



THE ARMY LAWYER

Headquarters, Department of the Army

**Department of the Army Pamphlet 27-50-358
December 2002**

Articles

A Primer on the European Union and Its Legal System
Major Michael J. McCormick

The “Discretionary Function” and “Assault and Battery” Exceptions to the Federal Tort Claims Act (FTCA):
When They Apply and How They Work Together
Captain Kurt G. Larkin

TJAGSA Practice Notes
Faculty, The Judge Advocate General’s School, U.S. Army

Legal Assistance Note (New Immigration and Naturalization Rules to Assist Soldiers Fighting the War on Terrorism)
Tax Law Note (Update for 2002 Federal Income Tax Returns)

Claims Report
United States Army Claims Service

CLE News

Current Materials of Interest

Editor, Captain Joshua B. Stanton
Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for \$45.00 each (\$63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to charles.strong@hqda.army.mil or on 3 1/2" diskettes to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781. Articles should follow *The Bluebook, A Uniform System of Citation* (17th

ed. 2000) and *Military Citation* (TJAGSA, 7th ed. 2001). Manuscripts will be returned upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at <http://www.jagcnet.army.mil>.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, TJAGSA, 600 Massie Road, ATTN: JAGS-ADL-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978, ext. 396 or electronic mail to charles.strong@hqda.army.mil.

Issues may be cited as ARMY LAW., [date], at [page number].

Articles

A Primer on the European Union and Its Legal System 1
Major Michael J. McCormick

The “Discretionary Function” and “Assault and Battery” Exceptions to the Federal Tort Claims Act (FTCA):
When They Apply and How They Work Together 13
Captain Kurt G. Larkin

TJAGSA Practice Notes

Faculty, The Judge Advocate General’s School, U.S. Army

Legal Assistance Note (New Immigration and Naturalization Rules to Assist Soldiers Fighting the War on Terrorism) 17
Tax Law Note (Update for 2002 Federal Income Tax Returns)..... 19

Claims Report

United States Army Claims Service

Personnel Claims Note
 When to Use (and How to Reject) a Carrier’s Estimate 27

Tort Claims Note
 Damage to Rental Cars 30

CLE News 34

Current Materials of Interest 41

Individual Paid Subscriptions to *The Army Lawyer* Inside Back Cover

A Primer on the European Union and Its Legal System

Major Michael J. McCormick
Deputy Officer in Charge, United States Sending State Office
United States Embassy, Rome, Italy

Most Americans first heard of the European Union (EU) when twelve of its member countries introduced the Euro on 1 January 2002.¹ The EU, however, has existed for the latter half of the Twentieth Century. As the EU has evolved, so have the debates about its proper role in relation to its member nations. As one European commentator stated:

For some [the EU] is simply a set of intergovernmental institutions, useful for specific purposes, but without any wider implications. For others, it is a device in a strategy which has lost its purpose—that of cornering the USSR or containing Germany; for others it is a delusion of European unity which now has to be thrown off in order to preserve the natural and enduring primacy of the nation states; others think it is the transcending of evil in the lives of nations, a unity which reflects the greater good for individuals. Finally, there is the view that it is none of these, that it is something unique in relations between states which have retained their sovereignty and equality.²

It is still too early to tell if the EU will become a superpower, as some observers have predicted.³ The combined influence of the fifteen member nations, however, makes this possibility very real.⁴ This article is designed for Department of Defense

(DOD) attorneys still unfamiliar with the EU. It describes the history, evolution, and organization of the EU, and provides a brief explanation of how to research EU legal issues. This article is intended to give readers a better understanding of the EU, its history, its legal structures, and how to research EU law.

History of the EU

The history of the EU reflects the turbulent history of Twentieth Century Europe, and nations' efforts to stabilize the continent through economic and political interdependence.⁵ Even after Europe stabilized politically, nations continued to transfer economic political power to the EU in an attempt to keep pace with the global trend toward free trade and open markets. The EU today is a complicated supranational organization. Not surprisingly, some Europeans have opposed the perceived transfer of their national sovereignty to this new entity.⁶ The EU has responded with an ever-increasing amount of literature, attempting to promote and explain the complicated structure and activities of the EU.⁷

Origins of the EU

One of the first proponents of a united Europe was the French statesman, Jean Monnet. Monnet is commonly referred to as the founding father of European integration.⁸ He and other

1. European Union, *Europa, Euro Essentials*, at <http://europa.eu.int/euro/html/home5.html?lang=5> (last visited Nov. 26, 2002) [hereinafter *Euro Essentials*].
2. PAUL TAYLOR, *THE EUROPEAN UNION IN THE 1990s* 1 (1996).
3. Barbara Crutchfield George, et al., *The Dilemma of the European Union: Balancing the Power of the Supranational EU Entity Against the Sovereignty of Its Independent Member Nations*, 9 PACE INT'L L. REV. 111, 111-112 (1997).
4. Current members of the EU include Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxemburg, the Netherlands, Austria, Portugal, Finland, Sweden, and the United Kingdom. Thirteen other nations are in various stages of entry into the EU as "candidate" nations: Latvia, Lithuania, Estonia, Poland, the Czech Republic, Hungary, Romania, Bulgaria, Slovakia, Slovenia, Malta, Cyprus, and Turkey. European Union, *Europa, European Union at a Glance*, at <http://www.europa.eu.int/abc-en.htm> (last visited Nov. 26, 2002) [hereinafter *EU at a Glance*].
5. See *id.*; Convention for European Economic Cooperation, Apr. 16, 1948, 888 U.N.T.S. 142.
6. In Britain, for example, Former British Prime Minister Margaret Thatcher is the most prominent voice for the view that the EU is slowly destroying Britain's national sovereignty. *The Talk Show with Andrew Marr: Interview with Christopher Patten, EU External Relations Minister* (BBC television broadcast, Mar. 18, 2002), available at <http://www.bbc.co.uk/bbcfour/talkshow/features/chris-patten-transcript.shtml>. There is also a political grouping within the European Parliament whose manifesto opposes "a Federal Europe which would subject sovereign nations and take away the identity of European peoples." European Parliament, *Union for Europe of the Nations Group* (Dec. 2001), at http://www.europarl.eu.int/uen/en/stru/F_grou_en.htm. Another grouping "is open to people who are critical of further European integration and centralization." European Parliament, *Group for a Union of Democracies and Diversities*, at <http://www.europarl.eu.int/edd/gbframeset.html> (last visited Dec. 5, 2002).
7. See European Union, *Europa, Publications Portal*, at <http://www.europa.eu.int/publications/en/index.htm> (last visited Dec. 4, 2002).
8. TAYLOR, *supra* note 2, at 14.

