of USERRA claims DOL referred to DOJ annually has increased approximately 20 percent since September 11, 2001.” H.R. REP. NO. 108-683 at 38 (2004).

⁴⁷ Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, § 204, 118 Stat. 3598, 3606-8.

⁴⁸ 38 U.S.C. § 4334. The section’s main provision states that

Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.

Id. § 4334(a).

⁴⁹ *Id.* § 4334(c)(1).

⁵⁰ One of the chief sponsors of the original legislation had this to say about the notification section:

It seeks to promote understanding between employees and employers when it comes to their rights and obligations under USERRA. [It] would require the Department of Labor to produce a poster – similar to the Family and Medical Leave poster – for employers to post at work sites.

. . . . In posting USERRA and familiarizing themselves with the law, employers and employees will gain a deeper understanding of USERRA and preferably work out any potential conflicts before employees are activated.

150 CONG. REC. H8389-90 (daily ed. Oct. 6, 2004) (statement of Rep. McGovern). See also Patriotic Employer Act of 2004, H.R. 4477, 108th Cong. (2004) (including a bill introduced by Rep. McGovern, which became incorporated into the legislation actually adopted). Apparently, the lack of understanding on the part of employers can run deep. For some rather remarkable examples, see U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON PERSONNEL, COMMITTEE ON ARMED SERVICES, U.S. SENATE, RESERVE FORCES: DOD ACTIONS NEEDED TO BETTER MANAGE RELATIONS BETWEEN RESERVISTS AND THEIR EMPLOYERS, 37-42 (Jun. 13, 2002).

⁵¹ Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994, 69 Fed. Reg. 56,265 (to be codified as amended at 20 C.F.R. pt. 1002). The USERRA allows the DOL to publish implementing regulations. See 38 U.S.C. § 4331.

⁵² 69 Fed. Reg. at 56,267. See also President’s Memorandum on Plain Language in Government Writing, 34 WEEKLY COMP. PRES. DOC. 1010 (Jun. 1, 1998).

⁵³ Consider the following passage to be codified at 20 C.F.R. § 1002.22:

Who has the burden of proving discrimination or retaliation in violation of USERRA?
You have the burden of proving that activity protected by USERRA was one of the reasons that your employer took action against you, in order to establish that the action was discrimination or retaliation in violation of USERRA. If you succeed in proving this point, your employer can prevail by proving that he or she would have taken the action anyway, unless you can prove that but for your service the employer would not have taken the action.

69 Fed. Reg. at 56,288.

Conclusion

Congress continues to show interest in the protections and benefits available to servicemembers from all components. Although they worked, comprehensively, to modernize and update the Soldiers' and Sailors' Civil Relief Act protections through the passage of the Servicemembers Civil Relief Act, problems with the residential and automobile leasing provisions became apparent. Congress reacted swiftly to further strengthen the legislation's provisions. As to reemployment rights, Congress acted in a subtle fashion to educate employers and employees on certain key principles. They have also worked to move along USERRA protections for federal sector employees. Legal assistance practitioners, labor counsel, and administrative lawyers should take note of these developments and be prepared for further activity. Given the activity over the last few years and the continual reporting requirements for DOL, one should conclude that Congress is focused on protecting servicemembers, their families, and veterans.

Note from the Field

Courts, Confidence, and Claims Commissions: The Case for Remitting to Iraqi Civil Courts the Tasks and Jurisdiction of the Iraqi Property Claims Commission (IPCC)

Dan E. Stigall¹

The issue of property rights and the plight of displaced people has been the object of increasing attention in recent years. International actors interested in maintaining peace in post-conflict settings are increasingly cognizant of the importance of addressing the grievances of people who have been displaced or dispossessed of valued property.

From Bosnia to East Timor, and now Iraq, property rights have been at the center of many of the problems that individuals face in the aftermath of armed conflicts. The importance of a fair, transparent and effective property rights policy, as an element of post-conflict recovery and development, can hardly be overrated. Clear and undisputed property title plays a fundamental role in the economic recovery from conflict and is a prerequisite to attract foreign investment. The protection or restoration of property rights is closely linked to the return of refugees and displaced persons, the protection of human rights and the restoration of the rule of law. Because land is life in many war-torn societies, property right violations tend to affect all parts of the surviving populations.²

Saddam Hussein's government, and the social convulsions of its subsequent overthrow, left a wake of displaced persons.³ After years of ethnic cleansing, forced migrations of ethnic groups, and continuing conflict, up to one million Iraqis are estimated to be displaced in their own country.⁴ At least one American commander has indicated that the instability caused by such displacement is one of the most serious problems facing the Coalition today.⁵

To address this looming crisis, on 14 January 2004, the Coalition Provisional Authority in Iraq (CPA) promulgated a regulation to establish a commission "for the purpose of collecting and resolving real property claims and to promulgate procedures for promptly resolving such claims in a fair and judicious manner"⁶ The impetus for the creation of such an entity was spurred by the desire to ease post-occupation instability and to quell violence caused by ethnic tensions and an otherwise offended polity.⁷ In spite of its noble motive, however, the Iraqi Property Claims Commission (IPCC) has failed.

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² See Hans Das, *Restoring Property Rights in the Aftermath of War*, 53 INT'L COMP. L.Q. 429 (Apr. 2004).

³ See United Nations High Commission for Refugees, *Country of Origin Information—Iraq* (Aug. 2004), available at http://www.unhcr.bg/coi/files/coi_iraq.pdf (noting that over 800,000 Iraqis were displaced in Northern Iraq over the past thirty years. In the South, an additional 100,000 to 200,000 Marsh Arabs were displaced due to fifteen years of Ba'athist policies of forced migration. In Central Iraq, pockets of displacement are occurring as a result of the ongoing conflict between the Coalition and Iraqi resistance groups. Further, an estimated 189,000 people have spontaneously returned from Iran).

⁴ See Integrated Regional Information Networks - U.N. Office for the Coordination of Humanitarian Affairs, *Report on Iraq: Refugee Returns Suspended Due to Insecurity and Housing Shortage* (Aug. 18, 2004), at http://www.irinnews.org/report.asp?ReportID=42724&SelectRegion=Iraq_Crisis&SelectCountry=IRAQ. See also Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2004) (noting in regard to Iraq's Marsh Arabs:

In 1991, after the first Gulf War, the Marsh Arabs and other Shiites in southern Iraq rose up in an unsuccessful attempt to overthrow or at least throw off the control of the Hussein government. The government responded with a nationwide propaganda campaign labeling the Marsh Arabs as "monkey-faced" outsiders, followed by an attack on the environment that sustained Marsh Arab society. Over the next few years, the government built a system of dams, dikes and canals to drain the wetlands, so that today only seven percent of the original area remains.

.....

While the exact number of deaths and of persons displaced as a result will probably never be known, most sources estimate the number of displaced persons to be between 200,000 and 400,000. A similar number may remain in the former marshes in a state of extreme poverty.)

⁵ See Jenne Matthew, *Iraqi Property Commission Failing, 167,400 Displaced Persons Since March*, Agence France-Presse, Sept. 3, 2004, available at <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/679980ae6343d55849256f040021bdec> [hereinafter *Iraqi Property Commission Failing*] (quoting Major General John R. S. Batiste as saying that the brewing crisis caused by displacement is the biggest problem facing the 1st Infantry Division, outweighing the threats of foreign fighters and insurgents in Sunni Muslim trouble spots north of Baghdad).

⁶ See COALITION PROVISIONAL AUTHORITY, REG. NO. 8, DELEGATION OF AUTHORITY REGARDING AN IRAQ PROPERTY CLAIMS COMMISSION (14 Jan. 2004) [hereinafter CPA REG. NO. 8].

⁷ See *supra* notes 3 and 4.

This article seeks to demonstrate that, given the existence of a functional civil law system in Iraq, the creation and perpetuation of the IPCC is not only an unnecessary waste of time and resources, but detrimental to the goals of the Multinational Forces in Iraq.

Past Precedent: The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC)

In the effort to resolve global crises, international actors increasingly rely on ad hoc entities styled as courts or claims commissions.⁸ As governments (and various nongovernmental actors) have become more willing to intervene in the internal affairs of other governments, property claims commissions have emerged as mechanisms whereby outside actors facilitate the resolution of domestic property disputes. The archetypical property claims commission is the CRPC in Bosnia.

As in post-conflict Iraq, enormous numbers of citizens were displaced in the wake of the Bosnian conflict.⁹ Accordingly, the Dayton Peace Agreement recognized the right of all refugees and displaced persons to freely return to their homes of origin and granted “the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.”¹⁰ Annex 7 of that agreement created a CRPC—an administrative body designed for mass claims resolution.¹¹

The CRPC was separate from the normal court system, consisting of nine members, three of whom were appointed by the President of the European Court of Human Rights.¹² It had broad powers and its own separate rules and regulations, guided by domestic property law.¹³ As Hans Das, a former employee of the CRPC, notes, however, compensation was generally not awarded by the CRPC: “[i]nstead, CRPC decisions simply confirm the pre-war interests of the claimants and authorize them to exercise their property rights in any lawful manner.”¹⁴ This is partially because the fund that was to serve as the source of compensation awards was never funded.¹⁵

The CRPC enjoyed some measure of success, collecting 318,780 claims and issuing approximately 290,000 final decisions on property title.¹⁶ The CRPC’s limitations, however, soon became apparent. A proposed “compensation fund” never materialized due to donor unwillingness to provide resources, thus curtailing the amount of redress the commission could provide.¹⁷ It also had no enforcement mechanism and could not, by itself, assist people to recover their property rights (or deal with the problem of secondary occupants) and return home. A decision made by the CRPC in favor of a particular claimant did not mean instant restitution of rights; it merely represented the first step of what turned out, for many owners and rights holders, to be a long process to recover their rights. It did not provide for an appeals mechanism against its decisions, which put the Bosnian government in contravention of the European Human Rights Convention which it had signed. It was not supported by a national legal framework to resolve restitution cases, repeal provisions responsible for the loss of property rights, or force local authorities to provide alternative accommodation for those in need and lay down enforcement procedures. Further, the CRPC faced major teething problems: its low budget, slow access to municipal records, poorly kept pre-war records, illegal construction, and bureaucratic and political obstructions hampered its ability to

⁸ See Nancy Combs et al., *International Courts and Tribunals*, 37 INT’L LAW. 523 (2004) (discussing the International Court of Justice, the United Nations Compensation Commission, the Iran-U.S. Claims Tribunal, and the Claims Resolution Tribunal established to provide Nazi victims or their heirs with an opportunity to claims assets deposited in Swiss banks prior to World War II).

⁹ Das, *supra* note 2, at 430.

¹⁰ See *id.* (citing General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), 35 I.L.M. 75, Annex 7, art. I (1996)).

¹¹ See *id.*

¹² *Id.* at 436.

¹³ See *id.* at 433.

¹⁴ *Id.* at 430.

¹⁵ See *id.* at 441.

¹⁶ *Id.* at 437.

