

An Investigation of Overtime Payments to FBI and Other Department of Justice Employees Deployed to Iraq and Afghanistan



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CHAPTER ONE INTRODUCTION

This report describes the results of an investigation by the Department of Justice's (Department or DOJ) Office of the Inspector General (OIG) into allegations that many FBI employees sent to Iraq received overtime pay in excess of the amounts permitted under federal pay statutes, federal regulations, and agency policies. Along with the OIG, the Federal Bureau of Investigation's (FBI) Inspection Division participated in this investigation into the conduct of FBI agents. In addition, the OIG investigated whether employees of other Department components, including the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the Drug Enforcement Administration (DEA), and the United States Marshals Service (USMS) also received overtime pay in excess of permissible amounts.

This investigation began in October 2007 when an FBI employee (who asked to remain anonymous) alleged to the OIG that FBI agents were paid for working 16 hours per day, 7 days per week (112 hours per week) while they were stationed in Iraq, regardless of the number of hours they actually worked. Based in part on a second complaint received by the OIG in February 2008, we expanded the investigation to include a limited examination of overtime practices by FBI employees in Afghanistan. The OIG further expanded its investigation when it learned that employees of ATF, DEA, and USMS working in Iraq or Afghanistan had also been claiming pay for as much as 16 hours per day, 7 days a week.

I. Methodology of the Investigation

The United States began the war in Afghanistan in October 2001 and the war in Iraq in March 2003. Since then, the FBI and other components of DOJ have deployed over 1,000 employees to Afghanistan and Iraq, mostly for tours of 3 months or less. According to the Department and its components, as of mid-2008 the following approximate numbers of employees have been deployed to these countries:

TABLE 1
DOJ COMPONENT DEPLOYMENTS
TO AFGHANISTAN AND IRAQ

<u>Component</u>	<u>Afghanistan</u>	<u>Iraq</u>
FBI	596	1,150
ATF	0	145
DEA	52	45
USMS	<10	84

In the course of this investigation, we interviewed over 60 FBI, DEA, ATF, USMS, DOJ, and U.S. Army employees. Because it was not feasible to interview all, or even a sizeable fraction of the employees who had served in Iraq from DOJ components, we interviewed at least one employee from each component who had worked in or was knowledgeable about each of the locations where employees from those components had been stationed in Iraq.

We also reviewed the time and attendance records submitted from early 2003 through October 2007 by every FBI employee who worked in Iraq. The OIG also reviewed similar records for employees from the other DOJ components.

In addition, we reviewed several hundred documents relating to the FBI employees' deployments in Iraq, including memoranda, e-mails, orders, "after-action reports" written by supervisors in Iraq, and questionnaires that some FBI employees filled out after returning to the United States. The OIG reviewed additional documents relevant to the other DOJ components that sent employees to Iraq.

We also reviewed the time and attendance records of FBI employees who worked in Afghanistan during fiscal year 2007 and other documents related to their deployments in Afghanistan. We also interviewed several FBI employees who had been deployed to Afghanistan or supervised employees there. The

DEA also sent employees to Afghanistan, and we examined documents and interviewed DEA supervisors about their time and attendance practices there.

In addition, we reviewed audits conducted by the FBI of FBI employee overtime in Iraq and Afghanistan for the first three quarters of 2008. The FBI conducted these audits after our investigation into these allegations began.

We also reviewed the federal laws, regulations, and policies that relate to time and attendance for FBI and the other components' employees. In addition, we consulted with the FBI Office of General Counsel regarding the applicability of these rules to FBI employees' claims for overtime pay in Iraq and Afghanistan.

II. Organization of the Report

This report is divided into 10 Chapters. In Chapter Two we provide background information regarding the types of "premium pay" that are available to FBI agents, and we summarize the laws, regulations, and policies governing overtime compensation for FBI employees. In Chapter Three we provide factual background regarding the FBI's mission in Iraq, including the number of employees who served in Iraq, their activities, and their living conditions.

Chapter Four describes the various memoranda, e-mails, and training materials issued by the FBI purporting to authorize overtime for employees in Iraq and the instructions and training provided to FBI employees regarding reporting their time while serving in Iraq.

Chapter Five presents the facts regarding the number of hours that FBI employees reported for pay purposes and the number of hours they actually worked. It also describes the concerns raised by some FBI employees regarding overtime claims in Iraq and the responses and positions of FBI managers regarding such claims. In Chapter Six we analyze whether the FBI's pay practices for employees in Iraq were consistent with federal pay statutes, federal pay regulations, and related FBI policies. We also assess the adequacy of the supervision and guidance provided to FBI employees in Iraq.

Chapter Seven reviews the FBI's mission in Afghanistan and examines issues relating to overtime claims that are similar to the issues raised with respect to Iraq.

Chapter Eight describes two additional policy documents that the FBI issued during the OIG's review for the purpose of correcting some of the problems uncovered during this review.

Chapter Nine examines ATF, DEA, and USMS missions to Iraq and Afghanistan and examines overtime pay practices in those DOJ components.

Chapter Ten sets forth our conclusions and recommendations.

III. Summary of Findings

FBI agents worked long hours under difficult conditions in Iraq. On certain days, some employees worked more than 16 hours. On occasion some worked more than 24 hours straight. On other days, employees worked significantly fewer than 16 hours. Due to the lack of accurate documentation or other evidence about the number of hours particular employees actually worked on each day, it is impossible to know the exact number of hours worked by any particular individual in Iraq on any particular day.

We found, however, that prior to 2008 FBI employees uniformly claimed overtime for working 16 hours per day for every day of their tours in Iraq. We concluded that this was not an accurate representation of the hours employees worked. We found that, on the whole, few if any employees in Iraq worked exactly 16 hours a day, every day for 90 days straight, within the meaning of the term “work” as it is used in applicable regulations and policies. Although some employees may have averaged 16 hours a day, we found that FBI employees often actually worked fewer hours than the 16 hours that they uniformly reported.

The FBI’s Counterterrorism Division (CTD) was primarily responsible for establishing and enforcing pay practices in Iraq for FBI employees. We found that, in an effort to maximize compensation for FBI employees who volunteered for Iraq duty, the CTD encouraged or condoned FBI employees’ practice of routinely reporting all waking activities in Iraq, up to 16 hours per day, every day, as “work” on their time and attendance forms.

CTD managers and FBI employees offered to us several justifications for this practice, including: (1) conditions in Iraq were harsh and there were few if any recreational opportunities during off-hours; (2) employees in Iraq were always in “on-call” status; and (3) 16 hours was a reasonable amount, representing an approximate average given that on some days some FBI employees worked around the clock, while on other days they worked fewer than 16 hours.

However, we concluded that the CTD’s administration of overtime pay violated applicable laws, regulations, and FBI policies. We found that the CTD permitted FBI employees to claim overtime for activities that are not compensable as “work,” such as eating meals, exercising more than 3 hours per week, and socializing. Moreover, while many FBI employees and

supervisors attempted to justify their claims on their time and attendance forms of 16 hours a day, 7 days a week by stating that even when they were not actually working they were on standby status in Iraq (being available for assignments but not actually working), federal pay regulations preclude paying agents overtime for such duty because they are already receiving “availability pay.”

We found additional problems with respect to payment of this overtime to FBI Special Agents. Special Agents are legally permitted to receive overtime pay only if the overtime is scheduled in writing in advance of the workweek, and only if they actually work the hours that were scheduled in advance. All other work hours must be compensated with credits for “availability hours,” effectively reducing the number of hours the agent has to work the rest of the year. Averaging hours to maximize overtime pay is not permitted by federal regulations.

In addition, we found that the CTD violated FBI policy when it shifted the regular workweeks for employees in Iraq from Monday through Friday to Sunday through Thursday in order to obtain additional pay for FBI employees. This switch had no practical impact because all employees were working 7-day weeks. However, changing the schedule of the “regular” workweek enabled FBI employees to claim a 25 percent pay differential for 8 hours of regularly scheduled “Sunday work.” As a result of this change, typical FBI employees in Iraq received approximately \$1,000 extra (depending on their base salary) over the course of their 3-month deployment in Iraq. Although FBI policy permits employees to switch workweeks for certain circumstances, we found that those circumstances did not exist in Iraq.

We also found that the FBI failed to adequately examine the hours reported by its employees. Until early 2008, the forms that FBI employees used to report the hours they worked were “certified,” or approved, by supervisors in the United States who had no personal knowledge of the hours their agents were actually working in Iraq. In November 2007, as a result of this investigation, the FBI changed this practice so that supervisors in Iraq are now required to approve the hours that are reported by FBI employees in Iraq.

We also found that prior to July 2008 CTD managers did not consult with the FBI’s Human Resources Division or its Office of General Counsel to determine whether the CTD’s overtime practices in Iraq were consistent with law, regulation, and FBI policy. As a result, the CTD provided incomplete and inaccurate guidance to FBI employees regarding the requirements for claiming overtime. This incomplete and inaccurate guidance even continued when the FBI issued additional guidance in March, July, and October, 2008, subsequent to the initiation of this investigation.

Moreover, we found that the FBI did not perform the financial and manpower analyses that are required before paying overtime under FBI policies.

We recognize that the FBI's failure to comply with applicable laws and its own policies in the early stages of the Iraq war was understandable to some extent due to the crisis atmosphere in a war zone. However, the FBI has had 5 years since the Iraq war began to establish lawful overtime procedures, and it failed to do so prior to the initiation of this investigation.

As discussed in Chapter Five, as a result of controls implemented in 2008 in response to the initiation of this investigation, FBI employees in Iraq are no longer claiming overtime based on a uniform 16-hour, 7-day schedule (124 hours of overtime per 2-week pay period). In 2008, employees reported working on average 106 hours per 2-week pay period, with corresponding cost savings to the FBI. However, we believe that FBI employees are still obtaining overtime hours that the law and FBI policy do not allow. As discussed below, we believe that the FBI should implement further controls and guidance to bring its policies and practices into full compliance with federal regulations.

Finally, based on a more limited review, we also found that similar problems affected FBI time and attendance practices in Afghanistan, as well as ATF, DEA, and USMS time and attendance practices for their employees deployed in Iraq and Afghanistan.

In Chapter Ten, we make several recommendations for the FBI and other DOJ components regarding their pay practices for employees deployed overseas. Among other things, we recommend that the FBI clarify its overtime guidance and that ATF, USMS, and DEA each issue a new guidance document governing premium pay for employees in Iraq and Afghanistan. In general, such policies should address the following issues:

- The components should instruct employees regarding what activities in Afghanistan and Iraq can be reported as “work” according to federal personnel regulations and Department policy. In particular, employees may not report mealtimes or commuting time as work unless certain very restrictive conditions are satisfied, and may not report time spent socializing. Agents also may not report time spent “standing by” as overtime hours.
- The components must establish individualized work schedules for employees that state the regular hours, availability pay hours, and scheduled overtime hours that the employees will be working on each day in the upcoming week. This schedule should correspond to the

actual work hours expected of the employees for the upcoming week being scheduled.

- Employees must submit accurate records of the hours they actually work on each day, without averaging time across days or weeks.
- According to federal pay statutes and regulations, components may pay overtime to agents only for hours that were scheduled in advance. If an agent works more hours than were scheduled in advance, the excess hours must be credited as availability pay hours and overtime pay may not be provided for these hours.
- If employees in Iraq and Afghanistan are normally scheduled for 7 days of work every week, the regular workweek should be Monday through Friday, and all hours scheduled for Saturday or Sunday should be compensated as overtime hours. Sunday pay should not be granted for overtime hours.

We also recommend that the FBI and DOJ components adopt procedures that will permit a complete and accurate accounting of the costs for all categories of premium pay that are provided to their employees serving in Iraq and Afghanistan.

CHAPTER TWO

BACKGROUND REGARDING PREMIUM PAY CATEGORIES AND TIME REPORTING PROCEDURES APPLICABLE TO FBI EMPLOYEES

In this chapter we provide background information regarding the categories of premium pay available to FBI employees. We also describe FBI procedures for reporting employees' time for compensation. In addition, we summarize relevant laws, regulations, and FBI policies specifically addressing overtime compensation for FBI employees.

I. Categories of Premium Pay

In addition to their regular salaries, FBI employees may qualify for various types of "premium" pay. The following categories of premium pay were awarded to almost all of the FBI employees who worked in Iraq:

- overtime for hours worked beyond the regular workday (paid as an hourly amount that for many employees is the same hourly rate as their regular salary but that for some lower-paid employees can be up to 50 percent higher than their regular hourly salary);¹
- night differential (an additional 10 percent above the employee's salary) for hours worked between 6:00 p.m. and 6:00 a.m.;²
- Sunday differential (25 percent above salary) for up to 8 hours of non-overtime work on Sundays if Sunday is a regularly scheduled work day within the employee's basic 5-day, 40-hour workweek;³
- post differential (up to 25 percent extra for the first 40 hours per week) for work in locations that differ substantially from conditions in the continental United States and that warrant additional pay as a recruitment and retention incentive;⁴
- danger pay (25 percent extra for the first 40 hours per week) for work on the basis of civil insurrection, civil war, terrorism, or wartime conditions

¹ 5 U.S.C. § 5542. Because federal law limits the maximum rate that can be paid for overtime, many employees in Iraq were paid no more than their basic hourly rate for overtime.

² 5 U.S.C. § 5545(a); 5 C.F.R. § 550.121.

³ 5 U.S.C. § 5546(a); 5 C.F.R. § 550.171.

⁴ 5 U.S.C. § 5925(a); *FBI Manual of Administrative Operations and Procedure*, (MAOP) Pt. 1 1.8-12(3). According to the FBI, this percentage increased from 25 percent to 35 percent beginning in March 2006.

which threaten physical harm or imminent danger to the health or well-being of the employee;⁵ and

- holiday pay (twice the employee's salary) for up to 8 hours of work on holidays, such as Christmas, if the holiday was a regularly-scheduled work day.⁶

In the United States, FBI employees can earn night and Sunday differentials, and many FBI employees stationed abroad earn post differential and danger pay. Few FBI Special Agents earn overtime – whether working in the United States or abroad – because the FBI has rarely approved it.

II. Procedures for Reporting Time

Until recently, all FBI employees completed and signed forms (known as “time and attendance” or “T & A” forms) every 2 weeks listing the hours they worked. Employees would also account for their hours by signing in and out on a daily basis, indicating their actual arrival and departure times. Each time and attendance form was signed by the employee's supervisor, certifying that the hours entered were actually worked. Payroll clerks then entered the information from the signed forms into a central payroll database.

Employees who were working for extended periods in locations other than their regular offices normally sent an e-mail to their payroll clerks stating the hours that they had worked each day during a 2-week pay period.

Recently, the FBI started using a new payroll system that allows employees to enter their time directly into a payroll database rather than using T & A forms and payroll clerks. The new system also no longer requires employees to sign in and out with daily arrival and departure times, but requires noting only the total daily hours worked.

III. Laws, Regulations, and Policies Governing Overtime Compensation for FBI Employees

In this section we summarize the relevant statutes, regulations, and FBI policies governing overtime compensation.

⁵ 5 U.S.C. § 5928. According to the FBI, this percentage increased from 25 percent to 35 percent beginning in March 2006.

⁶ 5 U.S.C. § 5546(b); 5 C.F.R. §550.103; 5 C.F.R. § 550.131(a).

A. General Principles

The Federal Employee Pay Act (FEPA) contains the general overtime provisions applicable to FBI agents and many FBI support employees. 5 U.S.C. § 5542(a).⁷ Implementing regulations provide guidance and contain additional requirements. Additional rules for FBI agents are set forth in the FBI's Manual of Administrative and Operational Procedures (MAOP). The particular rules regarding compensation for hours worked above 40 hours per week are different depending on whether the employee is a Special Agent or support personnel.

FBI Special Agents do not normally receive overtime pay. Instead, they are compensated for most or all of their overtime hours through "availability pay." Availability pay is a form of premium pay authorized under the FEPA for criminal investigators who routinely work unscheduled duty hours in excess of the basic 40 hour workweek. See 5 U.S.C. §§ 5542(d)(2) and 5545a; 5 C.F.R. § 550.181(a). It pays Special Agents a 25 percent premium above their basic pay rate. 5 U.S.C. § 5545a(h); 5 C.F.R. § 550.185(a). The purpose of availability pay is "to ensure the availability of criminal investigators for unscheduled duty in excess of a 40 hour workweek based on the needs of the employing agency." 5 U.S.C. § 5545a(b). Availability pay is paid to criminal investigators who work or are available to work an average of at least 2 extra hours each regular workday above the normal 8-hour schedule. 5 U.S.C. § 5545a(d).

Under the availability pay system, if Special Agents are required to work more than 50 hours during a particular week, they usually receive no additional pay. Instead, they get credit towards the average of the 2 extra availability pay hours per regular workday that they are required to work for the year, effectively reducing the number of hours they are required to work for the rest of the year. However, if overtime has been scheduled in advance – known as scheduled overtime – then Special Agents receive extra pay for the hours above 50 they work. 5 U.S.C. § 5542(d). Although the amount of extra pay agents receive varies depending on their pay level, most Special Agents receive their hourly basic pay rate for each hour of overtime. 5 U.S.C. § 5542(a)(4); MAOP, Pt. 1, § 8-2.1(3).

Support personnel, including all those who are not Special Agents, work 40-hour weeks and do not receive availability pay. Therefore, they are entitled to overtime for any hours they are required to work in excess of 40 hours per week.

⁷ The Fair Labor and Standards Act (FLSA), 29 U.S.C. § 201, contains additional provisions relating to overtime, but FBI agents and most FBI support employees who served in Iraq are exempt from the FLSA. See Manual of Administrative and Operational Procedures (MAOP) Pt. 1, § 8-2.1.

B. Requirements for Paying Scheduled Overtime

Federal law and FBI policies contain explicit requirements regarding when the FBI can pay overtime to its employees.

First, FEPA requires regularly scheduled overtime work to be “officially ordered or approved.” 5 U.S.C. § 5542(a). This requirement applies to both FBI Special Agents and most other FBI employees. The regulations require that the order or approval be memorialized “in writing by an officer or employee to whom this authority has been specifically delegated.” 5 C.F.R. § 550.111(c).⁸ The FBI’s MAOP requires that “[a]ll overtime work is to be approved and scheduled in writing by supervisors and managers granted such authority.” MAOP Pt. 1, § 8-2.1(8).

Second, there are restrictions on paying overtime to law enforcement agents who receive availability pay. Under both FEPA and its implementing regulations, FBI Special Agents may only be paid for overtime for “work that is scheduled in advance of the administrative workweek.” 5 U.S.C. § 5542(d); 5 C.F.R. § 550.112(f)(1). FBI agents may only be paid for scheduled overtime hours beyond the first 10 hours on a regularly scheduled workday (8 hours plus 2 hours for availability pay, usually on Monday through Friday), plus all scheduled overtime hours on off days such as Saturday or Sunday. *Id.*

The FBI’s MAOP imposes additional requirements for approving scheduled overtime for Special Agents who are paid availability pay. The scheduled overtime request must “contain an explanation of why the use of unscheduled work compensated by Availability Pay (AVP) and/or increased staffing to cover the required work assignment is insufficient.” The FBI’s Finance Division also must prepare a financial analysis that considers “the number of [Special Agents], the grades of the personnel to be assigned, the duty station of record of the personnel to be scheduled/assigned, and the expected duration of the assignment.” MAOP, Pt. 1, § 8-2.1.1.

In addition, the FBI is required to establish a written schedule that must be “communicated to the affected employee(s) in advance of the administrative workweek in which the overtime is to be performed.” MAOP, Pt. 1, § 8-

⁸ The writing requirement is not merely an administrative directive, but rather a substantive requirement. *Doe v. United States*, 372 F. 3d 1347, 1357-8. “[A] federal employee cannot recover overtime pay under FEPA without prior *written* authorization or approval of the overtime work. That the employing agency may have induced the employee to work overtime is not enough.” *Corrigan v. United States*, 68 Fed. Cl. 589, 596 (2005) (emphasis supplied), *citing*, *Doe*, 372 F. 3d at 1364. “The writing requirement also serves an important purpose of the statute – to control the government’s liability for overtime.” *Doe*, 372 F. 3d at 1361. Although *Doe* involved an overtime claim by DOJ attorneys, it has been applied to other federal employees. *Bishop v. United States*, 77 Fed. Cl. 470 (2007).

2.1.1(4)(b). If the FBI fails to prepare and present a written schedule, it is not allowed to pay overtime and instead is required to credit the Special Agent with availability pay time.⁹ Furthermore, if the agent works hours that are not part of his official written overtime schedule, he or she can be credited with availability pay hours but cannot be paid overtime. MAOP, Pt. 1, § 8-2.1.1 (7).¹⁰

The MAOP provides examples of the consequences of failing to provide a written overtime schedule. In one example, a Special Agent is asked on a Monday to perform 4 additional hours on Tuesday. Because the agent “was not scheduled for the additional hours in advance of the administrative workweek, the [agent] will not receive any scheduled overtime compensation. Instead, the entire period of extra duty on Tuesday will be credited as AVP hours.” MAOP, Pt. 1, § 8-2.1.1 (4).

Furthermore, the specific hours that have been scheduled ahead of time are the only hours that can be compensated as overtime. The MAOP gives the following example of this point. A Special Agent is given a written schedule calling for him to work overtime on certain days and times, but not on Tuesday. If the agent works an additional hour on Tuesday, because “the additional one hour was not scheduled in advance, the unscheduled hour cannot be claimed as overtime. The hour may be added to the two hours of AVP [availability pay] for a total of three hours of AVP.” MAOP, Pt. 1, § 8-2.1.1 (7).