European statesmen, such as Winston Churchill and the French politician Robert Schuman, believed that European nations needed to build effective international structures to prevent another devastating war in Europe.⁹ Monnet believed that a supranational government was the best way to accomplish this objective,¹⁰ stating that “[a] supranational entity has the power to make decisions that are binding on member states . . . even if those member states disagree.”¹¹

The first step toward European supranationalism was the European Coal and Steel Community (ECSC), signed in 1951. The founding member nations of this organization were Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands.¹² The ECSC was designed to pool together the coal and steel resources of the member nations to improve economic efficiency and prevent political conflicts.¹³ The ECSC was successful on both accounts.¹⁴ This success encouraged European statesmen to believe that more interdependence would create more peace and prosperity.¹⁵

2. *The Treaty of Rome*

Europe first agreed to move toward economic union in 1957 with the Treaty of Rome.¹⁶ This treaty is still the foundation of the EU;¹⁷ it first created the European Economic Community (EEC) and articulated a vision for the level of economic cooperation that exists in Europe today.¹⁸

The Community shall have as its task, by establishing a common market and an eco-

nomical and monetary union and by implementing the common policies or activities referred to in this Treaty, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member states.¹⁹

Europe seemed to be headed for rapid evolution in the 1950s. The parties to the Treaty of Rome signed a second treaty, creating the European Atomic Energy Community (EURATOM), the same day.²⁰ These nations hoped that the new agreements would elevate the economic and political power of Western Europe.²¹

3. *The Single European Act*

From the late 1960s to the early 1980s, the economies of Western Europe stagnated while those in the United States and Asia grew. With the reduction in its relative economic power, Europe's political status also fell.²² The member states began to discuss moving further toward economic integration to stay competitive. In 1986, they agreed to the Single European Act,²³ which marked the beginning of a true economic union. The

9. ALEX RONEY & STANLEY BUDD, *THE EUROPEAN UNION: A GUIDE THROUGH THE EC/EU MAZE* 2 (6th ed. 1998).

10. George et al., *supra* note 3, at 129.

11. *Id.* at 129 n.4.

12. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

13. *See id.*; RONEY & BUDD, *supra* note 9, at 2.

14. RONEY & BUDD, *supra* note 9, at 2.

15. GORDON L. WEIL, *A HANDBOOK ON THE EUROPEAN ECONOMIC COMMUNITY* 2-3 (1965).

16. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 267 [hereinafter Treaty of Rome].

17. George et al., *supra* note 3, at 130.

18. *Id.* at 129.

19. Treaty of Rome, *supra* note 16, art. 2.

20. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167.

21. *See id.*; Treaty of Rome, *supra* note 16.

22. George et al., *supra* note 3, at 133.

23. Feb. 28, 1986, 1987 O.J. (L 169) 1.

new treaty, which became on effective 1 December 1992, “resulted in over 370 million consumers being able to trade freely without different technical and regulatory standards, border controls, and excise taxes.”²⁴ By the time the Single European Act took effect, six more states had joined the EEC, now renamed the European Community (EC), raising its membership to twelve. The new members were Ireland, Denmark, Spain, Portugal, Greece, and most significantly, the United Kingdom.²⁵

4. *The Maastricht Treaty*

Although the Single European Act was a great step toward an integrated Europe, it still fell short of the vision of economic unity articulated in the Treaty of Rome. Taking advantage of the momentum toward unity, European statesmen drafted the Treaty of the European Union, commonly referred to as the Maastricht Treaty or Maastricht.²⁶ Maastricht not only moved Europe toward greater economic unity, it also made the first strides toward political unity. Maastricht marked the announcement of this new, supranational entity, and named it “The European Union.”²⁷ It also created the concept of the Three Pillars:

The image was of a temple with three pillars, the roof being the common institutional framework, and the three pillars being the economic community, the foreign and defence arrangements, now incorporated in a Common Foreign and Security Policy (CFSP), and a citizen’s Europe . . . which

involved more police cooperation, more common consular representation, and a move towards a common visa policy.²⁸

Under the three-pillar structure, Maastricht changed multiple aspects of everyday life in Europe, including social, economic, and educational issues.²⁹ The most visible effect, however, was economic—the creation of the Economic Monetary Union (EMU), which “set the structure, goals and timetable for achieving a high degree of economic convergence between Member States, and the creation of a single currency, the Euro.”³⁰ Maastricht came into effect on 1 November 1993.³¹ Within two years, the formerly neutral nations of Austria, Finland, and Sweden joined the EU, bringing the list of EU member nations to fifteen, where it stands today.³²

5. *The Amsterdam Treaty*

The 1997 Treaty of Amsterdam³³ represented Europe’s continued determination to move toward integration.³⁴ Amsterdam added detail to the vision of a united Europe that Maastricht left unspoken; it expanded on the Three Pillars of Maastricht, emphasized economic cooperation among member states,³⁵ and extended the powers of the new European Parliament.³⁶ Its most visible, practical effects were to further integrate Europe’s telecommunications, transport, energy, and employment policies.³⁷ Amsterdam also consolidated a number of previous EU treaties.³⁸

24. George et al., *supra* note 3, at 134.

25. RONEY & BUDD, *supra* note 9, at 7.

26. TAYLOR, *supra* note 2, at 53-54.

27. George et al., *supra* note 3, at 134.

28. TAYLOR, *supra* note 2, at 54.

29. See RONEY & BUDD, *supra* note 9, at 31-35.

30. *Id.* at 33.

31. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1.

32. *EU at a Glance*, *supra* note 4.

33. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Amsterdam Treaty].

34. European Union, *Europa, The Amsterdam Treaty: A Comprehensive Guide*, at <http://europe.eu.int/scadplus/leg/en/s50000.htm> (last visited Dec. 2, 2002).

35. RONEY & BUDD, *supra* note 9, at 35.

36. European Union, *Europa, The Amsterdam Treaty: A Comprehensive Guide, The European Parliament*, at <http://europe.eu.int/scadplus/leg/en/s50000.htm> (last visited Dec. 4, 2002) (listing twenty-three provisions of the Amsterdam Treaty granting the European Parliament new codecision powers).

37. RONEY & BUDD, *supra* note 9, at 35.

The Treaty of Nice³⁹ represented Europe's response to the end of the Cold War and the prospect of expanding the EU eastward. It listed twelve new candidate states the EU would consider for eventual EU membership, potentially raising the total number of member states to twenty-seven.⁴⁰ The Treaty of Nice was ratified by the last member state on 26 August 2002, and entered into force on 1 October 2002.⁴¹

The EU is presently discussing its next steps toward integration. The goals of these discussions include a more open government, giving national parliaments more voice at the EU level, and possibly drafting a European constitution.⁴²

Organization and Administration of the EU

According to one former U.S. diplomat, "The EU is unique—not a regional organization like the UN. It is also not a customs union, a trade organization like General Agreement on Tariffs and Trade (GATT), nor is it a nation-state."⁴³ The heart of the EU is a large bureaucracy that dedicates itself to the lengthy deliberation of issues.⁴⁴ Branches within this bureaucracy are comparable to the executive, judicial, and legislative branches of the U.S. government.

38. Unfortunately, this consolidation was more confusing than enlightening. For example, the Amsterdam Treaty changed many of the article numbers of treaties predating Amsterdam; as a result, it is much more difficult to locate pre-Amsterdam articles and European Court of Justice (ECJ) cases. Most practitioners and scholars now cite to the consolidated versions of the European Union Treaty and European Community Treaty. The most accessible texts of the consolidated versions of the two treaties are found at *Eur-Lex*, the EU's official legal research Web site, <http://europa.eu.int/eur-lex/en/treaties/index.html> (last visited Dec. 2, 2002).

