The CID Titling Process—Founded or Unfounded?

Major Patricia A. Ham
Branch Chief
Government Appellate Division

Introduction

All trial counsel have faced the following situation: "Ma'am, this is the United States Army Criminal Investigation Command (CID) Special Agent Holmes.[1] I'm just calling for my final SJA coordination to see if I can get your opinion on some cases so I can close them. I'll just run the facts of each case by you; let me know if you think there's enough evidence to title the subject." What is the trial counsel supposed to do? What is the agent asking? What exactly is "titling"? What ramifications are there for the soldier who is titled?

This article first discusses the definition, significance, and recent history of titling. Major changes to the process were made in 1992, significantly altering the titling analysis. Second, the article analyzes the current titling standard and provides arguments both in favor of and against the standard. Third, this article discusses how a soldier can best challenge a titling decision. Finally, the article provides recommendations to better serve both the soldier and the titling process.

The Definition of Titling

Titling is the decision to place the name of a person or other entity in the "subject" block of a CID report of investigation (ROI).[2] A "subject" is "[a] person . . . or other legal entity . . . about which credible information exists which would cause a reasonable person to suspect that person . . . or other legal entity . . . may have committed a criminal offense, or otherwise cause such person . . . or other legal entity . . . to be the object of a criminal investigation."[3]

Titling is an operational decision, not a legal or judicial one. For that reason, the responsibility for the decision to title an individual rests with the CID agent.[4] The basis for a decision to title is the existence of "credible information" that a person or entity "may have committed a criminal offense" or is "otherwise made the object of a criminal investigation."[5] "Credible information" is:

> Information disclosed or obtained by an investigator which, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to indicate criminal activity has occurred and would cause a reasonable investigator under similar circumstances to pursue further the facts of the case to determine whether a criminal act has occurred.[6]

Titling within the Army must be distinguished from the determination of whether sufficient evidence exists to "found" an offense.[7] In addition, titling must be distinguished from the determination of whether an offense is "substantiated."[8] After an offense is fully investigated, the CID agent must coordinate with the trial counsel to determine, based on probable cause, whether an offense is substantiated.[9] Unless there is probable cause to believe that the subject actually committed the offense for which he is titled, the CID agent should not substantiate the

1. The United States Army Criminal Investigation Command (USACIDC) is known by the acronym "CID," which is the historic term for matters specifically identified with USACIDC activities or organizations. *See* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES, glossary (30 Oct. 1985) (IO1, 27 Sept. 1993) [hereinafter AR 195-2].

2. *Id*. An ROI is "an official written record of all pertinent information and facts obtained in a criminal investigation." *Id.* The full definition of titling is "[t]he decision by a properly authorized official possessing credible information of criminal activity to place the name of one or more persons, corporations, or other legal entities into the subject portion of the title section of a CID [ROI]." *Id.*

3. *Id.*

4. U.S. DEP'T OF DEFENSE, INSTR. 5505.7, TITLING AND INDEXING OF SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE (14 May 1992) [hereinafter DOD INSTR. 5505.7].

5. AR 195-2, *supra* note 1, para. 1-5o.

6. *Id.* glossary.

7. "Founded" is defined as "a determination by the [CID] that a criminal offense enumerated in the [Uniform Code of Military Justice (UCMJ)], Federal Criminal Code, or applicable state statute has been committed. The determination that a founded offense exists is an investigative decision and not dependent upon judicial decision." U.S. ARMY CRIMINAL INVESTIGATION COMMAND, REG. 195-1, CRIMINAL INVESTIGATION OPERATION PROCEDURES, para. 7-25c(1) (1 Oct. 1994) [hereinafter CID REG. 195-1]. Other categorizations of offenses are "unfounded" or "insufficient evidence." "Unfounded" means that a criminal offense did not occur. *Id*. para. 7-25c(2). "Insufficient evidence is (a) the inability to determine whether or not an offense occurred or (b) the inability to establish probable cause that a certain entity listed in the subject block for an offense enumerated in the UCMJ . . . did or did not commit the offense." *Id.* para. 7-25c(3)(a)-(b).

offense.[10] Even if the offense is unfounded or not substantiated, the titling decision remains in place, and information about the subject remains retrievable.

The different standards applied to the separate sections of the ROI may lead to some confusing results. For example, soldier *A* reports to the CID that his new television set was stolen from his barracks room. This is "credible information" that a crime was committed, and the CID opens an investigation. Soldier *B* is initially identified as a subject and is "titled" in the initial ROI based on credible information that he was seen near the crime scene at the time of the theft carrying a television set similar to the one stolen from soldier *A*. Further investigation establishes, however, that soldier *B* recently purchased the television he was carrying, and soldier *B* produces a receipt to substantiate his lack of involvement in the theft. As such, no probable cause exists to believe that soldier *B* stole soldier *A*'s television. What is the result?

First, soldier *B* is listed as the subject of the ROI because credible information existed to believe that he had committed the offense. Second, the offense is "founded," because it did occur. Finally, the investigative summary and staff judge advocate coordination portions of the ROI clearly state that probable cause against soldier *B* is lacking. Therefore, the offense is unsubstantiated as to soldier *B*.

Some CID agents might ignore the regulation and would "unfound" the offense in this scenario. This is in direct contravention of *CID Regulation 195-1*, which defines "unfounded" as "a determination . . . that a criminal offense . . . did not occur," not that the titled subject did not commit the offense.[11] This practice confuses the meanings of "founded" and "unfounded" with the meanings of "substantiated" and "unsubstantiated." This is but one of many confusing areas in the titling arena. In all cases of the scenario set forth here, soldier *B* remains "titled" as a subject of the investigation.

Purpose and Significance of Titling

Upon initiation of an investigation, the CID prepares an initial ROI. "An initial ROI is a report dispatched to advise concerned commanders, CID supervisors, and other designated recipients that a [CID] investigation has been initiated."[12] The standard to initiate an investigation is "determination that credible information exists that an offense has been committed which falls within [CID] investigative responsibility."[13] The decision to initiate an investigation is determined separately from the decision of whether a person should be listed as a subject in the ROI.

A subject may or may not be titled in the initial ROI, depending on the evidence developed at the time. For example, the

---

8. *Id*. paras. 7-14g, 7-14j(25) (discussing, but not defining, substantiation of an offense). The "investigative summary" portion of the ROI is a brief description of the incident under investigation, including the who, what, where, when, and how. *Id*. para. 7-14g. Examples provided in *CID Regulation 195-1* give the correct wording for this section of the ROI; the examples provided are in "probable cause" language. *Id.* For example, the agent who is drafting the investigative summary is instructed to include certain language:

> (1) Investigation established probable cause to believe that . . . .
> (2) Investigation established that the offense of . . . did not occur as alleged.
> (3) Investigation revealed that . . . did not commit the offense of . . . as alleged.
> (4) Investigation established there was insufficient evidence to determine . . . .

Id. para 7-14g. Similarly, *CID Regulation 195-1* discusses the "SJA coordination portion of the ROI." *Id.* para. 7-14j(25). This portion of the ROI describes the investigating agent's contact with a member of the servicing Office of the Staff Judge Advocate (OSJA), usually the trial counsel assigned to cover the jurisdiction of the offense. This contact occurs near the end of the investigation. The CID agent must seek an opinion from the trial counsel as to whether the evidence against the subject rises to the level of probable cause to believe that the suspect committed the offense alleged. Again, the language examples for ROI inclusion are framed in terms of probable cause. "[F]or example, 'CPT Jones said there was probable cause to believe SMITH committed the offense of . . . .'" *Id.* para. 7-14j(25).

9. The agent is required to coordinate with the OSJA prior to finalizing the investigation "to determine if the investigation is complete and sufficient for legal purposes." CID REG. 195-1, *supra* note 7, para. 5-28. "The primary element to determine during SJA coordination prior to listing an individual in a report of investigation is that probable cause exists to believe the subject committed the offense cited." *Id*. para. 7-14j(25).

10. The probable cause standard still applies when determining whether or not an offense is substantiated. In 1992, when the titling standard was changed from probable cause to credible information, the CID stated its desire to retain the probable cause standard for determining whether an offense is substantiated. In its message announcing the new titling standard, the CID stated:

> [A]ll references to the probable cause standard for *listing* persons as subjects of ROIs as well as procedures for deleting subjects and victims are rescinded, with the exception of deletions due to mistaken identity. *The probable cause standard will apply only to whether or not there is probable cause to substantiate that a person committed an offense, and may be stated only in the investigative findings and legal coordination portions of the ROI.*

Message, 301258Z Jun 92, Commander, United States Army Criminal Investigation Division, CIOP-PP-PO, subject: Changes to CID REG. 195-1 (Categorization and Listing of Subjects and Victims in CID Reports), para. R (30 June 1992) [hereinafter Changes to CID Reg. 195-1 Message] (emphasis added).

11. *See* CID REG. 195-1, *supra* note 7, para. 7-25c(2).

CID may receive credible information that a murder occurred, based on the discovery of a soldier's mutilated body in his quarters. This discovery triggers the requirement for an initial ROI within three working days. If there is not separate additional credible information as to the identity of the potential murderer, however, the initial ROI would list "unknown" as the subject(s) of the investigation.

If an individual is titled in the initial ROI a commander may "flag" the soldier who is listed as a subject, and may suspend the subject's security clearance.[14] The initial ROI reminds commanders "of their responsibilities to suspend security clearances and favorable personnel actions" whenever the ROI lists Army members or Department of Defense (DOD) civilian employees as subjects.[15] In such cases, the following information must appear in the initial ROI: "Commanders are reminded of the provisions of [*Army Regulation* (*AR*)] *600-8-2* pertaining to suspension of favorable personnel actions and *AR 380-67* for the suspension of security clearances of persons under investigation."[16]

"The primary purpose for titling an individual as the subject of a criminal report of investigation is to ensure that information contained in the report can be retrieved at some future point in time for law enforcement and security purposes. This is strictly an administrative function."[17] To facilitate this primary purpose, the identities of subjects of ROIs must be listed or "indexed" in the Defense Clearance and Investigations Index (DCII) when the CID initiates the investigation.[18] The DCII "includes not only criminal investigation files, but background and security investigations as well."[19] The index is a computerized central registry of investigations for all DOD investigative activities.[20]

The primary significance of the titling decision is indexing in the DCII. The information indexed in the DCII is "personal identifying data of individuals or entities who appear as the subjects, victims, or incidentals in the investigative reports of DOD criminal, counterintelligence, fraud, and personnel security investigative activities."[21] The personal identifying data

---

12. *Id.* para. 7-11a. In addition to the "initial ROI," there are final ROIs, status ROIs, interim ROIs, supplemental ROIs, corrected ROIs, referred ROIs, collateral ROIs, and joint investigation ROIs. *Id*. paras. 7-11 through 7-21. The original of all final, referred, collateral, and supplemental ROIs goes to the United States Army Crime Records Center (CRC) at Fort Belvoir, Virginia. *Id.* para. 8-4. A file copy is retained in the case folder of the CID unit that prepared the ROI. *Id.* para. 8-5. The provost marshal(s) responsible for the area(s) where the incident(s) occurred receives a copy. *Id.* para. 8-8.

