

## My Experience with the Rule-of-Law Mission in Iraq

By Albert Manwaring\*



Albert Manwaring is a Partner of Morris James LLP in Wilmington, Delaware, and concentrates his practice in corporate, securities, and commercial litigation. He is a Lieutenant Colonel in the Army Reserves, where he serves as the Chief, Training Coordination for the G-3/5/7 of the U.S. Army Reserve Legal Command in Gaithersburg, Maryland.

### I. Introduction

In the fall of 2009, I left my day job at Pepper Hamilton LLP and deployed to Iraq with my Army Reserve Civil Affairs Command. The civil service mission in Iraq was arguably the largest U.S.-led reconstruction effort since the Marshall plan that followed World War II. While I did not plan to be a part of this civil service effort, nor fully realize its effect on my family and law practice before my departure, my experience in Iraq with the rule-of-law mission was professionally rewarding. With my commercial law background, I am hopeful that I was able to add some value to this historic effort.

To prepare for deployment to Iraq, I spent the first three months training at Fort Dix, New Jersey. Although the change from the routine of my office was refreshing, my days at Fort Dix were long and physical. I had begun my military career with Army basic training at Fort Dix, and I often reflected how ironic it was that I was receiving this advanced soldier training some twenty years later, at the same place, near the end of my military career. I quickly realized—after hanging upside down in the seat of a military vehicle in the dark during roll-over training, and sparring with a burly soldier about half my age during hand-to-hand combat training—that war is a young man's game and, physically, I was way past my prime.

Upon arriving in Iraq, I was assigned to serve as a rule-of-law officer

in the Department of State's Office of Provincial Affairs (OPA), which was located in the U.S. Embassy, Baghdad. OPA managed provincial reconstruction teams (PRTs), which were located in sixteen of Iraq's Provinces and included members of the Department of State, the Department of Justice, USAID, civil affairs members of the military, and other federal agencies, all working together to improve Iraq's governance, economic, and rule-of-law sectors.

As an Army lawyer in OPA, I worked with attorneys on the reconstruction teams to support their rule-of-law practices in Iraq's Provinces. I helped obtain funding for their rule-of-law projects, coordinated their efforts with military rule-of-law attorneys, and provided oversight of their work plans. In support of these efforts, I traveled frequently in Iraq's Provinces with reconstruction team attorneys to meet with Iraqi judges and police, as well as prison, law school, and bar association representatives.

Although traveling outside of both the International Zone (formerly known as the Green Zone) in Baghdad and our military bases in Iraq's Provinces was, of course, more dangerous than working from my desk in the Embassy, interacting with Iraqi judges and lawyers was the most interesting and rewarding part of my job. To safeguard our movement, we traveled in armored military vehicles accompanied by substantial military security. Baghdad courts were always busy, and in that way, were not unlike my own New Castle County Courthouse, except for the part of combat soldiers, providing security with machine guns inside the court. Imagine walking into court personally armed and guarded by military security with machine guns. But, none of this military force seemed ever to faze the Iraqi judges, who waited patiently

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for me to disarm and remove my body armor before beginning our conferences with the customary drinking of tea. In my engagements with the Iraqis, they were cordial, cooperative, and receptive to our help. Indeed, the enthusiasm of young Iraqi lawyers for the practice of law and their desire for improvements to Iraq's rule of law was very promising.

My duties in the OPA also included providing resources to reconstruction team attorneys concerning the best rule-of-law practices. To preserve the knowledge, lessons, and history of our civil service effort in Iraq, the Department of State assembled a team that traveled to many of the reconstruction teams and military forces in Iraq's Provinces to collect the histories, lessons learned, and best practices of our civil service effort. I was a part of this team, and subsequently used the information collected to create a webpage, containing resources to support the U.S. rule-of-law community in Iraq.

Definitions of the rule-of-law are often worded in broad terms that provide minimal insight into the scope of the rule-of-law mission in Iraq. Defining a rule-of-law in terms of the six areas where our efforts were focused in Iraq is the most useful way to understand the rule-of-law mission. These six areas were colloquially referred to as courts, cops, corrections, corruption, commercial law, and community access to justice.

## II. Courts

The primary focus in this area of law was judicial security, which was critical to fostering an independent, functional judicial system in Iraq. The U.S. rule-of-law community pushed very hard at the highest level in the Iraqi government for all judges to have security personnel assigned to guard them, twenty-four hours a day, seven days a week. After much effort, we were also able to provide many judges with weapons and ballistic vests to protect themselves. Judicial security efforts also included x-ray machines for courthouses, and renovations to courthouse entrances to make them safer for the judiciary. Judicial security efforts were unfortunately

a work in progress. Many judges had no security when they left the courthouse, or if they had security, the personnel were often the judge's family or friends, who were untrained and unarmed.