39. Treaty of Nice, Dec. 12, 2000, 2001 O.J. (C 80) 1 [hereinafter Treaty of Nice].

40. The Treaty of Nice provides for EU expansion by reapportioning representation in the European Parliament, the Council of Ministers, the Committee of Regions, and the Economic and Social Committee. Representation will be divided among the fifteen existing EU member nations and twelve candidate states: Latvia, Lithuania, Estonia, Poland, Hungary, Romania, Bulgaria, the Czech Republic, Cyprus, Malta, Slovakia, and Slovenia. The treaty makes no provision, however, for long-time candidate Turkey. *Id.* decl. 20; EUROPEAN COMMISSION, WHAT DIFFERENCE WILL THE TREATY OF NICE MAKE? 3 (2001), available at http://europa.eu.int/comm/igc2000/dialogue/info/offdoc/guidecitoyen_en.pdf.

41. EUROPEAN UNION, TREATY OF NICE, RATIFICATION SITUATION 2, available at http://www.europa.eu.int/comm/nice_treaty/ratifiable_en.pdf (last visited Dec. 3, 2002).

42. Angus Roxburgh, *Big Brains Ponder EU Architecture*, BBC News Online (Dec. 6, 2002), at <http://news.bbc.co.uk/2/hi/europe/2548843.stm>; BBC News Online, *EU "Constitution" Draft Unveiled* (Oct. 28, 2002), at <http://news.bbc.co.uk/2/hi/europe/2367237.stm>; Kirsty Hughes, *Outcomes of the Laeken Summit: A Comment Piece*, Centre for European Policy Studies Web site (Dec. 2001), at <http://www.ceps.be/Commentary/Dec01/Laeken.htm>.

43. Stuart Eizenstat, *United States Relations with the European Union and the Changing Europe*, 9 EMORY INT'L L. REV. 1, 2-3 (1995).

44. RONEY & BUDD, *supra* note 9, at 40-41.

45. WALTER CAIRNS, INTRODUCTION TO EUROPEAN UNION LAW 20 (1997); European Union, *Europa, Institutions of the European Union, European Commission*, at http://www.europa.eu.int/institutions/comm/index_en.htm (last visited Dec. 4, 2002) [hereinafter *European Commission Web Page*].

46. CAIRNS, *supra* note 45, at 23-26; *European Commission Web Page*, *supra* note 45.

47. *European Commission Web Page*, *supra* note 45.

The European Commission is the EU's executive branch. It consists of twenty members from the different member states.⁴⁵ The European Commission serves six functions within the greater EU structure: guardian of the EU Treaty; participant in the legislative process; advisor to the EU government; representative of EU interests; financial manager; and administrator of EU bureaucracy.⁴⁶ As guardian of the EU treaty, the European Commission has the power to compel member states to follow the Treaty of European Union. If necessary, the European Commission can sue an offending state in the European Court of Justice (ECJ). The European Commission participates in the legislative process by initiating and helping to draft legislation, making recommendations on policy and proposed legislation, and directly legislating in certain matters, such as employment regulations. The European Commission represents the EU in legally binding negotiations. The Commission also advises the EU on budgetary matters and is responsible for implementing the budget. Finally, the European Commission performs numerous administrative tasks to support its roles.⁴⁷

2. *The Council of Ministers*

The Council of Ministers is the main decision-maker of the EU. The Council, which shares the EU's legislative powers with the European Parliament, is composed of one ministerial-level member of each member state's government who is empowered to commit the member state to EU policy decisions.⁴⁸ The Council is the object of frequent confusion with two other completely unrelated entities with similar names—

the Council of Europe⁴⁹ and the European Council, which is composed of the heads of all of the EU member states.⁵⁰ The President of the Council is as close as the EU comes to having a head of state. The presidency rotates among the member states every six months. The president has the power to call meetings, preside at and chair them, and set the agenda for the duration of this six-month term.⁵¹

3. European Parliament

The Treaty of Amsterdam transformed the EU Parliament, which had been a mere consultative body, into an important policy-maker with the power to enact binding legislation.⁵² The EU Parliament's composition is determined through a combination of proportional representation and negotiation with member states.⁵³ The EU Parliament has 626 members, all of whom were elected by direct suffrage every five years.⁵⁴ The parliament's political composition is confusing; there are seven major political party groups, including the Group of the European People's Party, the Group of the Party of European Socialists, and the Group for a Europe of Democracies and Diversities.⁵⁵ Other members are unaffiliated with any party.⁵⁶ As these groupings illustrate, ideology appears to transcend nationality in the EU Parliament.

The EU Parliament has three fundamental powers: legislative, budgetary, and supervisory.⁵⁷ The legislative power may be further divided into five specific powers and functions: the

right to information, the right to consultation, the cooperation procedure, the power to formulate legislation, and the power to approve certain types of legislation.⁵⁸ These powers and functions reflect different levels of involvement in the EU governing process. The right to information covers specific EU actions that could affect the member states—for example, the Council must inform Parliament if it decides to allow member states to take unilateral measures against third countries with regard to capital movements.⁵⁹

The EU Parliament also has discretionary and obligatory rights to be consulted about proposed legislation. The obligatory right to consult, called the “codecision power,” applies to specific categories of legislation, including any affecting “the free movement of workers, the establishment of the internal market, research and technological development, the environment, consumer protection, education, culture and health.”⁶⁰ Legislation covered by the Parliament's codecision power becomes law only after a process of repeated consultation, negotiation, and amendment between the Council, committees of the Parliament, and the entire Parliament. The EU Parliament can also formulate legislation, which begins with a report from one of the Parliament's standing committees. The EU Parliament's final legislative power is the requirement of assent; this power applies to specific categories of legislation, including international agreements and the accession of new states to the EU.⁶¹

48. European Union, *Europa, European Union Institutions, Council of Ministers*, at http://www.europa.eu.int/institutions/council/index_en.htm (last visited Dec. 5, 2002) [hereinafter *Council Web Page*]; RONEY & BUDD, *supra* note 9, at 12.

49. The Council of Europe was formed after World War I to promote cultural and economic integration within Europe, but to a much less ambitious extent than the EU. CAIRNS, *supra* note 45, at 12.

50. RONEY & BUDD, *supra* note 9, at 13.

51. *Council Web Page*, *supra* note 48; JAMES HANLON, EUROPEAN COMMUNITY LAW 31 (2000).

52. THE TREATY OF AMSTERDAM: TEXT AND COMMENTARY xxxv (Andrew Duff ed., 1997) (introduction by Andrew Duff); European Union, *Europa, European Union Institutions, European Parliament*, at http://www.europa.eu.int/institutions/parliament/index_en.htm (last visited Dec. 5, 2002) [hereinafter *European Parliament Web Page*].

53. CAIRNS, *supra* note 45, at 30.

54. *European Parliament Web Page*, *supra* note 52.

55. European Parliament, *Europarl, Members of the European Parliament* (Dec. 5, 2002), at http://www.db.europarl.eu.int/ep5/owa/p_meps2.repartition?ilg=EN&iorig=home.

56. *Id.*

57. *European Parliament Web Page*, *supra* note 52.

58. CAIRNS, *supra* note 45, at 32-33.

59. *Id.* at 31-32.

60. *European Parliament Web Page*, *supra* note 52.