In addition to the "routine distribution" described above, "special distribution is required when there is an identified subject." *Id.* para. 8-9. For "special distribution," one copy is sent to the action commander (company/battery/troop) of each military or DOD civilian subject or, in the case of a family member, to the installation commander or his designated representative. *Id.* para. 8-10(a)-(b). Also, one copy is sent to the SJA who supports each action commander. *Id*. para. 8-11.

13. *Id.* para. 7-11a. The CID agent must dispatch the initial ROI by the close of business of the third working day following a determination that credible information exists of an offense for which the CID has investigative responsibility. *Id*.

14. *Id.* para. 7-11(o).

15. *Id*.

16. *Id*. "Flagging" is the suspension of favorable personnel actions, such as promotion and permanent change of station. *See* U.S. DEP'T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (30 Oct. 1987) (IO1, 15 Apr. 1994). A flag is required when a soldier is under investigation. *Id.* para. 1-12a(1). The flag is removed "when the soldier is released without charges, charges are dropped, or punishment is complete." *Id*. *See also* U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM, paras. 8-101(b)(1) and 8-102 (9 Sept. 1988) [hereinafter AR 380-67]. *Army Regulation 380-67* requires the commander to notify the United States Army Central Personnel Security and Clearance Facility (CCF) "when the commander learns of credible derogatory information on a member of his or her command" falling within certain parameters. *Id.* para. 8-101(b)(1). "Derogatory information" is "[i]nformation that constitutes a possible basis for taking an adverse or unfavorable personnel security action." *Id.* para. 1-304.3. Such derogatory information includes both "adverse loyalty information" and "adverse suitability information" (including criminal conduct). *Id.* para. 1-304.3(a)-(b).

Army Regulation 380-67 gives the commander the authority to suspend an individual's security clearance "when a commander learns of 'significant derogatory information' falling within certain parameters." *Id.* para. 8-102. "Significant derogatory information" is "[i]nformation that could, in itself, justify an unfavorable administrative action, or prompt an adjudicator to seek additional investigation or clarification." *Id.* para. 1-323. The parameters of the "significant derogatory information" covered involves numerous activities that include, but are not limited to, "[c]riminal or dishonest conduct"; "[a]cts of omission or commission that indicate poor judgment, unreliability, or untrustworthiness"; and "[a]cts of sexual misconduct or perversion indicative of moral turpitude, poor judgment, or lack of regard for the laws of society." *Id.* paras. 2-200h, i, q.

See U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION, para. 2-6b (19 Dec. 1986) (IO1 24 Oct. 1994) [hereinafter AR 600-37] (requiring the CCF to advise the Department of the Army Suitability Evaluation Board (DASEB) regarding "unfavorable information or cases of denial or revocation of security clearance involving senior enlisted (E6 or above), commissioned, or warrant officer personnel"). The DASEB has the authority to order that unfavorable information be placed in a soldier's official military personnel file (OMPF). *Id*. para. 2-3. "Unfavorable information" is "*[a]ny credible derogatory information* that may reflect on a soldier's character, integrity, trustworthiness, or reliability." *Id.* glossary (emphasis added).

17. Office of Criminal Investigations Policy and Oversight, *Review of Titling and Indexing Procedures Utilized by the Defense Criminal Investigative Organizations*, DOD IG No. 91FBD013, at 1 (1991) [hereinafter *Review of Titling and Indexing Procedures*]. *See infra* notes 57-67 and accompanying text (discussing the history, methodology, and recommendations of the *Review of Titling and Indexing Procedures*).

18. DOD INSTR. 5505.7, *supra* note 4, para. F-4. *See also* CID REG. 195-1, *supra* note 7, para. 21-28; AR 195-2, *supra* note 1, para. 1-5o.

19. *Review of Titling and Indexing Procedures*, *supra* note 17, at 3.

includes names; aliases; social security numbers; and the date, state, and country of birth of individuals.[22] The DCII does not disclose the results of an investigation, nor does it disclose action taken by the command, a court-martial, or any other adjudicative body.[23] As of 1994, the last year for which published statistics are available, the DCII contained over twenty-nine million indices on approximately nineteen million individuals, and it was growing at a rate of about two million indices per year.[24]

Within the Army, at the same time that a subject is indexed in the DCII, the subject is also indexed in the United States Army Crime Records Center (CRC), a separate repository solely for Army investigative reports.[25] Unlike the DCII, the CRC maintains more than just identifying data; the entire ROI is retained, including a report of any action taken against the subject.[26] The CRC, on its own, exchanges information with numerous organizations "as it pertains to the exchange of criminal investigation reports or information in support of the Executive Branch of the United States Government."[27] One of the organizations with which the CRC exchanges information is the Department of the Army Suitability Evaluation Board (DASEB), which has the authority to file "unfavorable information" in a soldier's official military personnel file (OMPF).[28]

To search the DCII, a requester must enter personal identifying data of an individual or entity, for example, a social security number.[29] The DCII indices identify, consolidate, and provide a list of all investigations conducted in the DOD on the individual or entity concerned. The DCII then refers the requester to the appropriate agency or agencies (the CRC for Army criminal investigations) from which the complete file(s) of the investigation(s) may be obtained.[30] "The files are owned, maintained, and controlled by the contributing user organizations."[31] The agency that contributes and maintains the investigative files determines the length of time during which a file is retrievable from the DCII files. For Army criminal investigations, the

---

20. *Id. See also* DOD INSTR. 5505.7, *supra* note 4, para. D-2. The DCII was established to constitute an automated, computerized central index of investigations for all DOD investigations. Office of Criminal Investigations Policy and Oversight, *Review of Operating Policies and Procedures for Users of the Defense Central Index of Investigations*, DOD IG No. 86FRR006, at 1 (1987) [hereinafter *Review of DCII Policies and Procedures*]. The Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (C3I), has operational responsibility for the DCII. The Defense Security Service (DSS), formerly the Defense Investigative Service, operates the system. The DOD Inspector General (IG) is responsible for overseeing the use of the DCII by the Defense Criminal Investigative Organizations (DCIOs), including the CID. 2 REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY OF THE DEPARTMENT OF DEFENSE 89 (U.S. Government Printing Office 1994) [hereinafter ADVISORY BOARD REPORT]. There are four DCIOs: the Defense Criminal Investigative Service (DCIS); the CID; the United States Naval Criminal Investigative Service (NCIS); and the United States Air Force Office of Special Investigations (AFOSI). 1 ADVISORY BOARD REPORT, *supra*, at v n.1. Military criminal investigative organizations (MCIOs) include the CID, the NCIS, and the AFOSI. *Id*.

21. 2 ADVISORY BOARD REPORT, *supra* note 20, at 89. An "incidental" is "any person or entity associated with a matter under investigation and whose identity may be of subsequent value for law enforcement or security purposes." DOD INSTR. 5505.7, *supra* note 4, encl. 1 (definitions).

22. 2 ADVISORY BOARD REPORT, *supra* note 20, at 89.

23. *Review of DCII Policies and Procedures*, *supra* note 20, at 6.

24. *Id.* Information on the indices rate of growth was obtained from the historical files on titling retained at the Office of Criminal Investigative Policy and Oversight, DOD Inspector General, 400 Army Navy Drive, Alexandria, Virginia [hereinafter *DOD IG Historical File—Titling*]. The *DOD IG Historical Files— Titling* are those materials collected while the DOD IG was conducting its investigation into titling procedures. The investigation resulted in the *Review of Titling and Indexing Procedures* (see note 17) and *DOD Instruction 5505.7* (see note 4). *See infra* 57-74 and accompanying text (discussing the investigation, the *Review of Indexing and Titling Procedures*, and *DOD Instruction 5505.7*).

25. CID REG. 195-1, *supra* note 7, ch. 21.

26. Interview with Philip McGuire, Director, U.S. Army Criminal Records Center, at Fort Belvoir, Va. (Feb. 27, 1998).

27. CID REG. 195-1, *supra* note 7, para. 21-9. The organizations include, but are not limited to, the following: the DSS; United States Army Intelligence and Security Command; Department of the Army Suitability Evaluation Board; the CCF; United States Army Military Police School; National Security Agency; Central Intelligence Agency; Federal Bureau of Investigation; Office of Personnel Management; Immigration and Naturalization Service; Department of State; the NCIS; the AFOSI; United States Treasury Enforcement Agencies (Internal Revenue Service; Secret Service; United States Customs; Bureau of Engraving and Printing; and Bureau of Alcohol, Tobacco, and Firearms); and the DCIS. *Id.* paras. 21-9(b)(1)-(15). *See* AR 195-2, *supra* note 1, para. 5-1.

28. AR 600-37, *supra* note 16, para. 2-3. The standard for inclusion in the OMPF is that "[t]he unfavorable information is of such a serious nature as to apparently warrant, unless adequately explained or rebutted, filing in a recipient's OMPF." *Id.* para. 6-3c(3). "Unfavorable information" is "*[a]ny credible derogatory information* that may reflect on a soldier's character, integrity, trustworthiness, or reliability." *Id*. glossary (emphasis added). On its face, this definition includes the mere titling of a soldier. Upon request, the CID will transmit to the DASEB "copies of final CID . . . ROIs . . . reflecting known subjects." AR 195-2, *supra* note 1, para. 5-1L. *See* AR 600-37, *supra* note 16, para. 2-6.