In addition to the requirement for work schedules found in the MAOP, there is a more generally applicable federal regulation that requires agencies to establish work schedules for employees “in advance of the administrative workweek over periods of not less than 1 week.” 5 CFR § 610.121(a)(1).¹¹ The agency “shall schedule an employee’s regularly scheduled administrative workweek so that it corresponds with the employee’s actual work requirements.” 5 CFR § 610.121(b)(1). The agency is also under an obligation to reschedule an employee’s regularly scheduled workweek if it “knows in advance of an administrative workweek that the specific days and/or hours of

⁹ FBI policy states that “the schedule must be established and communicated in writing” to the Special Agents at the beginning of the workweek, “OTHERWISE, SA PERSONNEL WOULD NOT BE ELIGIBLE FOR COMPENSATION FOR ANY APPROVED SOT PERFORMED IN THE FOLLOWING SEVEN-DAY PERIOD.” MAOP, Pt. 1, § 8-2.1.1 (4)(b) (capitalization in original).

¹⁰ We are not aware of any regulation or policy that exempts service in Iraq or Afghanistan from these requirements.

¹¹ An exception exists where “the head of an agency determines that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased.” *Id.*

a day actually required of an employee in that administrative workweek will differ from those required in the current administrative workweek.” 5 CFR § 610.121(b)(2).

C. Work Activities Compensable with Overtime Pay

Both FEPA and its implementing regulations require overtime pay for excess “hours of work” but do not define that term. Instead, the regulations describe whether certain activities may be included when computing overtime work.¹² The FEPA regulations provide that an employee shall be paid for every minute of regular overtime work for “principal activities,” defined as “the activities that an employee is employed to perform.” 5 C.F.R. § 550.112(a). The regulation also permits compensation for certain “preshift” (preparatory) and “postshift” (concluding) activities if they are “indispensable to the performance of the principal activities.” 5 C.F.R. § 550.112(b).

1. Time spent standing by or in on-call status

Federal employees can be paid for time they spend standing by (waiting for work, but not actually working), only if:

for work-related reasons, the employee is restricted by official order to a designated post and is assigned to be in a state of readiness to perform work with limitations on the employee’s activities so substantial that the employee cannot use the time effectively for his or her own purposes.

5 C.F.R. § 550.112(k)(1). Employees do not get paid for standing by if “the restriction is a natural result of geographic isolation or the fact that the employee resides on the agency’s premises.” 5 C.F.R. § 550.112(k)(2). For example, the employee is not paid for waiting or stand-by time if the restriction is caused by his assignment to “a remote wildland area or on a ship.” *Id.*

Similarly, an employee who is off duty but in an “on-call status” does not get paid for work if the employee is allowed to leave a telephone number or

¹² Similarly the Fair Labor Standards Act (FLSA) contains no definition of work, but uses and defines the term “employ” to mean “to suffer or permit to work.” It also contains a partial definition of “hours worked” in the form of a limited exception for clothes-changing and wash-up time. The FLSA regulations define “hours of work” generally to mean “all time spent by an employee performing an activity for the benefit of an agency and under the control of direction of the agency.” 5 C.F.R. 551.104. The regulations caution that whether “time is credited as hours of work is determined by considering many factors,” including various other regulations, provisions of law, Comptroller General decisions, OPM policy guidance, and agency policy and regulations. *Id.*

carry an “electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius.” 5 C.F.R. § 550.112(l)(1).

Although standby pay is highly restricted for non-agent employees, as discussed above, it is essentially prohibited for agents. As noted above, criminal investigators such as FBI agents receive availability pay in part for the purpose of ensuring their availability for unscheduled duty based on the needs of the agency. 5 U.S.C. § 5545(d). Thus, availability pay for agents serves the same purpose of standby pay for other employees. Federal regulations accordingly preclude the payment of “standby duty pay” to criminal investigators receiving availability pay. 5 C.F.R. § 550.186. Other FBI employees may receive standby pay depending on the degree to which their activities are restricted.

2. Time spent sleeping and eating

In general, federal employees are not paid for “time available for, or spent, sleeping and eating . . . even where the employee is required to be on the employer's premises, [unless] substantial labor is performed in the time set aside for sleeping and eating” or unless the sleeping or eating is “interrupted by a call to duty.” 5 C.F.R. § 550.112(m)(1).¹³ Federal employees are not paid for sleep time, even if it is disrupted.¹⁴

FBI policy allows employees to take a lunch break, but the FBI does not pay them for that time. MAOP, Pt. 1, § 20-22(1) and Part 2, § 1-2.4.1.¹⁵ The policy makes no distinction between domestic and overseas lunch breaks. The FBI has no specific policy about sleep time.

¹³ See also *Rapp v. United States*, 340 F.2d 635, 642-643 (Ct.Cl. 1964), *implied overruling on other grounds recognized by*, *Doe*, 372 F.3d 1347; See also *Armstrong v. United States*, 144 Ct.Cl. 659 (1959) (sleeping and eating time are not “hours of employment” and thus not compensable overtime where employees “were very rarely interrupted in their normal sleeping and eating time,” as “these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not . . .”).

¹⁴ See *Rapp*, 340 F.2d 635, 643 (“The fact that plaintiffs’ sleep may have been broken occasionally by the clattering of the communication equipment would not prevent the deduction of sleeping time” from the overtime hours claimed), *citing*, *Avary v. United States*, 141 Ct. Cl. 577, 579 (1958) (plaintiffs’ claim for overtime on the grounds that “their sleep was broken by the noise of trains and airplanes, is untenable.”)

¹⁵ See also MAOP, Pt. 1, § 8-2.1.1(7).

3. Time spent working out

The FBI's MAOP allows Special Agents to be paid for three 1-hour exercise periods a week. MAOP, Pt. 1, 24-7. However, it explicitly states that overtime cannot be paid for exercise periods. MAOP, Pt. 1, 24-7(2). Therefore, paid exercise must take place during regular work hours.

4. Time spent commuting

Generally, federal employees are not paid for the time spent commuting from home to work. FEPA provides that "time spent in a travel status away from the official-duty station of an employee is not hours of employment" compensable as overtime unless certain limited conditions are satisfied. 5 U.S.C. §5542(b)(2).¹⁶ *Barth v. United States*, 568 F.2d 1329, 1331 (Ct. Cl. 1978) held that this provision of FEPA codifies the principle that "travel which has no purpose other than to transport an employee to and from the place where he is to perform his duties is not work and is not compensable as overtime" (citations omitted). *Mossbauer v. United States*, 541 F. 2d 823, 825 (9th Cir. 1976), applied this principle to an employee who was required to live in government quarters away from home during the workweek in order to facilitate his presence at a remote worksite. The court held that "[i]f [the employee's] travel from his quarters is analogous to a suburban dweller's daily commuting, the time spent in such travel is not includable in [the employee's] 'hours of employment.'" (Footnote and citations omitted.)

The FBI's MAOP states that "normal travel to and from work is not compensable." MAOP, Pt. 1, § 8-2.1(4)(c). The MAOP also forbids Special Agents from receiving availability pay credit for time commuting to and from the "place of business," even if the Special Agent is driving a government vehicle. MAOP Pt. 1, § 8-1.8.

D. Changing the Regular Workweek

Although most FBI employees have a basic workweek from Monday through Friday, the FBI functions 7 days a week and therefore requires some employees to work a different basic shift, which may include Sunday. Under 5 C.F.R. §§ 550.103 and 550.171, such employees are entitled to a 25 percent

¹⁶ Under the statutory exceptions, time spent in a travel status is compensable if the travel: (1) is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; (2) involves the performance of actual work while traveling; (3) is incident to travel that involves the performance of work; (4) is carried out under arduous conditions; or (5) results from an event which could not be scheduled or controlled administratively. 5 U.S.C. § 5542(b)(2). The FEPA regulations likewise provide that "travel from home to work and vice versa is not hours of work." 5 C.F.R. § 550.112(j)."

premium for up to 8 scheduled non-overtime hours worked on Sunday. However, if the employee's basic workweek is changed solely at the request of and for the benefit of the employee, then the employee does not qualify for extra Sunday pay. MAOP, Part I, § 20-8(2).

CHAPTER THREE BACKGROUND ON THE FBI IN IRAQ

I. Deployments to Iraq

According to FBI officials and documents we reviewed, the FBI started deploying its employees to Iraq in March 2003 to collect and analyze information that could help protect against terrorist threats in the United States and against U.S. personnel or interests overseas. FBI officials and documents stated that by sending its employees to Iraq, the FBI could obtain important information faster, avoiding the need to wait for information to flow through the military and other agencies before reaching the FBI. The FBI also attempted to prevent terrorist acts within Iraq by, among other means, processing bomb and other crime scenes in Iraq and by working with Iraqi police officers to investigate Iraqi crimes. In addition, the FBI helped investigate Saddam Hussein and his associates for crimes against the Iraqi people.

Initially, the FBI sent 34 employees to Iraq for deployments varying in duration. Subsequently, the FBI adopted a standard deployment period of 3 months. From March 2003 to July 2008, the FBI had sent a total of approximately 1,150 employees to Iraq, some of whom served multiple deployments.

All of these FBI employees volunteered to serve in Iraq. Generally, they came from FBI field offices located throughout the United States.

II. Employee Assignments

Jobs assigned to FBI employees in Iraq changed over time in response to changing conditions, but generally fell into one of three categories: interrogations, task forces, or training.

A. Interrogations

A substantial number of FBI employees interrogated detainees held at various detention facilities in Iraq. Initially, the interrogations were mostly at the Abu Ghraib prison not far from Baghdad. Over time, the sites for interrogations changed. Currently, the majority of FBI interrogations take place at a military facility north of Baghdad and at another facility within the borders of the Baghdad International Airport (BIAP).

B. Task Forces

Another large group of FBI employees worked on one of several task forces in Iraq. The major task forces included:

- The **Regime Crimes Liaison Office (RCLO) Task Force**, which was responsible for finding and assembling the evidence necessary to try Saddam Hussein and his associates. Most of the FBI employees assigned to the RCLO lived in Baghdad, where they interviewed witnesses and assembled evidence. A few of them lived in Doha, Qatar (about 400 miles south of Iraq), where they were responsible for, among other things, finding relevant documents among the millions of records recovered from Iraqi government offices following the fall of Saddam's government and stored in Doha.
- The **Major Crimes Task Force (MCTF)**, which provided training, mentoring, and investigative assistance to a select group of Iraq police responsible for ongoing criminal investigations, including major kidnappings and other crimes.
- The **Law and Order Task Force (LAOTF)**, which trained Iraqi prosecutors, judges, and police officers to institute a fair system of justice.
- The **Hostage Working Group (HWG)**, which investigated kidnappings, generally of American citizens in Iraq.
- The **Combined Explosives Exploitation Cell (CEXC)**, which investigated and attempted to prevent bombings.

C. Training

A smaller group of FBI employees taught a variety of courses to Iraqi police on subjects ranging from investigating kidnappings to running a counterterrorism operation.¹⁷ The FBI trainers generally stayed in Iraq for the duration of the courses (typically a few weeks) rather than for 90 days. These employees were coordinated by the FBI's International Training Assistance Unit (ITAU) rather than CTD.

¹⁷ The general training missions differed from the MCTF and LAOTF missions. The employees working on the MCTF and LAOTF provided training to Iraqi counterparts and also worked in the field with the Iraqis on pending cases. The trainers did not work on cases but instead focused exclusively on providing classroom instruction to Iraqi law enforcement officers.

D. Number of Employees

The number of employees assigned to each type of job tended to change with time. Approximately 30 to 40 employees at a time were assigned to interrogations and related tasks through most of 2007. The number of employees assigned to the task forces varied even more. For example, in the spring and early summer of 2005, when prosecutors were busy preparing for the Saddam Hussein trials, 13 FBI employees in Baghdad were assigned to the RCLO. In contrast, by early 2007 when the trials were further along, nine FBI employees were assigned to RCLO, and by the spring and early summer of 2007 there were none. As various task forces were created, emphasized, or deemphasized over the years, there were numerous changes in both the number of FBI employees assigned and the tasks that were delegated to them. The number of trainers also varied widely. At times, there were no trainers in Iraq; at other times, there were as many as eight.

E. Extra Assignments

In addition to work on their main assignments, many FBI employees were given extra assignments, such as maintaining the building they lived in, getting gas for vehicles, and providing security. For example, the FBI's Baghdad Operations Center was an older, deteriorating building that required constant attention. At the Baghdad Operations Center, one of the extra jobs involved escorting the sewage trucks that periodically emptied the sewage holding tank outside the building. Another extra job involved escorting the various repairmen who came to repair one or more problems that arose inside the building. Security needs also required FBI employees to answer telephones, monitor closed-circuit TV monitors, and generally maintain communications either for a 12-hour overnight shift or a 12-hour daytime shift. Although witnesses said they did not remember how often they had been assigned these additional security duties, two schedules that we saw showed employees scheduled to either a daytime or overnight shift about three times over a 6-week period.

III. Living Arrangements for FBI Employees in Iraq

Although the locations and conditions within them changed over time, most FBI employees in Iraq lived in the Green (or International) Zone in Baghdad, the Baghdad International Airport (BIAP), or various other military bases. In addition, a few FBI employees lived in Doha.

A. Green Zone

The Green Zone is a large gated neighborhood in the middle of Baghdad that was formerly Saddam Hussein's private compound but since 2003 has

been used in part by the U.S. government for its operations. Within the Green Zone is a building known as the Baghdad Operations Center, which is used exclusively by the FBI. Most FBI employees stationed in the Green Zone worked in the Baghdad Operations Center, which has office space, small sleeping rooms, a communications room, a small kitchen, a small workout room, and basic laundry facilities. Other employees did most or all of their work at other buildings within the Green Zone, such as the U.S. Embassy, which is a few minutes away by car.

When FBI employees were not working, there were few opportunities for recreation. The Baghdad Operations Center had a few small televisions that could play DVDs, and there was a larger TV-DVD at a building near the Baghdad Operations Center that was periodically used for movies. The Green Zone also contained a cafeteria, a post exchange (PX), a gymnasium (separate from the workout room at the Baghdad Operations Center), and a pool, all of which were used at various times by FBI employees. To get to each of these other facilities, employees generally used one of several cars available at the Baghdad Operations Center.

B. Baghdad International Airport (BIAP)

The BIAP is a large, gated complex that includes not only the Baghdad airport but also several military facilities. Initially, the employees stationed at the BIAP lived in tents, but later they generally slept in a building or trailers located within a military facility. Showers and bathrooms were located in other nearby trailers.

Many of those living at the military facility commuted daily to work, generally to one or more nearby military facilities for interrogations, while others worked with soldiers who traveled outside of the BIAP. The BIAP has several cafeterias, a workout facility, a pool, and a PX that employees living at the military facility could use. Because mortars and other explosives sometimes detonated in the Green Zone and the BIAP, it could be dangerous to travel through either location. Accordingly, some FBI employees did not leave the Baghdad Operations Center or the military facility, unless required.

C. Other Iraq locations

The employees who worked at the other locations in Baghdad and Iraq, mostly military bases, had a variety of living arrangements. Some lived in tents, others in temporary or permanent buildings. Some bases had more recreational facilities than others. Some employees worked within the bases, while others worked mostly outside the bases.

D. Doha, Qatar

The FBI employees stationed in Doha reported to the On-Scene Commander (OSC) in Iraq. Most of the employees assigned to work in Doha commuted daily to a U.S. military base. The base included a cafeteria, PX, movie theater, workout facility, and pool and tennis courts, which were available for use by FBI employees.

IV. The FBI's Command Structure in Iraq

Nearly all FBI employees in Iraq were under the command of the FBI's Counterterrorism Division (CTD). The CTD's top supervisor in Iraq, the On-Scene Commander, lived and worked in the Green Zone. The On-Scene Commander supervised almost all of the FBI employees who worked and lived in the other locations in Iraq, but also any ATF, DEA, and USMS employees who were assigned to the RCLO, MCTF, and other similar task forces.¹⁸

V. Time Reporting Procedures in Iraq

Unlike FBI employees in the United States, FBI employees in Iraq were not required to sign their own time and attendance (T & A) forms. Instead, their forms were completed and filed by a payroll clerk in their home office in the United States without their signature. Until recently, the supervisors in their home offices continued to sign and certify the employees' T & A forms, even though those supervisors were not in Iraq and consequently had no direct knowledge that the hours they were "certifying" were actually the hours that the employees had worked.

We found that some employees in Iraq contacted their T & A clerks regularly to report their hours, while others told their T & A clerks, before leaving the United States, that they should routinely enter 16 hours of pay for them, 7 days a week, unless instructed otherwise.

¹⁸ In addition to the employees assigned to the CTD, a smaller group of FBI employees were assigned to the Legal Attaché's (Legat) office, which worked with the U.S. Embassy in Baghdad. Those employees were allowed to claim no more than 72 hours per week (12 hours per day, 6 days per week). In addition, they were told that they had to keep accurate track of the hours that they worked and that they had to have their supervisors in Iraq – the ones who worked with them and knew what hours they were actually working – approve their T & A forms before they could be sent to the United States for entry in the payroll system. Accordingly, we did not focus our review on these employees.

CHAPTER FOUR
FBI MEMORANDA, GUIDANCE, AND TRAINING
REGARDING OVERTIME IN IRAQ

We found that the FBI paid overtime to its employees in Iraq since the first deployments in March 2003. This chapter describes the history of the memoranda issued by the FBI purporting to authorize such payments, and the guidance and training provided to FBI employees regarding how to report their time.

I. CTD Memoranda

Responsibility for pay procedures in Iraq was assigned to the Counterterrorism Division (CTD) in FBI Headquarters in Washington. CTD management prepared and issued several memoranda and e-mails purporting to authorize the payment of overtime to FBI employees in Iraq and instructing employees on how to claim such overtime.

A. The 2003 Overtime Memorandum

The first CTD document issued on this topic was a 3-page memorandum dated March 18, 2003, from FBI Deputy Director Bruce Gebhardt and several other officials in the CTD to the Director's Office (2003 Overtime Memorandum). It requested approval of overtime for FBI employees working "in support of the Iraqi conflict."¹⁹ On its face, the 2003 Overtime Memorandum applied not only to employees in Iraq, but also to those in the United States working on Iraq matters.

The memorandum stated that the CTD was requesting the authorization of scheduled overtime and a waiver of a bi-weekly pay cap that might otherwise limit compensation to FBI employees receiving premium pay in connection with the Iraq mission. It stated:

To provide maximum compensation permissible under law and regulation, it is recommended that [scheduled overtime] be approved for SA [Special Agent] and support personnel directly assisting with Iraqi conflict efforts. Approval of [scheduled overtime] does not negate the requirement for SAs to complete two hours of availability pay (AVP) on each of their regularly scheduled work days (typically Monday through Friday).

¹⁹ A copy of the 2003 Overtime Memorandum is contained in Appendix A to this report.

The memorandum stated that scheduled overtime will be “discontinued at such time as employees may be scheduled in a manner which lessens the need for unusual amounts of overtime or other forms of premium pay.”

The 2003 memorandum did not set forth a specific work schedule for employees working in support of the Iraq effort or indicate the number of hours per day or days per week that were being approved for overtime pay. Nor did it contain the financial or manpower analyses required under the MAOP before overtime can be authorized.

The copy of the memorandum that we received stated that it was approved by FBI Deputy Director Gebhardt and several other officials in the CTD. Although the document contained blank spaces for an official’s initials to indicate whether its recommendations had been approved or disapproved, we were unable to locate a copy bearing any such initials, and the document was never “uploaded” into the FBI computer network for broad dissemination. However, subsequent FBI memoranda stated that Deputy Director Gebhardt signed the memorandum and authorized scheduled overtime in connection with the Iraq mission on March 18 or March 23, 2003.²⁰ We found no evidence that the FBI’s Office of General Counsel (OGC) or any other FBI attorneys drafted the memorandum or reviewed it for compliance with relevant laws and regulations.

B. The Administrative Services Division Memorandum

On March 24, 2003, 6 days after the date of the 2003 Overtime Memorandum, a unit within the FBI’s Administrative Services Division (ASD) issued a follow-up memorandum (ASD Memorandum), a copy of which is attached to this report as Appendix B.²¹ Nine FBI officials are listed as having approved the ASD Memorandum, including Deputy Director Gebhardt and officials from CTD and ASD. The ASD Memorandum stated that its purpose was to:

Advise[] that scheduled overtime (SOT) was approved for Special Agents (SAs) and support employees performing work in command posts in connection with the [Iraq conflict]. Other important compensation

²⁰ Thomas J. Harrington, who was Deputy Assistant Director of the CTD in March 2003 and who appears on the memorandum as one of the approving officials, told us that he had never seen the 2003 memorandum before our interview. However, Harrington said that overtime for employees in Iraq had definitely been approved by that time.

²¹ The ASD is now known as the Human Resources Division.

information is provided herein. This communication supplements an e-mail to all offices transmitted on 03/19/2003.²²

The ASD Memorandum stated that Deputy Director Gebhardt had approved scheduled overtime for employees assigned to work on the Iraq mission “at command posts.” According to one of the FBI employees listed on the memorandum as a contact, “command posts” were 24-hour facilities set up in FBI field offices. She said that FBI workplaces later established in Iraq were also considered “command posts” for purposes of the ASD Memorandum.

The ASD Memorandum stated that although overtime had already been approved, SAs could not begin claiming scheduled overtime until March 23, 2003 – a Sunday. This delay was necessary, the ASD Memorandum explained, because “to claim SOT, a written schedule must be formulated and communicated to SAs in advance of the administrative workweek.” In other words, because the week beginning on Sunday, March 23, 2003, was the first full workweek after approval of scheduled overtime, it was the first date on which SAs could claim scheduled overtime. Prior to that, the SAs would not have received a written schedule in advance of the workweek.

