

Center for Law & Military Operations (CLAMO) Note from the Field

Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program¹

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Background

Foreign Claims Act⁸

Task Force All-American (TF 82) assumed military responsibility for the Al Anbar province of Iraq in September 2003. The task force is comprised of elements of the 82d Airborne Division, the 3d Armored Cavalry Regiment, and the 1st Brigade Combat Team of 1st Infantry Division.³ The unit's primary mission is to create and maintain a secure environment in support of the Coalition Provisional Authority (CPA).⁴ Although, on 1 May 2003, President Bush declared that "major combat operations in Iraq have ended,"⁵ TF 82 continues to execute many offensive combat operations as part of its mission. Nevertheless, stability operations remain a key focus as coalition forces in Iraq continually strive to win the hearts and minds of the Iraqi people. The legal team supporting TF 82 assists in stability operations by managing actions under the Foreign Claims Act (FCA)⁶ and the Commander's Emergency Response Program (CERP).⁷ Using these two tools, legal personnel here play a key role in the positive strides toward rebuilding Iraq.

Recently, a nationally televised news story on the war in Iraq featured a judge advocate (JA) from the 82d Airborne Division.⁹ In this story, the featured content was not legal advice regarding rules of engagement or even military justice, but the JA's role as a Foreign Claims Commission (FCC).¹⁰ This media interest in how the U.S. government compensates Iraqi civilians for non-battle harm reflects the growing importance of the Army's FCCs in stabilizing and rebuilding Iraq.

On 17 June 2003, the Department of Defense (DOD) Office of the General Counsel issued a memorandum assigning the U.S. Army single-service claims authority for Iraq.¹¹ Before this date, the U.S. Air Force had single-service claims authority. In Iraq, the U.S. Army administers nearly all claims using the FCA. The FCA establishes special requirements to settle "claims of inhabitants of a foreign country, or of a foreign country or a political subdivision thereof, against the United States for personal injury, death, or property damage caused by ser-

1. The author uses only unclassified portions of orders and fragmentation orders (FRAGOS) as citations for this article.
2. Captain Tackaberry is currently attached to the 82d Airborne Division and serves as the Chief, Claims, at the division headquarters in Ramadi, Iraq. This assignment serves as the resource for this article's background information.
3. See Headquarters, U.S. Central Command, *News Release, "Task Force All American" Update*, Jan. 2, 2004, available at <http://209.157.64.200/focus/f-news/1050266/posts> (last visited Jan. 9, 2004); Major General Charles H. Swannack, Jr., Commander, 82d Airborne Division, Letter from Commanding General, Dec. 2003, available at http://www.bragg.army.mil/www-82DV/frg/messages/letter_from_commanding_general.htm (last visited Jan. 9, 2004).
4. American Forces Press Service, *"Task Force All American" Continues Security Operations in Anbar*, Dec. 15, 2003, available at http://www.dod.mil/news/Dec2003/n12152003_200312153.html (last visited Jan. 9, 2004).
5. President George W. Bush, Address Aboard the USS *Abraham Lincoln* (May 1, 2003).
6. See 10 U.S.C. § 2734 (2000).
7. See Emergency Supplemental Appropriations for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209 (2003). The CERP is a program for commanders. Paragraph 3.D.8, however, states that "commanders will consult with their servicing Staff Judge Advocates and Finance Officers/Resource Managers for guidance on the implementation of this program within their command." *Id.* Within TF 82, the commanding general has delegated the operation of the CERP to the SJA and G8 while maintaining approval authority. Interview with Lieutenant Colonel Thomas Ayres, Staff Judge Advocate, 82d Airborne Division, in Ramadi, Iraq (Dec. 27, 2003) [hereinafter LTC Ayres Interview].
8. See 10 U.S.C. § 2734.
9. Interview by Christianne Ammanpour, CNN, with Captain Patrick Murphy, 82d Airborne Division in Baghdad, Iraq (Dec. 2003). Captain Murphy currently serves as the Trial Counsel for 325th Airborne Infantry Regiment, 2d Brigade, 82d Airborne Division. In Iraq, this unit serves in Baghdad under the direction of the 1st Armored Division.
10. *Id.*
11. Memorandum, Acting General Counsel, Department of Defense, to Secretary of the Army, subject: Claims Responsibility-Iraq (17 June 2003).