The soldier is entitled to notification of the intent to place the information in the OMPF and an opportunity to respond prior to the DASEB's final determination. *Id*. Completed investigative reports, including ROIs, however, can be filed in the soldier's OMPF without referral to the soldier. *Id.* para. 3-3c. This provision does not exclude ROIs that have not resulted in disciplinary or administrative action against the soldier. *Id.*

29. 2 ADVISORY BOARD REPORT, *supra* note 20, at 90.

30. *Id.* at 92. *See Review of DCII Policies and Procedures*, *supra* note 20, at 2.

information is kept at the CRC and the DCII and is retrievable for forty years.[32]

Access to information in the DCII is widespread. The DCII receives an average of 35,000 requests per day.[33] Twenty-seven agencies are authorized access and input to the DCII, with a total of 1179 terminals.[34] An additional 129 terminals have "read only" capability.[35] A working group was recently established to examine whether access should be extended to an even greater number of agencies.[36] The information retrieved may be used to determine promotions, to make employment decisions, to assist in assignment decisions,[37] to make security determinations,[38] and to assist criminal investigators in subsequent investigations.

Once the CID enters a subject's name in the DCII, that name can only be removed in the case of mistaken identity, such as when the CID entered the wrong person's name into the DCII.[39] "Mistaken identity" does not mean that someone other than the subject is found to have committed the offense. Rather, it means that someone with the same name as the listed subject should have been entered as the subject instead. For example, SPC Joe Smith, SSN 123-456-*7890* was entered as the listed subject of a report of investigation by mistake, instead of SPC Joe Smith, 123-456-*7899*, the correct subject. In this scenario, SPC Smith should be able to have his name removed from the title block, but, in order to do so, he must follow the amendment procedure.[40]

31. 2 ADVISORY BOARD REPORT, *supra* note 20, at 92 (quoting *Review of DCII Policies and Procedures*, *supra* note 20).

32. *Review of Titling and Indexing Procedures*, *supra* note 17, at 6. The CID has access to data in the CRC and can retrieve information concerning investigations and individuals. Other law enforcement agencies, however, do not have direct access to the CRC and must access those materials via the DCII. *Id.* The Army justifies the lengthy retention period for criminal investigation files because "experience has shown that recidivism by criminal offenders requires the retention of criminal history records for at least 40 years." *Review of DCII Policies and Procedures*, *supra* note 20, at 19. For comparison, the AFOSI retains personnel security investigation reports for 15 years, espionage and sabotage files permanently, and criminal files for 15 years. The AFOSI's rationale for the 15-year retention of criminal files is that they "have always felt that the purpose of retaining a file was to satisfy the needs of the Air Force. It appeared that 15 years was sufficient to meet those needs." *Id*. at 20. The DCIS maintains criminal files for 15 years, or for one year after a person loses his military affiliation, whichever is sooner. If adverse action is taken, however, the DCIS retains the information for 25 years. *DOD IG Historical Files—Titling*, *supra* note 24.

33. 2 ADVISORY BOARD REPORT, *supra* note 20, at 90. The report surveyed the week of 4-8 April 1994, to obtain an average daily number of requests. Attempts to obtain more recent information from the DSS were unsuccessful.

34. *Id.* The *Advisory Board Report* notes that, in reality, greater than 27 agencies may access and input to the DCII, as some DOD organizations input data for more than one agency. For example, the CID inputs data for itself and the military police (MP). The agencies with access and input capabilities include the Army and Air Force Exchange System; Defense Information System; Defense Contract Agency; Defense Finance and Accounting Service; Defense Intelligence Agency; Defense Industrial Security Clearance Review; Defense Logistics Agency; Defense Mapping Agency; Defense Nuclear Agency; Office of the Joint Chiefs of Staff; National Agency Check Center; Navy Intelligence Command; National Security Agency; Naval Security Group; On Site Inspection Agency; and Washington Headquarters Service. *Id.* at 92, n.318.

35. *Id*. at 92. Those organizations with "read only" capability include: Defense Commissary Agency; Naval Personnel Command; U.S. Army Field Support Center; U.S. Army Field Intelligence and Security Command; Department of the Army, Office of the Deputy Chief of Staff for Intelligence; Naval Systems Supply Command; military records centers; Battle Creek Defense Logistics Service Center; Wright Patterson Air Force Base; Military Traffic Management Command; Naval Military Personnel Command; and Naval Security Group Command. *Id.*

36. Interview with Bruce Drucker, DOD IG Office of Criminal Investigations Policy and Oversight, in Alexandria, Va. (Mar. 2, 1998). Granting access to the unified and specified commands, as well as the major commands, has also been considered. 2 ADVISORY BOARD REPORT, *supra* note 20, at 93.

37. Titling decisions and the mandatory filing of those decisions in the DCII can affect promotions. There are several categories of information that promotion selection boards review. 10 U.S.C.A. § 615 (West 1998). Those categories include: (1) information contained in the soldier's official military personnel file; (2) information communicated to the board by the officer; and "*other information . . . determined . . . to be substantiated, relevant information that could reasonably and materially affect the deliberations of the selection board.*" *Id*. § 615(a)(a)(A)-(C) (emphasis added). *See* U.S. DEP'T OF DEFENSE, INSTR. 1320.4, MILITARY OFFICER ACTIONS REQUIRING APPROVAL OF THE SECRETARY OF DEFENSE OR THE PRESIDENT, OR CONFIRMATION BY THE SENATE (14 Mar. 1995) [hereinafter DOD INSTR. 1320.4] (implementing the statute). *See also* U.S. DEP'T OF ARMY, REG. 600-8-29, OFFICER PROMOTIONS (30 Nov. 1994) [hereinafter AR 600-8-29].

In the Army, there are several categories of officers for whom there must be a check for adverse information outside of that included in the officer's OMPF. Those categories are all officers being considered for promotion to brigadier general or higher; all officers in the rank of lieutenant colonel and colonel being considered for battalion or brigade command; and all officers selected for promotion to colonel. Telephone Interview with Major Mike Klein, Captain Mike Lutton, and Major Hal Baird, Action Attorneys, Administrative Law Division, Office of the Judge Advocate General (Feb. 23, 1998).

38. *See supra* note 16 (describing the commander's responsibility to suspend the security clearances of soldiers who are under investigation). In addition to the commander's responsibility, the CCF has direct access to the DCII. "DCII records will be checked on all subjects of DOD investigations." AR 380-67, *supra* note 16, para. 1-304. In addition, the CCF may advise a commander to suspend a security clearance, even when the commander has decided not to do so. *Id.* para. 8-102.

39. DOD INSTR. 5505.7, *supra* note 4, para. F-b. *See* AR 195-2, *supra* note 1, para. 4-4b; CID REG.195-1, *supra* note 7, para. 7-6a.

40. Interview with Major Dan Kelly, judge advocate advisor to the CID Command 1995-1997, in Charlottesville, Va. (Feb. 25, 1998) [hereinafter Kelly Interview]; Interview with Philip McGuire, Director, U.S. Army Crime Records Center, at Fort Belvoir, Va. (Feb. 27, 1998) [hereinafter McGuire Interview].

The above scenario is distinguished from that where SPC Joe Smith is the listed subject, but CPT Ron Howard is later found to have committed the offense. In the latter scenario, SPC Joe Smith remains titled and listed in the CRC and the DCII as the subject of the investigation. If CPT Howard's responsibility is discovered prior to the CID finalizing the investigation, however, the offense should be "unsubstantiated" as to SPC Smith, as no probable cause existed to believe that Smith committed the offense. If CPT Howard's involvement were discovered after the CID finalized the investigation, SPC Smith would have to seek to amend the ROI to reflect that the offense was unsubstantiated. "The fact that the person is found not to have committed the offense under investigation or that the offense did not occur" is not grounds to remove the person's name from the DCII.[41]

Recent History of the Titling Standard

The Titling Standard Prior to 1992

Prior to 1992, the CID used a probable cause standard to title "subjects" in a final ROI and to index the subject's name and other personal identifying data in the DCII.[42] The CID could initiate an investigation, however, based on "credible information" and could list a "suspect" in an initial ROI based on that same credible information standard.[43] The initial investigation was indexed within the CID channels at the CRC in an automated index that was separate from the DCII.[44] The CID forwarded information to the DCII, such as the name of the suspect or the victim, but, in some instances, the CID transmitted the report under a code name or file number that was not retrievable by the suspect's name.[45] The CID forwarded the entire initial ROI to commanders and the SJA, among other recipients. The command could take actions such as "flagging" or suspending security clearances based on an initial ROI that was initiated solely on credible information.

If an individual was listed as a "suspect" based on credible information, but subsequent investigation determined that probable cause to title the individual as a "subject" was lacking, that the offense did not occur, or that the suspect did not commit the offense, the individual was deleted from the title block of the report.[46] All recipients of the initial ROI were notified of the change by a "status report."[47]

Under the pre-1992 titling standard, the CID temporarily indexed information in the DCII about the suspect or the offense upon completion of the initial ROI. The CID did not complete permanent indexing until they completed the investigation and determined that probable cause existed to believe that an offense was committed and that the "suspect" committed that offense.[48] Once the CID made this determination, the "suspect" could then properly be called a "subject." The CID agent and the trial counsel determined probable cause during a "final coordination." The CID required the CID agent to seek advice from the servicing trial counsel on the issue of whether probable cause existed to title a suspect, although the final decision as to whether to title rested with the CID.[49] Only when the CID determined that probable cause existed was the individual permanently listed as a "subject" in the title block of the final

---

41. DOD INSTR. 5505.7, *supra* note 4, para. F-b. *See also* AR 195-2, *supra* note 1, para. 1-5o(2); CID REG. 195-1, *supra* note 7, para. 7-6a.

42. *See* U.S. ARMY CRIMINAL INVESTIGATION COMMAND, REG. 195-1, OPERATIONAL PROCEDURES, para. 7-6a (1 Nov. 1986) (Io1, 1 Apr. 1989) [hereinafter OLD CID REG. 195-1]. A "subject" was a "person, corporation, or other legal entity . . . about whom probable cause exist[ed] to believe that the person committed a particular criminal offense. Only subjects [were] listed in the title section of the final report of investigation." *Id.*

43. *Id.* para. 7-5. A "suspect" was "a person, corporation, or other legal entity about whom some credible information exist[ed] that the person, corporation, or entity may have committed a criminal offense." *Id*.