61. *Id.*

The EU Parliament also has budgetary and political powers.⁶² The “[EU] Parliament has been given the last word on non-compulsory expenditure.”⁶³ It can also debate policy and discuss issues where it contemplates the eventual adoption of resolutions.⁶⁴ Finally, the EU Parliament has “supervisory powers,” including the power to establish temporary committees to investigate irregularities in the administration of the EU.⁶⁵ Perhaps the ultimate power of the EU, however, is the power to censure the European Commission, a step that would force the Commission to resign. A vote of censure requires an absolute majority of all members of Parliament and two-thirds of the voting members. Thus far, the European Parliament has never exercised this power.⁶⁶

4. *European Court of Justice*

The power of the European Court of Justice (ECJ) has grown as recent treaties solidified the supremacy of EU law over member state law. As one commentator recently noted:

[The ECJ’s] activities have had a profound effect upon the development of Community law, particularly with regard to the foundation of a “constitution” of the Community. There is little doubt that the Court of Justice saw the Treaties as expressions of purpose, and further saw their role as adding substance to those “dry bones.” The Court has been concerned to ensure that Community law is effective, both in respect of a new legal system in its own right, and in terms of integra-

tion with the legal systems of the Member States. It could, and has, been argued that the Court has gone far beyond what was intended by the Treaty; never the less [sic], the Court has developed a package of fundamental rights which have become an entrenched part of the Community system.⁶⁷

The ECJ has two bodies—the ECJ itself and the Court of First Instance.⁶⁸ The ECJ is composed of fifteen judges; traditionally, each member state has provided one judge for the ECJ.⁶⁹ Eight advocates-general also assist the court by investigating the facts and presenting impartial opinions to the judges.⁷⁰ The function of the advocate general is an aspect of the civil law system. In criminal cases, the advocate general acts as a public prosecutor and brings the case against the accused on behalf of the public interest. In civil cases, the advocate general acts as an expert advisor and makes recommendations that represent the public interest.⁷¹ Because the ECJ frequently follows the recommendations of the advocate general, this position carries significant power.⁷²

Like the ECJ, the Court of First Instance has fifteen judges.⁷³ The main purpose of the Court of First Instance is to relieve the workload of the ECJ by resolving more routine cases, such as disputes between EU organizations, competition cases, ECSC disputes, and intellectual property cases.⁷⁴ Parties may appeal decisions of the Court of First Instance, but only to challenge alleged errors of law.⁷⁵

62. *Id.*

63. CAIRNS, *supra* note 45, at 32.

64. *Id.* at 33.

65. *European Parliament Web Page*, *supra* note 52.

66. *Id.*

67. HANLON, *supra* note 51, at 39.

68. CAIRNS, *supra* note 45, at 34; European Union, *Europa, Institutions of the European Union, Court of Justice of the European Communities*, at http://www.europa.eu.int/institutions/court/index_en.htm (last visited Dec. 5, 2002) [hereinafter *ECJ Web Page*].

69. Consolidated Version of the Treaty on European Union, Nov. 10, 1997, arts. 138-139, 1997 O.J. (C 340) 145 [hereinafter Consolidated EU Treaty]; *ECJ Web Page*, *supra* note 68.

70. *ECJ Web Page*, *supra* note 68.

71. CAIRNS, *supra* note 45, at 34.

72. *Id.* at 35.

73. *Id.*

74. *Id.*; *ECJ Web Page*, *supra* note 68.

75. CAIRNS, *supra* note 45, at 35.

5. Other EU Organizations

Several other EU organizations have sufficient influence within the EU as a whole to merit discussion. These organizations include the European Court of Auditors, the European Investment Bank, the European Economic and Social Committee, and the Committee of Regions. The European Court of Auditors consists of fifteen members. This “court” does not have the power to decide any controversy; it is a specialized body established by the EU in 1977 to monitor and supervise the EU’s finances.⁷⁶ The European Investment Bank is the investment arm of the EU. Created by the Single European Act, its function is to provide the EU a way to develop projects that promote economic and social cohesion.⁷⁷ The European Investment Bank also provides loans and guarantees to less-developed regions and funds business development projects.⁷⁸

The European Economic and Social Committee (ESC) represents important social and economic groups in European society, such as trade unions and management organizations.⁷⁹ The Consolidated Treaty of the European Communities sets the composition of the ESC at 222 members, with a specified number from each member nation.⁸⁰ The EU must consult the ESC

before taking actions that affect certain areas, such as agricultural policy,⁸¹ the free movement of workers,⁸² education,⁸³ employment,⁸⁴ and common transport policy.⁸⁵

The Committee of the Regions, which has a consultative function similar to that of the ESC, represents the interests of local and regional governments in the EU.⁸⁶ As with the ESC, the EU must consult the Committee of the Regions before it takes actions that affect specific social issues, such as cultural affairs,⁸⁷ education,⁸⁸ consumer protection,⁸⁹ employment,⁹⁰ and public health.⁹¹

EU Law

Understanding EU law begins with understanding how to define it. European Union law comes from multiple sources, and its terminology can be confusing.⁹² The Consolidated European Community Treaty describes the four forms of EU legislation: regulations, directives, decisions, and recommendations/opinions.⁹³ Regulations and directives are laws based on proposals from the Commission that are adopted by the Council.⁹⁴ Regulations and directives differ in that regulations

76. *Id.* at 42; European Union, *Europa, Institutions of the European Union, Court of Auditors*, at http://www.europa.eu.int/institutions/eca/index_en.htm (last visited Dec. 5, 2002).

77. HANLON, *supra* note 51, at 8.

78. CAIRNS, *supra* note 45, at 43.

79. Consolidated Version of the Treaty Establishing the European Community, Nov. 10, 1997, art. 257, 1997 O.J. (C 340) 3, 144 [hereinafter Consolidated EC Treaty]; European Union, *Europa, Institutions of the European Union, Economic and Social Committee*, at http://www.europa.eu.int/institutions/esc/index_en.htm (last visited Dec. 5, 2002).

80. Consolidated EC Treaty, *supra* note 79, art. 258; see THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE ESC: A BRIDGE BETWEEN EUROPE AND CIVIL SOCIETY (2000), available at http://www.esc.eu.int/pages/en/org/pla_EN.pdf.

81. Consolidated EC Treaty, *supra* note 79, art. 37.

82. *Id.* art. 40.

83. *Id.* art. 149.

84. *Id.* art. 128.

85. *Id.* art. 71.

86. *Id.* art. 263; HANLON, *supra* note 51, at 38; European Union, *Europa, Institutions of the European Union, Committee of the Regions*, at http://www.europa.eu.int/institutions/cor/index_en.htm (last visited Dec. 5, 2002).

87. Consolidated EC Treaty, *supra* note 79, art. 151.

88. *Id.* art. 149.

89. *Id.* art. 153.

90. *Id.* art. 128.

91. *Id.* art. 152.

92. Roxburgh, *supra* note 42 (discussing a proposal to simplify EU law by abolishing distinctions between regulations and directives).