The ASD Memorandum stated that employees who were not SAs could begin collecting scheduled overtime immediately, because the CTD was not required to give non-SAs a written schedule in advance of the workweek.

To illustrate several points about the use of overtime, the memorandum used a hypothetical workweek comprised of 12-hour shifts over a 5-day week. This hypothetical workweek contrasted with the 16-hour, 7-day workweeks that FBI employees in Iraq soon began claiming.

The ASD Memorandum also discussed three other categories of premium pay that were available to employees assigned to the Iraq matter: night pay for regularly scheduled work performed between the hours of 6:00 p.m. and 6:00 a.m., Sunday pay, and holiday pay.

C. The 2005 Overtime Memorandum

We obtained an FBI memorandum dated May 17, 2005 (2005 Overtime Memorandum) that purported to “set forth the policy of overtime (OT) pay” for employees serving in both Iraq and Afghanistan. However, it is not clear whether this memorandum was officially adopted as FBI policy. The 2005 Overtime Memorandum, appended to this report as Appendix C, was drafted by

²² The FBI was unable to provide us the March 19 “e-mail to all offices” referenced in the ASD Memorandum. We believe such an e-mail may have summarized or attached the March 2003 memorandum discussed above.

the Chief of the CTD's Military Liaison Detainee Unit (MLDU) and another employee in MLDU. MLDU was responsible for providing logistical, training, and equipment support for FBI employees in Iraq.

The MLDU chief told us that the 2005 Overtime Memorandum was drafted in response to questions from CTD managers about issues such as which employees were eligible for what sorts of overtime pay, and:

How do you separate daily work? If I need to put on my bulletproof vest to go to the restroom, at what point . . . [am I] off duty and what time am I on duty? A mortar attack comes in and everybody has to scramble . . . Do I sign in?

The MLDU Chief told us that his supervisors in the CTD asked him to write the memorandum.²³ While the MLDU Chief could not remember the specific instructions he received, he said that his supervisors wanted to know "what are we doing on overtime; how much is it costing; how are we controlling it?"

The resulting 2005 Overtime Memorandum began by stating that the 2003 Overtime Memorandum approved scheduled overtime because employees were required to work "in excess of the normal eight hour" day, with the purpose of providing them "maximum compensation permissible under law and regulation."

In a section labeled "Analysis," the 2005 Overtime Memorandum noted that 400 FBI employees had gone to Iraq so far, and that employees served in 90-day deployments during which they "usually work [16-hour shifts] to accommodate the unusual work environment, the military's 12-hour shifts and the eight hour time difference between Iraq and the eastern United States."²⁴

In addition, the 2005 memorandum stated, "in order to ensure the proper supervisory oversight, . . . the On-Scene Commanders in Iraq and

²³ The MLDU Chief said he could not remember exactly which supervisor assigned the memorandum. The memorandum lists several approving CTD officials above the MLDU Chief, including the Assistant Chief, Operational Response Section; the Chief, Operational Response Section; the Deputy Assistant Director, CTD; the Assistant Director, CTD; and the Executive Assistant Director, CTD.

²⁴ The memorandum purported to supply an "Analysis" of the costs of overtime. However, as detailed in Section II of Chapter Five, the calculations in the memorandum contained mathematical errors and assumptions that are internally inconsistent and at variance with law and regulation. We believe this memorandum cannot be relied upon as an accurate indication of overtime costs for FBI employees in Iraq.

Afghanistan will pre-approve work schedules” for employees in Iraq, who will “continue to TURK hours worked up to 16 hours in a 24-hour day.”²⁵

Lastly, the memorandum required supervisors in Washington, D.C., to “review, on a quarterly basis, the performance and output of these dedicated personnel to evaluate the quality and quantity” of their work.

The MLDU Chief said that he never saw a signed version of the 2005 Overtime Memorandum and that, to his knowledge, it was never officially approved.²⁶

T.J. Harrington was the Deputy Assistant Director of CTD when the 2005 Overtime Memorandum was written. He told us he thought the memorandum was officially signed and approved, but he was not certain. He said he was not aware of any involvement by the FBI’s Office of General Counsel or Human Resources Division in creating or reviewing the memorandum. Harrington said he did not know whether the quarterly reviews mandated in the memorandum were ever performed.

D. The 2007 Overtime E-mail

On November 2, 2007, soon after the FBI Inspection Division completed a preliminary review of T & A data related to Iraq, and shortly before this investigation began, Kevin L. Perkins, Assistant Director for the FBI’s Inspection Division, sent an e-mail to CTD management directing an “immediate policy change” in the way overtime payments for FBI personnel in Iraq were approved. This e-mail is attached as Appendix D. The e-mail stated, “Right now each person in Iraq forwards their T & A back to their home office of assignment for approval. No check/balance/oversight occurs in Iraq.” The new policy required On-Scene Commanders or their designees to approve any overtime claims submitted from Iraq before they are paid.

E. The March 2008 Overtime Memorandum

A more formal policy change for Iraq and Afghanistan was announced in a 4-page memorandum written by CTD officials and dated March 5, 2008 (March 2008 Overtime Memorandum), a copy of which is attached as Appendix E.²⁷ The March 2008 Overtime Memorandum was issued several months after

²⁵ TURK is the acronym for “time utilization record keeping” that many FBI employees use to refer to the system for recording the hours worked each pay period.

²⁶ However, as detailed in Chapter Seven, the MLDU chief did initiate some audits of time worked by FBI agents in Afghanistan.

²⁷ The memorandum was approved by Arthur M. Cummings, II, Executive Assistant Director for Counterterrorism and Counterintelligence; Joseph Billy, Jr., then-Assistant (Cont’d.)

this investigation was initiated. It appears to have been prepared in response to Assistant Director Perkins' November 2007 e-mail, which also transmitted "instructions" for the Human Resources Division and the Counterterrorism Division. The instructions, prepared by the Inspection Division, stated that the CTD would "enhance" the Iraq Overtime Policy to include:

- Requirement that T & A forms be prepared contemporaneously and approved by immediate supervisors in Iraq;
- Specific guidance on the definition of "work";
- Coordination between CTD and other FBI Divisions to ensure consistent application of overtime policy;
- Adjustment to Afghanistan Policy to be consistent; and
- Procedures to increase managerial oversight and documentation to justify overtime expenditures.

The March 2008 Overtime Memorandum begins (as did the 2005 Overtime Memorandum) by referring to the 2003 Overtime Memorandum that purportedly approved scheduled overtime. The March 2008 Memorandum stated that employees in Iraq and Afghanistan "are scheduled to work seven days a week [for specific 16-hour shifts]²⁸ to accommodate the unusual work environment, the military's 12-hour shifts, and the eight hour time difference between Iraq and the eastern United States." This is the only document that the FBI has provided that explicitly states that FBI employees in Iraq were "scheduled" to work these hours, although the 2005 memorandum stated that FBI employees "usually" worked these hours.

The March 2008 Overtime Memorandum also provided guidance on what activities could be reported as work. It stated that:

Director of the CTD; James W. McJunkin, Deputy Assistant Director of the CTD; and James H. Robertson, Chief of the CTD's International Terrorism Operations Section II. The front page of the March 2008 Overtime Memorandum is dated March 5, 2008, but it also bears a handwritten notation indicating that it was approved on March 21, 2008. However, subsequent pages of the Memorandum bear the date January 25, 2008, and subsequent references to the Memorandum in FBI documents sometimes refer to this date. For consistency, in this report we refer to this memorandum as the March 2008 Overtime Memorandum.

²⁸ The FBI considers the specific starting and ending times for the workday schedule contained in this Memorandum to be law enforcement sensitive. We therefore refer to this schedule as the "generic 16-hour schedule." When we use that term in this report we are referring to the schedule in the March 2008 Overtime Memorandum, which has a precise starting time and a precise ending time 16 hours later.

[A]ctivities conducted during the workday related to operational readiness, such as eating, exercising, training, and the preparation of gear and equipment for the following workday, are considered on the clock. Activities considered rest and relaxation that may be conducive to general fitness although not directly related to operational readiness are excluded and considered off the clock.

The March 2008 Overtime Memorandum further stated:

The SOT is the maximum compensation permissible under law and regulation. The [work week] starts on Monday and Agent personnel are authorized compensation for SOT (after normal workweek – 50 hours); 8 hours of Sunday pay; Holiday Pay (when applicable); and 5 hours Night Differential.

Next, the Memorandum repeated the requirement (contained in the 2005 Overtime Memorandum) that required On-Scene Commanders to pre-approve work schedules. The March 2008 memorandum also slightly changed the procedures for approving work hours:

All personnel will be required to document the actual hours worked each day and will be appropriately compensated. Depending on the circumstances of the daily mission, the actual hours worked and the resultant compensation may be less or more than the approved scheduled 16 hour work day. Additionally, all personnel will have their work time approved in the interim by the On-Scene Commander or his/her designee.

Finally, the March 2008 Overtime Memorandum repeated the requirement (first contained in the 2005 Memorandum) that Washington, D.C., supervisors must audit work hours claimed. “Any pattern of hours claimed indicative of potential abuse will be thoroughly reviewed and the current policy reassessed,” the memorandum concluded.

II. The “Pay Sheets”

In addition to the e-mails and memoranda discussed above, the FBI addressed the issue of overtime in a series of “pay sheets” that instructed employees on how to report their time.

The first employees sent to Iraq in the spring of 2003 were unsure about how many hours a day they would be allowed to claim as overtime. According to one employee, the first group was initially allowed to claim only 2 hours of overtime a day, even though they were working many more hours than that. However, the employee said they were soon permitted to claim up to 16 total

hours a day (6 hours of overtime on weekdays and 16 on weekend days). CTD administrators told us that even after claiming 16 hours each day became standard practice, employees continued to call and e-mail with questions.

To answer the employees' questions, a supervisor in the Rapid Deployment Logistics Unit (RDLU) conferred with FBI payroll and finance offices and, based on that input, drafted a sheet showing employees how to fill out the T & A forms and what hours they could charge daily.²⁹ The result was a 1-page sheet – entitled Iraq Work Schedule Pay Authorization (“pay sheet”) – that purported to show what hours could be claimed and how they should be accounted for. The RDLU supervisor told us she was unsure when she had drafted the pay sheet, but estimated that it may have been as early as the fall of 2003. The earliest version of the pay sheet that we were able to find was contained in a pre-deployment handbook that was distributed in the fall of 2005. The pay sheet, which was included in almost all of the pre-deployment handbooks given to all employees before they left for Iraq, became the primary authority on which employees relied when filling out their T & A forms.

The pay sheet, a copy of which is appended to this report as Appendix F, “assumed” that everyone in Iraq was working a 16-hour day. Based on that assumption, the pay sheet contained a sample weekly schedule reflecting those hours and listing Sunday as a regular work day. The supervisor who drafted the pay sheet said the FBI finance section told her to use 16 hours as a typical day because early in the Iraq mission “most of them [employees in Iraq] were working at least 16 hours a day.”

By April 2006 the pay sheet had been modified slightly to include an explicit instruction that Iraq-bound employees should tell their payroll clerks that they would be working the generic 16-hour schedule, 7 days a week. In addition, the pay sheet instructed employees to give the pay sheet to their payroll clerks, who would use the information to enter their payroll data. For consistency, the pay sheet instructed all employees in Iraq from the same field office to have one payroll clerk within that office complete the T & A forms for all employees in Iraq.

The early versions of the pay sheet did not tell employees what to do if they did not work 16 hours on any particular day. However, by April 2006 the pay sheet was modified to add cautionary language that the 16-hour, 7-day schedule is the maximum allowed and that “if you do not work 16 hours do not claim it.”³⁰

²⁹ The RDLU is not part of CTD but was nevertheless responsible, among other things, for coordinating the logistics needed to send employees to Iraq.

³⁰ The pay sheets distributed to FBI employees slated to go to Iraq changed over time. We were unable to find copies of all versions of the pay sheets. The earliest version that we (Cont'd.)

Starting a year later in April 2007, the pay sheet was slightly modified again, this time by putting that same information in bold font so that it read: **“if you do not work 16 hours – do not claim it – claim only what you work.”**³¹

Like most of the overtime memoranda, the pay sheets did not include information regarding what activities were compensable as “work” in Iraq.

III. Pre-Deployment Training

The FBI provided pre-deployment training to many employees who were sent to Iraq, regarding a variety of issues pertinent to their assignments. However, little or nothing was said during the pre-deployment training sessions about what constituted “work” in Iraq, according to the FBI trainers who led those sessions.

During this training, Iraq-bound employees occasionally asked what they could count as “work” once they arrived overseas. One pre-deployment trainer told us that, in his opinion, an employee was “working” in Iraq whenever he was awake. However, the trainer said he did not voice his opinion to others. Instead, he said he told his classes that they should:

Claim what you work. If you work 16 hours, that’s what you claim. If you . . . work 24 hours – and there will be times when guys will work 24 hours, 28 hours straight – that’s what you claim. If you work 12 hours, claim what you work.

That trainer told us that he referred anyone who asked additional questions to an internal FBI website (which, based on our review, does not contain any information about what counts as “work”) or to the FBI’s Finance Division.

Another trainer said that during her classes she spent “at most” 2 minutes discussing the number of hours that employees could expect to work in Iraq and how to claim them administratively – with no time describing what

found was given to employees heading to Iraq in November 2005 and this version did not contain the cautionary language. The next pay sheet that we found was given to employees heading to Iraq in April 2006 and did contain the cautionary language.

³¹ The sample weekly schedules and the admonishment to “claim only what you work” was omitted in one version of the handbook distributed in July 2007. The FBI employee responsible for drafting that version told us that he omitted the information because he was not a “pay expert” and he was tired of fielding questions about pay issues that he could not answer. Subsequent versions of the handbook included that information.

counted as “work.” According to that trainer, she handed out the pay sheet that shows the 16-hour “assumed” day and told the Iraq-bound employees that:

[This schedule] is assuming a 16-hour workday. If you work more than these hours, then you need to TURK it. If you work less than these hours, you TURK it. This is a basic guideline, this is an OPR issue, and you're all good employees.³²

We interviewed an FBI administrative employee responsible for answering questions that other employees raised about scheduled overtime or other pay issues. That employee was in the ASD at the time and was named in the ASD Memorandum as a resource who could be called for advice and information.

The ASD employee said that when the ASD Memorandum first came out, she received “dozens and dozens” of calls a day about scheduled overtime.³³ Although she said she could not remember specific questions, she said they came mostly from agents who wanted to know whether particular hours should be counted as overtime or availability pay. In addition, she said she received a lot of questions about whether lunches could be counted as work, to which she responded, “if they went out and got something to eat, then that does not qualify as overtime,” but if they ate while they were working then they could be paid. She said she did not remember anyone asking if they could be paid for more than 3 hours of exercise a week.

In the next chapter we describe the facts we found regarding the hours that FBI employees reported and the hours that they actually worked in Iraq.

³² The OPR [Office of Professional Responsibility] was the internal FBI office that investigated FBI misconduct allegations.

³³ The majority of these calls were from FBI employees earning overtime in the United States, although some of the calls came from employees detailed to Iraq.

CHAPTER FIVE OVERTIME CLAIMS BY FBI EMPLOYEES IN IRAQ

As detailed in this chapter, we found that since the beginning of the FBI's Iraq mission, virtually all FBI employees in Iraq reported working exactly 16 hours per day, 7 days per week for their entire deployments. We found that as a result of overtime and other forms of premium pay, including danger pay, post differential, and Sunday pay, a typical GS-13 step 5 employee received as much as \$45,000 in addition to his regular salary during a 3-month deployment. The overtime for a 3-month deployment of a typical FBI agent amounted to approximately \$31,500.

We found that often FBI employees actually worked fewer hours than the 16 hours that they uniformly reported, and that the degree of the discrepancy varied widely among locations and assignments. However, FBI employees and managers almost uniformly defended to us the practice of claiming compensation on the basis of the 16-hour, 7-day schedule because of the unique and difficult working conditions in Iraq and as an essential inducement to volunteers for this duty.

We determined that a few FBI employees raised questions regarding the propriety of overtime claims being made in Iraq, but these concerns did not result in any review of or change in FBI practices. Lastly, we found that FBI employees concluded that FBI management had tacitly endorsed the practice of reporting 16 hours of work for every day, regardless of their activities.

I. Time Reported

Our review of all T & A reports filed by FBI employees working in Iraq or Doha between 2003 and October 2008 revealed that virtually all FBI employees – regardless of when the employees were deployed, where they lived or what jobs they were assigned – claimed 112 hours per week (16 hours per day, 7 days per week), for the entire time they were overseas. Of the thousands of T & A records we reviewed, fewer than 5 percent claimed less than 112 hours per week. Moreover, many of the employees who initially did not report 112 hours told us that they had meant to report the maximum number of hours and that their T & A clerks had apparently mistakenly entered fewer hours.

Almost none of the T & A reports reflected more than 16 hours on some days and less than 16 hours on other days. Instead, virtually every T & A report claimed exactly 16 hours every day.³⁴

In addition, some FBI employees claimed 16 hours of work for 1 or 2 days after they had left Iraq. Some employees were sent to another country for 1 or 2 days of rest and relaxation after they left Iraq and before they took a flight to the United States. We found that some employees also claimed 16 hours of work for those days in another country.³⁵

Our investigation identified only two FBI employees, both of whom worked in Doha, who intentionally reported significantly fewer than 16 hours a day. Those employees billed 12 hours per day for 7 days each week during their deployments in 2005. All other Doha employees deployed before or after these two employees claimed 16 hours a day, 7 days per week like other FBI employees in Iraq.

We also reviewed the Iraq overtime payments made after the November 2, 2007, e-mail that changed the way that T & A forms were approved. That review showed that initially, virtually all the employees in Iraq continued to claim and receive pay for 16 hours per day, 7 days per week. In other words, there appeared to be no difference in the amount of overtime paid before the policy change (when T & A forms were approved in the United States) and after the policy change (when T & A forms were approved in Iraq.)

This practice changed in 2008. As previously noted, the March 2008 Overtime Memorandum required the FBI to prepare quarterly audits of overtime hours claimed by FBI employees deployed to Iraq and Afghanistan. As of November 2008, the FBI had completed three such quarterly audits each for Iraq and Afghanistan. These audits indicate that the practice of FBI employees uniformly reporting 16 hours of work every day ceased in 2008. The audits summarized overtime claims on the basis of the average number of overtime hours reported per pay period. The results are highlighted in Table 2.

As shown in Table 2, the FBI quarterly audits indicate that during the first three quarters of 2008, FBI employees reported, on average, between 100 and 114 hours of overtime per 2 week pay period. By comparison, in prior

³⁴ A few employees billed 15 or 17 hours a day, 7 days a week, but like the others they habitually billed exactly the same number of hours, day in and day out.

³⁵ The CTD recommended to each employee's field office that the office grant 3 to 5 days off after their return, depending on how long the employee spent in Iraq. This was initially awarded as "administrative leave" but in 2007 the FBI determined that administrative leave is not available for this purpose. Thereafter, time off was granted by the employees' home office as a "time off award."

years Special Agents were uniformly reporting 124 hours of overtime in each pay period, and non-agents were uniformly reporting 144 hours of overtime per pay period. In addition, the audits indicated that individual claims for overtime in 2008 varied considerably from the average, with some employees averaging as few as 19 hours of overtime per pay period and others averaging as much as 148 hours. According to the audits, therefore, FBI employees have now stopped the practice of claiming overtime based on a uniform schedule of 16 hours, 7 days a week. However, as discussed below, we believe that some FBI employees are still reporting time that is not properly compensable as overtime according to federal regulations, including meal times and time spent in standby status waiting for assignments.

II. Cost of Overtime in Iraq

We calculated the amount of premium pay that was paid to a typical FBI employee in Iraq during a 90-day deployment. For illustrative purposes, we used the salary of a GS-13 step 5 employee, which represents the pay level of an FBI Special Agent with several years of experience. We also used the 2005 pay schedule with a “rest of the U.S.” locality adjustment.³⁶ We believe such an estimate of the premium pay given to this hypothetical Special Agent would be a conservative estimate of the average amount paid to FBI employees sent to Iraq.

Our calculations are summarized in Table 3. We based the calculation on the agent reporting 16 hours of work every day for a 13-week (91-day) deployment, as almost all agents actually reported prior to 2008. This translates to 112 hours per week, of which 40 hours are regular time, 10 hours are availability pay time, and 62 hours are overtime (5 hours for regular work days and 16 hours for “weekend” days). Based on the generic 16-hour schedule, the agent would also be eligible for 5 hours of night pay every day. For Sunday pay we assumed 13 Sundays during the deployment. For holiday pay we assumed two holidays during the deployment. We also credited the hypothetical employee with the 25 percent post differential and 25 percent danger differential that the FBI made available to employees in Iraq.³⁷

As shown on Table 3, the typical GS-13 step 5 agent received a total of \$45,126 in premium pay (including \$31,531 in overtime pay) for working a 13-week deployment in Iraq in 2005, above and beyond his regular pay for that

³⁶ This “rest of the U.S.” locality adjustment is the lowest such adjustment for any region of the United States. See <http://www.opm.gov/oca/05tables/indexLEO.asp>. We note that many FBI employees deployed to Iraq received a higher locality adjustment, but no employees received a lower one.

³⁷ According to the FBI, these percentages increased to 35 percent in 2006.

period of \$25,428 (including availability pay), for a total compensation of \$70,554 during the 13-week deployment. In other words a typical agent in Iraq was able to nearly triple his regular income during the period of his deployment.