44. 2 ADVISORY BOARD REPORT, *supra* note 20, at 91.

45. *Review of Titling and Indexing Procedures, supra* note 17, at 4.

46. OLD CID REG. 195-1, *supra* note 42, para. 7-5a-c.

47. *Id.*

48. *See id*. glossary.

> Probable cause to title a person or an entity in a criminal investigation exist[ed] when, considering the quality and quantity of all available evidence, without regard to its admissibility in a court of law, the evidence point[ed] toward the commission of a crime by a particular person or entity and would cause a reasonably prudent person to believe that the person or entity committed the crime. Probable cause must be distinguished from proof beyond a reasonable doubt, the latter being the evidentiary standard followed at criminal trials. The existence of probable cause to title [was] a determination made by the investigating organization.

Id.

49. *Review of Titling and Indexing Procedures, supra* note 17, at 4. In the example provided at the introduction of this article, the agent is seeking a titling opinion based on the pre-1992 standard described herein. Agent Holmes is awaiting a determination of probable cause before he titles an individual. After 1992, that would no longer be the case.

report of investigation and indexed as such in the CRC and the DCII.

> Hence, if an investigation [was] closed by the CID as unfounded, no information concerning the identity of the individual who was the subject of the investigation remain[ed] in the DCII. Further, the initially reported code name or sequence number for an investigation originally submitted in that manner [was] deleted from the DCII.[50]

The 1992 Change to the Titling Standard

In 1990, the House Armed Services Committee reviewed the military investigative commands. This review "revealed that a standardized policy for 'titling' a person need[ed] to be developed."[51] The Committee defined titling as "the process where an individual is listed as the subject of an investigation (titled) because probable cause has been established that the person has committed a crime."[52] The Committee determined that individuals were being titled in the absence of probable cause and that, once titled, "the individual's name is included in law enforcement records 'ad infinitum' and usually is not expunged unless the individual prove[d] his innocence."[53]

The Committee directed the "services to revise their procedures along the lines used by the Army to ensure that probable cause has been proven before 'titling' occurs."[54] In addition, the Committee directed the services to "expunge from their records the names of all individuals who have been 'titled' without probable cause."[55] The Committee tasked the Department of Defense Inspector General (DOD IG) to monitor the services' implementation of the Committee's instructions.[56]

In response to the Committee's concerns, the DOD IG Office of Criminal Investigations Policy and Oversight conducted a review of the titling procedures used by the Defense Criminal Investigative Services (DCIO).[57] In addition, the DOD IG reviewed analogous procedures of non-DOD criminal investigative organizations, such as the Federal Bureau of Investigation (FBI); the Bureau of Alcohol, Tobacco, and Firearms; the United States Secret Service; and the Internal Revenue Service Criminal Investigation Division and Inspection Service.[58] The review resulted in the May 1991 publication of a DOD IG report, titled *Review of Titling and Indexing Procedures Utilized by the Defense Criminal Investigative Organizations*,[59] and the publication in May 1992 of *DOD Instruction 5505.7*.[60] The DOD instruction dramatically changed the titling process in the Army from the probable cause to title standard to the credible information standard described earlier.

The DOD IG report recommended a uniform standard for titling decisions. It further recommended that the DOD IG establish the uniform policy for titling "based on a determination that sufficient evidence exists to warrant an investigation."[61] The rationale for the recommendation was that a DOD-wide standard based on a lower than probable cause determina-

---

50. *Review of Titling and Indexing Procedures*, *supra* note 17, at 5. Even if deleted from the DCII, the information remained in the CRC and was retrievable within the CID channels for 40 years. *Id*. at 4. The CID adhered to a probable cause standard to title "in order to prevent an unreasonable abridgement to the right to privacy" and stressed that "care must be exercised when naming individuals within the ROI." OLD CID REG. 195-1, *supra* note 42, para. 7-4. The Army was, however, the only DCIO to adhere to the probable cause standard. Other DCIOs permanently indexed subjects in the DCII when they determined that there was "merit to the complaint" and that the "information provided by the complaint was credible" or "there was sufficient evidence to determine an investigation was warranted." 2 ADVISORY BOARD REPORT, *supra* note 20, at 91 (quoting *Review of DCII Policies and Procedures, supra* note 20). The names of those indexed were not removed, except in cases of mistaken identity. *Id*.

51. H.R. REP. NO. 101-665, at 216 (1990).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Although the Committee intended for the titling procedures of the various services to comport with the Army's, the DOD IG nonetheless conducted a study and directed the services to do just the opposite. The DOD IG justified its actions on several grounds. First, the Committee report "recommended" that the uniform DOD titling standard be probable cause, and the DOD IG "was tasked to determine the *feasibility* of the recommendation." *Review of Titling and Indexing Procedures*, *supra* note 17, executive summary (emphasis added). Second, the Inspector General Act provides that the DOD IG is to develop policy, to monitor and evaluate program performance, and to provide guidance to all DOD activities relating to the criminal investigation program. In carrying out those responsibilities and the Committee's request to monitor this issue, the DOD IG "conducted a study of titling policies and procedures in the DOD investigative organizations." *Id.* at 1.

58. *Id.* executive summary.

59. *Id.*

60. DOD INSTR. 5505.7, *supra* note 4.

tion would "result in uniformity in the information going into the DCII, and [would] promote efficiency in the criminal investigative process."[62] The report rejected the House Armed Services Committee's recommendation of the probable cause standard because "it would have a significant negative impact on DOD investigative operations and would be inconsistent with the policies of the law enforcement community."[63]

The DOD IG report found that the CID was the only law enforcement or investigative agency to use the probable cause standard for titling subjects of investigations. "The standards for titling for the other law enforcement agencies range[d] from a credible evidence standard to the mere receipt of an allegation or complaint. Evidence sufficient to warrant an investigation was found to be the predominate standard for titling decisions."[64] The primary purpose for titling is to ensure the future availability of the information contained in the report for law enforcement and security uses.[65] The DOD IG report found that adoption of the probable cause standard would have "significant negative impact on the DOD and upon the ability of non-DOD law enforcement agencies, such as the FBI, to access and [to] use DOD investigative information as it would severely limit the entry of names into the DCII."[66] This limitation would result in the loss of valuable law enforcement information.

In its report, the DOD IG argued that if the CID previously investigated an individual, the existence of the investigation, by itself, is valuable investigative information that should not be deleted from the DCII.

> The identification of numerous investigations of the same company or individual, for a similar crime, allows the Government to identify a pattern and practice of misconduct. Such patterns can provide a basis for the Government to coordinate appropriate criminal, civil, contractual, and administrative remedies for procurement fraud. Further, previous investigations, regardless of their outcome, can be used to: establish a modus operandi in subsequent investigations of the same person; avoid duplicate investigations; record previous allegations; update security clearances; and provide a starting point for follow-on investigations on the same individuals or entities.[67]

Department of Defense Instruction 5505.7, which became effective on 14 May 1992, implemented the recommendations of the DOD IG report.[68] The instruction established the credible information standard for titling and indexing the subject of a criminal investigation, as well as the mistaken identity standard for removal of a subject's name from the DCII.[69] *Department of Defense Instruction 5505.7* states that titling and indexing shall occur at the start of an investigation.[70]

"[T]he act of titling and indexing shall not, in and of itself, connote any degree of guilt or innocence."[71] In addition, the instruction cautions that "judicial or adverse administrative actions shall not be taken SOLELY on the basis of the fact that a person has been titled in an investigation."[72] Changes to *CID Regulation 195-1* followed the DOD instruction and became effective on 1 July 1992.[73] An interim change to *AR 195-2* became effective on 27 September 1993.[74]

---

61. *Review of Titling and Indexing Procedures*, *supra* note 17, executive summary. In addition, "[t]he policy will further provide that indices of investigations will be maintained with more stringent requirements limiting removal of names from such indices." *Id*.

62. *Id.* at 2.

63. *Id.*

64. *Id.* at 2.

65. *Id.* at 1.

66. *Id.* at 2.

67. *Id.* at 11.

68. DOD INSTR. 5505.7, *supra* note 4, para. F-1.

69. *Id.* paras. D-3, F-4(b).

70. *Id.* para. F-4.

71. *Id.* para. F-1.

72. *Id*. para. F-2 (emphasis in original). Action may be based on any information found in the investigation, which may be located solely because titling occurred based on whether credible information existed.

73. Changes to CID Reg. 195-1 Message, *supra* note 10, para. 2.

74. AR 195-2, *supra* note 1, at IO1. Much of the change's language is taken verbatim from *DOD Instruction 5505.7*.

Arguments in Favor of the Current Standard

The arguments in favor of the current titling standard, and against any stricter standard, are clearly set forth in the DOD IG report. The DOD IG found that titling was "no more than a step in maintaining indices of investigations."[75] The value of maintaining and indexing the investigative information "is to show that an allegation was raised, pursued, proved, disproved, or in some instances, to establish a modus operandi."[76] Titling should not connote guilt or innocence, nor should it "carry with it any stigma upon which responsible individuals would initiate any *inappropriate* administrative action."[77]

> The purpose of a criminal investigation is to prove or [to] disapprove an allegation of criminality and not to establish the guilt or innocence of an individual. Due process requires that guilt or innocence be established in a court of law. The report of investigation is merely the repository for all those facts tending to prove or [to] disprove the allegations, gathered . . . during the course of a thorough investigation.[78]

Indexing in the DCII when an investigation is initiated based on credible information serves the administrative function of titling, as well as the law enforcement purposes described in the DOD IG report. Conversely, adoption of the probable cause standard recommended by the House Armed Services Committee would hinder the administrative function. Simply stated, if probable cause were established as the uniform standard for titling, a large amount of raw intelligence data that is used by law enforcement agencies would be lost.

The following illustrates the DOD IG's concern. Typically, a DCII check is one of the first steps in the investigative process to determine whether a suspect is or has been the subject of a prior investigation. If an agent finds information on the DCII, he can go to the investigative agency that maintains the information and get a copy of the report and the disposition of the case. Prior to 1992, the CID's procedure of removing information from the DCII unless it met the probable cause standard negated the entire purpose of the DCII. Unless the agent who was searching the DCII knew that the CID maintained a separate internal index of information in the CRC, whether a person had been a subject of an investigation would be overlooked.