93. *Id.* art. 249; see also DAVID MEDURST, A BRIEF AND PRACTICAL GUIDE TO EU LAW 31 (2001).

directly apply to all member states, while only the end results of directives are binding; member states are free to implement directives through any available means, such as regulations, decrees, or statutes. Decisions are EU laws, issued by the Council or the Commission, which bind only those governments, companies, or individuals they specifically address. Finally, recommendations and opinions are strong persuasive authority, but have no binding force.⁹⁵ European Union law does *not* include the rules governing the institutions of other European organizations such as the European Convention of Human Rights or the laws of the various EU member states.⁹⁶

The relationship between EU law and member nation governments is based on three fundamental principles: direct applicability, direct effect, and the primacy of EU law over member state law.⁹⁷ The first of the three principles, direct applicability, means that regulations approved by the Council apply within each of the member states, without the need for any further enactment by national authorities.⁹⁸ The direct applicability of EU regulations makes them “one of the most powerful law-making tools available to the Community.”⁹⁹

Direct effect allows individual citizens of EU nations to enforce rights they are granted by EU law in the national courts of the member states.¹⁰⁰ It gives citizens the right to sue or be sued by individuals or their own governments.¹⁰¹ Not all EU law automatically has direct effect; a law will only have direct effect if it meets three prerequisites. First, the EU rule or law must be clear;¹⁰² second, it must be unconditional; and finally,

it must be free of any reservation making its implementation dependent on further action by EU or national authorities.¹⁰³ Direct effect is a concept unique to EU law. No other international organization creates individual substantive rights and gives citizens of sovereign nations the means to enforce them.¹⁰⁴

The supremacy of EU law is the last key principle of the EU legal system. This principle dictates that, in the event of a conflict between EU law and the law of a member state, the EU law will prevail.¹⁰⁵ Article 10 of the Consolidated European Community Treaty directs member states to take “all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.”¹⁰⁶ The supremacy of EU law represents the remarkable extent to which nations with long histories of nationalism have transferred their national sovereignty to the collective control of the EU.¹⁰⁷ This is referred to as the concept of primacy.¹⁰⁸

The EU law is a very recent phenomenon; it borrows from its member states’ common and civil law systems, but is ultimately unlike either of them. Whether this new set of legal structures can successfully bring order and uniformity to the EU remains an open question, but every legal practitioner in Europe today must become familiar with EU law. This task is complicated by the rapid evolution of the relationship between EU and member state law.¹⁰⁹

94. Consolidated EC Treaty, *supra* note 79, arts. 250-254.

95. *Id.* art. 249.

96. CAIRNS, *supra* note 45, at 1.

97. TAYLOR, *supra* note 2, at 32; *see* Consolidated EC Treaty, *supra* note 79, art. 249.

98. TAYLOR, *supra* note 2, at 32.

99. HANLON, *supra* note 51, at 84.

100. *Id.* at 84 (citing Case 26/62, NV Algemene Transport en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Admin., 1963 E.C.R. 609).

101. TAYLOR, *supra* note 2, at 18.

102. CAIRNS, *supra* note 45, at 85.

103. *Id.* at 85-86.

104. *Id.* at 83-84.

105. *Id.* at 8-9.

106. Consolidated EC Treaty, *supra* note 79, art. 10.

107. HANLON, *supra* note 51, at 53; *see also* KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 183 (2001).

108. Eizenstat, *supra* note 43, at 6-7.

109. Roxburgh, *supra* note 42 (discussing the latest round of proposals for overhauling the EU structure to give it more power over the members states).

The multiple sources of EU law and the speed with which those laws change mean that researching EU law may be more difficult than researching the law of other jurisdictions. Practitioners must expend considerable effort to stay current with the multiple directives, regulations, and cases. Fortunately, the EU has made excellent use of the Internet, and practitioners can access Commission regulations and directives, ECJ decisions, and the EU's founding treaties through the official EU legal research Web site, *Eur-Lex*.¹¹⁰

The most authoritative source of EU legislative materials is the *Official Journal (OJ)*. The *OJ* is divided into two series—the L Series, which contains all binding EU legislation, and the C Series, which contains non-binding decisions and resolutions. The *OJ* also contains texts of proposed legislation, legislative histories, and notices of EU judicial decisions. A useful subdirectory within *Eur-Lex* is the *Directory of Community Legislation in Force*.¹¹¹ Because this source is in digest form, it is an efficient way to research EU legislation covering a specific subject area. Finally, LEXIS has a database which contains EU legislative material.¹¹²

The EU Web site is also the best location for practitioners to research EU court decisions.¹¹³ The ECJ also maintains its own Web site, which contains a search engine and access to recent decisions of the ECJ and the Court of First Instance.¹¹⁴ *European Court Reports* is the official reporter for both courts, but often publishes decisions long after the courts decide them. *European Current Law*, a monthly digest, may be more current. LEXIS also has a database for EU court decisions.¹¹⁵ Practitioners unfamiliar with EU legal research should consider consulting some of the excellent research guides that are available online.¹¹⁶

Participants in Europe's other great alliance, the North Atlantic Treaty Organization (NATO), may become nervous when they contrast the flexibility of the NATO charter and SOFA against the rigid supremacy of EU law over national law.¹¹⁷ As one British commentator stated:

The problem has never arisen of Britain being asked to take action through NATO that it had no wish to take. Were this to happen, Britain could instead refuse and give notice of its intention to leave the organization. In contrast, Britain regularly has to do things under European law they disagree with or does not wish to do [sic], and there is a legal structure in place to ensure it conforms.¹¹⁸

Against this backdrop of misgivings about the ultimate power of the EU, this article next discusses how the growing body of EU regulations is creating challenges for armed forces within NATO.

1. The Overall Challenge: The EU Goal of Legal Uniformity

The EU seeks to harmonize its laws with those of its member nations; it is the member states, however, not the EU, that usually compromise more to conform to EU rules. Article 307 of the Consolidated European Community Treaty states, "To the extent that such agreements are not compatible with this Treaty, the member state or states concerned shall take all appropriate steps to eliminate the incompatibilities established. Member states shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude."¹¹⁹

110. See European Union, *Europa, Eur-Lex—The Portal to European Union Law*, at <http://europa.eu.int/eur-lex/en/index.html> (last visited Dec. 3, 2002) [hereinafter *Eur-Lex*].

111. See *id.*

112. See <http://www.lexis.com/research/sel>.

113. See *Eur-Lex*, *supra* note 110.

114. See Court of Justice and First Instance, *Curia*, at <http://curia.eu.int/en/index.htm> (last visited Dec. 3, 2002).

115. The database is "Legal (excluding US)/European Union/Case Law."

116. See, e.g., European Union, *Europa, Information Sources and Contacts*, at http://europa.eu.int/geninfo/info/guide/index_en.htm (last visited Nov. 26, 2002); see also European Union in the U.S., *Best European Union Web Sites*, at <http://www.eurunion.org/infores/BestLawSites.htm> (last visited Nov. 26, 2002); European Community in the U.S., *Research Tools*, at <http://eurunion.org/infores/resguide.htm> (last visited Nov. 26, 2002); University of California, Berkeley Library, *Government and Social Science Information, The European Union (EU)*, at <http://www.lib.berkeley.edu/GSSI/eugde.html> (last visited Nov. 26, 2002).