¹⁷ Anne Davies, *Restitution of Land and Property Rights*, 21 FORCED MIGRATION REV. 12 (Sept. 2004), available at <http://www.fmreview.org/text/FMR/21/04.htm>. See also Das, *supra* note 2, at 441.

tackle the massive task of compiling a nationwide register of contested property.¹⁸ The CRPC's mandate expired in late 2003, and undecided claims were released to be handled by domestic bodies.¹⁹

Ann Davies, the acting head of the United Nations Office for the Coordination of Humanitarian Affairs in Monrovia, Liberia, notes that "the CRPC experience has highlighted the necessity to ensure that property rights restitution should be a nationally-owned and directed process. While the international community can assist, it should refrain from imposing its concepts without thinking through how these can be implemented practically."²⁰ Further,

[L]essons learned in [Bosnia] appear not to be being heeded in Iraq where it is estimated that up a million people were displaced as a result of expulsion policies that the former regime used to remove opponents and gain valuable land in the southern marshes and in the north. A worrying start was made when the occupation authorities established an IPCC in January 2004 with little Iraqi involvement. Experts working for the Coalition Provisional Authority (CPA) drafted a document and required the Iraqi Governing Council (IGC) to implement its provisions without paying sufficient attention to realistic enforcement mechanisms.

. . . .

Had more attention been paid to the Bosnian experience it would have been readily apparent to the architects of the IPCC that national involvement from the start is vital to successful implementation of the scheme. Nevertheless, imperfect though it may be, a start has been made.²¹

The IPCC

The initial regulation authorizing the creation of the IPCC was promulgated on 14 January 2004.²² This statute, and its annex, authorized the establishment of a claims commission to resolve claims:

arising between July 17, 1968 and April 9, 2003 involving immovable property, assets affixed to immovable property, easements, or servitudes that were: (i) confiscated or seized for reasons other than land reform; or (ii) expropriated for reasons other than lawfully used eminent domain, or as a result of opposition to the Ba'athist Government of Iraq, or as a result of ethnicity, religion, sect of the owners, or for purposes of ethnic cleansing; or (iii) acquired for less than appropriate value by the Ba'athist Government of Iraq; or (iv) property otherwise affected.

Article 10 of that annex provided the following:

Newly introduced inhabitants of residential property in areas that were subject to ethnic cleansing by the former governments of Iraq . . . may be (i) resettled, (ii) may receive compensation from the state, (iii) may receive new property from the state near their residence . . . or (iv) may receive compensation for the cost of moving to such area.²³

Article 8 of the initial promulgating regulation contained a list of thirteen general principles to guide the IPCC in the adjudication of claims, but was prefaced with the following language: "The IPCC shall comply with the following principles when resolving property claims. The Governing Council shall issue more detailed provisions regarding the process in the Guidelines and Instructions."²⁴ These general principles were not taken from the *Iraqi Civil Code*, but were ad hoc rules specific to the IPCC and matters within its purview.

¹⁸ See Davies, *supra* note 17, at 12.

¹⁹ See COMMISSION ON THE EUROPEAN COMMUNITIES, REPORT FROM THE COMMISSION TO THE COUNCIL ON THE PREPAREDNESS OF BOSNIA AND HERZEGOVINA TO NEGOTIATE A STABILISATION AND ASSOCIATION AGREEMENT WITH THE EUROPEAN UNION (2003), available at http://europa.eu.int/comm/external_relations/see/docs/com03_692_en.pdf.

²⁰ See Davies, *supra* note 17, at 13.

²¹ *Id.* at 14.

²² See CPA REG. NO. 8, *supra* note 6.

²³ *Id.* Annex, art. 10.

²⁴ *Id.* Annex, art. 8. See also *id.* Annex, art. 14 (stating that "[t]he Governing Council shall issue Guidelines and Instructions that will regulate the procedures to be followed by the IPCC.").

The initial regulation contained a filing deadline of 31 December 2004. Any claim filed thereafter would not be accepted by the IPCC, but could be “referred to the Iraqi Court system, which shall apply the principles included in this Statute.”²⁵

Thus, the CPA envisioned an entity that would provide some means of redress to Iraqis displaced by Ba’athist policies prior to 9 April 2003. The IPCC would settle claims based upon some general principles with the understanding that more detailed rules and procedures would be later promulgated by the Governing Council. By early June, however, it was becoming increasingly clear that the claims commission envisioned by the promulgating regulation was not materializing. The Governing Council had not issued the more detailed guidelines and instructions promised by Article 8. With the clock ticking down toward the final deadline for filing claims, the IPCC process seemed to stagnate. On 24 June 2004, the week the CPA dissolved, the CPA promulgated *Coalition Provisional Regulation Number 12*, noting that the initial regulation did not provide adequate mechanisms for the operation of the IPCC.

In many respects, the new regulation repeated the former’s substance. The new regulation, however, included two annexes containing more detailed procedural and structural information as well as some substantive changes. Notably, the functional competence of the IPCC was expanded to include claims arising between 18 March 2003 and 30 June 2005. In addition, its jurisdiction was expressly made exclusive²⁶—something that was only implicit in the earlier statute. The filing deadline was also extended to 30 June 2005.

The amended and restated IPCC statute envisions a commission that consists of an appellate division (established as a separate chamber of the Iraqi Court of Cassation), regional commissions in each governorate in Iraq, and a National Secretariat, which shall be responsible for overseeing all operational and management activities of the IPCC.²⁷ The National Secretariat was also given the responsibility of issuing the guidelines containing the procedures set forth by the IPCC.²⁸

Once a claimant files a claim at an IPCC office in his area, the Regional Secretariat opens a file, serves notice on the interested parties and the General Directorate of Real Estate Registration, verifies the claim, and authenticates the identity of the parties.²⁹ The regional commission then renders a decision which can be appealed within sixty days.³⁰ Decisions made by the appellate division are final.³¹

Scope and Types of Remedies Available Under the IPCC Statute

Before analyzing the substantive provisions governing dispute resolution, it is important to examine the rules governing the scope and types of remedies available under the IPCC statute.

The current IPCC statute provides redress for claims arising between two time periods. The first jurisdictional grant is for claims arising between 17 July 1968 and 9 April 2003, involving immovable property, assets affixed to immovable property, easements, or servitudes that were:

Confiscated, seized, expropriated, forcibly acquired for less than full value, or otherwise taken, by the former governments of Iraq for reasons other than land reform or lawfully used eminent domain. Any taking that was due to the owner’s or possessor’s opposition to the former governments of Iraq, or their ethnicity, religion, or sect, or for purposes of ethnic cleansing, shall meet this standard³²

The second jurisdictional grant is for claims arising between 18 March 2003 and 30 June 2005, involving “real property or an interest in real property” that was or will be:

²⁵ *Id.* Annex, art. 11.

²⁶ *See* COALITION PROVISIONAL AUTHORITY, REG. NO. 12 Annex A, sec. 5, arts. 9 and 11 (24 June 2004) [hereinafter CPA REG. NO. 12].

²⁷ *Id.* Annex A, sec. 2, art. 2.

²⁸ *Id.* Annex A, sec. 5, art. 13.

²⁹ *Id.* Annex A, sec. 3, art. 6.

³⁰ *Id.* Annex A, sec. 3, art. 7.

³¹ *Id.*

³² *Id.* Annex A, sec. 5, art. 9.

confiscated, seized, expropriated, forcibly taken for less than full value, or otherwise acquired and/or reacquired (i) as a result of the owner's or possessor's ethnicity, religion, or sect, or for purposes of ethnic cleansing, or (ii) by individuals who had been previously dispossessed of their property as a result of the former Ba'athist governments' policy of property confiscation.³³

Thus, the statutory language only gives the IPCC jurisdiction over claims regarding immovable property and interests therein and only for two specific periods of time. Claims for moveable property, damages such as mental anguish or humiliation, or claims occurring outside the statutory timeframe would still fall within the Iraqi civil courts' purview.

The remedies available under the IPCC statute are laid out in Annex A, Article 8, of the current IPCC statute.³⁴ These remedies consist of returning the property to its original (or rightful) owner;³⁵ returning the property to the original (or rightful) owner subject to conditions, such as reimbursement for improvements;³⁶ or receiving compensation for the price of the property.³⁷ Under certain situations, a successful claimant may request that a subsequent purchaser purchase the property, minus the purchase amount paid to the former government by the subsequent purchaser.³⁸ Additionally, presumably to protect innocent purchasers, the statute provides that an original owner, when demanding return of the property, must compensate subsequent purchasers for improvements and additions to the property.³⁹

Article 7(F) states that:

[I]f the property in question is occupied, possessed or used by the non-prevailing party, and such party has no other property, then the non-prevailing party would be granted a prescribed period of time to surrender possession of the premises. The Regional Secretariat shall also inform the displaced person(s) of the availability of any services for assistance.⁴⁰

In addition to the displaced persons, Iraqi citizens used as the means of displacement⁴¹ can also find redress in Annex A, Article 10, which provides that:

Newly introduced inhabitants of residential property in areas that were subject to ethnic cleansing by the former governments of Iraq . . . may be (i) resettled, (ii) may receive compensation from the state, (iii) may receive new property from the state near their residence . . . or (iv) may receive compensation for the cost of moving to such area.⁴²

Thus, the statute provides a means of redress for newly introduced inhabitants of areas that were subject to ethnic cleansing campaigns. The displaced person, depending on his situation, will be allowed one of the remedies available in Article 8.

Though the statute should be lauded for providing some means of redress, its shortcomings are apparent. It allows no compensation for moveable property or immovable property that was damaged, but not confiscated. Its means of compensation is narrowly focused on the purchase price of property, neglecting other damages such as emotional damages and lost rent. Likewise, as discussed more fully below, the statute also neglects the subject of fruits and products of usurped property and makes no distinction between good faith and bad faith purchasers.

³³ *Id.*

³⁴ *Id.* Annex A, sec. 4, art. 8.

³⁵ *Id.* art. 8(A) – (E).

³⁶ *Id.* art. 8(F).

³⁷ *Id.* art. 8(M).

³⁸ *Id.* art. 8(H).

³⁹ *Id.* art. 8(H)-(K).

⁴⁰ *Id.* Annex A, art. 9.

⁴¹ Major Jeffrey Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 MIL. L. REV. 96 (2003) (“[T]he actions of Iraq have removed the Kurds and other non-Arabs from oil rich areas near the northern city of Kirkuk. Though these populations were often given the opportunity to “correct” their nationality to Arab, those unwilling to convert were subjected to various forms of harassment, to include arrest and forced relocation. To add to this instability, Iraq relocated Arab Shia populations from the south to Kirkuk to frustrate Kurdish claims to land in the area and “to affirm the ‘Arabic’ character of the city.”).

⁴² CPA REG. NO. 12, *supra* note 26, Annex A, art. 10.

Though the limits on the kinds of remedies available under the IPCC statute make it problematic, its inadequacy becomes more apparent when analyzing the statute's general principles which govern the way in which its remedies are to be awarded.