For example,[79] if a person is the subject of a CID investigation but probable cause was not established, information is either deleted from the DCII or is not reported in the first place. If that person later attends a function hosted by the President of the United States and the Secret Service runs a DCII check on the person, nothing appears. The Secret Service is not aware of the CID's second indexing system (the CRC), which contains an investigation about the individual's prior threats against the President that were found to lack probable cause. The person shoots the President.

In addition, the command was predisposed to believing that a titled individual was guilty because the CID required a probable cause determination prior to listing an individual as a subject in an ROI. A probable cause determination is a legal conclusion that should be made by someone who is acting in an unbiased judicial capacity and should not be part of the investigative process. The determination of probable cause in investigative actions was not neutral and detached, as would be required for other investigative activities, such as obtaining search warrants. The lack of neutrality inherent in the probable cause determination denigrated the quasi-judicial nature of the titling decision and added to the perception that the titled individual was guilty. Furthermore, "anyone reviewing the DCII [is predisposed] to conclude guilt based on the CID system."[80] Injecting a legal determination into an investigation "is universally recognized as an inappropriate use of the investigative process and could also lead to a variety of abuses in administrative due process. The report should remain an objective repository of the facts and evidence bearing on the allegations."[81]

Arguments Against the Current Titling Standard

The Army's Comments to the DOD IG Concerning the Credible Information Standard

After publication of the DOD IG report in May 1991, the DOD IG began drafting *DOD Instruction 5505.7*. The DOD IG asked all of the investigative agencies in the services to submit comments concerning the proposed instruction. The Army's

---

75. *Review of Titling and Indexing Procedures*, *supra* note 17, executive summary.

76. *Id.* at 3.

77. *Id.* (emphasis added). It is contemplated that appropriate administrative actions may be taken on the basis of titling alone.

78. *Id.*

79. *DOD IG Historical File—Titling*, *supra* note 24.

80. *Id.*

81. *Review of Titling and Indexing Procedures*, *supra* note 17, at 13.

comments were the most comprehensive and critical of the proposed instruction and provided some of the most cogent arguments against the current titling standard.

Major General John L. Fugh, The Judge Advocate General for the Army at the time the DOD IG requested the comments, insisted on having personal involvement in the Army response, and he provided a personally signed memorandum[82] as an introduction to the Army's cover memorandum[83] and nonconcurrence[84] with comments. Major General Fugh succinctly stated the Army's position and main criticism of the credible information titling standard:

> The military is a unique society for which there is no civilian counterpart. I'm therefore concerned about the "Big Brother" aspects of the DCII. Many of us have access to that system, and the information is used for personnel decisions including security clearances, promotions, assignments, schooling, and even off-duty employment.[85]

The thrust of the Army memorandum, a cover paper to the Army nonconcurrence attached to Major General Fugh's memorandum, focused on three "key issues:"[86]

> a. Evidentiary standards for titling and for entering a person's name in the DCII.
> b. Degree of access to the DCII and underlying investigative files . . . [and]
> c. Use of the fact of indexing on the DCII without an adequate system in place for the adjudication with legal review of the underlying raw investigative information for administrative purposes.[87]

The Army opined that the proposed DOD instruction directing the change to the credible information standard only addressed the first key issue. "In the absence of adequate inquiry into and proposals concerning the other two issues, adoption of the DOD IG proposal is premature and unwise, and carries a high risk of unfair and abusive agency action."[88]

> The Army attacked the DOD IG's premise that titling and indexing are administrative functions, "a [mere] indication[ ] of the historical fact that, at some point, a person became the focus of a criminal investigation."[89]

That concept is acceptable only if the fact of titling is not to be used for any other purpose than as a record of investigative activity and there is no negative connotation associated with being titled. Army experience is that being titled and indexed does carry a very negative connotation.[90]

In addition, the Army criticized the DOD IG's focus of its review, commenting:

> [The analysis was based] almost exclusively on *inputs* to the DCII and the indices of investigative activity used by Federal agencies, such as the FBI, which have a purely law enforcement or security function. The report does not discuss access to or use of DCII entries within DOD, i.e. *outputs* from the DCII, for other than investigative or law enforcement purposes.[91]

---

82. Memorandum from MG John L. Fugh, The Judge Advocate General, U.S. Army, to Derek Vander Schaff, the DOD IG, subject: Comments to Proposed DOD Instruction 5505.7 (23 Mar. 1992) (found in *DOD IG Historical File—Titling*, *supra* note 24) [hereinafter Fugh Memo].

83. Draft Memorandum from MG John C. Heldstab, Director of Operations, Readiness, and Mobilization, DAMO-ODL, to Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: DOD Instruction 5505XA, Titling and Indexing of Subjects of Criminal Investigations in the Department of Defense, ACTION MEMORANDUM (undated) [hereinafter Army Memo].

84. Draft Memorandum to Department of Defense Inspector General, subject: DOD Instruction 5505.XA, Titling and Indexing in the Department of Defense—INFORMATION MEMORANDUM (undated) [hereinafter Army Nonconcurrence]. The DOD historical files do not contain final versions of either the Army memorandum or the Army nonconcurrence. *See generally DOD IG Historical File—Titling*, *supra* note 24. Both were attached to the original memorandum from Major General Fugh. *See* Fugh Memo, *supra* note 82.

85. Fugh Memo, *supra* note 82. Major General Fugh also noted that the "current Army [titling] system has been upheld in the courts because we do have safeguards . . . . I doubt that we would have prevailed in a 'no safeguard' system." Fugh Memo, *supra* note 82 (citing Aquino v. Stone, 768 F. Supp. 529 (E.D. Va. 1991), *aff'd*, 957 F.2d 139 (4th Cir. 1992)). *Aquino* referred to the probable cause standard to title, as well as the possibility of amending the ROI based on new, relevant, and material facts. *Aquino*, 957 F.2d at 143. In addition, the court cited the old standard to remove someone from the title block, such as when probable cause to title the individual did not exist. *Id.*

86. Army Memo, *supra* note 83, para. l.

87. *Id.*

88. *Id.*

89. *Id.* para i.

90. *Id.*

The Army also commented that the DOD was, in effect, comparing apples to oranges by relying on comparison of DOD titling procedures to non-DOD titling procedures of organizations like the FBI. Non-DOD organizations like the FBI have extremely strict restrictions on access to its system and output of its data. The system and its output are restricted to law enforcement and security investigations only, solely to determine whether raw investigative data exists, and, if so, to access it.[92] If that were the case in the DOD, the Army conceded that the IG's comparison would be valid.

> However, where the outputs from the system are widely accessible to agencies or officials *other than* criminal or security agencies or personnel . . . and where that output is used directly to support agency actions or determinations other than subsequent criminal or security investigations, then the standard recommended by the DOD IG is grossly unfair. With such a widely accessible and multi-purpose system, a probable cause standard with legal review is necessary to ensure fairness.[93]

In the Army nonconcurrence, the Army "strongly urge[d] the DOD IG to examine thoroughly the issues of access to and use of DCII information prior to removing the safeguard of a probable cause determination from the input to the DCII."[94]

Criticism of the Advisory Board on the Investigative Capability of the Department of Defense

In 1993, "Congress recommended that the Secretary of Defense conduct a 'vigorous review of the conduct and review of DOD investigations' and convene an advisory board to 'assess the current state of affairs within the Department' with respect to its investigative capability."[95] The Advisory Board on the Investigative Capability of the Department of Defense was formed in late 1993; the Advisory Board published its *Report of the Advisory Board on the Investigative Capability of the Department of Defense* in late 1994.[96] As part of its review, the Advisory Board examined and severely criticized the credible information standard for titling, for much the same reasons the Army provided nearly two years previously.

The Advisory Board accepted the necessity of a retrieval method for prior investigations about an individual for law enforcement and security purposes and found the DCII's centralized index of investigative records a "necessary tool for effective law enforcement in DOD."[97] The Advisory Board found, however, that the DCII was different from the indices that non-DOD agencies used because of its expansive access. "We find the current number of organizations, and thus individuals, with access to the DCII troubling, especially in light of the credible information standard for titling and the sheer number . . . of individuals whose identities appear in the system."[98]

The Advisory Board identified several potential dangers of the broad access to DCII information. First, the Advisory Board found it an "unacceptable risk" for non-DCIO personnel to have access to information concerning ongoing criminal investigations.[99] Because the information on subjects is entered into the DCII at the initiation of an investigation, it is possible that the subject may become aware of the investigation and may contact or harm potential witnesses.[100]

Second, the Advisory Board found that access to "closed criminal investigations" in the DCII by non-criminal investigative agencies creates an "unacceptable risk for individuals listed as subjects in the system."[101] *Department of Defense Instruction 5505.7* cautions that titling alone does not provide a basis for adverse action, judicial or administrative.[102] Despite this cautionary provision, however, organizations or commands can potentially abuse and misuse DCII information. The concern is that organizations may make personnel or other deci-

91. *Id.* para. 2c (emphasis in original).

92. Army Memo, *supra* note 83, para. j.

93. *Id.* (emphasis in original).

94. Army Nonconcurrence, *supra* note 84, para. g.

95. 1 ADVISORY BOARD REPORT, *supra* note 20, at v.

96. *Id.* The Advisory Board published its findings and recommendations in a two-volume report. The first volume of the report contains the actual findings, recommendations, and analysis leading to the findings and recommendations. The second volume contains all of the background information that the Advisory Board relied upon to reach its conclusions. *Id.*

97. *Id.* at 44.

98. *Id.* at 45.