## III. Cops

Iraq's criminal justice system relies on defendant confessions, which leaves opportunities for injustice. Therefore, many of our law enforcement efforts were focused on providing Iraqi judges, prosecutors, and police with training and equipment to collect and analyze forensic evidence, such as ballistics, fibers, and documents, and then to educate them on how to use this evidence to prosecute cases in Iraq's criminal courts. Nothing happens in Iraq without an Iraqi "buy in." Hence, many conferences were held to educate Iraqi judges, prosecutors, and police on the reliability and efficacy of forensic evidence to successfully prosecute criminal cases.

## IV. Corrections

The U.S. Department of Corrections has done a good job of training Iraqi corrections officers in prisons for convicted defendants, to ensure compliance with international corrections standards for security, housing, food, and medical care. But, the Iraqi pretrial detention facilities were often plagued by overcrowding. The U.S. rule-of-law community came to the conclusion, however, that merely building more prisons was not the answer, but rather, we needed to help the Iraqis increase efficiencies in the processing of criminal cases through their criminal justice system. We were hopeful that our on-going implementation of case tracking software and computers in Iraqi courthouses will allow for more efficient tracking of pretrial detainees, and expedite the prosecution of their criminal cases to alleviate overcrowding in Iraq's pretrial detention facilities.

## V. Corruption

In the area of anti-corruption, rule-of-law attorneys worked to train Iraqi

Commission of Integrity officials on sophisticated white collar crimes, such as money laundering, fraud, and other financial crimes. We also provided these officials with basic resources, such as vehicles, office furniture, and equipment to facilitate their investigation and prosecution of corruption.

## VI. Commercial Law

Due to the security situation in Iraq, criminal law efforts to prosecute insurgents have historically received most of the attention in the U.S. rule-of-law community. During my tour in 2010, civil or commercial law began to receive more attention as a key to fostering private investment to improve Iraq's economy. Because of my commercial law background, I had the opportunity to work with the U.S. Department of Commerce's Commercial Law Development Program. Many of the efforts were aimed at educating Iraqis to obtain their acceptance of the further development of commercial law in Iraq. For example, the Commercial Law Development Program sponsored educational programs on international arbitration under the New York Convention to address issues with the enforceability of civil judgments in Iraq, hydrocarbon legislation training, and programs to educate Ministry of Oil attorneys on key issues in petroleum licensing and exploration contracts with oil companies.

## VII. Community Access to Justice

This work included cooperation and outreach with law schools and bar associations—in Iraq and through partnerships between Iraqi and U.S. law schools—to develop an Iraqi law school curriculum, continuing legal education programs, and legal aid clinics for indigent criminal defendants.

## VIII. Conclusion

In sum, the rule-of-law effort is one of our greatest success stories in Iraq. While there are continuing challenges in judicial security, corruption, confession-based prosecutions, overcrowding

in prisons, and enforceability of civil judgments, the rule of law is one of the keys to Iraq's success, and there is much promise for the future of Iraq.

## CFPB Ability-to-Repay Rule...

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a "safe harbor" and a "rebuttable presumption," albeit using a much different approach than the FRB.

The 2013 ATR Final Rule includes a "safe harbor" for a covered transaction that meets the definition of "qualified mortgage" and is not a "higher-priced covered transaction," a definition that is substantially the same as the one applicable to a "higher-priced mortgage loan" in current Regulation Z.<sup>15</sup> The CFPB views covered transactions eligible for the "safe harbor" as being lower-priced, less risky "prime" loans. For any covered transaction that meets the definition of a "qualified mortgage" and is not a "higher-priced covered transaction," the creditor or assignee is deemed to comply with the ability-to-repay requirement (*i.e.*, will be conclusively presumed to have made a good faith and reasonable determination of the consumer's ability to repay), although the consumer could still contend that the covered transaction did not actually meet the criteria for a "qualified mortgage."

The 2013 ATR Final Rule also includes a "rebuttable presumption" standard for a covered transaction that meets the definition of "qualified mortgage" but that is a "higher-priced covered transaction." The CFPB considers "higher-priced covered transactions" to be "subprime" loans extended primarily to consumers with a weaker or less established credit history. For any covered transaction that meets the definition of a "qualified mortgage" but is a "higher-priced covered transaction," the creditor or assignee is merely presumed to comply with the ability-to-repay requirement. However, the 2013 ATR Final Rule sets forth limited grounds on which the presumption may be rebutted.