We requested information from the FBI regarding the total cost of premium pay awarded to FBI employees in Iraq since 2003. The FBI said it could not provide any records or calculations of the total premium pay that it has paid to employees in Iraq, and it does not appear that the FBI has been keeping or compiling any such specific records. The information the FBI provided did not permit us to calculate a precise total. Among other things, the data provided by the FBI did not distinguish between FBI employees sent to Iraq and other FBI employees who earned overtime working in the United States on the Iraq mission or on certain other matters for which overtime had been approved.

The only document that we received from the FBI that purported to estimate or analyze the total costs of premium pay in Iraq was the 2005 Overtime Memorandum. However, we found that the 2005 Overtime Memorandum contained computational errors and inconsistent assumptions, and did not provide a reliable estimate of the cost of overtime or other premium compensation paid to FBI employees in Iraq. For example, the financial analysis in that Memorandum stated that the average employee would receive \$11,247 in Sunday pay, the same amount that would be paid for danger pay and as a post differential. This figure is too large for Sunday pay by an order of magnitude. Rather, as shown on Table 3, a typical agent would earn about \$1,017 in Sunday pay for 13-week tour. The formula for Sunday pay is completely different from the formulas for danger pay and post differential pay; these formulas could not generate identical numbers if applied properly.

Therefore, we believe a more accurate, albeit extremely rough, estimate of the total cost of premium pay in Iraq can be constructed by multiplying the figures on Table 3 for a “typical” GS-13 step 5 agent by the total number of tours that FBI employees have served in Iraq since 2003. As of the time of this report, FBI employees had completed approximately 1,400 tours in Iraq since 2003. Our calculation of estimates for the total costs of various kinds of premium pay for FBI employees in Iraq is shown in the last column of Table 3. We estimated that the FBI has paid a total of approximately \$63 million in premium pay for employees deployed to Iraq since 2003, of which approximately \$44 million was for overtime. We recognize that these estimates are rough because there is variance in the pay rates for different FBI employees. However, in the absence of more detailed data from the FBI, this estimate provides a sense of the general magnitude of costs that the FBI has paid to employees as premium pay for service in Iraq, including overtime pay.

III. Time Actually Worked

To attempt to determine the amount of time that FBI employees were actually working while deployed in Iraq, we interviewed a variety of FBI employees, including both those who had been in Iraq and those who had stayed in the United States but had various responsibilities for the Iraq program. We also reviewed FBI documents, including: (1) anonymous questionnaires that were administered to all FBI personnel returning from Iraq between July 2005 and October 2007; (2) after-action reports written by the On-Scene Commanders who supervised FBI personnel in Iraq; and (3) after-action reports written by FBI trainers describing their activities in Iraq.³⁸ The questionnaires and after-action reports did not focus directly on the issue of overtime hours, but they contained contemporaneous statements that revealed important information related to our investigation. Because our investigation revealed that the hours worked by any particular individual depended in part on both the location where that person was living and the job assignment that person received, this section is organized by location and job assignment.

In general, we concluded that the T & A forms completed by employees in Iraq are not an accurate reflection of the hours actually worked. Although the T & A forms almost universally claimed 16 hours of work every day, 7 days each week, the witnesses and documents revealed that many FBI employees did not work that many hours. In addition, many employees told us that they did not work exactly 16 hours every day, but that some days were longer than 16 hours and some days shorter. However, while some employees told us that they occasionally worked as much as 24 hours in a day, we found no T & A form that claimed 24 hours.

A. FBI Employees in Baghdad

The FBI employees who worked in Baghdad generally told us they worked at least 16 hours a day, 7 days a week, although several stated that that would have been an average and not necessarily the exact total of hours for each day.³⁹

³⁸ The questionnaires primarily sought information related to logistical matters, such as whether employees were properly equipped, and the FBI stopped conducting the survey in 2007.

³⁹ We could find no indication, either written or oral, that any employee ever took any sick leave while serving in Iraq. An employee taking sick leave would only be able to claim 8 hours pay for that day. There were indications that employees were not always well. For example, one supervisor noted that he was extremely rattled by a roadside bomb that exploded and hit another vehicle in a motorcade in which he was traveling. Afterward, he said, he took several hours off to recover his composure. Also, he said, another FBI employee was very upset when he learned about some of the fatalities in Iraq. The supervisor said the other employee needed several days off. We find it difficult to believe that out of more than 1,150 employees (Cont'd.)

Further, several employees acknowledged that not all 16 hours were spent on activities constituting “work” within the meaning of applicable regulations and policies. Several employees we interviewed noted that FBI employees generally hosted a cocktail party every Saturday evening. The parties were held at a club or facility in Baghdad, which had a bar stocked with alcohol. While some employees would go to the club on weeknights, it was most crowded on Saturday evenings during the cocktail parties. The employees said that the festivities at the club began in the evening (accounts differed as to the exact hour it began), and several DOJ attorneys stationed in Iraq at that time said that it would have been impossible for FBI employees to be working 16 hours on the Saturdays when they quit early to attend the party at the club.⁴⁰

Several FBI employees claimed the time spent at the cocktail party was “work” because it was a “liaison” effort that brought various benefits to the FBI. For example, several employees said that some of the employees from other government agencies who joined them at the parties often ended up helping the FBI later on. As one employee put it:

Even the small amount of time . . . I spent and others spent at [the club], that was furthering the FBI’s mission. For liaison purposes, it was fantastic. I can give you example after example of how that liaison effort paid off with favors and other things that would be done for us.

One employee stationed at the Baghdad Operations Center said that at times employees watched DVD movies on one of the televisions located within the building or on the television located in the club. Several FBI employees noted that they periodically spent time during the work day washing clothes. Questioned whether he should have been paid for the time spent in this activity, one employee defended the practice, saying, “when you’re in that environment, anything you do to survive is work for the FBI.”

In the following subsections we address the activities and hours associated with particular job assignments in Baghdad.

1. Trainers in Baghdad

As described in Chapter Three, the FBI sent trainers to Iraq for several weeks at a time to help train Iraqi police. We believe it is unlikely that these

who served approximately 1,400 tours in Iraq, not one employee missed a single work day because of illness.

⁴⁰ The DOJ attorneys, who were in Iraq to help staff the RCLO, worked with the FBI employees assigned to that task force.

trainers worked 16 hours a day, 7 days a week. According to several of the trainers, they arrived at their classrooms each morning and the classes would end 8 or 9 hours later. They said that they would prepare for the following day's classes before returning to their quarters by the late afternoon. Moreover, because the Iraqi students worked Sunday through Thursday, the trainers gave classes only those 5 days. On occasion the courses were postponed or canceled due to political or security issues or religious holidays.

An On-Scene Commander also stated in an after-action report written in November 2005 that a 7-week training course for Iraqi police officers "was hampered by class cancellations due to pay day and religious holidays. Also there were interruptions due to a major sand storm, two fires, and the assassination of two Iraqi police officers who worked at the . . . training facility." Similar problems were noted in an after-action report written in January 2006, which reported that a 6-week course (dubbed "CT8") to train Iraqi police, military, and intelligence officers "was hampered by class cancellations due to pay day and religious holidays." The report stated:

CT8 gave up its first week of training to the Bureau of Alcohol, Tobacco and Firearms (BATF) so they could present a post-blast class to a combined session of CT7 and CT8. [...] class was then shut down by the Interior Minister from 10/9/2005 through 10/16/2005 so that the students could help with security for the referendum. Class was also not in session during the four day 'Eid' holiday following the conclusion of Ramadan (11/3/05 and 11/6/05).

Yet, virtually all trainers put on their time and attendance forms that they worked 16 hours a day, 7 days a week for all the weeks they were in Iraq.

We also reviewed after-action reports written by the trainers themselves. According to several of these, a number of planned classes had to be cancelled due to problems ranging from a lack of students to bombings and curfews. For example, one group of three trainers who went to Iraq for approximately 4 weeks during the summer of 2007 had more than half their classes cancelled. There were no classes the first week, mostly due to a curfew imposed on Baghdad after a bombing; four classes the second week; no classes the third week because no students showed up; and five classes the fourth week. However, the three employees teaching that class each claimed 16 hours a day, 7 days a week for the entire time they were in Iraq.

The trainers we interviewed said that they used evenings, Fridays, and Saturdays to prepare for upcoming classes. One trainer claimed that, in addition to their regular duties, the trainers spent substantial time helping others at the Baghdad Operations Center and working overnight shifts on the security detail. However, one of the Baghdad Operations Center supervisors said he did not remember asking trainers to serve any overnight security shifts.

Taking all of the available evidence together, we concluded that the FBI trainers sent to Iraq did not work 16 hours a day, 7 days per week, and did not work that many hours on average during their deployments.

2. Regime Crimes Liaison Office

As previously noted, the FBI assigned employees to the Regime Crimes Liaison Office task force (RCLO), to assist in preparing evidence for the trials of Saddam Hussein and his associates. Although one RCLO supervisor who was in Iraq for most of 2005 claimed that every employee he supervised worked an average of 112 hours a week, we found significant evidence that the FBI employees did not work that many hours. For example, at least six different FBI employees who completed post-deployment questionnaires at various times between October 2005 and July 2007 commented that the RCLO was over-staffed. One stated:

I had to laugh when I saw the number of people assigned to RCLO. There were more people assigned to RCLO [even though] two trials would essentially have been resolved [earlier]. Maybe they needed extra poker players.

In an after-action report dated January 4, 2007, an On-Scene Commander returning from Iraq stated that some employees working on the RCLO:

expressed frustration . . . as there was not enough work to keep the [employees] fully engaged. As such, there was an inordinate amount of “down time” on behalf of the [employees].

We interviewed several DOJ attorneys who worked directly with the RCLO employees and had an opportunity to observe their work hours. These witnesses questioned whether the RCLO employees worked anywhere near the 16 hours they claimed for every day.

For example, one DOJ attorney who was in Iraq during all of 2006 and 2007 told us that the RCLO employees generally worked about an 11-hour day. Some days, he said, they had a 90-minute lunch in the middle. Also, the attorney said, the agents worked Monday through Friday and half of Sunday, but generally not on Saturday. According to the attorney, FBI employees told him that they did not have to document their overtime and that they would be paid for the maximum number of hours regardless of the hours they actually worked.

Another DOJ attorney who was assigned to the RCLO during the latter half of 2006 said that most RCLO staffers worked 8 ½ hours each day, taking

Fridays off but working most of the day on Saturdays.⁴¹ This schedule would equal, at most, 51 hours per week, assuming no meal breaks.

Another DOJ attorney assigned to the RCLO in Iraq during the latter half of 2006 said that the RCLO employees worked 6 days a week for approximately 11 ½ hours per day, although some trial days could be longer and occasionally a day could last over 16 hours.

According to another DOJ attorney who was in Iraq for all of 2006 and the first half of 2007, most RCLO employees worked about 8 to 10 hours a day, 6 days a week – although some employees worked longer or shorter hours. Although he said he was not sure what the FBI employees were doing when they were not in his presence, this attorney said he did not believe they were working anywhere near 112 hours a week. According to this attorney, the FBI employees told him that they expected to get a certain amount of money, but that they were never told they had to work a certain number of hours for it. Instead, they said, it was a “perk” of their job.

FBI employees who worked on the RCLO disputed the DOJ attorneys’ claims, arguing that the attorneys were not with them all day and did not realize all the other jobs that the FBI employees were doing. While the RCLO staffers may not have worked 112 hours a week on RCLO business, one FBI supervisor said, they nevertheless had worked the remaining hours on other, non-RCLO business.

However, a supervisor in Washington said that it was a “common assumption” that the RCLO employees were not working as hard as the employees at the military base north of Baghdad and some of those at the Baghdad International Airport (BIAP).

In sum, we concluded that there was substantial evidence that FBI employees who were assigned to the RCLO task force did not work 16 hours every day of their deployment, as they indicated on their timesheets.

3. Major Crimes Task Force

The FBI also placed employees with the Major Crimes Task Force (MCTF) in Baghdad to assist Iraq police with training and criminal investigations. Although the MCTF employees reported 16 hours days, 7 days a week like other FBI employees in Iraq, the actual hours that MCTF personnel actually worked varied widely over time.

⁴¹ The official weekend in Iraq is Friday and Saturday.

One reason that the hours of MCTF employees varied so widely was the fact that to perform many of their functions the employees had to leave the Green Zone for the more dangerous areas of Baghdad and beyond. One of the FBI's MCTF supervisors estimated that employees assigned to the task force worked 12- to 14-hour shifts on most days. That supervisor also stated that when those employees had special assignments outside of the Green Zone, their shifts could last 24 to 48 hours straight, or even longer.

However, because each trip out of the Green Zone had to be pre-approved by FBI headquarters as part of an effort to ensure the safety of FBI employees, most of the time the MCTF employees were confined to the Green Zone. An after-action report dated March 2006 noted that "operational aspects of the MCTF have been hampered by funding problems and related equipment issues, as well as safety concerns associated with the travel of U.S. task force members outside the [Green Zone]." According to a January 2007 after-action report, during approximately 1 year of operation, MCTF employees had gone outside the Green Zone a total of 46 times, most of which were 1-day trips. The FBI's legal attaché in Iraq likewise estimated that MCTF employees left the Green Zone (on investigations) about 50 times between the fall of 2005 and February 2007, generally for no more than a day, and that not every MCTF staffer would go on each trip outside the Green Zone. The legal attaché estimated that, when in the Green Zone, MCTF employees generally worked about 12 to 14 hours a day, including breaks for food and physical training.

One On-Scene Commander estimated that the MCTF employees worked fewer hours than employees assigned to many of the other jobs in Iraq. A DOJ attorney who was assigned to the RCLO in Iraq from the spring of 2005 to the spring of 2007 said that he believed most employees assigned to the MCTF were working 8 to 10 hours a day. According to that attorney, on many days he would see MCTF employees twice: once in the morning as they were getting coffee in the embassy cafeteria and again in the late afternoon as they were sitting around a table there. When he asked them what they had done during the day, he said they would often tell him that they had not accomplished much because their FBI supervisors would not allow them to leave the Green Zone. Without leaving the Green Zone, they explained to him, they could not really investigate the cases that had been assigned to them.

In sum, we concluded there was substantial evidence that many FBI employees detailed to the MCTF did not work 16-hour days, 7 days a week, particularly during the extended periods that they were confined to the Green Zone.

B. Baghdad International Airport

As noted in Chapter Three, FBI agents conducted interviews at military facilities within the Baghdad International Airport (BIAP). At the BIAP, one

supervisor said, most employees worked 15 ½ - 16 hour days, 7 days a week. He said these days would generally include hour-long workouts in the gym and dinner at about 6:00 p.m. The supervisor estimated that employees there worked at least 95 percent of the reported 112-hours-per-week, and there were a number of times when employees were called to work after 11:00 p.m.

However, we found indications that not all employees living at the BIAP worked 16 hours every day. For example, one employee who was on one of the earliest deployments to Iraq (during the period when everyone was sleeping in tents at the BIAP) said that most nights they would project a movie on a wall for 2 or 2 ½ hours. “Sometimes we’d sit there and watch the whole movie. Other times, you had work to do,” he said.

As at the Baghdad Operations Center, during later years there was a bar at the BIAP where FBI employees held cocktail parties every other Saturday night during hours that employees reported as work. Also, some of the employees occasionally saw a movie that the military screened on a week night starting in the early evening (again during hours reported as work) , and others went swimming from time to time in a nearby pool. None of the T & A forms reviewed by the OIG and INSD showed any variation in hours billed that would indicate deductions were made for time spent at Saturday night cocktail parties, movie screenings, or other recreational activities.

We concluded that although FBI employees worked long hours at the BIAP, they did not consistently work 16 hours every day for their entire deployments.

C. Other Iraq Locations

The majority of the FBI employees elsewhere in Iraq lived at a military base north of Baghdad. Most of these employees were interrogating detainees and were assigned to one of two overlapping 13-hour shifts. There were no weekend breaks. According to the FBI base supervisor, the employees involved in interrogations worked at least 13 hours a day, and often 14-15 hours. One On-Scene Commander wrote in an after-action report that FBI employees stationed at one of the military bases north of Baghdad – “are required to work fourteen plus hours per day, with no time off.” In sum, it appears that FBI agents who conducted interrogations at the military base worked extremely long hours. Upon examination, however, even these employees were likely not working 16 hours every day for the full duration of their deployment.

In addition, there were generally one or two FBI employees at that base who participated in military missions outside of the base. Those employees generally started working in the afternoon and often did not finish until 17 to 18 hours later the following day on the days when they went out of the base. Similarly, several FBI employees at other military bases throughout Iraq

participated in military missions outside of the bases. Those employees also worked similar 17 to 18 hour shifts, at least on days when they went out on missions. It is difficult to know how many hours FBI employees who participated in military missions worked per week, but the evidence indicates they did not work the uniform 16-hour schedule that they reported.⁴²

D. Doha, Qatar

As previously noted, a few FBI employees were detailed to Doha to provide support for the FBI mission in Iraq. Again, we found evidence that the Doha employees did not uniformly work 16 hour days for every day of their deployment.

First, as noted above, two FBI employees sent to Doha in late 2005 reported working 12-hour days for 7 days per week. Those employees initially questioned why they were not permitted to claim the same hours as other FBI employees detailed to Iraq, but they told us that once they arrived in Doha they found that they could complete their work within 12 hours. Nevertheless, the FBI employees performing the same functions in prior and subsequent deployments claimed 16 hours, 7 days per week. The experience of the two employees in 2005 suggests that others with the same job assignment did not necessarily work 16-hour days.

Another employee who worked in Doha in early 2007 said:

Did I necessarily work [a 16-hour day]? No . . . [but] there was one stretch where I worked 36 hours without sleeping because I was running back and forth. . . . I would catch a nap out at the air base while I'm waiting on somebody or something like that. . . . I was working more than 16 hours . . . but some of it may have been sitting there twiddling your thumbs waiting on the phone to ring, too.

The same employee said that most employees left their quarters in the morning and left the office (to return to their quarters) about 14½ or 15 hours later. Travel each way took about an hour, he said, or longer if the traffic or weather was bad. Both of the Doha employees that we interviewed said that they included the time spent commuting from their quarters to the military base where they worked in the hours they reported as work.

One employee who worked in Doha said he played some tennis on the base. A DEA employee who worked alongside FBI employees in Doha said that

⁴² The number of nightly missions during any given period at any of the bases varied, depending on a number of factors. The precise number of missions that the teams logged at the military base north of Baghdad is classified.

he worked shorter days on Fridays and Saturdays and only billed for 10 hours on those days.

IV. Employee Justifications

The FBI employees we interviewed uniformly told us that they believe FBI employees in Iraq should be paid for a 16-hour, 7-day per week schedule. Some FBI employees felt they should be paid for every hour they were awake in Iraq. Comparing time “worked” in Iraq to time “worked” in the United States, most said, was comparing apples to oranges. As one FBI agent put it:

In Iraq, first of all, you’re in a war zone. [...] And you’re on duty 7 days a week, . . . 24 hours a day depending on what’s going on in Iraq that day. For example [in the United States] I know pretty much on a day-to-day basis what I’m going to be doing. [...] In Iraq, you’re taking care of the building, you are conducting interviews, you’re doing counterterrorism missions. Whatever it is that they need you to do, . . . you do it. So it’s much different than work here in the United States.

Asked for specific reasons why work in Iraq was not comparable to work in the United States, most employees gave one or more of the following reasons. First, life in Iraq was dangerous and stressful, whether housed at the relatively safe Green Zone or at one of the less-safe military bases. As one FBI employee stated, “we were attacked all the time; we were shot at all the time. Mortars, mortar attacks and sniper attacks were a constant. You wore a [bullet-proof] vest, you wore a helmet . . . if you were outside.” Even at night, another person said, the attacks were a problem: “Even after you shut down your day, which is late into the p.m. hours, when you get a few hours of sleep, you’re constantly being awakened by explosions and things of that nature.”⁴³ Although no FBI employee has been killed or seriously injured physically, several have been in or near areas under mortar attack and at least a few have been in convoys attacked by improvised explosive devices.⁴⁴

Second, the employees said there was little or nothing to do in Iraq after work hours. For example, there were no safe locations where they could go after work to restaurants or movie theaters – the types of diversions that can be counted on when traveling in the United States.

⁴³ Based on these reasons, some employees said that the hours they spent working out in one of the Green Zone gyms should count as work because they were furthering the FBI mission. As one said: “We’ve been trained there’s no better way to relieve stress. And you’re in a very stressful environment”

⁴⁴ In Afghanistan, FBI agents were involved in several ambushes and violent actions, leading to a temporary suspension of participation in some of the more dangerous missions.

Third, some claimed that the FBI employees were on standby the entire time that they were in Iraq. As one supervisor put it: “I had no qualms about waking people up and keeping them up all night.”

Fourth, at least one employee said that he did not believe the FBI would get as many volunteers to serve in Iraq if the pay were cut, and another employee said the money helped “sell it at home” to his wife.

Fifth, several employees told us the unique nature of work in Iraq, including periods of waiting with nothing specific to do, made it difficult to know when they were “working” and to accurately count their hours. For example, one supervisor stated that sometimes the military would declare lockdowns and forbid everyone from leaving a prison building. In one such instance, that supervisor said, one of the FBI employees who had been visiting the prison was required to remain in a building for hours late at night, even though no work was getting done. Another employee said that keeping accurate track of the hours worked was not a simple matter. Asked if everyone was working 16 hours a day, he said:

Probably not. But in a practical sense, I’m not really sure how you would know whether you worked 16 hours a day. I mean, you work four hours at this and you’ve got a half hour where you’re sitting there doing nothing, and then you’ve got another two hours where you have to, you know, go meet up somewhere. [...] As somebody who was there, I’m not really sure how they would parse the day and say, ‘okay, you know, I worked this many hours today and then I worked this many hours.’ It just doesn’t seem like it would be a really practical way to do it.