The General Principles of the IPCC Statute

An important aspect of the CRPC in Bosnia is that, though it possessed its own separate rules and regulations, it was to pay a certain degree of respect to domestic property law.⁴³ Further, it was established with a shelf-life—a designated time after which responsibility would transfer to local courts.⁴⁴ In contrast to its Bosnian ancestor, however, the IPCC statute eschews the provisions of the *Iraqi Civil Code* in favor of fourteen principles that are ad hoc rules designed specifically for the IPCC and that do not necessarily bear any relation to their counterparts in the *Iraqi Civil Code*. They are as follows:

- a. Any properties that were confiscated or seized, or on which liens or other encumbrances were placed by the former governments of Iraq (not in the ordinary course of commercial business), but with title remaining in the name of the original owner shall be returned to the original owner, freed and discharged from any such liens or other encumbrances.
- b. Any properties that were confiscated or seized and whose title was transferred to the former governments of Iraq, or an agent thereof, and which were not sold to a third party, shall be returned to the original owner.
- c. Any properties confiscated by the former governments of Iraq that were used as mosques, other places of worship, religious schools, charities or were associated with such uses shall be returned to the appropriate *waqfs* (religious endowments) connected to such uses or to the appropriate holders of title to such properties prior to their confiscation.
- d. Any properties whose title is in the name of senior members of the former governments of Iraq shall be returned to the rightful owners, if it is established that such properties were improperly acquired.
- e. If a property was confiscated and subsequently sold to a buyer (the "First Buyer"), and (i) title remains in the name of the First Buyer and (ii) no improvements were made to the property, then title to the property will be transferred back to the original owner, and the First Buyer would not be entitled to compensation from the original owner.
- f. If the property was an unimproved property (that is, a property not built upon) when confiscated or otherwise seized, and then subsequently sold to the First Buyer, and the First Buyer has improved the property by building upon it, then the original owner would be entitled to either (i) having title transferred to him, provided that he pays the First Buyer the value of the improvements or (ii) being paid appropriate compensation for the property (as an unimproved property).
- g. If the property was sold to the First Buyer, who subsequently acquired an adjoining property from the state, then title to both the original property and the adjoining property shall be transferred to the original owner, provided that such original owner pay the First Buyer the amount that such First Buyer paid for the adjoining property.
- h. If the property has a building on it and then was sold to the First Buyer, who subsequently demolished the original building and built a new building on it, then the original owner of the property may (i) request that title be transferred to him, after paying for the new building, less the value of the old demolished building, or (ii) may request that the First Buyer acquire the property, including the demolished building (less any amounts paid by the First Buyer to the former governments of Iraq).
- i. If the property was subsequently sold by the First Buyer to other buyers, then the original owner could either (i) request that title be transferred to him, or (ii) request compensation for the value of the property. If the original owner chooses option (i) above, then the final buyer would be entitled to compensation for the value of the property.

⁴³ See Das, *supra* note 2, at 433.

⁴⁴ See *id.* at 437.

j. If the property was charged as security to a lender for a loan to the First Buyer, then title to the property would be freed and discharged from any such charge, and the lender would then have a right of action against the First Buyer to recover any outstanding balance due under the loan.

k. If the property was unimproved and a building was built on it by the First Buyer, and the property was charged to a lender as security for a loan, then any amounts due to the First Buyer by the original owner (pursuant to Paragraph F above) would be paid by the original owner direct to the lender to fully or partially satisfy the loan.

l. If the property was confiscated and sold in a public auction and was purchased by either the original owner or his heirs, then they will be entitled to compensation from the state in an amount equivalent to the purchase price.

m. If the property is currently being used for a public or charitable purpose, the property shall continue to be used for that purpose, and the Government or current owner, user or possessor shall provide the original owner, user or possessor with compensation.

n. Any other relevant situation in line with these provisions.⁴⁵

The section announcing these general principles begins with the following statement: “The IPCC shall comply with, but not be limited to, the application of the following examples when resolving real property claims.”⁴⁶ Thus, along with the language of Article 41, the IPCC statute makes it clear that the adjudicators may veer outside the language of these rules to formulate an appropriate remedy.⁴⁷

The fourteen general principles cover a host of situations. The articulated principles, however, contain major gaps and drawbacks that cannot be overcome merely by noting that the rules are malleable. Particularly, the principles do not address all the situations covered by the jurisdictional mandate of the statute and do not provide adequate remedies for the losses they are meant to address.

Overlooked Claimants

The IPCC statute extends its jurisdiction over claims arising between 18 March 2003 and 30 June 2005, as well as claims from those who lost property that was forcibly acquired for less than full value. Yet, the general principles only address property that was confiscated or seized by the Ba’athist regime.⁴⁸ It would be impossible to hold the regime responsible for property confiscated or seized after the end of the regime—9 April 2003. Accordingly, the general principles in the IPCC statute contain absolutely no language providing a means of redress for persons with claims arising between 9 April 2003 and 30 June 2005, as envisioned by the revised IPCC Statute. Though the jurisdictional mandate was expanded to include a new series of claims, no provisions were added to the general principles of the statute that might provide redress for such claimants.

The obvious cure to the problem caused by such careless drafting is to say that the general principles are mere guidelines and that, as the adjudicators are free to veer outside their constraints, the principles can be applied to claims arising between 9 April 2003 and 30 June 2005 involving immovables taken as a result of the owner’s or possessor’s ethnicity, religion, or

⁴⁵ CPA REG. NO. 12, *supra* note 26, Annex A, sec. 4, art. 8.

⁴⁶ *Id.* Annex A, sec. 4, art. 8.

⁴⁷ *See id.* Annex B, art. 41 (noting that “[t]he IPCC shall comply with, but not be limited to, the application of principles set forth in Article 8 of the Statute.”).

⁴⁸ *See id.* Annex A, sec. 4, art. 8. Subsection A of the Annex states the following:

Any properties that were confiscated or seized, or on which liens or other encumbrances were placed by the former governments of Iraq (not in the ordinary course of commercial business), but with title remaining in the name of the original owner shall be returned to the original owner, freed and discharged from any such liens or other encumbrances.

Id. Subsection B states that “[a]ny properties that were confiscated or seized and whose title was transferred to the former governments of Iraq, or an agent thereof, and which were not sold to a third party, shall be returned to the original owner.” *Id.* Annex A, sec. 4, art. 8(B). The subsequent principles all envision property that was taken by the Ba’athist regime at some point.

sect. In other words, the rules are so pliable that, so long as jurisdiction exists over the claim, the adjudicators can devise something to address the concern.

Such legal gymnastics might allow one to plug up an obvious hole, but it seems curious (if not dangerous) to allow an entire class of disputes to be resolved without any express guidance from the rules that purport to govern such matters. Since the Enlightenment, legal commentators have warned against the dangers of such obscurity in legislation.⁴⁹

Likewise, the guidelines do not address claimants who were forced to sign contracts and transfer their land unwillingly or those whose land was taken for less than its full value. All of the general principles meant to guide the adjudicator in making his or her determination address property that was confiscated or seized. Even if one were to argue, as stated above, that the rules are so pliable that one could fashion an ad hoc remedy, no provisions exist to guide the adjudicator on how to proceed with a forced or faulty contract. Again, the IPCC adjudicator is left to his imagination.

At best, the claimants whose situations have been overlooked by the general principles will face adjudicators operating blindly. At worst, they will be left without any remedy whatsoever. This becomes a serious problem when one considers the language of Article 11(C), which gives the IPCC exclusive jurisdiction over cases within its jurisdictional reach. Thus, claimants could find themselves trapped within the maw of its jurisdiction without a means of escape.

The Importance of Faith

Just as the general principles overlook certain claimants, they also overlook critical elements of property law that any adequate legal system must address—primarily the issue of good or bad faith and the fate of the products of confiscated land.

Subsections E through M of the IPCC statute address the fate of subsequent purchasers. The IPCC statute, lists the following examples of real property claims:

If a property was confiscated and subsequently sold to a buyer (the “First Buyer”) and (i) the title remains in the name of the First Buyer and (ii) no improvements were made to the property, then title to the property will be transferred back to the original owner and the First Buyer would not be entitled to compensation from the original owner.⁵⁰

If the property was an unimproved property (...not built upon) when confiscated or otherwise seized, and then subsequently sold to the First Buyer, and the First Buyer has improved the property by building upon it, then the original owner would be entitled to either (i) having the title transferred to him, provided that he pays the First Buyer the value of the improvements or (ii) being paid appropriate compensation for the property (as an unimproved property).⁵¹

Therefore, under the IPCC statute, the Iraqi citizen dispossessed of his or her property, may wind up owing money to a subsequent purchaser. On the surface, there is nothing wrong with such a scenario; however, the statute makes no distinction between good faith or bad faith purchasers. The statute is completely silent on the issue of the “First Buyer’s” knowledge or state of mind.

Without different provisions for good and bad faith purchasers, the general principles of the IPCC statute are set to work substantial injustice among displaced persons. For instance, according to the general principles’ plain guidance, a person who had the misfortune of having his farm seized and sold by Saddam Hussein would still owe compensation to the subsequent purchaser for improvements and additions—even if that subsequent purchaser had full knowledge that he was buying a farm from Saddam that was wrongfully seized. Likewise, a person displaced for ethnic reasons—an Arab forced out of his home by Kurds in Northern Iraq—would be obligated to reimburse the person who forcefully removed him from his home. Such outcomes are astoundingly unsatisfactory.

⁴⁹ See Cesare BECCARIA, ON CRIMES AND PUNISHMENTS ch. 5 (1764) (noting that “without the written word, a society will never arrive at a fixed form of government . . . in which laws which are unalterable except by the general will, are not corrupted as they make their way through the throng of private interests.”).

⁵⁰ See CPA REG. NO. 12, *supra* note 26, Annex A, art. 8(E).

⁵¹ See *id.* art. 8(F).

Similarly, the fate of fruits of the land is completely neglected by the statute. Not only do the general principles fail to address the topic, but it is not clearly within the jurisdictional purview of the statute. Therefore, even if allowed to address the matter, IPCC adjudicators will have no guidelines for determining what compensation is due the displaced owner of an orchard or farm. The costs of such fruits are not to be underestimated, especially in recent years.

“Iraq’s capacity to generate its own food was severely incapacitated by the Gulf War and virtually no food was imported during this period. By early January 1991, food prices were five to twenty times higher than they had been before the war. In the meantime, salaries plummeted.”⁵² The combination of high food prices and low income makes the issue of reimbursement for wrongfully seized fruits and crops significant. This is even more apparent because much of the land involved in the displacement of Iraqis was used for agriculture. As a recent Human Rights Watch Report noted:

Arabization first occurred on a massive scale in the second half of the 1970s, following the creation by the Iraqi government of an autonomous zone in parts of Iraqi Kurdistan. During that period, some 250,000 Kurds and other non-Arabs were expelled from a huge swath of northern Iraq, ranging from Khanaqin on the Iranian border all the way to Sinjar on the Syrian-Turkish border were forcibly displaced. These comprised entire families, including women and children. Simultaneously, the Iraqi government brought in landless Arabs and their families from the nearby al-Jazeera desert to farm the former Kurdish lands. The land titles of the Kurds and other non-Arabs were invalidated. The land was declared government land, but was leased on annual contracts only to the new Arab farmers.⁵³

Thus, displacement and the wrongful taking of immoveable property are intertwined with the issue of the proper ownership of the fruits of seized land. Nothing in the statute, however, addresses this important matter. Even if one were to construe the jurisdictional language as allowing it, the guidelines focus exclusively on the purchase price of the property, leaving the issue of the ownership of its fruits lost in the silence of inadequacy.