vice members or civilian employees, or claims that arise incident to noncombat activities of the Armed Forces.”¹² Under the FCA, the U.S. Army should follow “the law and custom of the country in which the incident occurred to determine which elements of damage are payable and which individuals are entitled to compensation.”¹³ Fortunately, Iraqi tort law follows the same basic principles as common law torts,¹⁴ and JAs can use their previous legal training to make determinations of liability.¹⁵

For TF 82, the pace of claims operations has been brisk—making prompt adjudication a high priority for legal personnel. Upon assuming duties in the Al Anbar province, TF 82 inherited nearly 600 open claims from the previous unit in the area for property damage or loss, and injury or death of local nationals. The one-week period ending 18 December 2003, alone, tallied 102 new claims filed within the province. To date, the number of claims filed within Al Anbar exceeds 2200. Of all claims, only thirty-eight exceeded the staff judge advocate’s FCC authority of \$15,000 for claims processed at the division level. Under the authority of the FCA, TF 82 has presently paid over \$290,000 and approved another \$50,000 for future payments.

To stream-line administration of claims in TF 82’s area of responsibility, a JA in each brigade is appointed as a one-person FCC, and investigates claims in his brigade’s area of responsibility. At the brigade level, the one-person FCCs have the authority to adjudicate and settle claims up to \$2500. Foreign Claims Commissions at the TF 82 headquarters can adjudicate claims up to \$15,000. Claims for amounts over \$15,000 are forwarded to Combined Joint Task Force 7 (CJTF-7) FCC for settlement.

Under TF 82, the staff judge advocate has attached two JAs to each brigade combat team (BCT). The geographic dispersion of the BCTs necessitated this arrangement to facilitate timely and competent legal advice on the wide variety of legal issues that confronted the BCTs. One JA functions as the brigade trial counsel, providing advice in the operational and discipline fields. The second JA serves as a FCC, completing administrative law tasks, and assisting all legal assistance clients within the BCT. The addition of a second JA, however, has markedly increased the BCT’s ability to provide services to the FCA claimants in its area.

Under TF 82’s organization, primary responsibility for intake of claims lies with the BCTs. For example, the JA at 1st BCT, (1st Brigade, 1st Infantry Division) presently intakes

claims at the Ar Ramadi courthouse three days each week, the 3d Armored Cavalry Regiment utilizes unit claims officers (UCOs) for intake of claims during operations, and the JA at the 3d Brigade (82d Airborne Division) intakes claims at the mayor’s office in downtown Fallujah and in the field when conducting operations. The TF 82 headquarters provides support and higher FCC authority for all BCTs. The headquarters also adjudicates any claims collected by Civil Affairs Teams operating under TF 82’s control, though the preference is for the BCTs to collect and adjudicate claims whenever possible.

Experience has demonstrated that interpreters play a vital role in claims administration. The interpreters embedded within the TF 82 headquarters and brigades translated all claims forms, correspondence to claimants, and settlement agreements, in both English and Arabic. An example is at appendix A. Besides creating forms in Arabic, interpreters translate interviews conducted and written claims submitted in Arabic. Additionally, the interpreters frequently obtain estimates of repair costs and fair market value for claims investigations by conversing with local nationals or other interpreters with the unit. Properly resourcing the interpreters increases their ability to perform this work. The TF 82’s use of interpreters created a need for software capable of word processing in Arabic. During pre-deployment mission analysis, units should attempt to determine the computer equipment and appropriate programs needed for word processing in both English and the local language(s). Sufficient manpower and equipment for translation greatly decreases the processing time for claims and increases understanding for all parties involved.

After claims are received and interpreted, the JA acting as a FCC must conduct an investigation and make several determinations before finally adjudicating the claim. The FCC is often obliged to deny claims submitted under the FCA because the claim arose out of combat activities. Pursuant to the FCA, *Army Regulation (AR) 27-20* states that FCA claims may not be paid when the loss arises from “those activities resulting directly or indirectly from action by the enemy, or by the U.S. Armed Forces engaged in armed conflict, or in immediate preparation for impending armed conflict.”¹⁶ Although major combat ended in May 2003, combat operations continue on a routine basis. Acting as FCCs, JAs must weigh the circumstances to determine whether the circumstances causing the damage claimed amount to “combat.” Currently, TF 82 FCCs begin the claims adjudication process with the rebuttable presumption that a combat operation occurs when coalition forces fire weapons. Use of this standard significantly simplifies and standardizes claims adjudication.