Rebutting this presumption for "higher-priced covered transactions" requires proof that the creditor did not make a good faith and reasonable determination of the consumer's ability to repay at the time of consummation; specifically, the consumer asserting a violation of Regulation Z must demonstrate that, at the time that the loan was originated,<sup>16</sup> the consumer's income, debt obligations, alimony, child support and monthly payments (including mortgage-related obligations) on the covered transaction and any simultaneous loans of which the creditor was aware at consummation left insufficient residual income or assets (other

than the value of the dwelling and any attached real property) to meet living expenses, including any recurring, material non-debt expenses of which the creditor was aware at consummation. Importantly, the CFPB indicated that a consumer is less likely to prevail in rebutting the presumption the longer that the consumer has made timely payments, without modification or accommodation, and, for adjustable rate mortgage loans, after recast.

### V. "Qualified Mortgage" Definition, Exemption, and Points and Fees Calculations

Under the 2013 ATR Final Rule, a "qualified mortgage" is a covered transaction that meets the following criteria:

- the covered transaction provides for regular periodic payments that are substantially equal (except for the effect of interest rate changes after consummation on adjustable-rate or step-rate mortgages), and that:
  - do not result in an increase of the principal balance (*e.g.*, no negative amortization loans);
  - do not allow the consumer to defer repayment of principal (*e.g.*, no interest-only or graduated payment loans);
  - do not result in a balloon payment (*i.e.*, a scheduled payment that is more than twice as large as the average of earlier scheduled payments), except that certain special criteria apply to a smaller creditor operating predominantly in rural or underserved areas;
- the covered transaction does not have a loan term in excess of thirty years;
- the covered transaction does not have total points and fees (including loan originator compensation<sup>17</sup>) in excess of three percent of the total loan amount for a loan equal to or greater

than \$100,000,<sup>18</sup> less up to two bona fide discount points if the interest rate without any discount does not exceed the average prime offer rate by more than one percentage point;

- the creditor underwrites the loan (taking into account the monthly payment for mortgage-related obligations) using: (1) the maximum interest rate that may apply during the first five years after the date on which the first regular periodic payment will be due; and (2) periodic payments of principal and interest that will repay either the loan amount (*i.e.*, the principal amount of the promissory note or loan contract, even if not fully disbursed at origination) over the loan term or the outstanding principal balance over the remaining loan term as of the date the interest rate adjusts to the maximum;
- the creditor considered and verified at or before consummation the consumer's current or reasonably expected income or assets (other than the value of the dwelling and any real property attached to the dwelling that secures the loan) and the consumer's current debt obligations, alimony and child support;<sup>19</sup> and
- the consumer's DTI ratio at consummation does not exceed forty-three percent, determined using the consumer's monthly payment<sup>20</sup> on the covered transaction (including any mortgage-related obligation) and on any simultaneous

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15. The term "higher-priced covered transaction" means "a covered transaction with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by 1.5 or more percentage points for a first-lien covered transaction, or by 3.5 or more percentage points for a subordinate-lien covered transaction."

16. The Official Interpretations to Regulation Z add the crucial qualifying language "based on the information available to the creditor" at this point, which modifies the entire concept.

17. This includes all compensation paid directly or indirectly by a consumer or a creditor to a loan originator that can be attributed to that transaction at the time the interest rate is set (regardless of when actually paid), which would exclude compensation based on long-term loan performance, base salary, etc.

18. Different tiers—either flat dollar amounts or percentages—apply for smaller loans: for a loan amount greater than or equal to \$60,000 but less than \$100,000, \$3,000; for a loan amount greater than or equal to \$20,000 but less than \$60,000, 5% of the total loan amount; for a loan amount greater than or equal to \$12,500 but less than \$20,000, \$1,000; and for a loan amount less than \$12,500, 8% of the loan amount. These amounts are indexed for inflation.

19. The 2013 ATR Final Rule adds an appendix, "Standards for Determining Monthly Debt and Income," which contains detailed procedures for the calculations.

20. For purposes of this requirement, the DTI calculation generally must be made in accordance with the aforementioned appendix, "Standards for Determining Monthly Debt and Income." However, the monthly payment for the covered transaction is calculated in the same manner as set forth elsewhere in the definition of "qualified mortgage" (*e.g.*, using the maximum interest rate that may apply during the first five years), and the monthly payment for any simultaneous loan is calculated in the same manner as set forth in the ability-to-repay requirement.