The Iraqi Civil Code: An Organic Solution

What recourse is left to an interim government that wishes to provide a means of redress to its aggrieved citizenry? The answer is astonishingly simple: allow property disputes to be addressed in their proper forum.

Civil courts, in most jurisdictions throughout the world, are the proper forum for property disputes.⁵⁴ Iraq possesses an advanced system of property law that, in contrast to the incomplete, untested, and ad hoc guidelines in the IPCC statute, is more than adequate for resolving property disputes of the most complex sort, including cases in which property was taken unlawfully.

The *Iraqi Civil Code* states that ownership vests unto the owner the right to dispose absolutely of that which he owns⁵⁵ and that “[n]o one can be deprived of his ownership except in the cases and in the manner provided for by law and in consideration for fair compensation payable in advance.”⁵⁶ Thus, true title does not pass with property (moveable or immoveable) not acquired lawfully or for less than fair compensation.

⁵² Cassandra LaRae-Perez, *Economic Sanctions As a Use of Force: Re-Evaluating the Legality of Sanctions From An Effects-Based Perspective*, 20 B.U. INT’L L.J. 161 (2002).

⁵³ See HUMAN RIGHTS WATCH, *CLAIMS IN CONFLICT: REVERSING ETHNIC CLEANSING IN NORTHERN IRAQ*, vol. 16, No. 4(E) (2004) [hereinafter *CLAIMS IN CONFLICT: REVERSING ETHNIC CLEANSING IN NORTHERN IRAQ*].

⁵⁴ See, e.g., *Watson v. Jones*, 80 U.S. 679 (1871) (noting that in the United States, for example,

if the General Assembly of the Presbyterian Church . . . at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up);

JOHN BELL ET AL., *PRINCIPLES OF FRENCH LAW* 45 (Oxford Univ. Press 1998) (noting that French civil courts—the *tribunal d’instance* and the *tribunal de grande instance*—are the proper forums for property disputes); Minh Day, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, A Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235 (2001) (noting that, in Rwanda, *gacaca* tribunals historically resolved disputes related to land use and rights, cattle, marriage, inheritance, loans and damages to property).

⁵⁵ See IRAQI CIVIL CODE, art. 1048 (1990 translation).

⁵⁶ *Id.* art. 1050.

A true owner whose immovable is demolished may leave the rubble to the offending party. Then, that true owner may claim from the offending party the value of the immovable and reparations for other injuries. The true owner also has the option to keep the immovable, claim reparation for other damages, and deduct the value of the immovable from the claim.⁵⁷

A true owner to whom property is returned may demand the removal or uprooting of and new constructions of plants at the cost of the offending person. If the removal would be injurious to the property, the owner has the option of acquiring the works for the cost of their removal.⁵⁸

The *Iraqi Civil Code* defines possession as “a material situation by which a person dominates (controls) directly or by an intermediary a thing which may be the subject of dealings...[or rights].”⁵⁹ The *Iraqi Civil Code* expressly states that

If possession has been coupled with coercion or was obtained secretly or if it contained confusion (was dubious) it shall not have an effect vis-à-vis the person who was the subject of coercion, or from whom possession has been concealed, or who has been confused in respect thereof except from the time these defects have ceased.⁶⁰

A person who is dispossessed of immovable property may file an action to have the property restored to him.⁶¹

Usurped or wrongfully taken property “must be restituted in kind to its owner at the place wherein it was usurped if it is existing.”⁶² In the case of moveable property, the owner of the property may even demand restitution of the property at a different place than the place where it was usurped, even if such a request requires moving of the property. In such cases, “the expense of moving it and the costs of providing for its restitution will be borne by the usurper which thing will be without prejudice to reparations for other injuries.”⁶³ If the usurper has destroyed or damaged the property, he or she is liable.⁶⁴

Specifically regarding immovable property, “the usurper is under an obligation to restore it to the owner together with comparable rent. The usurper shall be liable if the immovable has suffered damage or [if the property] has depreciated even without encroachment on his part.”⁶⁵

When calculating compensation, “the court will estimate the damages commensurately with the injury and the loss of gain sustained by the victim, provided that the [injury and loss of gain are] a natural result of the unlawful act.”⁶⁶

The right to compensation by the aggrieved party entails not only compensation for the economic loss caused by the offender, but also compensation for moral injury, defined by the *Iraqi Civil Code* as “any encroachment on the freedom, morality, honor, reputation, social standing, or financial position.”⁶⁷ Further, damages may be adjudged to third parties, including spouses and next of kin, who have suffered moral injury as a result of the offense.⁶⁸

⁵⁷ *Id.* art. 187.

⁵⁸ *Id.* arts. 1167, 1119.

⁵⁹ *Id.* art. 1145.

⁶⁰ *Id.* art. 1146.

⁶¹ *Id.* art. 1150.

⁶² *Id.* art. 192.

⁶³ *Id.* art. 193.

⁶⁴ *Id.*

⁶⁵ *Id.* art. 197.

⁶⁶ *Id.* art. 207.

⁶⁷ *Id.* art. 205.

⁶⁸ *See id.* arts. 204, 205.

Compensation may also be awarded for lost fruits and crops. Article 196 states the general rule that: “The accessories of the thing usurped are deemed to be usurped like it and the usurper shall be liable if they have perished even without encroachment on his part.”⁶⁹ Beyond this general rule of property law, the *Iraqi Civil Code* has an entire section devoted to “The Appropriation of Surpluses and Benefits and Recovery of Expenses.”⁷⁰ Under these provisions, a good faith possessor “will appropriate the surpluses he has received and the benefits he has collected during the time of his possession.”⁷¹ A bad faith possessor will be liable as of the time when he became of bad faith for all the fruits which he will receive and those which he failed to collect; however, he may obtain reimbursement of that which he has spent on producing the fruits.⁷²

Therefore, assuming a person who receives land in full knowledge that it was wrongfully appropriated by the Ba’athist regime is in bad faith, a person acquiring land containing a farm or orchard in bad faith would be liable to the true owner for the crops or fruits produced on that land. The true owner would only have to return the production costs.

On the other hand, assuming a person who receives land without knowledge that it was wrongfully appropriated by the Ba’athist regime is in good faith, that person would be able to keep any fruits or crops. This seems a fair way of approaching the matter as it does not punish the possessor who had no way of knowing his or her land was wrongfully taken.

The *Iraqi Civil Code* also notes that “[i]f the possessor is of bad faith, he shall be responsible for the perishing or deterioration of the thing even where the same has resulted from a fortuitous event unless he has proved the thing would have perished or deteriorated even if it had been kept in the hand of the person to whom it is due.”⁷³

When a court finds that an offending party owes damages, the court may determine the method of payment according to the particular circumstances. “[T]he damages may be payable in installments or as revenue in the form of a salary in which case the debtor may be required to provide a security.”⁷⁴ The court may also reduce the sum (or even refuse to order payment) if the injured party contributed to the situation, aggravated the injury, or took actions to worsen the debtor’s situation.⁷⁵

Being a complete system of law, the *Iraqi Civil Code* allows recovery for more than property-related issues. Article 202 of the *Iraqi Civil Code* states that “[e]very act which is injurious to persons such as murder, wounding, assault, or any other kind of inflicting injury entails payment of damages by the perpetrator.”⁷⁶ Therefore, Iraqi citizens would be entitled to remuneration from their torturers or other offending parties. It should be noted, however, that the article is broad enough to encompass a vast array of intentional harm—offering redress to Iraqi citizens who have been injured though not dispossessed of property.

Further, unlike the IPCC statute, the *Iraqi Civil Code* contains a sophisticated regime of law governing contracts and other obligations that could be invoked to address situations in which Iraqi citizens were duped or intimidated into signing contracts divesting themselves of property.⁷⁷ Like many civil codes based on the French model, the *Iraqi Civil Code* nullifies obligations if tainted by a vice of consent or defect of the will.⁷⁸ Accordingly, a contract is not valid if executed in mistake,⁷⁹ under duress,⁸⁰ or where a contracting party has made false representations.⁸¹ Like most modern civil codes, the *Iraqi Civil Code* contains provisions for *force majeure*⁸² and other exigencies.⁸³

⁶⁹ See *id.* art. 169.

⁷⁰ See *id.* arts. 1165 -1168.

⁷¹ *Id.* art. 1165.

⁷² *Id.* art. 1166

⁷³ *Id.* art. 1168.

⁷⁴ *Id.* art. 209(1).

⁷⁵ *Id.* art. 210.

⁷⁶ *Id.* art. 202.

⁷⁷ See *id.* arts. 115 and 121.

⁷⁸ See *id.* arts. 112-125.

⁷⁹ *Id.* art. 117.

⁸⁰ *Id.* art. 112.

Therefore, the *Iraqi Civil Code* is superior claims system. It not only has an advanced system of rules designed to address complex property disputes, but also addresses moveable and immoveable property and causes of action beyond confiscation of property. It permits recovery for a broad range of injury, allows recovery for damaged and confiscated property, and contains provisions that consider the good or bad faith of subsequent purchasers. Finally, it allows recovery of lost rent, lost fruits, emotional damages, and moral injury.

The Problem of Prescription

There are distinct and numerous disadvantages to the status quo. From a legal standpoint, the clock is ticking on prescriptive periods (or statutes of limitations.) The *Iraqi Civil Code* states that “[a] case shall not be heard in respect of an obligation whatever its cause . . . if it has not been claimed without lawful cause for a period of 15 years”⁸⁴ In the case of recurring rights, such as rent or income due to a possessor in bad faith, that period is shortened to five years.⁸⁵ In other cases, such as certain commercial exchanges, the prescriptive period is shortened even further to a period of one year.⁸⁶ Such legal limits could, in theory, bar certain actions within civil courts—especially for those acts which took place over fifteen years ago.

Fortunately, the *Iraqi Civil Code* tolls the running of prescription where there is an impediment rendering it impossible for the plaintiff to claim his or her right.⁸⁷ This rule reflects the civilian concept of *contra non valentem agere nulla currit praescriptio*, a Latin maxim meaning that prescription does not run against a party unable to act.⁸⁸ The IPCC statute, so long as it holds claimants in legal limbo, stands as a legal impediment that makes the bringing of a claim impossible. Likewise, an Iraqi civil court should have no hesitation in finding that the oppressive rule of a tyrant served as an impediment to aggrieved civilians filing suit. Accordingly, prescriptive periods should not pose a legal bar to actions by Iraqis who seek redress in civil courts.