99. *Id.*

100. *Id.*

101. *Id.*

sions based solely on whether a DCII search reveals a "hit" of an individual. Due to time constraints, limited access (read only capability), or laziness, the agency does not go beyond recognizing that an individual was titled.[103]

Third, the Advisory Board noted that investigators who are "interpreting a very broad and subjective standard with no second party review of the determination" make the determination to title based on the credible information standard.[104] While this may be acceptable if only law enforcement and security organizations have access to the information, it is unacceptable when the information is used for administrative determinations such as promotions.[105] The Advisory Board believed that non-criminal/non-security organizations should have access to such information only when a preponderance of the evidence supports the allegations.[106]

Fourth, the Advisory Board labeled as "unfair" the "absence of a mechanism for subjects to request removal of their name[s] from the DCII."[107]

> There are circumstances in which a titling decision could be viewed as arbitrary, capricious, or an abuse of discretion. It is not enough to allow a change to the system only in the event of mistaken identity. Criminal investigative organizations, and subjects, should have the ability to correct and address mistakes.[108]

Additional Criticisms of the Credible Information Standard and Its Application

Subjects are Titled Prematurely in Initial ROIs

The CID recognizes that individuals are in danger of being titled prematurely[109] because CID agents are required to prepare an initial ROI within three working days of when they initiate an investigation.[110] An investigation is initiated based on credible information that an offense within the CID jurisdiction has been committed.[111] A separate credible information determination is necessary to title an individual as a subject. "Credible information that a crime has or may have occurred may or may not meet the credible information standard to believe that a particular individual may have committed that crime."[112] Even if prematurely titled, a subject may not be removed from the title

102. DOD INSTR. 5505.7, *supra* note 4, para. F-2.

103. 1 ADVISORY BOARD REPORT, *supra* note 20, at 45. The Advisory Board provided a hypothetical to illustrate this concern:

> A DCIO receives what is perceived at first to be credible information that an individual has committed an offense and thus titles and indexes the subject in the DCII. This information later is deemed not credible, but the individual remains titled and in the DCII. Thus, five years later when an agency with access to the DCII conducts a search of the system on two candidates for the same critical position, the one individual is identified as the subject of a criminal investigation and the other not. Now, at this point, the agency should request the case file from the relevant DCIO and read that no credible information ultimately was developed. As a practical matter, however, the agency is pressed for time and makes a decision to employ the individual without the DCII criminal investigation record.

Id.

104. *Id.* at 46.

105. *Id.*

106. *Id.* A legitimate question arises as to whether such "non-criminal/non-security organizations" should have access to information even when supported by a preponderance of the evidence. If the reason to input data into the DCII in the first place is to allow retrieval of the information in the future for law enforcement and security purposes, why do non-law enforcement/non-security organizations have access at all? Arguably, promotion boards and the like would continue to have access, due to security concerns.

107. *Id.*

108. *Id.* at 46. This concern is glaringly illustrated by the following example. A subject is titled by a vindictive CID agent in the face of a total absence of credible information that the subject was involved in any criminal activity. While the subject should be able to become "untitled" via appeal to the CRC, current CID policy is that *DOD Instruction 5505.7* does not allow relief for the subject, because there is no "mistaken identity." Kelly Interview, *supra* note 40. This interpretation of the regulation appears to fly in the face of common sense. It stands to reason that if the agency does not follow its own regulatory standards and catches itself, it should be able to correct the error.

109. Memorandum, Deputy Chief of Staff for Operations, U.S. Army Criminal Investigation Command, CIOP-PP, subject: Operational Memorandum 013-96, Credible Information Standard for Titling an Individual or Entity in a Report of Investigation, para. 3 (27 Dec. 96) [hereinafter Op. Memo]. The problem of premature titling came to the CID's attention during IG inspections and action requests. *Id.* para. 1.

110. *See supra* note 13 and accompanying text.

111. *Id.*

112. Op. Memo, *supra* note 109, para. 3.

block in the absence of mistaken identity. This result is blatantly unfair to the individual.[113]

Lack of Clarity of Credible Information Standard

"Credible information" is an evidentiary determination peculiar to the titling area. Unlike probable cause, with a long history of judicial interpretation, "credible information" means nothing to attorneys, who are tasked to assist investigators in the determination of whether it exists in a particular case. Trial counsel might find it a standard that is impossible to measure. Moreover, there are at least two definitions of "credible information" in *AR 195-1* and *CID Regulation 195-1*.[114] This leads to needless confusion in the application of the standard.

Confusing Regulatory Guidance

Application of the credible information standard to an individual applies only to the decision to list that individual as a subject in the ROI.[115] A probable cause standard is applied to determine whether the offense is substantiated as to the individual.[116] To deduce the different standards applicable to different findings, one must cull them from *CID Regulation 195-1*, a regulation that is two and one-half inches thick and that is generally not available outside of the CID channels; trial counsel are not routinely granted access to the regulation.[117] *Army Regulation 195-2* does not distinguish among the decision to title an individual, the decision to found an offense, and the decision to substantiate the offense. Moreover, *AR 195-2* does not refer the reader to *CID Regulation 195-1* for additional information. The obscure CID Message that clarifies the standard is not referenced anywhere in *CID Regulation 195-1* or *AR 195-2*. Compounding confusion, *AR 195-2* was not amended to comport with the 1992 change to the credible information standard until September 1993. Attorneys and investigators should not be expected to apply standards that are so needlessly difficult to decipher.

Widespread Misunderstanding of the Credible Information Standard and Its Application

Due to the confusing regulatory guidance described above, coupled with the needless limited distribution of *CID Regulation 195-1*, many investigators and the trial counsel who assist them do not understand the difference between titling an individual, founding an offense, and substantiating an offense.[118] If there is such confusion among those who regularly deal with the system, what can be expected of commanders, promotion boards, and other entities that have access to titling information? The risk of misunderstanding, and hence, misuse, is almost certain.

Assumption of Guilt Inherent in DOD IG Rationale

Titling based on credible information and subsequent indexing in the DCII is necessary so that information can be retrieved in the future for law enforcement and security purposes.[119] That the CID investigated an individual is cited as valuable investi-

---

113. The CID recognized as much:

> It must be remembered that, once titled, with very limited exceptions, the subject's name will remain in the Criminal Records Center [CRC] and the Defense Clearance and Investigations Index [DCII] for 40 years. Questionable titling decisions do a great disservice to the individual and the Army community. Equally undesirable, they cast doubt on the credibility of our investigative processes.

Id. para. 5. To avoid this result, CID agents are advised that the "better practice" is to "submit the initial ROI listing unknown subjects and identify potential subjects in the narrative of the report." *Id*. para. 3. The best practice is not to identify a subject until the requirement of credible information is met.

114. In addition to the definition of "credible information" provided in *AR 195-2* and *CID Regulation 195-1*, there is a separate definition of "credible information" as applied only to adult private consensual sexual misconduct. *See* AR 195-2, *supra* note 1, glossary; CID REG. 195-1, *supra* note 7, glossary. For those purposes, credible information is defined as "information, considered in light of its source and all surrounding circumstances, that supports a reasonable belief that a service member has engaged in sexual misconduct. Credible information consists of articulable facts, not just a belief or suspicion." CID REG. 195-1, *supra* note 7, para. 5-24a(4). *See* U.S. DEP'T OF DEFENSE, INSTR. 5505.8, INVESTIGATIONS OF SEXUAL MISCONDUCT BY THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS AND OTHER DOD LAW ENFORCEMENT ORGANIZATIONS (28 Feb. 1994).

115. *See* Changes to CID Reg. 195-1 Message, *supra* note 10, para. R.

116. *Id*. (containing the only definition or explanation of the fundamental distinction between credible information and probable cause found in any publication or regulation).

117. In researching this paper, the author made an informal request to the CRC Director for *CID Regulation 195-1*; the request was denied. The CRC Director stated that a FOIA request for the regulation would be denied as well. The regulation used in researching this paper is located at The Judge Advocate General's School, Charlottesville, Virginia, in the Criminal Law Department. Conversations with the member of that department who obtained the regulation reveal that he had to go to extraordinary lengths in order to secure a copy. The rationale given by CID officials for such limited access to the regulation is that its distribution is limited. While true, the distribution restriction is not nearly as narrow as officials routinely contend. The "distribution restriction" page of the regulation states: "This publication contains technical and operational information that is for official government use only. *Distribution is limited to U.S. Government agencies . . . .*" CID REG. 195-1, *supra* note 7, Restriction -1 (emphasis added). Staff judge advocates, trial counsel, and defense counsel must be given greater access to the regulation to perform their jobs competently.

gative information in itself, as it may be used to "allow the [g]overnment to identify a pattern and practice of misconduct" by an individual,[120] among other things. This rationale is illogical unless there is an underlying assumption that the allegations against an individual who is merely titled in an ROI are true. To identify a "pattern of misconduct," one must assume the beginning or continuation of the "pattern" by reference to ROIs that include mere titling. Otherwise, those ROIs are meaningless.

Moreover, there is no logical connection between the stated necessity of information (to assist in subsequent law enforcement and security investigations) and a finding in the ROI that either the offense did not occur or the subject did not commit it. How does information that is indicative of nothing assist anything? Again, the answer assumes the truth of the allegations against the individual, despite the conclusions of the ROI.

Primer for Advocates: Challenging a Post-1992 Titling Decision

The Procedure of Army Regulation 195-2

There are two separate ways to attack an ROI. The first is to become "untitled" by removing an individual's name from the subject block of an ROI. The second is to seek amendment of other portions of the ROI, for example, changing a determination that the offense was founded to a determination that the offense was unfounded. An additional example of the second type of amendment is to seek to change from a determination that probable cause existed to substantiate the offense, to a determination that probable cause was lacking. Requests to amend an ROI, either seeking removal from the title block or other amendment, are made to the Director, CRC.[121] Requests are made pursuant to *AR 195-2*; the access and amend provisions of the Privacy Act are unavailable, as the CID has exempted itself from those provisions.[122]

Since 1992, becoming "untitled" is nearly impossible. In order to have an individual's name deleted from the title block, the individual must "conclusively establish that the wrong person's name has been entered as a result of mistaken identity."[123] The standard for amending other portions of the report, however, remained the same after 1992. Requests to amend other portions of the ROI would be granted, as before 1992, "only if the individual submits new, relevant, and material facts that are determined to warrant revising the report."[124] Unless an individual succeeds in removing his name from the title block, however, successfully amending other portions of the ROI do "not affect the indexing of the name in the DCII."[125]

Although the standard for granting a request for removal of one's name from the subject block changed drastically in 1992,

---

118. A survey of the Army members of the 46th Graduate Course, The Judge Advocate General's School, Charlottesville, Virginia, revealed that only 10 students out of 34 who responded understood that there was a difference between the decision to title an individual and the decision to found an offense. Many of those who understood that there was a difference could not define the difference. Numerous students were unaware of the 1992 change in the titling standard from probable cause to credible information, even though the same students acted as trial counsel after the change. In addition, numerous students could not define "titling" and frequently confused it with the decision to substantiate an offense.