117. See, e.g., Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67.

118. JOHN REDWOOD, STARS AND STRIFE: THE COMING CONFLICTS BETWEEN THE USA AND THE EUROPEAN UNION 98 (2001).

119. Consolidated EC Treaty, *supra* note 79, art. 307.

The EU has pronounced—in broad terms—its desire to cooperate with NATO and its policy objectives:

The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.¹²⁰

When one considers the breadth and depth of EU regulations, however, their potential to affect NATO operations is unlimited. For example, on 12 March 2001, the European Commission, fearing infestation by wood parasites, enacted an emergency measure to control the importation of wood packing material, such as pallets and crates, from the United States, Canada, China, and Japan.¹²¹ This measure affected numerous U.S. military agencies and required them to write and issue new policies to conform to the rule.¹²² European Union law also indirectly affects NATO when it forces member nations to amend their own laws. Two areas with the greatest potential for such conflicts are labor policies and environmental regulations.

2. EU-NATO SOFA Challenges—Labor Policies

The United States has always relied on local nationals to support its force abroad; this has required U.S. forces to comply with host nation labor law. More recently, however, the EU has put its imprimatur on local labor laws and greatly complicated them by adding layers of regulation for almost every imaginable contingency.¹²³

It is not merely the regulations themselves that are dizzying; the EU's complicated bureaucratic structure often results in multiple agencies regulating the same subject matter. A partial list of entities which have a role in writing labor regulations includes the European Commission for Employment and Social Affairs; the European Foundation for the Improvement of Living and Working Conditions; the European Agency for Safety and Health at Work; the EU Parliamentary Committee on Employment and Social Affairs; and the Committee of the Regions Commission on Employment, Economic Policy, Single Market, Industry, and Small and Medium Sized Enterprises.¹²⁴ A military commander's legal staff must be prepared to consider all of these organizations and their regulations to analyze a labor law issue.

3. EU-NATO SOFA Challenges—Environmental Regulations

The U.S. military is accustomed to dealing with a myriad of foreign environmental regulations; its policy has been to conform to European environmental laws to the maximum extent possible.¹²⁵ Again, however, member states' environmental laws are changing rapidly to comply with EU laws. For example, the EU Parliament recently enacted a new directive to control noise pollution, but fortunately, the directive contained an exception for "noise due to military activities in military areas."¹²⁶

The EU has not always been equally considerate of its laws' impact on NATO. One 1992 Council directive had the effect of requiring the German government to nominate two U.S. Army training areas in Germany as wildlife refuges. This directive, the EU Flora, Fauna, and Habitat Directive,¹²⁷ listed specific, detailed criteria for undeveloped areas that, if met, *required* the member state to nominate the area.¹²⁸ Two U.S. Army training grounds, Hohenfels and Grafenwoehr, met the qualifications; therefore, Germany was forced to nominate them as wildlife

120. Consolidated Version of the Treaty on European Union, Oct. 2, 1997, art. 17(1), 1997 O.J. (C 340) 5, 18.

121. Commission Decision No. 2001/219/EC, 2001 O.J. (L 81) 39.

122. See, e.g., Message, 191303 Nov 2001, Logistics Service Office, Wright-Patterson Air Force Base, subject: European Union (EU) Restrictions Regarding Non-Manufactured Wood Packing Materials (NMWPM), available at <http://packweb.wpafb.af.mil/messages/solidwood2.doc>; Defense Logistics Agency, *DOD Joint Work Group on Wood Infestation Issues* (May 22, 2001), at <http://www.dscpl.dla.mil/gi/general/jwg.htm>.

123. See, e.g., Commission Directive 2002/15 of 11 March 2002 on the Organisation of the Working Time of Persons Performing Mobile Road Transport Activities, 2002 O.J. (L 80) 35. For a complete list of EU labor regulations and directives in force, see *Eur-Lex, Legislation*, at http://www.europa.eu.int/eur-lex/en/lif/ind/en_analytical_index_05.html (last visited Dec. 3, 2002).

124. European Union, *Europa, Employment and Social Affairs*, at http://europa.eu.int/pol/socio/index_en.htm (last visited Dec. 3, 2002); European Union, *Europa, European Union Parliament Committee*, at http://www.europarl.eu.int/committees/empl_home.htm (last visited Dec. 3, 2002); European Union, *Europa, Committee of Regions Commissions*, at http://www.cor.eu.int/corz_en.htm (last visited Dec. 3, 2002).

125. U.S. DEP'T OF DEFENSE, DIR. 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS para. 4.2 (31 Mar. 1979).

126. Commission Directive No. 2002/49/EC, art. 2(2), 2002 O.J. (L 189) 12, 13.

127. Council Directive No. 92/43/EEC, 1992 O.J. (L 206) 7.

128. *Id.* art. 4.

The Future of the EU

refuges. Although German authorities have offered to cooperate with the Army on management of these areas, Army officials are concerned that the EU directive and the slow pace of EU bureaucracy may force the closure of the training grounds.¹²⁹

The proposed EU Environmental Liability Directive could also significantly affect U.S. military operations in Europe.¹³⁰ This directive would assign strict liability to certain polluters—which may include the U.S. military—much like the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) does in the United States.¹³¹

It is difficult to predict decisions of the EU Parliament's Committee on the Environment, Public Health and Consumer Policy. This politically diverse committee has sixty members ranging across the political spectrum, from the British Conservative Party to the German Green Party.¹³² The U.S. military cannot expect all members of this committee to be equally concerned about the impact of their decisions on U.S. or NATO military operations; many members may forcefully oppose military operations that impact the environment. Ultimately, commanders should expect environmental compliance in Europe to become more difficult. They will have to deal with both local and national authorities, and be cognizant of the EU's increasing authority and will to write new environmental regulations.¹³³

Expansion is the EU's main priority—and controversy—today. Thirteen candidate countries are seeking admission as full EU members: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey.¹³⁴ The optimism of expansion is tempered by the potential of almost doubling the size of the EU, and the potential expense of integrating less-developed economies.¹³⁵ The EU bureaucracy, already criticized for its expense and inefficiency,¹³⁶ will further expand to meet the new demands of regulating a larger land area and population. As one commentator stated, "The enlargement of the EU remains difficult without a credible reform of its institutions lest these institutions be unable to function after enlargement has begun."¹³⁷

The ultimate question for the EU is how far it will continue in its evolution toward nationhood. If the EU develops a unified foreign policy and defense force, it could become a superpower, a new "United States of Europe."¹³⁸ The Common Foreign Security Policy (CFSP) is one of the three pillars of the EU;¹³⁹ progress toward this goal, however, has lagged behind the EU's movement toward economic unity. The conflict in Kosovo highlighted the EU's inability to speak with a single, consistent voice, or to enforce any of its foreign policy initiatives.¹⁴⁰

Although some commentators support varying degrees of diplomatic and military union,¹⁴¹ others, particularly in the

129. Sean D. Naylor, *Environmental Plan Poses Risk to Training*, ARMY TIMES, Oct. 23, 2000, at 18.

130. Commission Proposal for a Directive of the European Parliament and of the Council on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, COM (2002) 17 final, available at <http://europa.eu.int/comm/environment/liability/> (last visited Dec. 6, 2002).

131. *Id.* arts. 6.7-6.11.

132. European Parliament, *Committee on the Environment, Public Health, and Consumer Policy*, at http://www.europarl.eu.int/committees/envi_home.htm (last visited Dec. 6, 2002).