Under that same theory, the employee said, he believed that the time spent eating – approximately 2 to 3 hours a day for many – should also be counted as work.

Seventh, many employees who had been to Iraq claimed that the days when they worked more than 16 hours more than offset the days when they worked less. These employees stated that they believed, on average, they worked 16 hours a day, 7 days a week.

V. Concerns About Overtime Claims Are Raised in FBI Headquarters

We found that a small number of FBI employees raised concerns to their supervisors or FBI Headquarters about the propriety of pay practices in Iraq. However, we found no evidence that any of these concerns led to any review of FBI pay practices or an examination of whether they were consistent with law or policy.

Concerns about pay practices for FBI employees in Iraq arose in connection with a complaint by an FBI analyst assigned to Doha that he and another Doha employee were unfairly denied a benefit – overtime pay based on 16 hours per day, 7 days a week – that was being provided to other FBI employees there. These two employees believed that they were supposed to claim no more than 12 hours per day, 6 days each week.⁴⁵ In September 2005, about a month before leaving for Doha, one of the employees sent an e-mail to his FBI supervisor in CTD’s Communications Exploitation Section (CXS), Charles Kelly.⁴⁶ The employee’s e-mail attached a copy of the pay sheet which assumed a 16-hour workday beginning and ending at specific times. Shortly afterward, Kelly forwarded the pay sheet to other CXS supervisors (including Laurie Bennett, then the Chief of CXS) and another employee who had previously been deployed to Doha. Kelly asked if it was “essential” to work 16 hours in Doha. Kevin Duff, a supervisory analyst who worked directly for Bennett, replied:⁴⁷

The schedule was established during the Feb/March timeframe in early 2003, during the beginning of the war. It was based on work hours in Iraq, which, believe it or not, were legitimately 16 hours a day – 7 days a week. When not working on specific Bureau business, our folks in Iraq were working just to survive – servicing the generators, picking up food, water, fuel, etc. There really was no time off. . . . The schedule was extended to Doha, because Doha supported the folks in Iraq and generally had to be available for them. . . . I think also, from the viewpoint of . . . management, the extra pay was a *beni* for being overseas for so long.

A month later, soon after arriving in Doha, the analyst again sent an e-mail, this time to Duff, noting that he and his co-worker in Doha were the only ones in either Iraq or Doha who were “in theater doing it this way.” The analyst told us he was referring to submitting 12 hours a day for pay. In response, Duff replied:

I think everyone views the extra pay as a benefit, if not an entitlement. Problem is, federal pay law might not view it that way. All the recent questions have raised the level of scrutiny and have people around here talking about T&A fraud. While I certainly don’t think it will come to

⁴⁵ One of the employees told us that before they were deployed to Doha their supervisors in CTD told them to report their time according to this schedule. However, the employee’s supervisor denied that she imposed a 12-hour, 6-day limit. She told us she merely instructed the employee to report only the hours he worked.

⁴⁶ Charles Kelly is a pseudonym.

⁴⁷ Kevin Duff is a pseudonym

this, it could, potentially lead to a giant OPR [Office of Professional Responsibility investigation].

Less than a week later, after several intervening e-mails, Kelly wrote to the analyst in Doha:

Don't worry about this T&A thing. If we keep our noses clean, as you are doing, we will be alright. It's the past practices that have raised the concerns. People are just asking the question, 'are we working 16 hours over there?' CTD Admin is taking a look at the issue. This has the potential to be a very big issue. We are talking about millions of \$dollars (sic) in overtime payments.

The FBI analyst who raised this issue told us that after he reported to Doha he dropped the matter because he found he was able to complete his duties within the 12-hour, 7-day schedule that he reported on his time sheets.

Kelly told us that his statement in his e-mail indicating that "CTD Admin is taking a look at the issue" referred to discussions that Duff had with Linda Prince, then-Chief of the Administrative Management and Support unit within the CTD, and Gary Nettles, Iraq Program Manager for the Rapid Deployment Logistics Unit (RDLU) within the Critical Incident Response Group (CIRG).⁴⁸ Duff wrote an e-mail to the analyst in Doha in which he said that Prince and Nettles were looking into the issue. However, Duff told us that he could not recall the specifics of what he discussed with Prince or Nettles or what they may have been looking into.⁴⁹

Nettles said he had no recollections of looking into an issue with Prince as referenced by Duff in his e-mail. Prince said she recalled speaking to Nettles to request any written policy on work hours for employees detailed to different areas of Iraq, but that Nettles did not have any written policies.

Bennett told us that she had wondered whether employees could really work the number of hours daily in Iraq that were submitted on their T & A sheets, but said she did not take her concerns to her supervisors in CTD or other FBI executives. While Bennett said she could not remember many details about her concerns, Duff (who worked directly for her) told us he recalled meetings of CTD managers during which Bennett and others commented that

⁴⁸ Linda Prince and Gary Nettles are pseudonyms.

⁴⁹ Duff stated that it is possible Prince and Nettles were looking at the CSX analyst's complaint that he would be paid less than other FBI employees deployed to Iraq, or that they may have been looking at the more fundamental question of whether employees deployed to Iraq are legitimately working 16 hours and whether this constituted "gross mismanagement."

“there’s no possible way that people are working 16 hours a day 7 days a week” for 90 straight days.

Prince told us that Bennett contacted her asking questions about the overtime policy for employees detailed to Iraq. Prince said Bennett was concerned that there may be T & A fraud occurring, given a policy that authorized blanket shifts of 16 hours, 7 days a week, with no requirement that personnel in Doha sign in and out on a daily basis. Prince said Bennett also questioned the need for FBI Intelligence Analysts to work in Doha under such a schedule, and whether personnel deployed to Doha would work the same hours as those in Iraq. Prince said she and her superiors also could not understand why employees were not keeping track of the actual hours they worked by signing in and out of work daily. She stated:

I just don’t understand, if you actually are doing something at 4:00 a.m., why you’re not logging in and saying you’re working at 4:00 a.m. and if you’re done at 11:00, or if you’re done at 10:30, those should be the time[s].

In addition, Prince said it was rumored around the FBI that employees in Iraq could get paid for 16 hours without actually working the full 16 hours.

Prince said she raised concerns about overtime claims with T.J. Harrington, who was then the Deputy Assistant Director of CTD. She said Harrington told her that all Iraq employees should be keeping daily logs of their hours.⁵⁰ Harrington told us that it was always his position that FBI employees in Iraq should keep a “straight book” with respect to their time. As discussed in Section VI of this chapter, however, Harrington told us that he believed, because of conditions in Iraq, FBI employees should be entitled to claim virtually all their time up to a maximum of 16 hours per day as work time.

Despite the concerns about pay practices in Iraq that were raised at various times, we found no evidence that before the initiation of this investigation FBI Headquarters ever reviewed the hours worked by employees in Iraq, made any changes in the oversight mechanisms, or provided clear guidance on what hours could be claimed.⁵¹

⁵⁰ As noted above, until recently FBI practice for signing in and out meant marking a T & A card with arrival and departure times. However, since November 2007 the FBI has been using a new automated system that does not require reporting of arrival and departure times, but simply an accounting of the total hours worked each day.

⁵¹ As discussed in Chapter Seven, the FBI made a brief effort to review overtime claims in Afghanistan in December 2005 and March 2006.

As noted above, after our investigation began CTD management issued additional policies relating to overtime. Eventually, FBI employees in Iraq began reporting variable hours rather than uniformly reporting 16 hours every day.

VI. FBI Management Positions on Pay Practices

Thomas J. Harrington was Deputy Assistant Director of the FBI's Counterterrorism Division from December 2002 until March 2008.⁵² The CTD was responsible for staffing and supervising almost all of the FBI employees in Iraq. Harrington told us he was responsible for administrative matters in the division, which included the FBI programs in Iraq and Afghanistan. Harrington was also listed as one of the approving officials on the 2003 and 2005 Overtime Memorandums, although he stated in our interview that he did not think he had actually seen the 2003 memorandum before our interview.

Harrington told us that the FBI initially planned to send agents to Iraq for only a short period, immediately after the invasion. Harrington told us that after that decision was made to keep FBI employees in Iraq for longer periods, Larry Mefford, the Assistant Director for CTD during the Iraq invasion, was "pretty adamant to make sure that the guys got paid every single dime possible under the circumstances," and told Harrington "not to make an issue" over the amount of money paid.⁵³

Harrington acknowledged that the FBI's practice was to permit FBI employees in Iraq to claim overtime on the basis of a 16-hour, 7-day schedule. He described the 16-hour standard as a maximum, but he also stated that because of the severe circumstances in Iraq, he believed that virtually all waking hours in Iraq were spent working or on call, and he also said that employees were not in a position to do anything else with their time. Harrington said he believed that all such hours should be compensated as work. However, Harrington said he did not realize – until we informed him – that employees were getting paid for the time spent drinking at cocktail parties at the Baghdad Operations Center and BIAP. "I wouldn't be comfortable" paying employees for the time they spent at cocktail parties, he said, both because the military has a no-alcohol policy in Iraq and because FBI employees need to be ready to respond appropriately at any time – something that could

⁵² Harrington was recently promoted and is now Associate Executive Assistant Director for the FBI's National Security Branch. Harrington stated that his comments applied equally to employees in both countries.

⁵³ Mefford is now retired.

be prevented by too much alcohol. “Using your weapon and having alcohol [do not] mix,” he said.

Harrington said that the Assistant Directors for CTD were ultimately responsible for setting the 16-hour standard for overtime. Mefford was the first Assistant Director during the Iraq mission, and Harrington said that he and Mefford “discussed these kinds of issues pretty regularly.” Harrington said he wasn’t personally involved in a specific decision to allow employees to claim pay for 16 hours a day, but he told us it was the “most realistic” number that the FBI could have used. Harrington said he was not certain exactly when the 16-hour standard was adopted in writing, but he thought it was “in the 2004 time range.”⁵⁴

Harrington gave several justifications for permitting FBI employees to claim 16-hour workdays in Iraq: (1) agents in Iraq are required to be constantly on-call and ready for duty, including during mealtimes, and should be paid for all those standby hours like firefighters; (2) agents have no freedom to use their off-time in Iraq; (3) agents should be paid for physical exercise in order to maintain fitness and relieve stress; (4) conditions in Iraq are difficult, uncomfortable, and dangerous; and (5) generous overtime pay is a necessary inducement to volunteers for Iraq duty.⁵⁵ He also said that although he was not certain that FBI employees assigned to Doha, the RCLO, or the MCTF were as busy as FBI agents conducting interrogations at military facilities in Iraq, it would create “management problems” to pay some employees in Iraq more overtime than others.

Harrington contrasted duty in Iraq to that in Guantanamo Bay, Cuba. Initially, Harrington said, FBI employees working in Guantanamo were paid for 16 hours. Harrington said that after visiting Guantanamo, he terminated this practice because there wasn’t enough work to justify it and because living conditions there were not too austere. In contrast, Harrington said, his visits to Iraq convinced him that employees there should be paid overtime because they had enough work to keep them busy and were living under extremely difficult conditions.

⁵⁴ We describe all of the written memoranda and pay sheets that the FBI provided to us in Sections I and II of this Chapter. It is not clear from those materials when the FBI specifically adopted the 16-hour standard.

⁵⁵ Although FBI employees were on call 24 hours a day, Harrington did not suggest paying overtime for more than 16 hours a day. He said “that’s what hazard pay is for.” (Harrington was likely referring to “danger pay,” described in Chapter Two. Most employees in Iraq do not qualify for “hazard pay,” which relates to duty involving certain unusual physical hardships or hazards. See 5 C.F.R. § 550.901 et seq.)

VII. Conclusions Regarding Hours Worked in Iraq

Due to the lack of accurate records and the uniform practice among FBI employees of reporting exactly 16 hours of work every day for their entire deployments, we were unable to construct any estimate of the number of hours that FBI employees actually “worked” in Iraq, as that term is used under the relevant laws, regulations, and FBI policies.

The evidence is clear, however, that the actual number of hours that FBI employees worked in Iraq varied widely. We found that some employees worked differing hours from day to day and week to week, depending on the demands of their assignments. Other employees worked as many as 24 hours on some days. The evidence showed that there was also great variance in hours worked among different employees, depending on factors such as location, assignment, and employee diligence.

The FBI employees we interviewed generally agreed that they did not report their hours precisely, but rather understood that they were permitted to claim pay for 16 hours of work every day for each day they worked in Iraq as a rough “average” of the time they actually worked in recognition that they were always on call, had limited opportunities to use off-time for private purposes, and as a tacitly approved “benefit” that served as an inducement to volunteer for this assignment, where they were working and living under stressful and uncomfortable conditions.

The employees’ understanding about reporting their time mirrored the justifications given by Deputy Assistant Director Harrington for the 16-hour standard workday. We found that the FBI’s written memoranda, “pay sheets,” and oral instructions, as described in Chapter Four, were at best vague and ambiguous regarding what constituted “work” in Iraq and how FBI employees should report their time and attendance. Although some pay sheet instructions advised FBI employees to report only what they worked, it appears that employees in Iraq understood that because of their on-call status and lack of opportunities for recreation, virtually all waking hours could be considered “work.”

We concluded that prior to this investigation most FBI employees believed that they had been approved by FBI management to claim compensation for 16 hours for every day they spent in Iraq, regardless of how many hours they were actually working. Given FBI management’s tacit approval of this practice, and the lack of documentation or other evidence about the number of hours particular employees actually worked on each day, we did not find sufficient evidence to conclude that particular FBI employees detailed to Iraq committed misconduct with respect to their overtime claims. Yet, as we discuss in the next chapter, these same employees were not entitled to claim 16 hours a day, 7 days a week without regard to how many hours they

actually worked. Rather, as discussed in the next chapter, we found that the FBI's practices and policy on overtime in Iraq were not consistent with applicable statutes, regulations, and FBI policies.

CHAPTER SIX

ANALYSIS OF FBI OVERTIME PRACTICES IN IRAQ

As demonstrated above, prior to the initiation of this investigation the FBI adopted a practice of permitting, with rare exception, all employees deployed to Iraq to report 16 hours of work per day, 7 days a week regardless of the actual time they worked. This de facto policy was consistent with a stated goal of maximizing the compensation of FBI employees who volunteered for this duty. In this chapter we analyze whether the FBI's pay practices were consistent with applicable statutes, regulations, and FBI policies. We also assess the adequacy of the supervision and guidance provided to FBI employees on these pay practices, and address accountability for the deficiencies in FBI practices.

I. Consistency with Statutes, Regulations, and Policies

A. Whether the FBI Allowed Employees To Claim Overtime for Non-Work Activities

We found that by allowing agents to claim overtime on the basis of a 16-hour work day, the FBI permitted agents to claim overtime for activities that are not compensable under federal regulations and FBI policies, such as time spent eating, exercising beyond 3 hours per week, commuting, socializing, and "standing by."

1. Eating

As detailed in Chapter Two, under the Federal Employee Pay Act (FEPA) regulations and the FBI's MAOP, employees cannot be paid for mealtime unless they are "interrupted by a call to duty" or perform "substantial labor" during the meal. Nevertheless, the FBI consistently disregarded this limitation and paid FBI employees overtime for time spent at meals. During the scheduled 16-hour workday, most FBI employees took breaks for at least one meal, and sometimes more. In many cases, mealtimes lasted an hour or more and were not interrupted by a call to duty.

FBI employees in the United States do not count lunch breaks toward their ordinary scheduled workday. Thus, a typical FBI support employee working at FBI Headquarters has a schedule that ends 8 hours and 45 minutes after it begins, although the employee is paid for only 8 hours (with 45 unpaid minutes for lunch). The same is true for FBI agents, except that they are required to work an average of 2 additional hours per day to qualify for their 25 percent availability pay premium.

Unlike work schedules in the United States, the standard 16-hour schedule in Iraq did not designate any amount of uncompensated time for meals. FBI employees did not routinely skip all meals during their 16-hour shifts. Yet, FBI employees claimed the full 16 hours as work, including mealtimes during those hours.

The March 2008 Overtime Memorandum condoned this practice by identifying eating as a compensable “activit[y] conducted during the workday related to operational readiness.” Yet, this practice violates federal pay regulations, which specifically provide that federal employees are not paid for “time available for, or spent, sleeping and eating . . . even where the employee is required to be on the employer's premises, [unless] substantial labor is performed in the time set aside for sleeping and eating” or unless the sleeping or eating is “interrupted by a call to duty.” 5 C.F.R. § 550.112(m)(1).

2. Exercising

As previously explained, the FBI’s MAOP authorizes employees to be paid for no more than 3 hours of exercise per week. The MAOP also prohibits using overtime hours for exercising. Yet, we found that the FBI consistently permitted its agents in Iraq to claim more than 3 hours of exercise per week as work, and likely paid overtime to its employees in Iraq for time spent exercising. The March 2008 Overtime Memorandum condoned this practice by defining exercise as an activity that is compensable because it is “related to operational readiness,” without regard to the 3-hour limitation. The March 2008 Overtime Memorandum was therefore inconsistent with the FBI’s MAOP to the extent that it authorized paying overtime to employees for any exercise time, and to the extent that it authorizes employees to claim more than 3 hours of exercise per week as regular work time.⁵⁶

3. Commuting

As noted in Chapter Two, federal law and FBI policies generally prohibit paying for commuting time to and from work even if the employee is temporarily living away from home because of a work assignment. Yet, FBI employees in Doha were permitted to count approximately 1 hour of commuting time each way as work time as part of the 12 or 16 hours they reported each day. None of the exceptions under federal law appear to be applicable to this travel time, such as arduous conditions or a requirement that work be performed during the travel.

⁵⁶ We do not believe that exercise can be considered a “preshift or postshift activity” for which overtime can be paid under 5 C.F.R. § 550.112(b)(1), because such activity is not typically “indispensable to the performance of the [employee’s] principal activities.”

In *Mossbauer v. United States*, 541 F.2d 823, 825 (9th Cir. 1976), the court held that an employee who was required to live away from home in order to facilitate his presence at a remote worksite could not claim reimbursement for the travel time from his quarters to the workplace if such travel time was “analogous to a suburban dweller’s daily commuting time.” We are not aware of any basis on which to distinguish the travel time in Doha from an employee’s daily commute. Doha is a modern city and is not in a war zone. We concluded that commuting time in Doha was not compensable as overtime.

4. Recreation and Socializing

Federal regulations permit the FBI to pay overtime for “principal activities,” defined as “the activities that the employee is employed to perform.” 5 C.F.R. § 112(a)(1). However, FBI employees were permitted to count hours spent socializing and watching movies toward their 16-hour schedules for purposes of overtime. These activities would not be compensable as work in the United States. Indeed, the MAOP specifically prohibits agents from consuming alcoholic beverages during working hours. MAOP, Pt. 1, § 1-2. We found no authority for the FBI to make an exception for overseas duty in Iraq.

5. Standing By

As previously noted, federal regulations preclude FBI agents who receive availability pay from also receiving overtime compensation for standby duty. 5 C.F.R. § 550.186. The reason for this restriction is that criminal investigators such as FBI agents already receive availability pay for the purpose of ensuring their availability for unscheduled duty based on the needs of the agency. 5 U.S.C. § 5545(d). It is not within the FBI’s discretion to waive this regulatory restriction.

However, FBI employees we interviewed, including CTD Deputy Assistant Director T.J. Harrington, stated that FBI employees in Iraq were on continuous standby status, which justified permitting them to claim 16 hours of work every day, regardless of what they were doing during the standby status. Yet, we found no authority for the FBI to pay its agents overtime for hours spent waiting for assignments. Federal pay regulations do not permit the FBI to pay its agents overtime for standby duty.

The analysis is more complicated with respect to non-agent employees such as Intelligence Analysts and other support personnel. These employees may receive overtime pay for standby duty, but only if they were restricted to a designated post with limitations on their activities “so substantial that the employee cannot use the time effectively for his or her own purposes.” 5 C.F.R. § 550.112(k)(1). As noted above, however, federal regulations stipulate that mere geographic isolation, such as an employee stationed in a remote wildland or on a ship at sea, is not sufficient to satisfy this condition. 5 C.F.R.

§ 550.112(k)(2). An employee does not qualify for standby pay if he is allowed to leave his designated post, even if he is required to remain within a call-back radius. 5 C.F.R. § 112(l)(1).

We did not have sufficient evidence regarding the restrictions on each non-agent employee's activities to determine whether such restrictions were so substantial that the employees could not have used the time for their own purposes. Yet, to the extent that such non-agent employees were permitted to spend some of these "standby" hours away from their work stations, such as in their quarters, at the club, or shopping at the PX, these hours would not be compensable as overtime.⁵⁷

B. Whether Overtime Was Properly Scheduled in Advance

As noted in Chapter Two, under federal statutes and regulations federal agents who receive availability pay may receive overtime pay only for "overtime work which is scheduled in advance of the administrative workweek." 5 U.S.C. § 5542(d)(1); see also 5 C.F.R. §§ 550.111(f)(1) and 550.182. The FBI's MAOP further requires, as a prerequisite to paying overtime, that the Special Agent's supervisor provide the agent with a written work schedule in advance of the administrative workweek that specifies the days and hours that the agent will be working. MAOP Pt. 1, § 8-2.1.1(1). In the absence of a written schedule, the employee is not eligible to be paid overtime and must instead be credited with availability pay hours. MAOP, Pt. 1, § 8-2.1.1(4). Moreover, the specific hours that have been scheduled ahead of time are the only hours that can be compensated as overtime. MAOP, Pt. 1, § 8-2.1.1(7).