Similarly, according to the Chief, Operations and Investigations Division of the Military Police School at Fort McClellan, Alabama, there is also widespread misunderstanding of the differing standards among CID agents. Telephone interview with Jerrold Unruh, Chief, Operations and Investigations Division, Military Police School, Fort McClellan, Ala. (Feb. 27, 1998). Mr. Unruh is in charge of all investigative training at Fort McClellan, including the CID Basic Course, Warrant Officer Basic Course, and all agent follow-on training held at the school. Although new agents are taught the credible information standard and how it is applied (to determine whether to list someone as a subject), Mr. Unruh saw significant confusion among more senior agents who did not receive additional training on the standard after 1992.

119. *See supra* note 17 and accompanying text.

120. *Review of Titling and Indexing Procedures*, *supra* note 17, at 11.

121. AR 195-2, *supra* note 1, para. 4-4c. The correct address to send requests to amend is: Commander, USACIDC, ATTN: CICR-FP (P97-0324), 6010 6th Street, Building 1465, Fort Belvoir, Virginia 22060-5585. The address in AR 195-2, para. 4-4c is incorrect.

122. *Id.* para. 4-4b. *See* 5 U.S.C.A. § 552a (West 1996). The exemption for criminal investigative files is found at § 552a(j)(2) of the statute, which provides that any agency may promulgate rules to exempt any system of records within the agency from specified Privacy Act provisions if the agency provides its rationale for so doing. Aquino v. Stone, 957 F.2d 139, 141 (4th Cir. 1992). The CID's rationale for the exemption is:

> Access might compromise on-going investigations, reveal classified information, investigatory techniques[,] or the identity of confidential informants, or invade the privacy of persons who provide information in connection with a particular investigation. The exemption from access necessarily includes exemption from amendment, certain agency requirements relating to access and amendment of records, and civil liability predicated upon agency compliance with those specific provisions of the Privacy Act. The exemption from access necessarily includes exemption from other requirements.

Id. at 530 (citation omitted).

123. AR 195-2, *supra* note 1, para. 4-4(b).

124. *Id.*

the procedure to request removal remained the same.[126] First, the soldier must obtain the ROI, usually from his commander.[127] When providing the ROI to the soldier, the commander is required to inform the soldier of the amendment procedure contained in *AR 195-2*.[128] If the soldier has not received a copy of the ROI from his commander, he must submit a request under the Privacy Act of 1974[129] to the Director, CRC, to obtain a copy from the CRC files. Next, the soldier, with the help of a legal assistance or trial defense attorney, prepares a memorandum with supporting documentation setting forth the reasons why removal from the title block (mistaken identity only) or other amendment to the ROI should be granted. The soldier must submit "new, relevant, and material facts that are determined to warrant revision of the report" to amend the ROI.[130] The new, relevant, and material facts can be submitted via additional statements or other evidence that is not found in the ROI. If no new evidence is submitted, the CRC will notify the soldier and allow an additional thirty days to provide further information.

After the thirty-day period has passed, the CRC forwards copies of the amendment request to the CID SJA and the CID Investigative Operations Section. All three entities determine individually whether the request for amendment should be granted. If all three are in agreement, the Director of the CRC approves the decision and notifies the soldier. If all three are not in agreement, each provides a memorandum in support of its position to the CID Deputy Commander, who makes the final decision on behalf of the CID Commander. The CID also notifies any agencies that received the original ROI. The CID Deputy Commander's decision is not reviewable and "constitutes action on behalf of the Secretary of the Army with respect to requests for amendments" under *AR* 195-2.[131]

If the soldier succeeds in removing his name from the title block because of mistaken identity, the name should also be removed from the DCII, and information concerning that particular investigation should no longer be retrievable using the soldier's personal identifying data.[132]

Requests to amend the ROI, either to remove a name from the subject block or to amend some other portion of the report, are rare.[133] Soldiers should request to amend their ROIs if they have evidence that incorrect information is contained in the ROIs or that the offenses for which they are titled are unfounded or not substantiated.

The Army Board for Correction of Military Records

If the soldier's attempt to amend the ROI through the CID procedures is unsuccessful, the next step is the Army Board for Correction of Military Records (ABCMR).[134] "The function of the [ABCMR] is to consider all applications properly before it for the purpose of determining the existence of an error or an injustice."[135] An error is a violation of a law or regulation. An injustice is determined as a matter of equity, a much more subjective standard than that applied to an error analysis.[136]

---

125. *Id.*

126. McGuire Interview, *supra* note 40. Mr. McGuire confirmed that the procedure did not change after the CID adopted the credible information standard. *See* Captain Paul M. Peterson, *CID ROI: Your Client and the Title Block*, ARMY LAW., Oct. 1987, at 50 (describing the procedure for requesting amendment to the ROI under the pre-1992 probable cause standard).

127. AR 195-2, *supra* note 1, para. 1-4f(1)(b).

128. *Id.*

129. 5 U.S.C.A. § 522a (West 1998).

130. AR 195-2, *supra* note 1, para. 4-4b.

131. *Id.*

132. *Review of Titling and Indexing Procedures*, *supra* note 17, at 6.

133. The CID officials declined to provide any statistical information concerning the number of investigations conducted per year, the number of individuals titled per year, the number of founded offenses per year, the number of requests for amendment of ROIs per year, and the number of requests for amendment granted per year. According to the Director, CRC, a request under the provisions of the Freedom of Information Act (FOIA) is required for the information. *See* 5 U.S.C.A. § 552 (West Supp. 1998). The average amount of time to respond to a "routine" FOIA request is eleven months or greater. McGuire Interview, *supra* note 40. Discussions with the CID judge advocates revealed that, from 1995-97, the CID received only 20-30 requests per year for removal from the title block or other amendment. The CID rarely granted any kind of relief.

134. *See* 10 U.S.C. § 1552 (West Supp. 1998) (establishing the ABCMR). The statute provides that "the Secretary of a military department may correct any military record . . . when the Secretary considers it necessary to correct an error or remove an injustice . . . such corrections shall be made by the Secretary acting through boards of civilians of the executive part of the military department." *Id.* § 1552(a)(1). *See generally* U.S. DEP'T OF DEFENSE, INSTR. 1336.6, CORRECTION OF MILITARY RECORDS (28 Dec. 1994); U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (18 May 1977) (C1, 1 May 1982) [hereinafter AR 15-185] (implementing the statute in the Army).

135. AR 15-185, *supra* note 134, para. 4.

The ABCMR is currently the soldier's best hope for successfully amending an ROI or removing his name from the subject block. Although very few of the ABCMR's approximately 14,000-15,000 cases annually challenge a titling decision,[137] the board has demonstrated a willingness to recommend that the Secretary of the military department expunge CID ROIs and any other record reflecting titling decisions.[138] The 1992 change to the titling standard did not change the way the ABCMR examines titling challenges. Both before and after the change, the ABCMR has recommended that the Secretary of a military department expunge a CID ROI whenever it finds error or injustice.

Procedurally, a soldier who challenges a titling decision must exhaust all other administrative remedies prior to filing an application with the ABCMR. The application is filed on Department of Defense Form 149. The soldier has three years "after discovery of the alleged error or injustice" to seek correction of his records through the ABCMR.[139] Both exhaustion of remedies and the statute of limitations can be waived.[140] Although *AR 15-185* does not discuss waiver or exhaustion or other administrative remedies, the first sentence of the ABCMR's format for responding to petitions states: "The applicant has exhausted or the Board has waived the requirement for exhaustion of all administrative remedies afforded by existing law or regulation."[141]

In addition to the application for correction of his military records, the soldier should include the challenged ROI and any statements or additional evidence not found in the ROI. The soldier should also obtain and submit memoranda of support from the chain of command. Such memoranda are significant in applications on which the ABCMR has acted favorably. The soldier should also submit a memorandum in support of his application that clearly sets forth the reasons why the ABCMR should grant relief. A legal assistance attorney or trial defense attorney may help the soldier prepare the packet for submission to the ABCMR.

The soldier is responsible, by regulation, only for obtaining records outside the Department of the Army; the applicant is assured access to all relevant official records that are necessary to prepare and to present his case before the ABCMR.[142] The ABCMR has the authority to request the transmittal of an applicant's military records and may call on any other Army agency for assistance.[143] For example, the ABCMR may request that the CID forward all documents pertaining to the challenged case from the CRC.

The ABCMR may convene a hearing to evaluate the soldier's application, or it may make its decision based on written submissions alone.[144] If the ABCMR, through hearing or otherwise, denies an application due to insufficient evidence of error or injustice, the soldier may submit new relevant evidence for consideration.[145] An application for correction to military records and all related documents are filed in the soldier's OMPF. If the ABCMR grants relief, however, the documents are returned to the ABCMR for permanent filing.[146]

An examination of the two successful titling challenges since the summer of 1996 yields the following information common to both cases. First, both individuals were titled based on the post-1992 credible information standard. Second, the offenses were both founded and substantiated. The allegations in both cases were substantiated based on probable cause, as required even after the initiation of the credible information

136. Telephone Interview with Karl F. Schneider, Deputy Assistant Secretary of the Army, Army Review Boards (Feb. 4, 1998). Mr. Schneider is the director of the ABCMR, the Army Discharge Review Board, and the Army Clemency and Parole Board.

137. *Id.* Since the summer of 1996, there have been approximately five titling challenges. Relief was granted in two cases due to injustice. This 20% rate of relief is much higher than the ABCMR's average in other cases, about 6-7%. There are three more titling challenges currently awaiting action by the ABCMR, out of a total of approximately 19,000 cases of all kinds awaiting action. Interview with Captain Bronte Montgomery, Army Board for Correction of Military Records, in Alexandria, Va. (Mar. 2, 1998) [hereinafter Montgomery Interview]. The ABCMR is the only service correction board that has ordered deletion of a name from the title block and the removal of the file from the DCII. *Review of Titling and Indexing Procedures*, *supra* note 17, at 6.

138. The ABCMR's recommendation is forwarded for final action/approval to the Secretary of the Army. AR 15-185, *supra* note 134, para. 20. The Secretary of the Army has delegated his authority the Deputy Assistant Secretary of the Army—Army Review Boards. If the deputy approves the ABCMR's recommendations, he directs the appropriate agencies to correct the soldier's record.

139. *Id.* para. 7.

140. *Id.* para. 8.

141. ABCMR Proceedings, Docket No. AC 97-07016, [redacted name] (18 June 1977).

142. AR 15-185, *supra* note 134, paras. 15, 19(2).

143. *Id*. para. 27.