12. U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS para. 10-2a (1 July 2003) [hereinafter AR 27-20].

13. *Id.* para. 10-5a.

14. Rosemary E. Libera, *Divide, Conquer, and Pay: Civil Compensation for Wartime Damages*, 24 B.C. INT’L & COMP. L. REV. 291 (2001).

15. Additionally, the FCA provides specific exclusions outlined in *Army Regulation (AR) 27-20, paragraph 10-4*. AR 27-20, *supra* note 12, para. 10-4.

16. *Id.*; COMBINED JOINT TASK FORCE-7, STANDARD OPERATING PROCEDURES, FOR FOREIGN CLAIMS IN IRAQ para. 5b(1) (28 May 2003).

Similar to all claims, adjudication continues with substantiation of the loss, proof of ownership, and valuation of the loss. In many instances, discovering evidence sufficient to make these findings is the most challenging part of the FCC's investigation. Commonly, documentation of ownership for real and personal property is not available. Documentation is often lost, destroyed, or non-existent, as the last recorded owner was an ancestor of the claimant. Claims that TF 82 receive frequently include the loss of currency. In these circumstances, the FCC is faced with the near impossibility of verifying either the existence or amount of currency. Additionally, FCCs must contend with evidence of fraud and abuse that occasionally appears in some claims. For instance, claimants have submitted multiple separate claims with identical pictures for damage; some have also filed the same claim in several locations. Finally, and perhaps not surprisingly, the claimant's valuation of the loss frequently includes an overestimate of replacement or repair costs. Despite these obstacles, TF 82 FCCs have made progress in eliminating the backlog of claims and simplifying the process.

One novel approach TF 82 has taken to assist claimants involves enlisting the services of local Iraqi attorneys to prepare, submit, and assist with the intake of claims.¹⁷ For their legal services, the attorneys are compensated with CERP funds, discussed later in this article. The use of Iraqi attorneys can be beneficial to claimants, as claims submitted are more complete due to the training that the FCC provides to the attorneys. Several safeguards are employed to prevent abuse of this arrangement. To submit a claim, the attorney must have a written attorney-client agreement. The Army pays all claims directly to the claimant—any payment to an attorney is strictly a matter between the claimant and his attorney (the attorney usually

receives a contingency fee of ten percent for successful claims). If attorneys are found submitting fraudulent claims, they are barred from the program, and from submitting future claims. Unfortunately, the coalition caught some Iraqi attorneys attempting to block claimants from submitting claims without representation. These attorneys are barred from submitting any future claims.¹⁸

After adjudication, FCCs contact claimants, through interpreters, and meet to discuss the claim at the location where the claim was submitted. At this meeting, FCCs either deliver a notice of denial or pay the claim in U.S. dollars after claimants sign settlement agreements.¹⁹

Commander's Emergency Response Program²⁰

In many cases, claims cannot be paid under the FCA because of the combat activities exclusion or because the payment of the claim would be "based solely on compassionate grounds."²¹ In these cases, the CERP may provide another avenue to satisfy the claimant. The CERP²² creates financial means for commanders to take immediate action to impact recovery efforts and to enact economic initiatives to rebuild Iraq.²³ Initially, the coalition intended the CERP to provide coverage only when coalition national claims laws, such as the FCA, did not provide recovery for a claim. At that time, the CERP funds were comprised of seized Iraqi assets. Now, two additional forms of funding for the CERP exist. On 6 November 2003, Congress appropriated an amount of DOD operations and maintenance (O&M) funds for the CERP.²⁴ In the Emergency Supplemental Appropriations for Defense and for the Reconstruction of Iraq

17. LTC Ayres Interview, *supra* note 7. This program of using local attorneys is not required for claimants.

18. *Id.*

19. Currently, the 82d Airborne Division Finance Office is authorized to issue U.S. dollars rather than the local currency. With approval of the U.S. Army Claims Service, all claims are paid in U.S. dollars. This is contrary to *Department of the Army Pamphlet (DA Pam.) 27-162, Claims Procedures, paragraph 2-100*, which states the following:

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

U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 2-100o (8 Aug. 2003) [hereinafter DA PAM. 27-162].

20. See Emergency Supplemental Appropriations for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209 (2003).

21. AR 27-20, *supra* note 12, para. 10-4d.

22. Headquarters, Combined-Joint Task Force 7, Fragmentary Order 89 (Commander's Emergency Response Program (CERP), Formerly the Brigade Commanders' Discretionary Fund), to CJTF-7 OPOD 03-036 (19 June 2003) [hereinafter FRAGO 89] (on file with author).