The Law Held Hostage

In spite of its clear superiority, the remedies and advantages of the *Iraqi Civil Code* are currently not available to Iraq’s citizenry—at least not those within the IPCC’s jurisdiction. The IPCC statute clearly states that it has exclusive jurisdiction over all claims within its purview⁸⁹ and that its terms trump any law to the contrary.⁹⁰ As a result, no aggrieved Iraqi citizen with a claim cognizable under the IPCC statute may bring his or her claim in an Iraqi Civil Court. This is problematic, not only because the IPCC statute is legally inadequate, but because of an even greater problem: it does not function.

Human Rights Watch noted the following:

[A]s of the end of June 2004, twenty-two offices were reported to be operating and receiving claims. But other key steps had not been taken to implement the provisions of the IPCC statute. Judge Dara Nouredin, a member of the former IGC and head of its Legal Committee, expressed his frustration to Human Rights Watch about the slow pace of developments in this regard, saying that by March 2004 the CPA had not improved the implementing regulations. This belied the optimism expressed by CPA officials at the start of

⁸¹ *Id.* art. 121.

⁸² *Id.* art. 211.

⁸³ *Id.* arts. 212, 213, and 214.

⁸⁴ *Id.* art. 429.

⁸⁵ *Id.* art. 430.

⁸⁶ *Id.* art. 431.

⁸⁷ *Id.* art. 435.

⁸⁸ *See* Crier v. Whitecloud, 496 So. 2d 305 (La. 1986).

⁸⁹ CPA REG. NO. 12, *supra* note 26, Annex A, art. 11(C).

⁹⁰ *Id.* art. 12.

2004 that mechanisms for the receipt and assessment of property claims could begin as early as mid to late February in some areas.⁹¹

By September 2004, months after the dissolution of the CPA, the situation had not improved. *Agence-France Press* reported: “Iraq’s property claims commission for disputed land in oil-rich northern Iraq has failed to process a single claim, despite more than 167,400 Kurds re-settling in dozens of refugee camps since March alone”⁹²

Recent reports indicate that the existing structure is understaffed, plagued by bureaucratic bickering, and the object of skepticism.⁹³

Skepticism of the commission’s value can be found in high places. In an interview with IRIN, Kirkuk Governor Abdulrahman Mustafa said he believed it would not be able to solve the area’s property problem. Asserting that the waves of Arabisation were the result of a decree in Baghdad, he argued that “the only thing that will work is a new decree annulling the first one.”⁹⁴

An honest diagnosis was given by Major General John R.S. Batiste, Commander of the 1st Infantry Division: “The Property Claims Commission is not working.”⁹⁵

Iraq’s courts, however, are functioning. The CPA, during its existence, fostered effective and fair justice systems, rehabilitated each of Baghdad’s courthouses to the point of functionality, and rehabilitated the Iraqi Judicial College (the site of judicial training).⁹⁶ Ambassador L. Paul Bremer, former director of the Coalition Provisional Authority, noted as early as 9 October 2003 that, “[s]ix months ago there were no functioning courts in Iraq. Today nearly all of Iraq’s 400 courts are functioning. Today, for the first time in over a generation, the Iraqi judiciary is fully independent.”⁹⁷

Thus, in contrast to the IPCC, the Iraqi courts are currently working, giving them a distinct advantage when determining which entity is best suited to address important property claims. In spite of that advantage, however, the IPCC statute prohibits aggrieved Iraqis from availing themselves of their newly functioning court system. Their only recourse is to an inoperable entity.

Strategic Considerations

Thus far, this article has demonstrated the numerous disadvantages of the IPCC and the distinct advantages of relinquishing jurisdiction over such matters to the Iraqi civil courts. Such a decision would not only benefit individual Iraqis, but would also advance the goals of the Multinational Forces in Iraq—the clearly articulated goal of fostering competent legal administration.⁹⁸ That goal can only be hindered by depriving the civil judiciary of an enormous part of its natural

⁹¹ See CLAIMS IN CONFLICT: REVERSING ETHNIC CLEANSING IN NORTHERN IRAQ, *supra* note 53.

⁹² See *Iraqi Property Claims Commission Failing*, *supra* note 5.

⁹³ See Integrated Regional Information Networks - U.N. Office for the Coordination of Humanitarian Affairs, *Report on Iraq: Property Commission Sets to Work Amid Widespread Scepticism* (Sept. 30, 2004), at http://www.irinnews.org/report.asp?ReportID=43436&SelectRegion=Middle_East&SelectCountry=IRAQ.

⁹⁴ *Id.*

⁹⁵ CLAIMS IN CONFLICT: REVERSING ETHNIC CLEANSING IN NORTHERN IRAQ, *supra* note 53.

⁹⁶ See *An Historic Review of CPA Accomplishments*, available at http://www.cpa-iraq.org/pressreleases/20040628_historic_review_cpa.doc.

⁹⁷ See L. Paul Bremer, Press Conference (9 Oct. 2003) (transcript available at http://www.cpa-iraq.org/transcripts/20031009_Oct-09Bremerpresscon.htm).

⁹⁸ See Richard L. Armitage, Deputy Secretary of State, Remarks to the Iraqi Judiciary (Sept. 15, 2004), available at <http://usinfo.state.gov/dhr/Archive/2004/Sep/h16-299062.html> (noting:

Who better represents the hopes and the aspirations of the Iraqi people than the distinguished judges that sit here? As I mentioned, I’ve had the opportunity to spend quite a bit of time in Iraq lately, and I’ve come to understand several things. I understand that the hopes and the aspirations of those Iraqi people lie very much on your shoulders. And I have absolutely no doubt that you would not be here, you would not be following the profession you do, if you were not absolutely passionate about the law, if you were not absolutely passionate about bringing justice to all the Iraqi people. So when Prime Minister Allawi is talking about the future of Iraq, as far as I am concerned, he is talking about you. You know better than anyone how difficult a road this is going to be. And it’s a dangerous road. *But democracy, justice, and the rule of law demand our fullest efforts. And I can promise you with a 100-percent certainty that President Bush is not going to rest until this job done. He is not going to rest until the Iraqi judges are seated on the*

jurisdiction. As Francis Fukuyama, Professor of International Political Economy at the Paul H. Nitze School of Advanced International Studies, John Hopkins University, has noted, “what is most urgent for the majority of developing countries is to increase the basic strength of their state institutions to supply those core functions that only government can provide.”⁹⁹ By usurping the jurisdiction of ordinary courts, the IPCC statute instead deprives the civil judiciary of the opportunity to resolve important issues affecting the Iraqi citizenry—depriving them of a chance to demonstrate their skill, impartiality, and importance. The statute may indeed deprive Iraqi courts of their best chance to instill among Iraqi citizens much needed confidence in their institution.

The IPCC statute, however, does more than deprive the Iraqi courts of the advantages of resolving these highly visible disputes—it strips them of talent and ability. Iraq does not possess an unlimited supply of skilled jurists and administrators. The IPCC statute calls for the creation of an administrative structure consisting of numerous legal advisers, operational managers, auditors, and data managers.¹⁰⁰ The statute requires that judges be employed to staff the appellate division and regional commissions.¹⁰¹ Thus, talented and skilled legal professionals that would otherwise be working in the Iraqi legal system are diverted to staff the claims commission. As Fukuyama has noted, “Policymakers in the development field should at least swear the oath of doctors to ‘do no harm’ and not initiate programs that undermine or suck out institutional capacity in the name of building it.”¹⁰²

Depriving the civil courts of prestige and manpower can only hinder their development, thus undermining the long-term goal of the Multinational Forces in Iraq. This becomes even more apparent when considering that the IPCC, like any ad hoc entity, is ephemeral, because it is designed to address a unique issue rather than a broad class of problems. Therefore, even if the IPCC begins working in earnest, it will eventually cease to exist—whether by virtue of its complete success or its complete failure. The civil courts, however, will remain. Therefore, long-term interests of those seeking a stable Iraq with a functional, respected judiciary are best served by remitting to Iraqi civil courts the tasks and jurisdiction of the IPCC.

Conclusion

The IPCC, though born of noble motives, has been a failure in its implementation. The statute, poorly drafted, is completely inadequate for the purposes of addressing the kinds of claims the IPCC was designed to resolve. The IPCC’s apparent inadequacy is accentuated by the functional court system that adheres to a civil law system that has been called “one of the most innovative and meticulously systematic codes of the Middle East.”¹⁰³ It is a failed entity, standing out in stark relief against the background of a rejuvenated judiciary and “a code that balanced and merged elements of Islamic and French law in one of the most successful attempts to preserve the best of both legal systems.”¹⁰⁴

Already, millions of dollars have been given to this failed endeavor—millions better spent on further training the Iraqi civil judiciary or establishing a fund to provide compensation for those Iraqis who lost property over the past decades.¹⁰⁵ Given the history of failure and the obvious advantages of returning jurisdiction to the Iraqi civil courts, there is no need to

bench, making just and wise decisions for Iraqi people. And when that day comes, as far as I am concerned, the whole face of the Middle East will begin to change. (emphasis added)

See also Lieutenant Colonel Craig T. Trebilcock, Notes from the Field: *Legal Cultures Clash in Iraq*, ARMY LAW., Sept. 2004, at 48 (noting:

The situation . . . in southern Iraq was a landscape of smoldering and looted courthouses, . . . and a legal system that was broken from years of corruption and political influence. The arrest of looters and the physical repair of courthouses were concrete goals the Coalition accomplished over several months. Yet, the most serious challenge in returning justice to the Iraqi people remains the establishment of a judiciary that holds the interests of the Iraqi people foremost in its heart.)

⁹⁹ See FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY 42 (2004).

¹⁰⁰ CPA REG. NO. 12, *supra* note 26, Annex B, art. 4.

¹⁰¹ See *id.* arts. 7, 15.

¹⁰² See FUKUYAMA, *supra* note 99, at 42.

¹⁰³ Khaled Abou El Fadl, *Rebuilding the Law*, WALL ST. J., Apr. 21. 2003.

¹⁰⁴ *Id.*

¹⁰⁵ See CLAIMS IN CONFLICT: REVERSING ETHNIC CLEANSING IN NORTHERN IRAQ, *supra* note 53 (noting that “the Iraq Supplemental bill approved by the U.S. Congress for the post-war reconstruction program provided for \$35 million for property-related compensation claims, of which \$5 million was earmarked for administration costs.”).

continue down this path. Simply because the Coalition has begun the process is not reason enough to continue it. As Marlowe's Old Man advised Dr. Faustus: "Though thou hast now offended like a man, do not persevere in it like a devil."¹⁰⁶

¹⁰⁶ CHRISTOPHER MARLOWE, DOCTOR FAUSTUS sc. 12 (1593).