133. See, e.g., European Union, *Europa, Eur-Lex Directory of Community Legislation in Force: Environment, Consumers, and Health Protection*, available at http://europa.eu.int/eur-lex/en/lif/ind/en_analytical_index_15.html (last visited Mar. 19, 2002).

134. *EU at a Glance*, *supra* note 4.

135. Paul Taylor, *Brinkmanship Mounts Ahead of EU Enlargement Summit*, REUTERS, Dec. 2, 2002, available at http://abcnews.go.com/wire/World/reuters20021202_342.html.

136. RONEY & BUDD, *supra* note 9, at 40-41; Roxburgh, *supra* note 42 (discussing proposals to streamline EU bureaucracy before the accession of new member states paralyzes it); BBC News Online, *MEPs Halt Attempt to Slash Perks* (Dec. 6, 2002), at <http://news.bbc.co.uk/2/hi/europe/2549517.stm>.

137. *The U.S.-European Relationship: Opportunities and Challenges, Hearing Before the House Subcomm. on Europe, Comm. on Int'l Relations*, 107th Cong. 9 (2001) (testimony of Simon Serfaty, Director of the Europe Program for the Center for Strategic and International Studies).

138. The EU is seriously considering renaming itself "The United States of Europe." According to one unnamed British official, however, this proposal "has not a cat in hell's chance of success." BBC News Online, *EU "Constitution" Draft Unveiled* (Oct. 28, 2002), at <http://news.bbc.co.uk/2/hi/europe/2367237.stm>.

139. TAYLOR, *supra* note 2, at 54.

140. Asteris Pliakos, *The Common European Policy on Security and Defense: Some Considerations Relating to Its Constitutional Identity*, 6 COLUM. J. EUR. L. 275, 275 (2000).

Conclusion

United Kingdom, worry that further strengthening the powers of the Council and the Commission could be the point of no return for their national sovereignty.¹⁴² Commission President Romano Prodi recently proposed that future Commission presidents should be elected by a two-thirds vote of the Parliament and have greatly expanded executive power. Under this proposal, member states would be powerless to block proposed EU laws in all areas except defense, and the EU would gain more legislative, budgetary, and foreign policy-making power at the expense of member states. The EU would also have a single, more powerful foreign minister, the “Secretary of the Union.”¹⁴³

The next decade is likely to determine whether the EU will evolve into a de facto nation-state, whether it can agree on a consistent security policy and become a stabilizing force within Europe, and whether NATO will continue to be Europe’s dominant military alliance.¹⁴⁴

The EU’s impact on U.S. military operations in Europe continues to grow as the EU steadily supplants the regulatory power of its member states. The EU already exercises a strong influence on environmental matters and labor issues, among others, requiring DOD attorneys to stay current with EU law to advise their commands competently. The great and growing importance of EU law affects more than just those commands based in Europe; it also affects other entities that support those commands. Regardless of the final form the EU takes, the importance of understanding its legal system is certain to continue growing.

141. See, e.g., Maria Gavouneli, *International Law Aspects of the European Union*, 8 TUL. J. INT’L & COMP. L. 146, 155 (2000).

142. Mark Davies, *UK at Odds with Prodi’s Europe Vision*, BBC News Online (Dec. 5, 2002), at http://news.bbc.co.uk/2/hi/uk_news/politics/2545403.stm.

143. *Id.*; Roxburgh, *supra* note 42.

144. Recently, Valery Giscard d’Estaing, the former French President and President of the European Convention, appeared on BBC television to explain the Convention’s proposals to streamline EU bureaucracy and transform the EU into a stronger federation. When asked whether the EU should become a superpower to serve as a counterpoint to the United States, Mr. Giscard said:

If you say counterpart, it’s an expression I don’t like, we want to be a superpower [sic]. No. No. We want to be imperialistic again? No. We want to exist as the largest group of people of the industrialized world because we are much more numerous than the Americans or the Russians.

Newsnight: Interview of Valery Giscard d’Estaing (BBC television broadcast, Oct. 29 2002), available at <http://news.bbc.co.uk/2/hi/programmes/newsnight/archive/2372175.stm>.

The “Discretionary Function” and “Assault and Battery” Exceptions to the Federal Tort Claims Act (FTCA): When They Apply and How They Work Together

CPT Kurt G. Larkin
Chief of Claims
United States Army Garrison
Fort McPherson, Georgia

Introduction

You have just arrived at the office for another exciting day in the world of Army claims. As you sit down to drink your coffee and prepare for the morning’s activities, your senior claims examiner steps hurriedly into your office and unfolds a newspaper on your desk. On the front page, in bold, inch-high letters, is the headline: “Army Soldier Arrested, Charged With Murder.” The promise of a calm day has just been shattered.

Scanning down the page, you learn that the soldier referred to in the article was already facing disciplinary action under the Uniform Code of Military Justice (UCMJ) on an unrelated but serious charge. Worse yet, his commander had decided not to impose pretrial confinement. The soldier should have been on restriction at the time of the murder. Before you have finished reading the article, the newly hired attorney for the victim’s family calls. He has learned that the soldier had a checkered service record and had committed violent acts in the past. In a demanding voice, he asks, “What was that commander thinking by failing to impose pretrial confinement on such a dangerous person?” He accuses the Army of negligently endangering the victim by violating its own rules. You know what to expect next—an FTCA claim for wrongful death.

The claim eventually arrives, accompanied by a folder full of newspaper articles questioning the Army’s failure to prevent this crime. As you copy the documents and prepare to send off a mirror file to your Area Action Officer (AAO), you cannot help but sympathize with the Assistant U.S. Attorney who will have to dispose of this case. The claimant’s attorney is unlikely to agree to any amount the government is likely to offer. A judge or jury would probably sympathize with the plaintiffs after hearing the gruesome facts. How will you handle this claim?

An experienced claims judge advocate will likely begin responding to such a claim by drafting a memorandum for the AAO recommending that the Army deny the claim. The FTCA creates two significant defenses that could apply in this case; their effect is to shield the federal government from the independent violent acts of its employees and the policy decisions that may have made those acts possible. The “discretionary function” and “assault and battery” exceptions, as they are commonly known, operate as threshold exclusions, exempting the United States from liability.¹ Often, as in the hypothetical case described above, the facts of a claim will trigger both defenses. Every claims judge advocate can benefit from understanding these defenses and knowing when to assert them.

Discretionary Function Exception to the FTCA

The FTCA’s waiver of sovereign immunity is subject to several exceptions.² First, the government is not liable for any claim based on a government agency or employee’s exercise (or failure to exercise) of a discretionary function. This exception may even apply to actions that constitute abuses of discretion.³ In *United States v. Gaubert*,⁴ the Supreme Court defined a two-part test for applying this exception. Initially, the test requires a determination that the challenged conduct “involves an element of judgment or choice.”⁵ If this prong is met, a court must then determine “whether that judgment is of the kind that the discretionary function exception was designed to shield.”⁶ The exception exists to prevent “judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”⁷

If a regulation governs the agency action that is the subject of the claim, a court will next test the action’s compliance with

1. 28 U.S.C. § 2680 (2000).

2. *See id.*

3. *Id.* § 2680(a).

4. 499 U.S. 315 (1990).

5. *Id.* at 322 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)).