23. See Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW, Feb. 2004, at 1 (providing a comprehensive analysis of CERP).

24. Emergency Supplemental Appropriations for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209 (2003).

and Afghanistan Act, Congress recognized that the CERP enables “military commanders in Iraq to respond to urgent humanitarian relief and reconstruction requirement . . . that immediately assist the Iraqi people.”²⁵ Additionally, the United Nations established the Developmental Fund for Iraq (DFI) to assist with reconstruction and recovery operations in Iraq.²⁶ The CJTF-7 has instituted specific limitations on the uses of either of the two types of funds.²⁷

The availability of the CERP funds provides commanders with the capability and flexibility to take immediate action to positively impact their area of responsibility.²⁸ Commanders can use the CERP for (1) reconstruction assistance;²⁹ (2) the CERP small rewards program;³⁰ or (3) compensation for economic loss due to death or serious bodily injury.³¹ The CERP funds also continue to pay otherwise meritorious claims that may not be paid under the FCA.

The primary use of CERP funds is “reconstruction assistance to the Iraqi people,”³² which is liberally defined as the “building, repair, reconstitution, and reestablishment of the social and material infrastructure of Iraq.”³³ Commanders *may* compensate for losses that coalition activities cause in its area of operations. This provides the ability to settle otherwise meritorious claims denied because of the FCA’s combat activities exclusion. This compensation, however, must not be used to benefit CJTF-7 forces³⁴ and must serve a primary purpose other than supporting individuals or businesses in a manner constituting a gift or similar unwarranted benefit.³⁵

There are some limits on the flexibility afforded to commanders. For instance, civil affairs units operating within Iraq assist commanders in determining which reconstruction assistance projects take priority. Likewise, legal personnel review proposed projects to ensure compliance with CERP limitations. Renovation and reconstruction of government buildings, schools, mosques, and water treatment facilities are examples of approved CERP projects. Authority was granted directly to commanders and project funds were allocated through C8/comptroller channels to provide greater capability and flexibility to take immediate actions. For reconstruction assistance, brigade commanders were given \$200,000 with an individual project limit of \$50,000 while division commanders received \$500,000 with individual project limits of \$100,000.³⁶ The Civil Affairs or Engineer teams generally identify and manage projects, but the JA does play a role. The JA must ensure that the projects are within the guidelines set forth in the various FRAGOs, as well as review contracts for the projects. The projects can range from installing a well for a small town to refurbishing a super phosphate plant costing millions of dollars.

Commanders may also use CERP funds to pay “rewards for information or other non-lethal assistance that leads to the capture of selected individuals, categories of weapons that appear on a list approved by U.S. Central Command, and documents related to weapons of mass destruction and terrorism.”³⁷ This program is distinct from any type of weapons buy-back program, which O&M funds have paid for in the past.³⁸ Under this program, battalion, brigade, and division commanders each

25. *Id.*

26. Headquarters, Combined-Joint Task Force 7, Fragmentary Order 1268 (CERP Program Update DFI, Appropriated and Seized), to CJTF-7 OPOD 03-036, para. 3.B.1. (22 Dec. 2003) [hereinafter FRAGO 1268] (on file with author).

27. Headquarters, 82d Airborne Division, Fragmentary Order 238 (CERP Program Update DFI, Appropriated and Seized), OPOD 03-12 (CHAMPION VICTORY), Annex A (on file with author). The types of funds available for each type of CERP expenditure are detailed in spreadsheet format. *Id.*

28. FRAGO 89, *supra* note 22, para. 3.B.

29. FRAGO 1268, *supra* note 26, para. 3.D.5.C. Seized and DFI CERP can not be used to repair collateral damaged caused by combat operations. To repair collateral damage caused by combat operations, units will use the CERP. *Id.*

30. *Id.* para. 3.D.5.B (explaining that only appropriated CERP funds will not be used to pay rewards). Only seized CERP or DFI CERP can be used to pay for rewards under the CERP. *Id.*

31. Memorandum, Staff Judge Advocate, Combined Joint Task Force Seven, to CJTF-7 C8 (COL Toner), subject: Use of Commander’s Emergency Response Program Funds to Promote Social and Economic Order (18 Dec. 2003) [hereinafter Use of Commander’s Emergency Response Program Funds to Promote Social and Economic Order Memo] (on file with author).