USALSA Report
U.S. Army Legal Services Agency

Trial Judiciary Note

Trial Judiciary Announces Publication of *Military Judges' Benchbooks* for Trials of Enemy Prisoners of War and Provost Courts

Against the backdrop of ongoing military operations in Iraq and Afghanistan, the U.S. Army Trial Judiciary recently published two *Military Judges' Benchbooks*, which are tailored for trials of enemy prisoners of war and civilians in occupied territories. The most extensive of these *Benchbooks* is *Department of the Army Pamphlet 27-9-1, Military Judges' Benchbook for Trial of Enemy Prisoners of War* (EPW Benchbook).¹ The other is *Department of the Army Pamphlet 27-9-2, Military Judges' Benchbook for Provost Courts* (Provost Court Benchbook).²

Both publications are companions to the original *Military Judges' Benchbook*³ and retain its basic format and many of its provisions. The new publications, however, go well beyond the original *Benchbook* by incorporating procedural requirements that are set forth in the Geneva Conventions relating to POWs⁴ and civilians.⁵ Additionally, the *EPW Benchbook* contains pattern instructions for law of war offenses⁶ and defenses.⁷ By contrast, the *Provost Court Benchbook* contains no instructions for offenses or defenses. Rather, it reserves Chapters 3 and 5 for substantive offenses and defenses that may be applicable in a particular occupied territory.⁸

Should the United States someday seek to prosecute EPWs or civilian internees, the *EPW* and *Provost Court Benchbooks* will, undoubtedly, play a preeminent role in such trials by navigating the military judge and counsel through a maze of unique legal requirements and complexities. Ultimately, they will help to ensure that an accused receives a fair trial and one that preserves his rights under the Geneva Conventions.

¹ U.S. DEP'T OF ARMY, PAM. 27-9-1, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK FOR TRIAL OF ENEMY PRISONERS OF WAR (4 Oct. 2004) [hereinafter EPW BENCHBOOK].

² U.S. DEP'T OF ARMY, PAM. 27-9-2, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK FOR PROVOSTS COURTS (4 Oct. 2004).

³ U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Apr. 2001).

⁴ Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC].

⁵ Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

⁶ See EPW BENCHBOOK, *supra* note 1, paras. 3A–D. The *EPW Benchbook* also contains all of the original *Benchbook's* instructions for Uniform Code of Military Justice offenses. See *id.* para. 3; see also UCMJ art. 2(9) (2002) (providing specifically that EPWs may be tried for post-capture UCMJ offenses, as well as those arising under law of war).

⁷ See EPW BENCHBOOK, *supra* note 1, para. 5-A. The *EPW Benchbook* also retains all defense instructions that are contained in the original *Benchbook*. See *id.* para. 5.

⁸ See GC IV, *supra* note 5, para. 64.

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

Id.

FOUNDING MOTHERS: THE WOMEN WHO RAISED OUR NATION¹

REVIEWED BY CAPTAIN ALYSSA M. SCHWENK²

*As this book is about the women who influenced the Founding Fathers, almost all of them are recognizable only because of the men in their lives.*³

I. Introduction

While many authors have attempted to persuade their readers that women should be given some credit for significant historical events in our nation's history, none have failed quite so miserably as Cokie Roberts. Though perhaps unintentionally, Roberts could not have stated the inescapable theme of this book any more succinctly than in the above quotation. In her book, the author suggests that Benjamin Franklin would have been a failure but for the wife from whom he was estranged for ten years⁴ and that Mercy Otis Warren almost single-handedly spawned the American Revolution after (amazingly) predicting it.⁵ The cites Roberts provides for her research are often cryptic and unhelpful in providing readers with the ability to decide for themselves whether her facts are accurate and her conclusions warranted (*e.g.*, she does not provide pinpoint cites).⁶ Indeed, Roberts takes her agenda to an extreme in this book, forcing significance upon every minute event that occurred in the lives of the women she wrote about. Her writing style is agonizing for the reader, as she inserts editorial comments after each set of facts asserted, rather than allowing the reader to come to his own conclusions based on the information presented.

Rather than choosing women from the Revolutionary time period whose accomplishments stood on their own, the author chose women whose husbands or sons were famous in an attempt to reconcile her chosen subject with her thesis. For example, why choose Deborah Franklin, Benjamin's wife, over her sister, Ann Smith Franklin, who ran a commercial printing business and, for a period of five years, wrote a series of almanacs printed by her business?⁷ "A new nation had been fought for, on the field of battle and in the forum of free debate, and it would survive. And its success was in no small part due to the efforts of the women."⁸ If, as the author posits, women had a significant role in founding this nation, why address only those who hold the status of wife or mother rather than demonstrating the women's status as revolutionaries? Why not establish that some of these women, and many others left unmentioned, were "Founding Mothers" regardless of their domestic circumstances? Certainly, it does not appear that the "Founding Fathers" were defined as such due to the fortune of being married to or borne by the right person.

II. Analysis

The author breaks the book into chronological chapters with no other apparent organization. Within each chapter, Roberts covers several women whom, she believes, are somehow significant. This significance, however, is not always clear, other than their role as wives, mothers, sisters, or daughters of great men. The book's opening quote could not establish this more succinctly. The fact that many of these women were part of the elite class and had a coterie of slaves and servants to help them accomplish their tasks detracts from many of their accomplishments from a modern standpoint. Regardless, several women are worth mentioning, either for their distinguished, unsung accomplishments or for their apparent lack thereof, despite the praises of the author. Unfortunately, many passages are worth noting simply for the infuriating, informal editorial comments of the author.

¹ COKIE ROBERTS, *FOUNDING MOTHERS: THE WOMEN WHO RAISED OUR NATION* (2004).

² Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

³ ROBERTS, *supra* note 1, at 279.

⁴ *See id.* at 36.

⁵ *See id.* at 53, 59-60.

⁶ *See id.* at 289-348; *see, e.g.*, JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* (2000) (providing an excellent example of a properly cited, well supported text).

⁷ COLUMBIA ENCYCLOPEDIA (6th ed. 2004), available at <http://www.encyclopedia.com/html/f/franklina1.asp>.

⁸ ROBERTS, *supra* note 1, at 277.

Eliza Lucas Pinckney

When you hear of a family with two brothers who fought heroically in the Revolutionary War, served their state in high office, and emerged as key figures in the new American nation, don't you immediately think, "They must have had a remarkable mother?" And so Charles Cotesworth Pinckney and Thomas Pinckney did. Today Eliza Lucas Pinckney would be the subject of talk-show gabfests and made-for-TV movies, a child prodigy turned into a celebrity. In the eighteenth century she was seen as just a considerate young woman performing her duty, with maybe a bit too much brain power for her own good.⁹

Thus begins the author's own "gabfest." She sets the overly familiar, often condescending tone from the beginning and never deviates from it. This proves to be incredibly distracting. While the facts she chooses to address could make a compelling argument that some of these women led interesting lives and were leaders in some sense, the ubiquitous tone repeatedly sours the delivery. Indeed, many passages are worthy of reading aloud, but only for the purpose of marveling at the outrageous colloquialisms and inciting a sense of general outrage from the listener.

Despite the delivery, the author established that Eliza Lucas was remarkable in that, at the age of sixteen, she took over the running of her father's three plantations in South Carolina. At the time, her father was off at war in Antigua, her mother was ill, and her brothers were attending school in England.¹⁰ Roberts writes, "Can you imagine a sixteen-year-old girl today being handed those responsibilities?"¹¹ When Eliza's father attempted to join her in marriage to various wealthy gentlemen, she gracefully declined.¹² "[T]he feisty Miss Lucas was, despite the workload, having too much fun to settle down with some *rich old coot*."¹³ Eventually, Eliza successfully created a cash crop out of indigo and silk.¹⁴ An "old biddy in the neighborhood,"¹⁵ however, became concerned that Eliza would never marry. "Some things never change—these older women worrying that the younger ones might be too serious for a man have been around forever."¹⁶ The "old biddy" need not have worried—Eliza married Charles Pinckney and became pregnant quickly thereafter. This, apparently, is the author's measure of success because she gave birth to Charles Cotesworth Pinckney and Thomas Pinckney—"[k]ey players in the move to independence."¹⁷

Esther Edwards Burr

In contrast to Eliza Pinckney's success as a mother, the next founding mother addressed by Roberts is Esther Edwards Burr, mother of Aaron Burr.¹⁸ Although Esther died when Aaron was two,¹⁹ and despite her son's notorious prosecution for treason, Roberts believes she deserves recognition and admiration as his mother.²⁰ A depressed woman and the wife of minister Aaron Burr,²¹ she left evidence of her life in the form of "a series of letters to her friend, Sarah Prince."²² In an

⁹ ROBERTS, *supra* note 1, at 1.

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *Id.* at 3.

¹³ *Id.* (emphasis added).

¹⁴ *Id.* at 5-7.

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ *See id.* at 6-11.

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 16.

²⁰ THOMAS FLEMING, DUEL: ALEXANDER HAMILTON, AARON BURR AND THE FUTURE OF AMERICA 389-93 (1999).

²¹ ROBERTS, *supra* note 1, at 17-18.

²² *Id.* at 16.

apparent attempt to lend more substance to the “gossipy writings”²³ Roberts characterizes the letters as a “journal.”²⁴ In the last journal entry before her death, Esther wrote about Aaron and his sister Sally:

Aaron is a little dirty noisy boy, very different from Sally almost in every thing. He begins to talk a little, is very sly and mischievous. He has more sprightliness than Sally and most say he is handsomer, but not so good-tempered. He is very resolute and requires a good governor to bring him to terms.²⁵

How this prescient observation makes Aaron’s mother a colonial woman who sufficiently distinguishes herself from others to deserve recognition is not apparent.

Deborah Read Franklin

Benjamin Franklin has come down in history not only as a scientist and statesman but as something of a rogue, a fellow with more than just an eye for the ladies. Much has been made of his relationships with women—a serious scholarly symposium exhaustively explored what Franklin thought of women in general, women in America, women in Europe, women friends, women family members. There’s a question left out of all of these studious inquiries: What about the women? What did they think?²⁶

In discussing Deborah Read Franklin, Roberts focuses on Benjamin Franklin’s indiscretions, giving passing mention to his many accomplishments. Franklin met Deborah Read and asked her to marry him when he was seventeen.²⁷ The wedding, however, did not take place as scheduled because Franklin went to England and “soon forgot about the teenager in Philadelphia when there was a whole new continent to conquer.”²⁸ Deborah’s mother arranged a marriage for her to another man, who eventually spent all of their money and went to the West Indies, where he is believed to have died.²⁹ When Franklin returned from England, Deborah was technically a married woman because her husband’s death was never confirmed.³⁰ Deborah and her mother, however, moved into a house with Franklin and his illegitimate son.³¹

Roberts posits that after Franklin “took to wife”³² Deborah, she “so greatly enhanced his prosperity that soon he paid off his debts.”³³ The author never explains or supports this premise. As Franklin rose in prominence, he spent more and more time in England taking on the “English equivalents of Deborah and Sally”³⁴ in London. A friend of Franklin’s in England wrote to Deborah warning her of Franklin’s indiscretions and advising her to go to London.³⁵ “Can you imagine? Now Deborah had to add *foxy females* to her list of worries.”³⁶

²³ *See id.*

²⁴ *Id.*

²⁵ *Id.* at 24.

²⁶ *Id.*

²⁷ *Id.* at 25.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 26.

³² *Id.* at 25.

³³ *Id.* at 26.

³⁴ *Id.* at 29. Deborah gave birth to Sally several years after “marrying” Franklin. *Id.* at 27.

³⁵ *Id.* at 29.

³⁶ *Id.* at 29 (emphasis added).