144. *Id.* para. 10a.

145. *Id.* para. 10b.

146. *Id.* para. 21e.

standard to title. Third, the soldiers successfully argued that the allegations lacked corroboration. Fourth, the chain of command determined that no adverse action against the soldier was appropriate due to the uncorroborated nature of the accusations. Fifth, the chain of command involved in the determination to take no action against the soldier included a major general or higher. Finally, the ABCMR concluded in both cases that the soldiers' names should be removed from the ROIs based on injustice and inequity, rather than error.

In the first case, the CID titled the applicant, an E-7 in the United States Army Reserve, for conspiracy to obtain false military identification cards and other offenses.[147] The allegations against the soldier were substantiated in the ROI with a finding of probable cause to believe that the soldier committed the crimes.[148] The evidence against the soldier consisted of the uncorroborated statements of a "bad check/scam artist who had been masquerading as a military undercover investigator."[149] The soldier's chain of command, up to the Adjutant General of the West Virginia National Guard (a major general) took no action against the soldier based upon insufficient evidence in the ROI. The soldier submitted numerous memoranda to the ABCMR from his chain of command and co-workers to dispute the uncorroborated allegations of the scam artist.

The ABCMR did not dispute or address the finding of probable cause. Nonetheless, the ABCMR concluded that, "[i]n the absence of any corroborating evidence that the applicant was involved in this incident and especially in light of the major general's conclusion that no further action is appropriate, the current situation is unjust."[150] Based on its conclusion, the ABCMR recommended that any reference to the soldier be deleted from the records and expunged from the soldier's military records.[151]

In the second case, a female active duty major was titled in January 1994 for adultery, false swearing, and sodomy based on the uncorroborated allegations of her supposed lover.[152] The ROI concluded that probable cause supported the offenses and were thus substantiated.[153] After the CID completed the investigation, the CID forwarded the ROI through the major's chain of command for a determination of whether to take adverse action. Her commander, a lieutenant general, declined to take any disciplinary action because his "review of the evidence . . . resulted in the conclusion that testimony is contradictory in many critical aspects without sufficient corroboration."[154]

The ABCMR specifically concluded that the CID agent properly substantiated the offense based on probable cause.[155] Nonetheless, the ABCMR concluded that "injustice and inequity exists in this case. While there may be probable cause, crime or guilt has not been shown, but the investigation will nevertheless serve to the applicant's severe detriment."[156] The ABCMR also noted that:

> [W]hile the ROI was returned without action, it remains accessible [in the DCII] and will or may be reviewed and used in the applicant's future, e.g., for various selection boards such as a command selection board. It is a distinct unfair disadvantage for anyone under these circumstances when in competition with their peers. The Board concludes this is an injustice and an inequity in this instance.[157]

Based on its conclusions, the ABCMR recommended correction of the officer's military records by deleting her name from the title block of the ROI, distributing copies of the amended ROI to all organizations that had received the original, and "removing her name and reference from the DCII."[158] The Deputy Assistant Secretary of the Army approved the

147. *See* ABCMR Proceedings, Docket No. AC95-07077, [redacted name] (9 Apr. 1997).

148. *Id*. at 2.

149. *Id*.

150. *Id.* at 3.

151. *Id*. The Deputy Assistant Secretary of the Army approved the ABCMR's recommendations and directed the CID to comply with them.

152. ABCMR Proceedings, Docket No. AC 97-07016, [redacted name], 18 June 1997.

153. *Id*. at 2. The officer had received top-block ratings throughout her career as both an enlisted soldier and an officer, with the exception of one center of mass appraisal. *Id*. at 3.

154. *Id.* at 4.

155. *Id.* at 5.

156. *Id*.

157. *Id.*

158. *Id*.

ABCMR's recommendations within thirty days after the ABCMR made the recommendations and directed the CID to comply. Although CID officials refused to comment on the case, the director of the CRC stated that he had complied fully with the direction of the ABCMR.[159]

These two recent cases demonstrate the willingness of the ABCMR to act where appropriate.[160] Following the cases, the SJA for the Department of the Army Review Boards Agency (DARBA) began work on a systematic methodology for review of titling challenges.[161]

> The need for this guidance was prompted by a concern by the General Counsel's Office and CID that the ABCMR might overturn titling decisions indiscriminately. The guidance is designed to focus the ABCMR and its analysts on the relevant issues to examine in reaching a decision, to ensure the decisions in this sensitive area are consistent, and to provide a basis for explanation of those decisions if they are challenged by the applicant or Army leadership.[162]

Although not yet complete, the methodology will most likely focus the ABCMR's analysis on two areas. First, was there credible information to initiate an investigation into the alleged offenses for which the applicant is titled? If not, the individual's name should be removed from the subject block. This prong focuses on the question of whether there was a violation of law or regulation in initiating the investigation against the applicant. The focus addresses the CID's policy of refusing to amend reports even where a mistaken determination of credible information forms the basis for the titling decision. Second, even if credible information existed to initiate the investigation, the offense was properly founded, and the individual's involvement in the offense was properly substantiated, is there nonetheless injustice and inequity caused by the use of the information? The comments of the Army in its memorandum and nonconcurrence to the 1992 change in the titling standard provide great equity arguments for soldiers who are petitioning the ABCMR, as well as for counsel who are assisting them.[163]

Soldiers and their attorneys who desire to challenge a titling decision at the ABCMR are encouraged to adopt the DARBA's methodology in their applications for relief. In particular, where the offense is unfounded or the individual's participation in the offense is not substantiated by probable cause, the soldier should attack the uses of the titling decision (for example, promotion boards, security clearances, or employment decisions). Although the sampling is small, the results are clear–the ABCMR is listening and is willing to act.[164]

Recommendations and Conclusion

The titling of an individual and subsequent indexing in the DCII should serve its primary function—ensuring that information contained in the report can be retrieved at some future point in time for law enforcement and security purposes.[165] To ensure the viability of that primary purpose, several changes to the titling process are necessary.

First, to ensure that only accurate information is used, the amendment procedure should be modified to allow greater successful challenges to the titling decision. The current standard of removal from the titling block only in cases of mistaken

159. McGuire Interview, *supra* note 40.

160. There is a question as to whether it is ever appropriate for the ABCMR to direct removal of a soldier's name from the title block based on any reason other than mistaken identity, as set forth in *DOD Instruction 5505.7* and *AR 195-2*. The ABCMR is granted the authority, by statute, to correct "any military record" when "necessary to correct an error or remove an injustice." 10 U.S.C.A. § 1552 (West 1998). The ABCMR's position is that its statutory mandate supercedes DOD instructions and Army regulations. Electronic Interview with Colonel Jan Serene, Staff Judge Advocate, Department of the Army Review Boards Agency (Apr. 2, 1998) [hereinafter Serene Interview].

161. Montgomery Interview, *supra* note 137. The Deputy Assistant Secretary of the Army—Army Review Boards asked the DARBA SJA to develop an analytical approach to titling cases. The approach is not so much a new one as it is "intended to be guidance to the ABCMR and its analysts to assist in their systematic and consistent review of requests to correct titling decisions." Serene Interview, *supra* note 160.

The Deputy did not disguise his distaste for the credible information standard to title a soldier. He expressed the opinion that the standard to title is extremely low, while the standard to have one's name removed from the title block is extremely high. The inequity in that equation is compounded by the vast access to the information granted by the DCII.

162. Serene Interview, *supra* note 160.

163. *See supra* notes 82-94 and accompanying text (discussing the Army memorandum and Army nonconcurrence to *DOD Instruction 5505.7*).

164. Administrative Procedures Act, 5 U.S.C.A. §§ 702-706 (West 1998) (providing a means for soldiers to appeal to the federal courts). An appeal to the federal courts would only be successful if the soldier could prove that the agency action challenged was arbitrary, capricious, or otherwise an abuse of discretion. *Id.* § 706(2)(A). *See, e.g.*, Aquino v. Stone, 957 F.2d 139 (4th Cir. 1992). There are very few challenges to titling decisions filed in the federal courts. In the last three years, at least, no challenges to titling decisions have been filed against the Army. Telephone Interview with Major Douglas Mickel, Senior Litigation Attorney, Office of the Judge Advocate General, Litigation Division (Feb. 23, 1998).

165. *Review of Titling and Indexing Procedures*, *supra* note 17, at 1.

identity allows the use of proven inaccurate accusations against individuals. Allowing a soldier to remain titled cannot be justified under the following circumstances: when there is a demonstrable absence of credible information; when an offense did not occur (for example, the offense is unfounded); or when the soldier, according to the ROI itself, did not commit the offense.

Second, the two primary regulations that address titling in the Army, *AR 195-2* and *CID Regulation 195-1*, must be updated and coordinated. The regulations must clearly distinguish between the decision to title an individual, the decision to found an offense, and the decision to substantiate an offense.

Third, CID agents and trial counsel must be instructed more systematically in the titling process. This should include instruction on the ramifications of the titling decision. Currently, trial counsel receive no systematic instruction on titling.

Fourth, if changes to the system are not made to ensure the accuracy of the titling information that is put into the DCII, access to such information should be vastly restricted from its current status. Any use of potentially inaccurate information based on such a low evidentiary standard for such a large array of administrative decisions negatively affects the Army in the end. For example, the most qualified person for the assignment, promotion, or security clearance may not be considered due to misunderstanding or misuse of a titling decision.

Finally, the Army must overcome the connotation of guilt associated with a titling decision. There is a definite stigma associated with titling in the Army.[166] Agents and attorneys must work to dispel that stigma. Actions as simple as providing the definition of titling in every ROI and cautioning readers about the improper use of mere titling would be a start. Similarly, a definition in the ROI of what it means to "found" and to "substantiate" an offense would be helpful to all readers of the ROI.

It will take time for the culture of the stigma associated with titling to dissipate. In the meantime, attorneys and agents must diligently apply the standards and requirements necessary to title an individual. Soldiers' careers depend on a fair application of the titling standards. Moreover, soldiers' careers depend on an understanding by those with access to a titling decision of what it means to be titled and, even more importantly, what it does not mean.

166. The DOD IG (see notes 80-81 and accompanying text) and the Army (see notes 88-89 and accompanying text) have recognized the existence of the stigma in the Army associated with titling.