Because federal pay laws and regulations require that overtime for FBI agents be "scheduled in advance," this obligation is not discretionary for the FBI. However, we found no evidence that specific overtime hours for FBI agents in Iraq were ever formally scheduled in advance until March 2008, after this investigation began, when the FBI explicitly stated that personnel assigned to Iraq and Afghanistan were scheduled to work 7 days a week for a specific 16-hour schedule.⁵⁸

The requirement that a written work schedule be provided to the agent in advance of the workweek is found in Part 1 of the FBI's MAOP, Section 8-2.1.1, and the FBI can presumably modify it. However, we found no evidence that the

⁵⁷ FBI policy could legally be modified to authorize agents to receive AVP credit (but not overtime) for time spent standing by.

⁵⁸ The 2005 Overtime Memorandum stated merely that FBI employees "usually" worked those hours. The pay sheets did not purport to schedule overtime in advance but rather sought merely to show employees how to report their time, using a 16-hour schedule with particular starting and ending times as an example.

FBI either modified this requirement or complied with it. The ASD Memorandum, which was issued in March 2003, referred to this requirement and provided examples and explanations of how employees would be compensated. However, we found no evidence that the CTD ever actually implemented or enforced this requirement in Iraq. Even the 2008 memorandum contains no requirement of a written schedule provided to agents in advance.

Moreover, even assuming that the FBI's de facto 16-hour, 7-day schedule had satisfied the requirement that overtime be "scheduled in advance," many FBI agents in Iraq did not work this schedule, and the FBI could not permissibly have compensated them for the maximum 62 hours per week of overtime. The evidence is clear that many agents worked different hours than those specified in the FBI's generic 16-hour schedule, that many agents' hours varied from day to day and week to week, and that many FBI employees in Iraq did not work 16 hours per day, every day of the week. Federal law and regulation only permits agents to be paid overtime for work actually performed during the specific hours on the specific days that were scheduled in advance. If other work is actually performed, it is unscheduled overtime and must be credited as availability pay.

For example, FBI employees were often required to work overnight in the communications room in Baghdad. That employee's hours would not have been encompassed in the generic 16-hour schedule, and therefore (if the employee was an agent) the hours outside that schedule would be compensable only as availability pay credits. Likewise, agents assigned to the military base north of Baghdad worked many nighttime hours falling outside the particular hours specified by the FBI as its generic 16-hour "schedule" and by law could be reimbursed with availability pay credits only, not with overtime pay.

A different problem resulted from the fact that FBI employees did not consistently work 16 hours every day. Many FBI employees told us that their actual hours varied widely from day to day according to the requirements of their assignments and events in Iraq, although they said that 16 hours was a reasonable "average" of their hours over the course of their deployment. Even if it is true that they worked on average 16 hours each day – and the evidence for many FBI employees indicated otherwise – we found no authority for FBI employees to "average" their time in this manner for purposes of claiming overtime pay. Agents may only claim overtime hours on a particular day for the hours that were both scheduled in advance and actually worked.⁵⁹

⁵⁹ The same problems exist with regard to night differential pay. The night differential premium (10 percent of the basic pay rate) is available for all *regularly scheduled work* between 6:00 p.m. and 6:00 a.m. The FBI apparently paid all employees in Iraq this differential for 5 hours every day. However, to the extent that the employee worked fewer than 16 hours on a particular day, or worked different hours than the exact hours specified in the FBI generic (Cont'd.)

To the extent that an FBI agent's workload in Iraq was so unpredictable from day to day that an accurate schedule could not be prepared in advance, and the agent worked overtime hours that were not scheduled, the FBI could not legally pay overtime for such hours. Conversely, if an agent worked fewer hours than he was scheduled for in advance, he could not be paid overtime for the hours he did not work. These limitations not only appear in the FBI's MAOP, but are also mandated under statute and regulation for any federal criminal investigator receiving availability pay. 5 U.S.C. § 5542(d)(4); 5 C.F.R. §§ 550.111(f)(1) and 550.182(b).

The ASD Memorandum, which was issued to all FBI divisions on March 24, 2003, provided an accurate road map to compliance with the requirements for Scheduled Overtime for agents. Among other things, it stated clearly that "a written schedule must be formulated and communicated to SAs in advance of the administrative workweek." It explained with examples how hours worked each day would be credited toward regular time, availability pay hours, and overtime. Yet, we were not provided with an adequate explanation why CTD simply ignored the instructions in the ASD Memorandum in Iraq.

In sum, the one-size-fits-all, generic schedule adopted by the CTD for FBI agents in Iraq did not comply with FBI policy or the law. The CTD's attempt to award its Iraq agents with the "maximum permissible compensation under law and regulation," as stated in the overtime memoranda, was contrary to law, regulation, and FBI policy.

Having found that, we recognize that the availability pay system was designed for domestic law enforcement and not for the conditions under which FBI agents served in Iraq and Afghanistan. The availability pay system is essentially based on the premise that over the course of a year the demands on a criminal investigator to work unscheduled overtime will average out to approximately 10 hours per week, and that beyond these amounts, additional overtime should be scheduled in advance. Circumstances in Iraq and Afghanistan may have been inconsistent with this premise, particularly if the actual demands on an agent's time in those countries were too unpredictable to permit reasonably accurate scheduling of overtime hours in advance of the workweek.

Yet, the FBI did not address this problem or seek an exemption from the relevant availability pay constraints for agents serving in these countries. The

schedule, the night differential was improperly paid. Again, there is no authority to average time over different days for purposes of calculating the night differential. If an agent is scheduled for particular hours, but actually keeps working until 3 hours after his scheduled stopping time, the agent may not receive overtime pay or night pay for the unscheduled hours. The agent may only receive availability pay credit for those hours.

restrictions on paying unscheduled overtime to criminal investigators have a statutory source and cannot be ignored. We also note that it was possible to obtain statutory waivers of certain pay regulations in other contexts. For example, the Department has obtained congressional waivers of the statutory annual premium pay limitations in 5 U.S.C. § 5547 for employees serving in Iraq. PL 109-13 § 1008 (2005); PL 109-163 § 1105 (2006). But the FBI did not do so in this case, and instead simply ignored the law.

A different analysis applies with respect to FBI non-agent employees who were not “criminal investigators” receiving availability pay. As previously noted, under 5 C.F.R. §§ 610.111 and 610.121(b), the FBI is generally required to schedule each employee’s administrative workweek, including regularly scheduled overtime, “so that it corresponds with the employee’s actual work requirements.” Likewise, the FBI’s MAOP requires that overtime hours be scheduled in advance for non-agent employees as well as for agents. MAOP Pt. 1, § 8-2.1(8). Yet, we found no evidence that overtime hours for non-agents were explicitly scheduled in advance prior to the blanket generic schedule announced in the March 2008 Overtime Memorandum.

Unlike the case with FBI agents who receive availability pay, the regulations require that non-agents be paid for any overtime hours they are required to work, regardless of whether the hours were scheduled in advance. See 5 C.F.R. §§ 610.111(b) and 610.121(b)(3). Therefore, the FBI’s failure to schedule overtime for non-agents did not mean that the FBI lacked authority to pay such employees for the overtime hours they were required to work, assuming that the overtime was officially ordered and approved and employees were engaging in compensable activities during that time.⁶⁰ Yet, as discussed above, we found evidence that FBI support employees did not actually work 16 hours per day, each day, and that prior to 2008 they were paid overtime for those hours nonetheless.

C. Whether the FBI Properly Ordered and Approved Overtime

A federal statute also requires regularly scheduled overtime to be “officially ordered and approved,” and federal regulations require that the approval be memorialized in writing by an appropriate official. 5 U.S.C. § 5542(a); 5 C.F.R. § 550.111(c). In addition, the FBI’s MAOP requires that any request for scheduled overtime for Special Agents include an explanation of why supervisors could not rely on Availability Pay and/or increased staffing instead of overtime. MAOP, Pt. 1, § 8-2.1.1. The MAOP also requires that the FBI’s Finance Division prepare a financial impact analysis in connection with any request for Scheduled Overtime for Special Agents. *Id.*

⁶⁰ The FBI sent substantially more agents to Iraq than non-agent employees.

We concluded that the 2003 Overtime Memorandum was approved by Deputy Director Gebhardt in March 2003 and that it satisfied the requirement that scheduled overtime be approved in writing. Although we could not locate a signed version of the 2003 memorandum, several subsequent FBI documents, including the ASD Memorandum, the 2005 memorandum, and the 2008 memorandum, stated that Gebhardt approved the 2003 memorandum at the time.⁶¹

The 2003 Overtime Memorandum was never “uploaded” into the FBI’s computer system for dissemination throughout the FBI. However, on March 24, 2003, the ASD Memorandum was issued for the purpose of “[a]dvis[ing] that scheduled overtime (SOT) was approved for Special Agents and support employees performing work in command posts in connection with the [Iraq] matter.” It therefore appears that the ASD Memorandum was the vehicle for disseminating the decision approving overtime for the Iraq mission, even though the decision itself was embodied in the 2003 Overtime Memorandum issued a few days earlier.⁶²

Although the 2003 Overtime Memorandum satisfied the writing requirement for approving scheduled overtime, it does not appear that the CTD satisfied the other requirements in the FBI’s MAOP for approving scheduled overtime. We found no evidence that anyone in the CTD ever explained why availability pay hours or additional staffing could not accomplish the FBI’s mission in Iraq, as is required by the MAOP.⁶³ The only financial analysis we found was a set of calculations in the 2005 Overtime Memorandum, prepared more than 2 years after overtime had actually been approved, that contained errors and inconsistencies. There is also no evidence that the 2005 financial analysis was ever considered as part of a decision to authorize scheduled overtime, as contemplated under the MAOP.

We believe that the CTD could have justified scheduled overtime for employees in Iraq under the procedures and criteria required by the MAOP. Given that the financial impact of the FBI’s decision to approve blanket

⁶¹ For Special Agents the authorized official under the MAOP is the Executive Assistant Director for Administration or higher-level FBI official. As Deputy Director, Gebhardt was authorized to order and approve overtime.

⁶² T.J. Harrington, the former Deputy Assistant Director for the CTD, told us that although there was no question overtime had been approved, he had never seen the 2003 Overtime Memorandum until we showed it to him.

⁶³ The 2003 Overtime Memorandum contains a general statement that overtime was needed because personnel would be “tasked to dedicating even more work hours to investigative efforts.” We do not consider this statement to satisfy the MAOP requirement for an explanation of why availability pay hours or additional staffing could not accomplish the FBI’s purposes.

overtime ran into the tens of millions of dollars – far greater than for ordinary requests for scheduled overtime such as those a field office might make in connection with an important investigation with urgent and immediate staffing demands – we believe that the FBI should have complied with the analytical and procedural requirements of the MAOP.

II. Whether the FBI Improperly Changed its Employees’ Official Workweeks in Order To Award Sunday Pay

The FBI instructed employees deployed to Iraq to change their “official” workweek from Monday-through-Friday to Sunday-through-Thursday during their deployment. The Sunday-through-Thursday shift is shown as one of the illustrative shifts in the pay sheets included in the pre-deployment handbook. Because of that change, employees increased their salary by qualifying for extra Sunday differential pay. We calculated that over a 90-day deployment, a typical GS-13 step 5 employee who switched to a Sunday-through-Thursday workweek in Iraq would earn approximately \$1,000 more (depending on the employee’s base salary) than an employee who kept his Monday-through-Friday workweek, even if they worked the same number of hours.

Federal regulations provide that the basic workweek is scheduled on 5 days, Monday through Friday if possible, and that additional days scheduled in advance are overtime. 5 C.F.R. §§ 610.111(a)(2) and 610.121(a)(2). If the needs of an agency require that an employee’s basic workweek include a Sunday, the employee is entitled to receive a 25 percent premium for up to 8 hours of Sunday work. However, under the FBI’s MAOP, if the employee’s basic workweek is changed solely at the request of and for the benefit of the employee, Sunday pay is not available. MAOP, Pt. 1, § 20-8(2).

Because the FBI anticipated that agents would be working 7-day workweeks, we found that the FBI’s practice of approving a schedule change to a Sunday-to-Thursday schedule was meaningless from a practical standpoint and served only one purpose: to enable all employees to claim Sunday differential pay in addition to the overtime they would be earning for working 7 days a week.⁶⁴ We believe that shifting the basic workweek to include Sunday violated 5 C.F.R. § 610.121(a)(2), as well as the FBI’s own MAOP because it did not serve the needs of the FBI in any way.

We also found that the March 2008 Overtime Memorandum did not correct this problem. It stated that the workweek begins on Monday, which

⁶⁴ In Iraq, the weekend is Friday and Saturday and Sunday is a regular workday. However, this was not a genuine rationale for shifting the agents’ regular workweeks to include Sunday, because all agents were expected to work 7 days a week.

would suggest that Sunday is not part of the 5-day basic workweek. If so, FBI employees in Iraq should get overtime for Sunday but not the 25 percent Sunday pay differential. As noted above, agents cannot claim Sunday pay for hours that are reimbursed as overtime. However, the March 2008 Overtime Memorandum contradicts its own instructions by stating that agents are authorized compensation for 8 hours of Sunday pay.

III. Estimate of the Total Cost of Improperly Paid Overtime and Sunday Pay

As previously noted, it is impossible to determine the precise number of hours that any particular FBI employee actually worked in Iraq, which prevents us from precisely calculating the total cost of improperly paid overtime and Sunday pay for FBI employees in Iraq. However, a conservative estimate of excess overtime paid can be calculated by comparing the hours that FBI employees reported in 2008 (after the practice of uniformly reporting 16 hours of work every day was abandoned) with the hours reported before 2008.

The quarterly audits for Iraq calculated that in 2008 FBI employees claimed an average of 100 to 112 hours of overtime each pay period. Using the midpoint (106 hours) as an average for the number of hours that should have been reported prior to 2008, we estimate that the average FBI employee reported 18 more hours per 2-week pay period (124 hours minus 106 hours) prior to 2008, when the practice of uniformly reporting 16 hours a day, every day, was abandoned. This means that, prior to 2008, a typical FBI employee collected roughly 117 hours (18 times 6.5 pay periods) more in overtime pay over a 3-month tour. Therefore, using a “typical” GS-13, step 5 employee from 2005, compensated at \$39.12 per hour, this translates to \$4,577 additional for each employee. Multiplying this figure by approximately 1,400 tours during 2003-2007, we estimate that the FBI paid roughly \$6.4 million in excess overtime for employees in Iraq.

We recognize that this estimate is an approximation. In responding to this estimation, the FBI noted that the underlying methodology assumes that in every year from 2003 to 2007, agents actually worked the same average number of hours per day that they reported in 2008. The FBI argues that its employees worked longer hours, on average, in the early years of the mission in Iraq. However, as noted above, the FBI was not able to provide any quantitative information regarding the number of hours agents actually worked during 2003-2007, although we concluded on the basis of interviews that few employees averaged 16 hours per day during their deployments. We also recognize that we cannot state with precision whether the average hours that employees reported in 2008 was representative of time FBI employees actually worked during 2003-2007.

Yet, we believe that our methodology for estimating the total of excess overtime payments is conservative and likely understates the amount of improper overtime for a variety of reasons. First, as noted above, until July 2008 the FBI's Iraq overtime policies inappropriately permitted agents to claim time spent for meals and exercise as overtime. The hours reported in the audits for the first two quarters of 2008 therefore likely included hours spent eating and exercising and likely overstated the number of hours that agents were actually working. In addition, the FBI has still never clarified that time spent "standing by" cannot be claimed by agents as overtime, and it is therefore likely that the 2008 audits include many hours in this category. In sum, we believe that because the FBI still has not fully corrected its policies regarding overtime prior to the audits, the hours reported in 2008 included hours that are not properly claimed as work.

This estimate is also conservative because it calculates the amount of the overpayment as if all employees were Special Agents who claimed 124 hours overtime per pay period prior to 2008. In fact, a significant minority of FBI employees in Iraq were non-agents who claimed 144 hours per pay period for overtime prior to 2008. Non-agent employees therefore were claiming on average roughly 38 hours of overtime per pay period more than they had previously claimed, rather than the 18 hour difference used in the calculations above.

Finally, as shown on Table 3, we estimated that the FBI paid approximately \$1,017 during a 3-month tour to a typical employee in Iraq for Sunday pay prior to 2008. Multiplying this figure by 1,400 tours suggests that the FBI overpaid its agents approximately \$1.4 million for Sunday pay from March 2003 to October 2007.

IV. Guidance and Supervision Provided to FBI Employees Deployed to Iraq

We concluded that the FBI provided inadequate and inaccurate guidance to its employees in Iraq regarding how they should report their hours of work. Although employees sent to Iraq often asked – especially in the early days of the Iraq mission – what activities they could count as "work" and what activities they could not (that is, what activities they could get paid for and what activities were personal and not part of work hours), they initially received no guidance or training.

The question of what activities are compensable as work was not discussed in the 2003 Overtime Memorandum that authorized overtime in Iraq. Nor was this issue addressed in the materials that the CTD used to prepare employees for the Iraq deployments, such as the pay sheets that listed the hours the agents were assumed to be working, the pre-deployment handbook

that was given to all employees slated to work in Iraq, or the FBI's Intranet that essentially contained the same information as the pre-deployment handbooks. Neither the ASD Memorandum, the 2005 Overtime Memorandum, nor the 2007 overtime e-mail cast any additional light on this issue.

In addition, employees who asked during pre-deployment training what counted as work were never given clear answers. Instead, trainers sidestepped the questions by telling employees to bill the hours they worked, without describing what counted as work. We believe these responses contributed to the tacit understanding that all employees could bill 16 hours a day, 7 days a week, regardless of the time they actually spent working.

In fact, the first formal guidance about what activities counted as "work" was provided in the March 2008 Overtime Memorandum, 5 years after the CTD starting sending employees to Iraq, and after this investigation had begun.

However, even this guidance was insufficient and incorrect. The March 2008 Overtime Memorandum stated that FBI employees could count as work "activities conducted during the workday related to operational readiness, such as eating, exercising, training and the preparation of gear and equipment for the following workday." That memorandum, which was prepared without consulting with the FBI's OGC, was wrong. Moreover, to the extent that the CTD was stating that all mealtimes and unlimited exercise sessions counted as work, the CTD lacked authority under federal law and the MAOP to make such a commitment. In addition, the March 2008 Memorandum failed to advise that certain activities, such as socializing at cocktail parties, cannot be claimed as work time. It also provided no clarification on whether employees can claim overtime for hours in which they are merely "standing by."

In essence, the CTD's March 2008 Overtime Memorandum appears to have accepted a "socks on/socks off" argument (made repeatedly by many employees who worked in Iraq, as well as by Harrington), under which virtually every waking hour should be counted as work simply because even non-work activities (such as eating and exercising) help employees survive the unrelenting and stressful environment in a war zone. Certainly, employees need "down" time to relax and recover, but simply because that down time helps employees adapt to a difficult environment does not convert it into paid work or overtime. If that were true, then any time – even time spent sleeping – could be paid work time.

We recognize that the FBI's failure to comply with applicable laws and its own policies in the early stages of the Iraq mission is understandable to some extent due to the crisis atmosphere. However, as detailed in Chapter Seven, by the time the Iraq mission began in 2003, FBI agents had already been in Afghanistan for a year, so the issue of compensating agents deployed to a war zone was not new. Moreover, the FBI had 5 years since the invasion of Iraq to

establish lawful overtime procedures and it failed to do so prior to the initiation of this investigation.

We had difficulty determining precisely which FBI officials were responsible for the deficiencies in the FBI's overtime practices in Iraq. Former Deputy Director Gebhardt apparently approved the original 2003 memorandum authorizing overtime. There is no evidence that the FBI performed the financial analysis required under the MAOP before this decision. Moreover, even if a financial analysis had been performed at the time, it would have become obsolete shortly thereafter when the United States invaded Iraq and the FBI's mission expanded significantly

But the 2003 memorandum did not purport to establish schedules for individual employees as required under statutes and regulations, or instruct them on how to report their time. The ASD Memorandum correctly identified the requirement for such schedules, but its instructions were never implemented. Responsibility for this omission was difficult to determine.

Harrington told us that the FBI's practice of allowing agents to report up to 16 hours per day was approved by the Assistant Directors for CTD, and that Mefford, the Assistant Director when the Iraq mission began in 2003, was "pretty adamant to make sure the guys got paid every single dime possible under the circumstances." We believe this philosophy led to the uniform practice of reporting 16 hours a day, 7 days a week. We also believe that the Assistant Directors for CTD and Deputy Assistant Director Harrington were ultimately responsible for this practice becoming the standard for all FBI agents in Iraq.⁶⁵

Yet, many of the deficiencies in the FBI's overtime practices in Iraq were ratified with the 2008 memorandum, which was issued after this investigation began and was approved by Arthur Cummings (Executive Assistant Director of the National Security Branch) and other CTD officials.⁶⁶ Ultimately, these approving officials bear some responsibility for these deficiencies.

Significantly, we found no evidence that any of these officials consulted with the FBI OGC at any time from 2003 until mid-2008 regarding the law and FBI policy for what constituted compensable work, or the requirements for paying overtime in Iraq. We found this omission to be inexplicable.

⁶⁵ The Assistant Directors for CTD during the 2003-2008 time period were Larry Mefford, John Pistole, Gary Bald, Willie Hulon and Joseph Billy Jr. Michael Heimbach, the current CTD Assistant Director, was appointed on April 25, 2008.

⁶⁶ The National Security Branch oversees the CTD and other divisions.