32. FRAGO 89, *supra* note 22, para. 3.B.4.

33. *Id.* para. 3.B.4.

34. *Id.* para. 3.D.3.A.

35. *Id.* para. 3.D.3.G.

36. *Id.* para. 3.B.

37. Headquarters, Combined-Joint Task Force 7, Fragmentary Order 250 (Amendment to the Commander’s Emergency Response Program (CERP) Formerly the Brigade Commander’s Discretionary Fund), OPOD 03-036, para. 3.B.

exercise authority for monetary awards. In recent experience, these awards have consistently increased. To pay monetary awards, battalion and brigade commanders make reward requests to the first general officer in the chain of command for approval. Judge advocates conduct legal reviews of the requests of all reward requests for the commander before approval.³⁹

Commanders may also use the CERP funds in cases of death or serious bodily harm.⁴⁰ This form of compensation for harm is distinct from solatia payments.⁴¹ The CERP payment compensates for economic losses such as the “loss of the ability of a family member to contribute to the welfare of the family whether in earning income to be used by the family or rendering household or other services for the benefit of the family.”⁴² This form of compensation is often paid when claims are denied under the FCA as a result of combat operations. For example, if a unit establishes a traffic control point (TCP) and uses small arms fire to engage a vehicle that fails to stop at the TCP, this incident will be considered a combat operation. If an innocent Iraqi civilian bystander is killed in the shooting, a claim filed by the family to compensate for the death may not be paid under the FCA because the death was not the result of “noncombat activity or a negligent or wrongful act or omission of soldiers or civilian employees of the U.S. Armed Forces.”⁴³ In this case, compensation may be paid under the CERP to “mitigate the adverse consequences of [Coalition] activities and promote social order and economic stability.”⁴⁴

In TF 82, these claims are usually paid under the CERP after an FCC denies the case as a FCA claim. For this reason, JAs are often the first service members with knowledge of the case and typically maintain responsibility for these CERP payments.

Judge advocates must look at each case carefully and work with many other sections to ensure these payments comply with the guidelines set forth in the CJTF-7 and 82d Airborne Division FRAGOs. Often it is not immediately clear if someone is an innocent bystander or is an active participant in anti-Coalition activity. Consequently, the JAs must sift through the fog of the battlefield to advise commanders whether to make a payment.

A common scenario at TF 82 occurs after a Coalition convoy is ambushed and the attackers flee to buildings or houses. When the Coalition soldiers return fire on the positively identified enemy in the building, the soldiers may kill or wound the enemy as well as other local nationals. This may also happen at TCPs as soldiers fire warning shots when vehicles fail to stop. This may cause death, injury, or property damage. Again, these situations are usually not within the scope of the FCA due to the combat activity exclusion. Investigations along with the JA’s advice, assist commanders to decide if payments are appropriate under the CERP. The main concern for both the CERP and the FCA is ensuring payments are not made to Iraqis conducting anti-Coalition activities.

Conclusion

Under the FCA and the CERP, the U.S. Army, primarily through The Judge Advocate General’s Corps, provides payments of U.S. dollars for claims made by many Iraqis. Ultimately, these programs show Iraqis that the Coalition cares about the well-being of the Iraqi people which should help in winning their hearts and minds. With their key jobs in administering the FCC and the CERP, legal personnel here play an important role in rebuilding Iraq.

38. *Id.* para. 3.B.1.

39. *Id.* paras. 3.C.1.D and 3.C.1.E.

40. Use of Commander’s Emergency Response Program Funds to Promote Social and Economic Order Memo, *supra* note 31, para. 3d.

41. Solatia payments are an expression of goodwill by the U.S. government. Under *DA Pam. 27-162*, “these payments are made from a unit’s operation and maintenance funds pursuant to directives established by the appropriate commander of the foreign jurisdiction.” *DA Pam. 27-162, supra* note 19, para. 13-13. Solatia payments have not been authorized for Iraq. Information Paper, CFLCC SJA, subject: Solatia Payments/Compensation for Iraqi Civilians Accidentally Injured/Killed by U.S. Forces during the War (4 Apr. 2003).

42. Use of Commander’s Emergency Response Program Funds to Promote Social and Economic Order Memo, *supra* note 31, para. 3d.

43. AR 27-20, *supra* note 12, para. 10-3a.

44. Use of Commander’s Emergency Response Program Funds to Promote Social and Economic Order Memo, *supra* note 31.