In 1765, Franklin left for London to take another assembly position and, after a ten year absence, Deborah passed away.³⁷ The author never explains how Deborah was the key to Franklin's success, yet gives her credit for his accomplishments throughout.³⁸

III. The Thesis and Its Modern Application

While Roberts's intent in writing this book may be honorable, her method of delivery fails. In attempting to distinguish these women as individuals and worthy of recognition, she only succeeded in pointing out that the sole thing they have in common is the men with whom they are associated. The author's aim of bringing more recognition to women's accomplishments would have been better served if she had chosen one or two of the truly remarkable women and covered their lives in more depth. She could have developed their upbringings, backgrounds, and their specific accomplishments, many of which would be considered substantial even by modern standards.

IV. Conclusion

This is a book which, "once you put it down, you can't pick it up."³⁹ Let the *Mothers* founder.⁴⁰

³⁷ *Id.* at 36.

³⁸ *Id.* at 26-29, 32-36. *But cf.* 9 ENCYCLOPAEDIA BRITANNICA 806 (1973) ("Deborah Franklin, although a good manager of her husband's affairs and devoted to her family, was far from his equal in intelligence or adaptability to social situations.").

³⁹ Lieutenant Colonel (Retired) H. Wayne Elliott, *Pass In Review: A Book Reviewer's View of Book Reviewing* 6 (undated) (unpublished manuscript, on file with the Director, Professional Writing Program, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia).

⁴⁰ *See generally id.* (stating that "if reading the book was as big a challenge as writing it must have been, there is no reason not to warn the unwary."). *See also* Posting of Jimmy Frank West to Amazon.com Book Reviews, *For In Style Readers Who've Yet to Graduate to People Mag* (June 23, 2004), at http://www.amazon.com/exec/obidos/tg/cm/member-glance/-/A3ER2NZ4O83ONY/1/ref=cm_cr_auth/102-4886613-6356957?%5Fencoding=UTF8 ("Trudging through page after page of facts from other books (usually better written ones), I kept attempting to think of another writer so committed to a grace-free style.") (last visited Nov. 23, 2004).

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, U.S. Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, please have the following information:

TJAGSA Code—181

Course Name—155th Contract Attorneys Course 5F-F10

Course Number—155th Contract Attorneys Course 5F-F10

Class Number—155th Contract Attorneys Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule (August 2004 - September 2006)

Course Title	Dates	ATRRS No.
GENERAL		
53d Graduate Course	16 August 04—25 May 05	5-27-C22
54th Graduate Course	15 August 05—25 May 06	5-27-C22
166th Basic Course	4—27 January 05 (Phase I—Ft. Lee)	5-27-C20
	28 January—8 April 05 (Phase II—TJAGSA)	5-27-C20
167th Basic Course	31 May—23 June 05 (Phase I—Ft. Lee)	5-27-C20
	24 June—1 September 05 (Phase II—TJAGSA)	5-27-C20
168th Basic Course	13 September—6 October 05 (Phase I—Ft. Lee)	5-27-C20
	7 October—15 December 05 (Phase II—TJAGSA)	5-27-C20
169th Basic Course	3—26 January 06 (Phase I—Ft. Lee)	5-27-C20
	27 January—7 April 06 (Phase II—TJAGSA)	5-27-C20
170th Basic Course	30 May—22 June (Phase I—Ft. Lee)	5-27-C20
	23 June—31 August	

	(Phase II—TJAGSA)	5-27-C20
171st Basic Course	12 September 06—TBD (Phase I—Ft. Lee)	5-27-C20
10th Speech Recognition Training	17—28 October 05	512-71DC4
16th Court Reporter Course	24 January—25 March 05	512-27DC5
17th Court Reporter Course	25 April—24 June 05	512-27DC5
18th Court Reporter Course	1 August—5 October 05	512-27DC5
19th Court Reporter Course	31 January—24 March 06	512-27DC5
20th Court Reporter Course	24 April—23 June 06	512-27DC5
21st Court Reporter Course	31 July—6 October 06	512-27DC5
6th Court Reporting Symposium	31 October—4 November 05	512-27DC6
186th Senior Officers Legal Orientation Course	28 March—1 April 05	5F-F1
187th Senior Officers Legal Orientation Course	13—17 June 05	5F-F1
188th Senior Officers Legal Orientation Course	12—16 September 05	5F-F1
189th Senior Officers Legal Orientation Course	14—18 November 05	5F-F1
190th Senior Officers Legal Orientation Course	30 January—3 February 06	5F-F1
191st Senior Officers Legal Orientation Course	27—31 March 06	5F-F1
192d Senior Officers Legal Orientation Course	12—16 June 06	5F-F1
193d Senior Officers Legal Orientation Course	11—15 September 06	5F-F1
12th RC General Officers Legal Orientation Course	25—27 January 06	5F-F3
35th Staff Judge Advocate Course	6—10 June 05	5F-F52
36th Staff Judge Advocate Course	5—9 June 06	5F-F52
8th Staff Judge Advocate Team Leadership Course	6—8 June 05	5F-F52S
9th Staff Judge Advocate Team Leadership Course	5—7 June 06	5F-F52S
2006 JAOAC (Phase II)	8—20 January 06	5F-F55
36th Methods of Instruction Course	31 May—3 June 05	5F-F70
37th Methods of Instruction Course	30 May—2 June 06	5F-F70
2005 JAG Annual CLE Workshop	3—7 October 05	5F-JAG
16th Legal Administrators Course	20—24 June 05	7A-270A1
17th Legal Administrators Course	19—23 June 06	7A-270A1
3d Paralegal SGM Training Symposium	6—10 December 2005	512-27D-50
16th Law for Paralegal NCOs Course	28 March—1 April 05	512-27D/20/30
17th Law for Paralegal NCOs Course	27—31 March 06	512-27D/20/30
16th Senior Paralegal NCO Management Course	13—17 June 05	512-27D/40/50
9th Chief Paralegal NCO Course	13—17 June 05	512-27D- CLNCO
3d 27D BNCOC	18 March—14 April 05	
4th 27D BNCOC	20 May—17 June 05	
5th 27D BNCOC	23 July—19 August 05	
6th 27D BNCOC	10 September—9 October 05	
2d 27D ANCOG	18 March—10 April 05	
3d 27D ANCOG	24 July—16 August 05	

4th 27D ANCOG	17 September—9 October 05	
12th JA Warrant Officer Basic Course	31 May—24 June 05	7A-270A0
13th JA Warrant Officer Basic Course	30 May—23 June 06	7A-270A0
JA Professional Recruiting Seminar	12—15 July 05	JARC-181
JA Professional Recruiting Seminar	11—14 July 06	JARC-181
6th JA Warrant Officer Advanced Course	11 July—5 August 05	7A-270A2
7th JA Warrant Officer Advanced Course	10 July—4 August 06	7A-270A2
ADMINISTRATIVE AND CIVIL LAW		
4th Advanced Federal Labor Relations Course	19—21 October 05	5F-F21
59th Federal Labor Relations Course	17—21 October 05	5F-F22
56th Legal Assistance Course (Family Law focus)	16—20 May 05	5F-F23
57th Legal Assistance Course (Estate Planning focus)	31 October—4 November 05	5F-F23
58th Legal Assistance Course (Family Law focus)	15—19 May 06	5F-F23
2005 USAREUR Legal Assistance CLE	17—21 October 05	5F-F23E
29th Admin Law for Military Installations Course	14—18 March 05	5F-F24
30th Admin Law for Military Installations Course	13—17 March 06	5F-F24
2005 USAREUR Administrative Law CLE	12—16 September 05	5F-F24E
2006 USAREUR Administrative Law CLE	11—14 September 06	5F-F24E
2005 Maxwell AFB Income Tax Course	12—16 December 05	5F-F28
2005 USAREUR Income Tax CLE	5—9 December 05	5F-F28E
2006 Hawaii Income Tax CLE	TBD	5F-F28H
2005 USAREUR Claims Course	28 November—2 December 05	5F-F26E
2006 PACOM Income Tax CLE	9—13 June 2006	5F-F28P
23d Federal Litigation Course	1—5 August 05	5F-F29
24th Federal Litigation Course	31 July—4 August 06	5F-F29
3d Ethics Counselors Course	18—22 April 05	5F-F202
4th Ethics Counselors Course	17—21 April 06	5F-F202
CONTRACT AND FISCAL LAW		
7th Advanced Contract Attorneys Course	20—24 March 06	5F-F103
154th Contract Attorneys Course	Not conducted	
155th Contract Attorneys Course	25 July—5 August 05	5F-F10
156th Contract Attorneys Course	24 July—4 August 06	5F-F10
5th Contract Litigation Course	21—25 March 05	5F-F102
7th Contract Litigation Course	20—24 March 06	5F-F102
2005 Government Contract & Fiscal Law Symposium	6—9 December 05	5F-F11

71st Fiscal Law Course	25—29 April 05	5F-F12
72d Fiscal Law Course	2—6 May 05	5F-F12
73d Fiscal Law Course	24—28 October 05	5F-F12
74th Fiscal Law Course	24—28 April 06	5F-F12
75th Fiscal Law Course	1—5 May 06	5F-F12
1st Operational Contracting Course	28 February—4 March 05	5F-F13
2d Operational Contracting Course	27 February—3 March 06	5F-F13
12th Comptrollers Accreditation Course (Hawaii)	26—30 January 04	5F-F14
13th Comptrollers Accreditation Course (Fort Monmouth)	14—17 June 04	5F-F14
7th Procurement Fraud Course	31 May —2 June 06	5F-F101
2005 USAREUR Contract & Fiscal Law CLE	29 March—1 April 05	5F-F15E
2006 USAREUR Contract & Fiscal Law CLE	28—31 March 06	5F-F15E
2005 Maxwell AFB Fiscal Law Course	7—10 February 05	
2006 Maxwell AFB Fiscal Law Course	6—9 February 06	
CRIMINAL LAW		
11th Military Justice Managers Course	22—26 August 05	5F-F31
12th Military Justice Managers Course	21—25 August 06	5F-F31
48th Military Judge Course	25 April—13 May 05	5F-F33
49th Military Judge Course	24 April—12 May 06	5F-F33
23d Criminal Law Advocacy Course	14—25 March 05	5F-F34
24th Criminal Law Advocacy Course	12—23 September 05	5F-F34
25th Criminal Law Advocacy Course	13—17 March 06	5F-F34
26th Criminal Law Advocacy Course	11—15 September 06	5F-F34
29th Criminal Law New Developments Course	14—17 November 05	5F-F35
2006 USAREUR Criminal Law CLE	9—13 January 06	5F-F35E
INTERNATIONAL AND OPERATIONAL LAW		
5th Domestic Operational Law Course	24—28 October 05	5F-F45
84th Law of War Course	11—15 July 05	5F-F42
85th Law of War Course	30 January—3 February 06	5F-F42
86th Law of War Course	10—14 July 06	5F-F42
43d Operational Law Course	28 February—11 March 05	5F-F47
44th Operational Law Course	8—19 August 05	5F-F47
45th Operational Law Course	27 February—10 March 06	5F-F47
46th Operational Law Course	7—18 August 06	5F-F47
2004 USAREUR Operational Law Course	29 November—2 December 05	5F-F47E

3. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990
- CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973
- CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747
- CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662
- ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900
- FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2005**, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2006 ("2006 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2006 JAOAC will be held in January 2006, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2005). If the student receives notice of the need to re-do any examination or exercise after 1 October 2005, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2005 will not be cleared to attend the 2006 JAOAC. If you have not received written notification of completion of Phase I of JAOAC,

you are not eligible to attend the resident phase.