Harrington told us that overtime was discussed and approved at upper-level management meetings, including some attended by FBI Director Mueller and General Counsel Caproni. However, the problem was not with the approval of the concept of paying overtime to FBI employees in Iraq; rather, it was with devising the proper procedures to ensure compliance with the requirements under federal law and FBI policy. This was a CTD responsibility. Neither Director Mueller nor General Counsel Caproni had any reason to expect that the CTD would approve the payment of overtime on the basis of a generic 16-hour, 7-day schedule regardless of the actual hours that employees were working, or that the CTD would fail to adopt or implement proper procedures for scheduling and reporting the overtime that had been approved in concept.

CHAPTER SEVEN

FBI IN AFGHANISTAN

In February 2008, several months after the initiation of this investigation, the FBI and OIG received an anonymous complaint about FBI activities in Afghanistan. The complaint alleged that:

[T]he FBI is so overstaffed in Kabul . . . [that] we are stumbling over each other and 10 do what in reality 2 agents can do. Even though we don't have enough to keep us busy, we are mandated to claim that we are working 7 days a week 16 or more hours a day. I know it is a falsehood, but I was forced to go along with the rest of the crowd. We get paid each day to workout as much as we want. We get paid to drive over to the military bases and shop for souvenirs, drink coffee etc. We get paid when we go to marine happy hours, etc. I know this is not right, but the management has instructed every employee to claim the same regardless of our actual hours. We could barely justify 8 hours and even then, it wouldn't take us all here.

As discussed in this chapter, we therefore reviewed FBI pay practices in Afghanistan and determined that many of the same deficiencies in pay practices that we found in Iraq also occurred in Afghanistan.

I. Background

The FBI deployed many employees to Afghanistan and these employees have served approximately 596 tours in Afghanistan since 2001.⁶⁷ Most FBI employees were deployed to Afghanistan for a period of 60 to 90 days.⁶⁸ FBI agents were assigned to interrogate detainees, participate in certain military operations comparable to the domestic execution of search warrants and crime scene processing, collect fingerprints and other identification information about detainees or suspects, and investigate bombings and other crimes. The agents generally lived and worked on military bases scattered around the country. FBI employees in Afghanistan reported to an On-Scene Commander for most of the period since 2001, but as in Iraq, prior to the 2007 e-mail they reported their hours to timekeepers in their home offices in the United States.

⁶⁷ The FBI could not provide us with the number of employees sent to Afghanistan, only the number of total tours FBI employees served. Because some employees served more than 1 tour, the number of employees would be somewhat less than 596.

⁶⁸ According to the FBI, the typical deployment to Afghanistan was recently increased.

II. FBI Memoranda, Guidance, and Policy

On September 13, 2001, 2 days after the terrorist attacks in New York and Washington, FBI Deputy Director Thomas J. Pickard approved a memorandum from the CTD seeking authorization for scheduled overtime for FBI Special Agents working on matters related to the attacks of September 11, 2001. On September 18, 2001, the Administrative Services Division (ASD) of the FBI issued a memorandum for distribution to all employees stating that scheduled overtime had been approved for employees working in support of the September 11 investigations. The FBI relied on these memoranda as authority to pay overtime for agents in Afghanistan.

These memoranda, which were prepared in the immediate aftermath of the September 11 attacks, did not include any guidance on the type of activities that are compensable with overtime pay. The September 13, 2001, memorandum stated that the Finance Division had determined that it was unable to estimate overtime costs through the end of September 2001.

The FBI did not provide any other documents addressing the approval of overtime for employees in Afghanistan until 2005. As noted in Chapter Four, the 2005 Overtime Memorandum, the 2007 overtime e-mail, and the March 2008 Overtime Memorandum all stated that they applied to both Iraq and Afghanistan.

III. Overtime Claims by FBI Employees in Afghanistan

We reviewed the hours billed by employees working in Afghanistan during 2007. Out of 103 employees deployed to Afghanistan that year, all but 2 reported (or said they intended to report) the maximum 16 hours per day, 7 days a week.⁶⁹

However, unlike in Iraq, it does not appear that the 16-hour, 7-day standard schedule was adopted as a uniform standard from the beginning. The FBI conducted a quarterly review of the performance and output of FBI employees in Afghanistan in December 2005, in which it examined the hours reported by seven employees in Afghanistan. This review found that FBI employees in Afghanistan had billed anywhere from 0 to 126 hours of overtime per pay period, and that only 1 of the 7 employees billed the same amount 2 weeks in a row. Both figures, according to the FBI supervisor who ordered the

⁶⁹ As in Iraq, some employees in Afghanistan reported fewer than 16 hours per day for 7 days a week, but they later told us that they intended to report the full 16 hours, and that differences were due to bookkeeping errors.

review, were evidence that employees were actually working the hours they billed, and not just routinely billing the maximum amount possible.

However, the FBI initiated another review in March 2006 examining the hours billed by seven FBI employees in Afghanistan who were different from those reviewed in December 2005. This time the review found that all 7 were billing 16 hours a day, 7 days a week, without variation. The FBI supervisor told us that this finding was particularly galling to him because he had received reports that one of the seven had been spending his days playing video games.

In an attempt to follow up on the findings of this review, in March 2006 the supervisor e-mailed the On-Scene Commander in Afghanistan asking for more information. The On-Scene Commander replied that agents were working more than 16 hours a day and that any effort to audit overtime was a “non-issue” that would only create an “unnecessary morale issue.” Furthermore, the On-Scene Commander wrote, any review of hours worked would pose problems:

If we want people to document their “working” hours, then clarification will have to be provided by HQ. . . . For example, when I stay up until 5:00 a.m. waiting . . . [for a dangerous assignment] to be approved, do I stay on the books that entire time, or do I sign out if I fall asleep for an hour or two. If I then get up at 7:00 a.m. to attend [a] briefing, but take a nap that afternoon, do I sign in and out. When an agent goes on an overnight . . . [assignment], is he on the books the entire 24/7, since they rarely get the opportunity to sleep (nor do they necessarily want to, as they are more concerned with staying alive.) When the air raid sirens go off in the middle of the night, and the agents scramble to the shelters and sit for two hours – should they sign in and out? There are so many scenarios that would require clarification from HQ, that it seems advantageous to all of us to set the hours as [the particular hours specified in the generic FBI 16-hour schedule], and then expect the agents to sign in and out for those hours. . . . Rather than having the agents try and “accurately” track their hours, a better fix may be to have HQ bless this shift, and then appreciate the bargain the Bureau is getting from everyone over here.

We found that the review begun in March 2006 was never completed and no further quarterly reviews were attempted until June 2008. In June, as required by the March 2008 Overtime Memorandum, the CTD resumed quarterly audits. As previously summarized in Table 2, the audits for Afghanistan indicate that on average FBI employees in Afghanistan claimed between 108 and 114 hours of overtime per pay period in 2008. In 2007, before the FBI told its employees that they should only claim the hours they actually worked, FBI Special Agents in Afghanistan claimed 124 hours of

overtime per pay period, and non-agent FBI employees claimed 144 hours of overtime per pay period, both based on 16-hour, 7-day schedules.

The FBI was unable to provide us a precise dollar figure for the overtime or other forms of premium pay paid to FBI employees in Afghanistan. We were not able to construct an estimate of the total cost of premium pay in Afghanistan because there was more variability in the lengths of deployments to Afghanistan and the practice of uniformly reporting 16 hours every day apparently did not catch on in Afghanistan until as late as 2006. Instead, we constructed an estimate for a single year (2007), based on the FBI's statement that 103 employees were deployed to Afghanistan that year and our finding that virtually all FBI employees were claiming 16 hours of work per day, 7 days a week by that time. Based on these calculations, we estimated that in 2007 alone the FBI paid its employees in Afghanistan approximately \$5.3 million in premium pay, of which approximately \$3.4 million was overtime pay.

Although our review of overtime in Afghanistan was limited, we found evidence that agents were not working exactly 16 hours per day every day. For example, the quarterly reviews conducted by the FBI showed that in 2005 and 2008 there was significant variability among employees and workdays in the amount of overtime worked in Afghanistan. Some employees claimed no overtime at all in 2005. According to the FBI audits, in 2008 the average amount of overtime claimed by individual FBI employees in Afghanistan ranged from a low of 48.8 hours per pay period to a high of 144 hours. We are not aware of any change in the assignments or management of FBI employees in Afghanistan in 2006 or 2007 that would have resulted in all employees actually working exactly 16 hours every day, 7 days a week throughout their deployments. Therefore, we do not believe that the practice of reporting time uniformly according to this schedule, which apparently began in 2006, reflected an accurate statement of the amount of time each FBI employee worked each day.

IV. Conclusions about Overtime in Afghanistan

We concluded that the same deficiencies in FBI pay practices that we identified in Iraq existed with respect to employees serving in Afghanistan, particularly since 2006. The FBI allowed agents to claim overtime pay on the basis of a de facto standardized 16-hour, 7-day schedule that did not necessarily reflect the hours each employee actually worked every day. This practice effectively allowed agents to claim time for activities that are not compensable as scheduled overtime, which violated relevant statutes, regulations, and FBI policies.

It is understandable that in the weeks and months immediately after the September 11 attacks the FBI's priority was to quickly get its employees to

work on the response to the attacks and on the expanded counterterrorism mission of the FBI, and that compliance with the procedural requirements for paying overtime was a secondary consideration. However, the FBI has been in Afghanistan for 7 years, and it has had abundant opportunities to revise its pay practices to comply with the requirements of law. Yet, we found that FBI pay practices in Afghanistan became even less consistent with legal requirements beginning in 2006, when employees began uniformly reporting 16-hour days.

CHAPTER EIGHT

RECENT MODIFICATIONS OF FBI POLICY

During the course of this investigation, the OIG shared its legal analysis of existing FBI policies and practices regarding the payment of overtime with the FBI Inspection Division and the FBI Office of General Counsel. In an attempt to address weaknesses in the existing policies, the FBI issued two additional overtime policies in July and October 2008 for overtime in Iraq and Afghanistan.⁷⁰

I. The July 2008 War Zone Overtime Policy

In July 2008 the CTD issued a War Zone Overtime Policy approved by Executive Assistant Director Cummings and by CTD officials. According to the Inspection Division, this policy was prepared in consultation with the FBI's Office of General Counsel and Human Resources Division. The stated purpose of the policy was to bring CTD into compliance with Title 5 of the Code of Federal Regulations with respect to the use of overtime to compensate employees deployed to war zones.

The July 2008 War Zone Overtime Policy defined "work" as "any activity for the benefit of an agency and under the control or direction of the agency." It amplified this definition by stating that:

- Work does not include consumption of alcohol while ostensibly engaging in liaison activities.
- Travel from temporary lodging to a temporary duty station is not compensable as work.
- Activities such as maintenance of living quarters qualify as work in a war zone environment where housing and work activities are co-located.
- FBI policy provides for three one-hour exercise periods per week, but the senior FBI official in a war zone may extend these periods based on extended working hours or arduous conditions. FBI policy prohibits overtime compensation for exercise periods.
- Rest and relaxation activities not directly related to operational readiness are not compensable as work.

⁷⁰ These recent policies were drafted without the knowledge of or prior review by the OIG.

- Meal breaks are only compensable if the employee is required to perform during meal breaks.

The July 2008 War Zone Overtime Policy also stated that overtime must be approved in writing in advance by an authorized FBI official. It further provided that:

Designated employees will be eligible to earn up to six hours of overtime (following eight hours regular work and two hours of AVP) and up to 14 hours on days off. Employees must actually work the scheduled overtime hours. Hours may not be averaged over two or more days.

II. The October 2008 Overtime Memorandum

On October 6, 2008, the CTD issued another document regarding overtime (the October 2008 Overtime Memorandum), for the stated purpose of “provid[ing] guidance and a template for the implementation of the FBI War Zone Overtime Policy” in Iraq and Afghanistan. This memorandum also stated that another purpose was “to provide enhanced budget control and work hour accountability of all deployed personnel.”

The October 2008 Overtime Memorandum defined work to include “any or all services or actions performed by an employee at the request of, and under the control of a supervisor.” The memorandum contained the same limitations on activities that could be reported as work which appeared in the July 2008 War Zone Overtime Policy, except that it did not include the language allowing supervisors to extend the amount of exercise time reportable as “work” above 3 hours per week, and it extended the permissible “day off” hours to 16.

The October 2008 Overtime Memorandum provided also that “all overtime work must be pre-approved in writing and scheduled **prior** to any work being performed.” (Emphasis in original.) It also stated that “[e]mployees will not be paid retroactively for overtime hours worked.” It provided a template memorandum for supervisors to use in pre-approving work schedules, including all overtime.

The memorandum stated with respect to work schedules:

For Special Agents, the work schedule should specify eight hours regular work, two hours of AVP, and up to six hours overtime for each workday (Monday – Friday). For Analysts and Professional Support employees, the work schedule should specify eight hours regular work and up to eight hours of overtime for each work day (Monday – Friday). For

weekend work (Saturday – Sunday), up to 16 hours overtime per day will be scheduled for Special Agents, Analysts, and Professional Support employees.

The memorandum further noted that for Special Agents any time worked above 6 hours per day of overtime will “revert to AVP” that is, be credited as hours against future availability pay obligations. It reiterated that employees may claim only the overtime hours they actually work, that they may not “average” their time over multiple days, and that employees are personally responsible for the accuracy of the data they enter into the time reporting system.

The October 2008 Overtime Memorandum stated that each employee should be assigned to a specific 8-hour shift on regular workdays. The template memorandum for pre-approving overtime shows each employee being assigned to a specific 8-hour shift, with 2 availability pay hours scheduled for the first 2 hours at the end of the regular shift. However, unlike work schedules in the United States, no unpaid time for meals is indicated in the sample schedule.

Significantly, the template memorandum indicates that every employee in Iraq or Afghanistan will be pre-approved to work “up to” 6 hours of overtime (for Special Agents), or 8 hours of overtime (for other FBI employees) on weekdays and 16 hours on weekend days. Neither the October 2008 Overtime Memorandum nor its template for pre-approving overtime appears to contemplate that there will be any variability in the total amount of overtime among FBI employees within the relevant category (agents and non-agents). Moreover, the specific overtime hours that are authorized on any particular day are not specified.

Finally, we determined that the Deputy On-Scene Commander in Iraq issued a memorandum dated October 20, 2008, related to pre-approving overtime for FBI employees in Iraq during the upcoming pay period. The memorandum substantially incorporated the template in the October 2008 Overtime Memorandum. The Deputy On-Scene Commander’s memorandum also contains blanket authorization for every Special Agent to receive overtime pay for “up to” 124 hours during the pay period (6 hours on weekdays and 16 hours on weekends) and for every other FBI employee to receive overtime for “up to” 144 hours (8 hours on weekdays and 16 on weekend days). Consistent with the template, the pre-approved schedule contains no unpaid periods for meals, even though it contemplates that FBI employees will serve 16 hours of continuous duty every day.

III. OIG Assessment of Recent Modifications

We concluded that the July 2008 War Zone Overtime Policy and the October 2008 Overtime Memorandum have corrected several problems in prior FBI policies and practices. For example, the October 2008 Overtime Memorandum appears to correct the problem of improper payment of overtime for time spent exercising by clarifying that overtime cannot be paid for exercise and by limiting FBI employees to claiming 3 hours of exercise per week as regularly scheduled work. In addition, both recent policies explicitly provide that: “Travel from temporary lodging to a temporary duty station is not compensable as work.”

However, we concluded that in several respects the recent policies still fall short of what is required to fully reconcile FBI pay practices with the law.

First, the July 2008 War Zone Overtime Policy attempted to correct the problem of employees claiming mealtimes as work by stating that “[m]eal breaks are only compensable if the employee is required to perform [work] during meal breaks.” However, another FBI guidance document appears to encourage employees to continue to report mealtimes as work. As noted above, the October 2008 Overtime Memorandum contained a template for pre-approving employee schedules, including scheduled overtime. Unlike normal sample work schedules in the MAOP, which are used in the United States, no unpaid time for meals is indicated in the sample schedules attached the October 2008 Overtime Memorandum, despite the fact that these schedules reflect FBI employees working up to 16 hours per day.⁷¹ If employees eat any meals during their 16-hour shifts, which they often do, and they report their time consistently with the template, they will be reporting meal times as work. We believe that this template should be modified to specify a realistic amount of unpaid time within each work shift for meals (such as one-half hour per meal), just as FBI work schedules in the MAOP provide for in the United States.

Second, the July 2008 War Zone Overtime Policy and the October 2008 Overtime Memorandum attempted to correct the problem of employees receiving pay for time socializing, such as at Saturday evening parties, by stating that “[t]he consumption of alcohol while ostensibly engaging in liaison activities” is outside CTD’s definition of work for purposes of earning overtime. The memoranda also state that rest and relaxation activities “not directly related to operational readiness” are not compensable overtime. We believe that these exclusions are too narrow. Socializing and recreation are not compensable work regardless of whether alcohol is being consumed. In

⁷¹ For example, Part 1, Section 8-2.1.1(7) of the MAOP contains two examples of sample work schedule for Special Agents showing varying amounts of scheduled overtime. These examples provided the employee with 45 minutes of unpaid meal time on every work day.

addition, the language regarding rest and relaxation could be interpreted to suggest that supervisors could approve these activities for overtime compensation by drawing some connection between these activities and “operational readiness.” While rest can always be said to promote operational readiness, this does not justify claiming rest time as compensable overtime. FBI employees simply should not claim overtime for socializing, rest, or recreation activities.

Third, the July 2008 War Zone Overtime Policy and the October 2008 Overtime Memorandum sought to comply with the requirement that overtime should be scheduled in advance. The October memorandum therefore provided a template for use by Deputy On-Scene Commanders to approve work schedules in advance of each pay period, including individualized work schedules for each employee.

However, we are concerned that the blanket approval of overtime contemplated in the template is not consistent with applicable regulations. Under the template, the FBI would grant blanket authority to all of its agents in Iraq and Afghanistan to work “up to” 6 overtime hours per weekday and 16 hours per weekend day, which translates to 124 hours per pay period. Based on the FBI’s recent overtime audits and our interviews of agents who served in Iraq and Afghanistan, it is clear that many of the agents do not work that many hours. As noted above, since the beginning of 2008 FBI employees in Iraq and Afghanistan have reported on average 100 to 112 overtime hours (in addition to 80 or 100 hours of regularly scheduled work) per 2-week pay period, which is less than the 124 hours per pay period reflected in the template. Moreover, some individual employees have averaged far fewer hours of overtime – as few as 18.7 hours per pay period. Clearly, some functions being filled in Iraq do not require 6 hours of overtime every day and 16 hours on every weekend day.

As previously explained, under 5 CFR § 610.121(b)(1), the FBI must “schedule an employee’s regularly scheduled administrative workweek so that it corresponds with the employee’s actual work requirements.” Therefore, the blanket approval of up to 16 hours of work each day, every day, does not accurately reflect the “actual work requirements” of most FBI employees in Iraq and Afghanistan. The FBI should require that the work schedules approved in advance for employees in Iraq and Afghanistan utilize more realistic schedules, tailored to actual work requirements of individual employees or categories of employees, rather than a routine blanket approval of “up to” an artificial maximum number of hours for all employees.

Fourth, the July 2008 War Zone Overtime Policy and the October 2008 Overtime Memorandum also fail to sufficiently clarify the issue of Sunday pay.

Because the regular workweek for agents in Iraq is currently Monday through Friday, the FBI may not grant Sunday pay for employees.⁷²

Fifth, like the March 2008 Overtime Memorandum, the July Policy and October Memorandum provide no clarification on whether employees can claim overtime for hours in which they claim they are merely “standing by.” Several FBI employees cited their “standby” status as a justification for claiming 16 hours of work every day, regardless of what they were doing. In the absence of clarification, we are concerned that employees are continuing to rely on this rationale for claiming hours that are not eligible for overtime pay.

Sixth, like their predecessor memoranda, the recent FBI policies do not contain any financial analysis supporting the decision to authorize overtime as required by the MAOP.

In sum, we concluded that the recent FBI policies, which were issued prior to the completion of this report and without review by the OIG, do not fully address the problems in prior FBI overtime compensation practices in Iraq and Afghanistan.

⁷² Going forward, there are some scenarios in which it could be appropriate for the FBI to shift a particular employee’s work week to include Sunday, if such a shift is for the benefit of the FBI and not solely for the benefit of the employee. However, such a shift would not be appropriate for any employee who is scheduled to work a full 8 or 10 hour workday or more on all seven days of the week, as we understand is the case with most if not all FBI employees in Iraq and Afghanistan. Shifting to a schedule that includes Sunday for such an employee would serve no other purpose than to enable him or her to claim Sunday pay and would violate federal regulations requiring that the regular 40-hour workweek be scheduled on Monday through Friday if possible.

CHAPTER NINE

OVERTIME CLAIMS AT OTHER DOJ COMPONENTS

In addition to the FBI, several other DOJ components sent employees to Iraq and Afghanistan, including the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the Drug Enforcement Administration (DEA); and the United States Marshals Service (USMS). In the course of our investigation, we learned that these components may also have adopted overtime practices similar to those of the FBI. We therefore expanded our investigation to review the pay practices of other DOJ components. We reviewed the T & A forms for most of ATF, DEA, and USMS employees sent to Iraq and Afghanistan and interviewed over 20 employees from those components regarding their hours and activities during their deployments.

I. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)

A. Background

ATF began sending employees to Iraq in 2004 and has deployed to Iraq a total of approximately 145 employees as of June 2008, some more than once. Most served in 3-month deployments, which varied in size from approximately 4 to 8 employees. Most ATF employees lived in the Green Zone, although at least four were stationed in Doha, Qatar.

Many ATF agents worked under the supervision of the FBI's On-Scene Commander on one of the task forces described in Chapter Three, such as the Regime Crimes Liaison Office (RCLO), the Major Crimes Task Force (MCTF), or the Law and Order Task Force (LAOTF). Other ATF agents worked on assignments that were not supervised by the FBI, such as serving on the Combined Explosives Exploitation Cell (CEXC) task force, providing training courses to Iraqi police officers, and conducting canine patrols for detecting explosives.

B. Pay Practices

Like the FBI employees in Iraq, ATF employees received overtime, holiday, night differential, post differential, danger, and Sunday pay. All ATF employees sent to Iraq were agents who were subject to the availability pay requirements described in Chapter Three.⁷³ Accordingly, they had to work 10 hours per day – 8 hours of regular duty and 2 hours of availability pay – before they qualified for overtime on a regular workday. ATF employees reported their

⁷³ The provisions of the FBI's MAOP described in Chapter Three do not apply to the employees of other DOJ components.

hours on T & A forms that generally (depending on the employee's assignment) were certified by a supervisor in the United States.

We reviewed ATF's policies relating to premium pay. Consistent with federal regulations, ATF requires that overtime work be authorized in writing in advance. In addition, ATF policy allows overtime payments only for hours actually worked. Unlike the FBI, however, ATF permits overtime hours to be approved retroactively when "compelling reasons make it impossible or impracticable to authorize overtime in advance."⁷⁴ Like the FBI, ATF pays its Special Agents a 25 percent premium as availability pay. However, unlike the FBI, ATF permits agents to get availability pay credit (but not overtime) for standby hours when the agent is required to be available during a specific time period on a regular workday, even if no work is actually performed.

The OIG reviewed all of the time cards submitted by ATF employees in Iraq and found that most employees claimed and were paid for 15.5 hours a day, 7 days a week. According to the Chief of ATF's International Affairs Office, ATF management allowed its employees to bill no more than 15.5 hours a day, based on advice from ATF's Human Resources Division that paying for lunch was prohibited by federal law.⁷⁵

We interviewed 5 ATF employees who had worked in Baghdad, Doha, or both for anywhere from 3 to 9 months. Two of the 4 employees who had worked in Doha said that they worked about 13 to 14 hours a day, 1 said that he did not remember how many hours he worked in Doha, and the fourth said she worked about 15 to 16 hours a day.

The four ATF agents who worked in Baghdad generally reported working longer hours.⁷⁶ One said that he worked 18 hours a day (and sometimes longer) when he was in Baghdad during the summer of 2004, but that when assigned to the MCTF in the winter of 2005 he worked approximately 14 to 15 hours a day. Another employee assigned to the RCLO said that he worked about 12 to 14.5 hours a day. A third agent assigned to Baghdad said he had worked about 15.5 hours a day, while a fourth said he did not remember his hours.

⁷⁴ We do not believe that it is consistent with federal pay regulations to grant retroactive approval of scheduled overtime for Special Agents. Special Agents receive availability pay specifically for the purpose of compensating them for unscheduled overtime hours; they should only receive availability pay credits for such time.

⁷⁵ Although ATF employees supervised by the International Affairs Office routinely claimed 15.5 hours per day, some ATF employees supervised by other ATF offices claimed 12 to 14 hours. We were unable to tell if those other employees billed for lunch.

⁷⁶ The numbers do not add up to five employees because some employees worked in both Doha and Baghdad.

However, the hours actually listed by ATF employees on their T & A forms did not correspond to the hours that they told us they had worked. For example, 1 employee told the OIG that he worked 13 to 14 hours a day when he was in Doha and 12 to 14.5 hours when he was in Baghdad, but we found that he billed 15.5 hours every day. Similarly, a different employee who told the OIG that he worked 13 to 14 hours in Doha and 14 to 15 in Baghdad also billed 15.5 hours every day.

The Chief of ATF's International Affairs Office said that he had been told that ATF agents in Iraq worked a "grueling" schedule, but that he was not in a position to make a personal judgment on the actual hours they worked. Since all of the agents he sent worked for one of the task forces under the supervision of the FBI's On-Scene Commander, he said that the hours they actually worked were the responsibility of the FBI.

ATF estimated that it spent \$4,175,731 on overtime in Iraq between 2003 and July 2008.⁷⁷

II. Drug Enforcement Administration (DEA)

A. Background

The DEA began sending four Special Agents at a time to Iraq in 2004. Recently, the number of agents sent at any one time has declined to three, although it can vary. As of June 2008, the DEA had sent a total of approximately 45 agents to Iraq and Doha, Qatar. All DEA agents in Iraq worked on either the RCLO, MCTF, or LAOTF. Most of the DEA agents lived in the Green Zone in Baghdad, although a few have lived in military bases outside Baghdad.

Since 2003, the DEA has deployed approximately 52 employees to Afghanistan for different lengths of time. The number deployed at any one time has varied, but in the summer of 2008 the DEA had about 20 employees in Afghanistan. Approximately half of them were deployed there for 120-days, while the other half were there for much longer durations – sometimes a year or more. All of the employees, who lived either in Kabul or in military facilities around the country, were helping to advise and train Afghani police in counter-narcotics investigations.

⁷⁷ Other government agencies reimbursed DOJ components for some of the money they spent on overtime and premium pay. For example, for several years the Department of State reimbursed the USMS for the overtime and premium pay of marshals providing security in Iraq. Similarly, the RCLO reimbursed the FBI, DEA, ATF, and USMS for the overtime and premium pay of their employees working on the Saddam Hussein trials.

B. Pay Practices

DEA employees received the same types of additional premium pay that FBI agents received for service in Iraq and Afghanistan. Likewise, the DEA agents in Iraq and Afghanistan had to work 10 hours on a regular work day – 8 hours of regular time and 2 hours of availability pay – before they were eligible for overtime.

All but 2 of the DEA agents sent to Iraq and Doha claimed 16 hours a day, 7 days a week, every week. The two who claimed less both worked in Doha. According to 1 agent, he reported 16 hours on weekdays, but reported only 10 hours a day on weekends, which are Friday and Saturday in Iraq. As a result, he reported 100 hours each week. The other said that he reported 14 hours a day every day except Sunday, when he went to church and took a long dinner, and therefore reported only 8 hours for that day. As a result, he reported 92 hours on most weeks.

Although DEA employees have been serving in Afghanistan since 2003, they received no overtime until February 2008 when the DEA allowed them to start charging up to 10 hours a week of overtime. According to the DEA's country attaché in Kabul, most of the employees work at least 10 hours of overtime each week and accordingly claim the full 10 hours. He said that none of the overtime is scheduled because the "nature of the work" in Afghanistan does not permit that sort of planning. DEA agents in Afghanistan are not allowed to bill for meals or exercise time.

The DEA estimated that overtime for its employees in Iraq cost approximately \$86,000 in FY 2004, \$461,000 in FY 2005, \$511,000 in FY 2006, and \$564,000 in FY 2007. In addition, the DEA told us that other premium pay for Iraq employees amounted to approximately \$16,000 in FY 2004, \$195,000 in FY 2005, \$227,000 in FY 2006, and \$313,000 in FY 2007.

III. United States Marshals Service (USMS)

A. Background

According to its payroll records, the USMS sent 84 employees to Iraq between early 2004 and June 2008 in deployments lasting from approximately 4 to 6 months and varying in size from approximately 4 to 16 employees. Until recently, the USMS sought volunteers only from its Special Operations Group (SOG), a specialty unit that is deployed in high risk or sensitive law

enforcement situations, civil disorders, or natural disasters.⁷⁸ All USMS employees deployed to Iraq lived in Baghdad in the Green Zone.

Most USMS employees in Iraq worked on judicial security, which included supervising Iraqi guards at the two main courthouses in Baghdad; running “safe houses” in Baghdad where witnesses, judges, and attorneys could live without fear of retaliation; and escorting witnesses, judges and attorneys to and from court proceedings. In addition, USMS employees inspected courthouses in other parts of Iraq and gave suggestions on how to improve security. A few USMS employees also worked on some of the task forces, such as the RCLO and MCTF. According to a USMS supervisor, those assigned to one of the task forces were also responsible for other USMS duties, such as supervising a safe house, after completing their task force duties.

B. Pay Practices

USMS employees received the same categories of premium pay as FBI employees deployed to Iraq under similar conditions, with one exception. A USMS official who supervises operations in Iraq told us that USMS employees were paid their regular hourly wages for Sundays, but did not receive the additional 25 percent “Sunday differential” paid to FBI employees.⁷⁹ In addition, USMS employees sent to Iraq were given temporary promotions so that their base pay was higher than it would have been in the United States.⁸⁰

USMS policies regarding overtime are generally consistent with the statutory and regulatory requirements previously described in this report. Overtime must be approved, ordered, and scheduled in advance. If a USMS agent is required to be “available for work” (standing by) during overtime hours that were not scheduled in advance, he or she may receive availability pay credit for those hours.

⁷⁸ In the summer of 2008, the USMS began sending a few non-SOG volunteers to work on the MCTF.

⁷⁹ As explained in Chapter Six, with respect to FBI pay practices in Iraq, federal regulations provide that the regular workweek is Monday through Friday and that Sunday work is reimbursed as overtime. 5 C.F.R. § 610.11(a)(2) and 610.121(a). Sunday differential pay is reserved for employees whose regular 5-day week includes Sunday, based on the needs of the agency. It appears that unlike the FBI, the USMS complied with federal regulations regarding Sunday pay.

⁸⁰ The USMS supervisor said that temporary pay raises were necessary because USMS employees, in general, get paid less than employees at some of the other agencies in Iraq. He said that the temporary pay raise helped give them “parity” with other employees stationed there.

We reviewed all of the time cards submitted by USMS employees in Iraq and found that virtually every employee claimed and was paid for 14 hours a day, 7 days a week until the end of December 2004, and after that for 16 hours a day, 7 days a week. Thus, it appears that USMS employees were originally permitted to report no more than 14 hours a day, but were given permission in 2005 to increase that to 16 hours. However, we could not determine from the available documents or witnesses why that change was made.

The Acting Assistant Director of the USMS's Tactical Operations Division, which oversees USMS operations in Iraq, told us that although USMS employees did not necessarily work 16 hours every day, they averaged 16 hours because they put in more on some days and less on others. He stated that USMS employees who worked for the RCLO and MCTF generally worked 10 hours a day on task force business and then another 6 on other USMS duties, such as running a safe house.

The USMS calculated that overtime for its employees in Iraq cost approximately \$827,000 in FY 2005, \$1.89 million in FY 2006, and \$1.79 million in FY 2007. According to USMS calculations, premium pay cost an additional \$396,000 in FY 2005, \$793,000 in FY 2006, and \$830,000 in FY 2007.

IV. Conclusions about Other DOJ Components

We found that many of the same overtime and pay issues that arose with the FBI also arose with other DOJ components who detailed employees to Afghanistan and Iraq. For instance, with a few exceptions noted above, almost all ATF, DEA, and USMS employees claimed overtime and other premium pay based on 15.5 or 16 hours a day, 7 days a week, without variance. Although these employees worked long hours during their deployments, several admitted that they worked fewer hours than they reported. In addition, we believe that the uniform practice of reporting these hours as work indicates that employees were including time spent exercising, eating meals, and standing by for assignments.

In general, we were unable to find any written documentation from DOJ components indicating that overtime was "scheduled in advance" so as to correspond with the employees' actual work requirements, as required under federal pay laws and regulations. Moreover, in the case of agents receiving availability pay (which was the case with most of these employees), the components were not permitted to pay overtime for unscheduled hours; instead, they were required to grant availability pay credits that would reduce the amount of hours the agents would be required to work later in the year.

CHAPTER TEN

CONCLUSIONS AND RECOMMENDATIONS

Many FBI employees worked long hours under difficult conditions in Iraq. We found that the hours that FBI employees worked in Iraq varied among assignments and locations, and they also varied from day to day depending on events. Due to the lack of accurate documentation, it is impossible to determine the exact hours worked by any particular individual in Iraq. However, we believe that few if any employees in Iraq worked exactly 16 hours a day, every day, for 90 days straight, and the evidence showed that some employees worked significantly fewer hours than that.

Nevertheless, in an effort to maximize compensation for all FBI employees who volunteered for duty in Iraq, the FBI's Counterterrorism Division (CTD) encouraged and condoned the practice of FBI employees reporting as compensable "work" all waking activities in Iraq, up to 16 hours per day, every day.

CTD managers and FBI employees gave several justifications for this practice, including: (1) conditions in Iraq were harsh and there were few if any recreational opportunities during off-hours; (2) employees in Iraq were always in "on-call" status; and (3) 16 hours was a reasonable average given that on some days FBI employees worked around the clock while on others they worked fewer than 16 hours.

Yet, the CTD's pay reporting practices violated applicable laws, regulations, and FBI policies, particularly with respect to the compensation of Special Agents. In order to compensate FBI employees for 16 hours a day, the CTD permitted them to claim overtime for activities that are not compensable as "work," such as eating, exercising more than 3 hours per week, commuting, socializing, and "standing by" available for assignments.

Moreover, Special Agents are permitted to receive overtime only if it is scheduled in writing in advance of the workweek, and they may only be paid for the precise hours that were scheduled in advance. All other work hours must be compensated with credits for "availability hours," effectively reducing the number of hours the agent must actually work the rest of the year in order to qualify for availability pay. Averaging hours to maximize overtime pay is not permitted. Further, the FBI did not perform the financial and manpower analyses that are a prerequisite to paying overtime under its own policies.

We also found that the FBI failed to adequately monitor the hours reported by its employees deployed to Iraq. Even after the FBI informed its employees in March 2008 that they should only report the hours they actually worked, the employees continued uniformly reporting 16 hours every day, and supervisors in Iraq approved their pay sheets.

The CTD also violated FBI policy when it shifted the normal workweeks for employees to a Sunday through Thursday schedule. Since all employees were scheduled for 7 days a week, this switch had no impact on their actual work schedules, but it served the sole function of enabling FBI employees to claim a 25 percent pay differential for 8 hours of regularly scheduled “Sunday work.” Yet, FBI policy does not permit such a schedule switch if it is merely for the benefit of the employee.

The FBI did not supply the OIG with records of the costs of overtime or other premium pay in Iraq. We estimated that the total cost of overtime pay and other categories of premium pay for FBI employees in Iraq from 2003 to 2007 has been approximately \$63 million. Although many FBI employees worked long hours in Iraq, a significant portion of the overtime and other premium compensation paid to FBI employees was paid in violation of federal pay laws and regulations and FBI policies. Based on the hours reported by employees in 2008, when somewhat more accurate reporting requirements were implemented, we estimated that FBI agents serving in Iraq prior to 2008 received at least \$6.4 million in excess overtime pay, plus \$1.4 million in excess Sunday pay.

We recognize that this estimate is a rough approximation. We also recognize that we cannot state with certainty that the average hours that employees reported in 2008 was representative of time FBI employees actually worked during 2003-2007.

However, we believe the \$6.4 million estimate for excess overtime pay is conservative for a variety of reasons. The estimate is based in part on hours reported in early 2008, before the FBI had fully corrected its policies regarding what activities may be reported as work. For example, the early 2008 hours apparently included hours spent at mealtimes and exercise, which are not properly claimed as overtime. In addition, the FBI has still never clarified that time spent “standing by” cannot be claimed by agents as overtime, and it is therefore likely that the 2008 audits include many hours in this category. If those hours had been excluded, FBI employees would have reported fewer hours in 2008 and our estimate of the excess overtime pay during prior years would have been larger.

Although we believe that FBI employees in Iraq and Afghanistan received overtime pay in excess of what was permitted under federal pay statutes and regulations, we do not recommend that the FBI attempt to recoup any excess overtime paid. We do not believe that there is sufficiently specific evidence regarding the time that individual agents actually worked to permit the FBI to calculate excess payments to individual employees. The pay records that the FBI agents were encouraged to submit did not accurately reflect their actual hours of work.

We recognize that the FBI was operating in a crisis atmosphere in the early period of the Iraq mission, and that management issues of first impression were presented in a war zone environment. However, we believe that CTD managers have had ample time since the beginning of the Iraq deployments to develop proper pay procedures. We found that until 2008 they never even consulted with the FBI's Office of General Counsel to determine the appropriate and legal pay practices for FBI employees in Iraq. As a result, the CTD provided incomplete and inaccurate guidance to FBI employees regarding the requirements for claiming overtime, which resulted in abuse of the overtime system.

Although the FBI issued three guidance documents during 2008 in an effort to correct its overtime practices, these policies did not fully address the problems. Among other things, the 2008 policies encourage a blanket approval of "up to" 124 hours of overtime per pay period for all agents, rather than requiring individualized work schedules that reflect the varying work requirements of individual employee assignments; they fail to clarify that Sunday pay is not available; and they fail to clarify that overtime pay cannot be paid for time spent "standing by."

Finally, based on more limited reviews, we found similar problems with FBI deployments in Afghanistan, as well employees sent by ATF, DEA, and USMS to Iraq or Afghanistan.

As a result of our investigation, we make the following recommendations for the FBI and other DOJ components to correct their pay practices in the future for employees deployed overseas.⁸¹

1. The FBI should issue new guidance and take steps to ensure that its Overtime and Premium Pay policies are enforced in a manner that is consistent with the requirements of federal pay statutes and regulations, and should train its agents to comply with these requirements in advance of their deployments to Iraq and Afghanistan.

- a. In particular, under federal regulations and FBI policy, FBI agents may not be paid overtime hours for eating, socializing (regardless of whether alcohol is consumed), or "standing by." Employee work schedules should specify a realistic amount of unpaid time within each shift for meals (such as ½ hour per meal), just as FBI work schedules provide in the United States.

⁸¹ The FBI submitted a letter in response to this report as well as responses to some of the OIG's recommendations. These materials are attached in Appendix G.

- b. When overtime is scheduled in advance, the schedule should reflect the actual work requirements of Special Agents rather than a blanket approval of “up to” 6 or 8 hours for every weekday and 16 hours for every weekend day for all employees, regardless of function or workload.
2. ATF, USMS, and DEA should each issue new guidance documents governing premium pay for employees in Iraq and Afghanistan. This document should be drafted in consultation with the component’s Office of General Counsel, Human Resources Division or equivalent division, and the component’s division responsible for administering the missions in Iraq and Afghanistan. The guidance document should be consistent with relevant statutes, regulations, and component policies, and should at a minimum include the following:
 - a. The components should instruct employees regarding what activities in Afghanistan and Iraq can be reported as “work” according to federal regulations and applicable policies. In particular, employees may not report mealtimes or commuting time as work unless certain very restrictive conditions are satisfied, and may not report time spent socializing. Agents also may not report time spent “standing by” as overtime hours, although components may grant availability pay credit hours for such time.
 - b. The components must establish individualized work schedules for employees that state the regular hours, availability pay hours, and scheduled overtime hours that the employees will be working on each day in the upcoming week. This schedule must correspond to the actual work hours expected of the employees for the upcoming week being scheduled. The schedule should identify reasonable unpaid periods within the schedule for mealtimes, such as ½ hour for each meal that will be consumed on a particular day (typically 2 meals in a 16-hour day, for example). A generic 16-hour schedule for all employees is not consistent with this requirement.
 - c. Components should establish reasonable and consistent policies for exercise during working hours.
 - d. Employees should be required to submit accurate records of the hours they actually work on each day, without averaging. Employees may only report time spent on compensable activities as discussed above.
 - e. According to federal pay statutes and regulations, the components may pay overtime to agents only for those hours that were scheduled in advance. If an agent works fewer hours than the

number scheduled for a particular day, the agent may be paid only for the hours the agent worked. If an agent works more hours than were scheduled in advance, the excess hours must be credited as availability pay hours and overtime pay may not be provided for these hours.

- f. If employees in Iraq and Afghanistan are normally scheduled for 7 days of work every week, the regular workweek should be Monday through Friday and all hours scheduled for Saturday or Sunday should be compensated as overtime hours. Sunday pay should not be granted for overtime hours.
3. The components should adopt procedures that will permit a complete and accurate accounting of the costs for all categories of premium pay for their employees serving in Iraq and Afghanistan on a quarterly basis. For example, the components should adopt and fully implement a requirement, similar to that contained in the FBI's 2005 Overtime Memorandum, for a review, on a quarterly basis, of the performance and output of its personnel in Iraq and Afghanistan to evaluate the quality and quantity of this mission-critical work. The quarterly audits should include the collection of information to determine whether the hours reported by component employees correspond to the hours actually engaged in compensable work activities.
4. The FBI should conduct the financial analysis and manpower analysis required in the Part 1, Section 8-2.1.1(2) and (3) of the MAOP as a condition for approving scheduled overtime, and the FBI should make a de novo determination whether to order and approve scheduled overtime for personnel assigned to the Iraq and Afghanistan missions. Any such determination should be of limited duration, no longer than 1 year, and any renewal of such determination should take into consideration an updated financial analysis and manpower analysis as contemplated in the MAOP, as well as information collected in the quarterly audits.
5. ATF, USMS, and DEA should comply with the requirement that overtime for their employees in Iraq and Afghanistan be officially ordered, approved in writing, and actually worked. Any component decision to order and approve overtime should be of limited duration, no longer than 1 year. Any such decision, and any decision to renew the order and approval of overtime, should take into consideration costs, manpower consideration, and the results of quarterly audits.
6. The FBI should consider reinstating the anonymous questionnaires given to employees returning from Iraq or Afghanistan, and should expand the questions to seek employee comments on any aspect of their work or the FBI's mission in those countries.