If you have any additional questions, contact Lieutenant Colonel JT. Parker, telephone (434) 971-3357, or e-mail JT.Parker@hqda.army.mil.

5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

State	Local Official	CLE Requirements
Alabama**	Director of CLE AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515 http://www.alabar.org/	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Administrative Assistant State Bar of AZ 111 W. Monroe St., Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7328 http://www.azbar.org/AttorneyResources/mcle.asp	-Fifteen hours per year, three hours must be in legal ethics. -Reporting date: 15 September.
Arkansas	Secretary Arkansas CLE Board Supreme Court of AR 120 Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855 http://courts.state.ar.us/clerules/htm	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.
California*	Director Office of Certification The State Bar of CA 180 Howard Street San Francisco, CA 94102 (415) 538-2133 http://calbar.org	-Twenty-five hours over three years, four hours required in ethics, one hour required in substance abuse and emotional distress, one hour required in elimination of bias. -Reporting date/period: Group 1 (Last Name A-G) 1 Feb 01-31 Jan 04 and every thirty-six months thereafter) Group 2 (Last Name H-M) 1 Feb 00 - 31 Jan 03 and every thirty-six months thereafter) Group 3 (Last Name N-Z) 1 Feb 02 - 31 Jan 05 and every thirty-six months thereafter).

Colorado	<p>Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094 http://www.courts.state.co.us/cle/cle.htm</p>	<p>-Forty-five hours over three year period, seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.</p>
Delaware	<p>Executive Director Commission on CLE 200 W. 9th St., Ste. 300-B Wilmington, DE 19801 (302) 577-7040 http://courts.state.de.us/cle/rules.htm</p>	<p>-Twenty-four hours over two years including at least four hours in Enhanced Ethics. See website for specific requirements for newly admitted attorneys. -Reporting date: Period ends 31 December.</p>
Florida**	<p>Course Approval Specialist Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5842 http://www.flabar.org/newflabar/memberservices/certify/blse600.html</p>	<p>-Thirty hours over a three year period, five hours must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys, and out-of-state attorneys are exempt. -Reporting date: Every three years during month designated by the Bar.</p>
Georgia	<p>GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8712 http://www.gabar.org/ga_bar/frame7.htm</p>	<p>-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January.</p>
Idaho	<p>Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500 http://www.state.id.us/isb/mcle_rules.htm</p>	<p>-Thirty hours over a three year period, two hours must be in legal ethics. -Reporting date: 31 December. Every third year determined by year of admission.</p>

Indiana	<p>Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943 http://www.state.in.us/judiciary/courtrules/admiss.pdf</p>	<p>-Thirty-six hours over a three year period (minimum of six hours per year), of which three hours must be legal ethics over three years. -Reporting date: 31 December.</p>
Iowa	<p>Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076</p>	<p>-Fifteen hours per year, two hours in legal ethics every two years. -Reporting date: 1 March.</p>
Kansas	<p>Executive Director CLE Commission 400 S. Kansas Ave., Suite 202 Topeka, KS 66603 (785) 357-6510 http://www.ksclc.org</p>	<p>-Twelve hours per year, two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program, hours must be completed in compliance period 1 July to 30 June.</p>
Kentucky	<p>Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795 http://www.kybar.org/clerules.htm</p>	<p>-Twelve and one-half hours per year, two hours must be in legal ethics, mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.</p>
Louisiana**	<p>MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 619-0140 http://www.lsba.org/html/rule_XXX.html</p>	<p>-Fifteen hours per year, one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.</p>
Maine	<p>Administrative Director P.O. Box 527 August, ME 04332-1820 (207) 623-1121 http://www.mainebar.org/cle.html</p>	<p>-Eleven hours per year, at least one hour in the area of professional responsibility is recommended but not</p>

		required. -Members of the armed forces of the United States on active duty; unless they are practicing law in Maine. -Report date: July.
Minnesota	Director MN State Board of CLE 25 Constitution Ave., Ste. 110 St. Paul, MN 55155 (651) 297-7100 http://www.mbcle.state.mn.us/	-Forty-five hours over a three-year period, three hours must be in ethics, every three years and two hours in elimination of bias. -Reporting date: 30 August.
Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056 http://www.msbar.org/meet.html	-Twelve hours per year, one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.
Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128 http://www.mobar.org/mobaracle/index.htm	-Fifteen hours per year, three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5 http://www.montana.org	-Fifteen hours per year. -Reporting date: 1 March.
Nevada	Executive Director Board of CLE 295 Holcomb Ave., Ste. A Reno, NV 89502 (775) 329-4443 http://www.nvbar.org	-Twelve hours per year, two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.

New Hampshire**	<p>Asst to NH MCLE Board MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942, ext. 122 http://www.nhbar.org</p>	<p>-Twelve hours per year, two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute, six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 1 August.</p>
New Mexico	<p>Administrator of Court Regulated Programs P.O. Box 87125 Albuquerque, NM 87125 (505) 797-6056 http://www.nmbar.org/mclerules.htm</p>	<p>-Fifteen hours per year, one hour must be in legal ethics. -Reporting period: January 1 - December 31; due April 30.</p>
New York*	<p>Counsel The NY State Continuing Legal Education Board 25 Beaver Street, Floor 8 New York, NY 10004 (212) 428-2105 or 1-877-697-4353 http://www.courts.state.ny.us</p>	<p>-Newly admitted: sixteen credits each year over a two-year period following admission to the NY Bar, three credits in Ethics, six credits in Skills, seven credits in Professional Practice/Practice Management each year. -Experienced attorneys: Twelve credits in any category, if registering in 2000, twenty-four credits (four in Ethics) per biennial reporting period, if registering in 2001 and thereafter. -Full-time active members of the U.S. Armed Forces are exempt from compliance. -Reporting date: every two years within thirty days after the attorney's birthday.</p>

North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123 http://www.ncbar.org/CLE/MCLE.html	-Twelve hours per year including two hours in ethics/or professionalism; three hours block course every three years devoted to ethics/professionalism. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.
North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404 No web site available	-Forty-five hours over three year period, three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.
Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St., FL 35 Columbus, OH 43266-0419 (614) 644-5470 http://www.sconet.state.oh.us/	-Twenty-four hours every two years, including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
Oklahoma**	MCLE Administrator OK Bar Association P.O. Box 53036 Oklahoma City, OK 73152 (405) 416-7009 http://www.okbar.org/mcle/	-Twelve hours per year, one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.
Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 359 http://www.osbar.org/	-Forty-five hours over three year period, six hours must be in ethics. -Reporting date: Compliance report filed every three years, except new admittees and reinstated members - an initial one year period.

Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd., Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253 http://www.pacle.org/	-Twelve hours per year, including a minimum one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA may defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr. Group 2-31 Aug. Group 3-31 Dec.
Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942 http://www.courts.state.ri.us/	-Ten hours each year, two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.
South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578 http://www.commcle.org/	-Fourteen hours per year, at least two hours must be in legal ethics/professional responsibility. -Active duty military attorneys are exempt. -Reporting date: 15 January.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096 http://www.cletn.com/	-Fifteen hours per year, three hours must be in legal ethics/professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106 http://www.courts.state.tx.us/	-Fifteen hours per year, three hours must be in legal ethics. -Full-time law school faculty are exempt (except ethics requirement). -Reporting date: Last day of birth month each year.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Salt Lake City, UT 84111-3834 (801) 531-9095	-Twenty-four hours, plus three hours in legal ethics every two years. -Non-residents if not

	http://www.utahbar.org/	practicing in state. -Reporting date: 31 January.
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281 http://www.state.vt.us/courts/	-Twenty hours over two year period, two hours in ethics each reporting period. -Reporting date: 2 July.
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St., Ste. 1500 Richmond, VA 23219-2803 (804) 775-0577 http://www.vsb.org/	-Twelve hours per year, two hours must be in legal ethics. -Reporting date: 31 October.
Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL 4 Seattle, WA 98121-2330 (206) 733-5912 http://www.wsba.org/	-Forty-five hours over a three-year period, including six hours ethics. -Reporting date: 31 January.
West Virginia	MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992 http://www.wvbar.org/	-Twenty-four hours over two year period, three hours must be in legal ethics, office management, and/or substance abuse. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July.
Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Tenney Bldg., Suite 715 110 East Main Street Madison, WI 53703-3328 (608) 266-9760 http://www.courts.state.wi.us/	-Thirty hours over two year period, three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be received by 1 February.

Wyoming

CLE Program Director
WY State Board of CLE
WY State Bar
P.O. Box 109
Cheyenne, WY 82003-0109
(307) 632-9061
<http://www.wyoming.bar.org>

-Fifteen hours per
year, one hour in
ethics.
-Reporting date: 30
January.

* Military exempt (exemption must be declared with state).

**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005).

5 - 6 Mar 05	Washington, DC 10th LSO	Contract Law, Administrative and Civil Law	LTC Philip Luci, Jr. (703) 482-5041 pluci@cox.net
11 - 13 Mar 05	Columbus, OH 9th LSO	Criminal Law, International and Operational Law	1LT Matthew Lampke (614) 644-8392 MLampke@ag.state.oh.us
16 - 17 Apr 05	Ayer, MA 94th RRC	International and Operational Law, Administrative and Civil Law	SFC Daryl Jent (978) 784-3933 darly.jent@us.army.mil
23 - 24 Apr 05	Indianapolis, IN INARNG	Contract Law, Administrative and Civil Law	COL George Thompson (317) 247-3491 george.thompson@in.ngb.army.mil
14 - 15 May 05	Nashville, TN 81st RRC	Contract Law, Administrative and Civil Law	CPT Kenneth Biskner (205) 795-1511 kenneth.biskner@us.army.mil
14 - 15 May 05	Chicago (Oakbrook) IL 91st LSO	Administrative and Civil Law, International and Operational Law	CPT Frank W. Ierulli (309) 999-6316 Frank.ierulli@us.army.mil
20 - 22 May 05	Kansas City, MO 89th RRC	Criminal Law, Administrative and Civil Law, Claims	MAJ Anna Swallow (800) 892-7266, ext. 1228 (316) 681-1759, ext. 1228 lynette.boyle@us.army.mil

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army

JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGSA Publications Available Through the LAAWS XXI JAGCNet, see the September 2004 issue of *The Army Lawyer*.

4. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3314. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General’s School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

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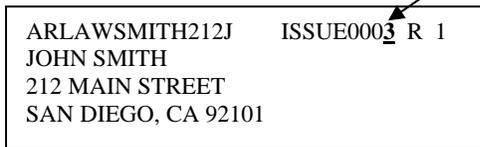
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U.S. Army
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