6. *Id.*

7. *Id.* at 323 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 814 (1984)).

that regulation. If an employee disobeys a specific regulation, the action could not have been truly discretionary, and the government will not enjoy the exception's protection.⁸ If a regulation gives the employee discretion, however, "the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations."⁹ Courts recognize that agencies also rely on internal guidelines and policies to guide their actions; the discretionary function exception also covers decisions made under such guidelines.¹⁰ Consistent with their traditionally strict construction of waivers of sovereign immunity, courts disfavor lawsuits against government agencies acting within their discretion. As the Supreme Court said in *Gaubert*, "[F]or a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."¹¹

Federal circuit courts have applied *Gaubert* to a variety of circumstances.¹² For example, the Court of Appeals, Eleventh Circuit, has consistently applied the *Gaubert* test as its standard of review in cases involving the discretionary function exception.¹³ It has strictly construed the test with respect to decisions covered by regulations or agency policies, stating that "the relevant inquiry is whether controlling statutes, regulations, and

administrative policies mandated" the challenged conduct.¹⁴ Further, federal employees and agencies are permitted a degree of discretion even within the general duty to abide by a rule: "Even though a statute or regulation imposes a general duty on a government agency, the discretionary function exception may still apply if the agency retains sufficient discretion in fulfilling that duty."¹⁵

Could a claims judge advocate cite *Gaubert* to argue in favor of denying the hypothetical wrongful death claim discussed above? Case law strongly suggests that one could. A federal district court had the opportunity to address a similar set of facts in *Malone v. United States*.¹⁶ In *Malone*, commanders placed a soldier pending trial for rape on restriction, but did not pursue pre-trial confinement. The soldier went absent without authority the day after he submitted an offer to plead guilty; soon thereafter, he raped another woman. The second victim, a civilian, sued the Army, alleging that the soldier's commanders negligently endangered the public when they failed to place him in pretrial confinement.¹⁷

After reviewing and applying the *Gaubert* test, the district court granted the government's motion for summary judgment.¹⁸ The court examined Rule for Courts-Martial 305¹⁹ and found that the rule only provided a set of factors for a commander to consider, and that "no mandatory directive existed

8. *See id.* at 324.

9. *Id.*

10. *Id.* ("When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.")

11. *Id.* at 325.

12. *See, e.g.,* *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001) (holding that an INS decision that assault and battery is a crime of moral turpitude is a discretionary function under 28 U.S.C. § 2680(a)); *Edwards v. Tenn. Valley Auth.*, 255 F.3d 318 (6th Cir. 2001) (holding that Tennessee Valley Authority was not liable for failing to maintain safety standards around the shoreline of lake-front property because no regulatory requirement exists); *Claude v. Smola*, 263 F.3d 858 (8th Cir. 2001) (holding that the government was not liable to a landowner where a contractor performed unsatisfactory repair work paid by a federal rural development grant; Department of Agriculture's lack of guidance to owner on which contractor to select was discretionary); *Sloan v. United States*, 236 F.3d 756 (D.C. Cir. 2001) (holding that the plaintiff could not recover damages for an unwarranted suspension of plaintiff's government contract because federal regulations specifically state that suspension is a discretionary action); *Shansky v. United States*, 164 F.3d 688 (1st Cir. 1999) (holding that aesthetic considerations, including decisions to preserve the historical accuracy of national landmarks, are legitimate policy concerns); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124 (10th Cir. 1999) (holding that the discretionary function exception compels dismissal of any claim requiring judicial scrutiny of a federal official's good faith or subjective decision-making); *Theriot v. United States*, 245 F.3d 388 (5th Cir. 1998) (holding that federal officials acted within their discretion under the Admiralty Act when they warned mariners of the location of an underwater sill on navigational charts rather than physically marking the site); *Calderon v. United States*, 123 F.3d 947 (7th Cir. 1997) (holding that the discretionary function exception applied to a Bureau of Prisons official's decision not to separate the plaintiff from his cellmate).

13. *See, e.g.,* *Cohen v. United States*, 151 F.3d 1338, 1341 (11th Cir. 1998); *Ochran v. United States*, 117 F.3d 495, 499 (11th Cir. 1997); *Autery v. United States*, 992 F.2d 1523, 1526 (11th Cir. 1993).

14. *Autrey*, 992 F.2d at 1528.

15. *Cohen*, 151 F.3d at 1342. *See also Ochran*, 117 F.3d at 500.

16. 61 F. Supp. 2d 1372 (S.D. Ga. 1999).

17. *Id.* at 1374.

18. *Id.* at 1382.

19. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (2002).

that the commanders were compelled to follow.”²⁰ Thus, the soldier’s commanders did not violate a mandatory regulation when they placed the soldier on restriction rather than in pretrial confinement.²¹ Turning to the second prong of the test, the court found that how to restrain a soldier is an “inherently policy laden” decision.²² The court further noted that the issues for a commander’s consideration, such as the individual rights of soldiers, the protection of the public, and the scope of the military investigation, were “exactly the type of policy judgments that the discretionary function is designed to shield.”²³

Assault and Battery Exception to the FTCA

A second exception to the FTCA’s waiver of sovereign immunity applies to claims “arising out of assault [or] battery.”²⁴ A plurality of the Supreme Court addressed the scope of this exception in *United States v. Shearer*.²⁵ In *Shearer*, a soldier just released from prison after serving a four-year term for manslaughter kidnapped and killed another soldier. The administratrix of the victim’s estate sued the government for negligently failing to prevent the assault and battery.²⁶ The plurality opinion stated that the assault and battery exception barred the claim, finding that “[n]o semantical recasting of events can alter the fact that the battery was the immediate cause of Private Shearer’s death and, consequently, the basis of respondent’s claim.”²⁷ The Court opined that a broad reading of the assault and battery exception was necessary to effectuate Congress’s intent in creating it:

Section 2680(h) does not merely bar claims for assault or battery; in sweeping language it excludes any claim arising out of assault or battery It is clear that Congress passed the Tort Claims Act on the straightforward

assurance that the United States would not be financially responsible for the assaults and batteries of its employees.²⁸

Thus, a claimant cannot circumvent application of this exception by framing a complaint that “sound[s] in negligence but stem[s] from a battery committed by a Government employee.”²⁹

The Court slightly narrowed the *Shearer* plurality’s holding in *Sheridan v. United States*,³⁰ when it held that the assault and battery exception did not bar all claims in which an intentional tort by a government employee contributed to the plaintiff’s injury. In *Sheridan*, a drunken and injured sailor entered a Navy hospital and brandished a firearm at several sailors. Subsequently, after leaving the hospital while still armed, the sailor shot and seriously injured the plaintiff, who then sued the government for negligence.³¹ The district court dismissed the case, citing the assault and battery exception.³² On review, the Supreme Court reversed the district court’s dismissal, stating that the assault and battery exception did not apply because the Navy had violated its own base regulations:

By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the Government assumed [the] responsibility to “perform its good Samaritan task in a careful manner.”³³

Although practitioners usually read *Shearer* and *Sheridan* together to define the limits of the assault and battery exception,

20. *Malone*, 61 F. Supp. 2d at 1379.

21. *Id.* at 1380.

22. *Id.*

23. *Id.*

24. 28 U.S.C. § 2680(h) (2000). This exception does not apply when the persons alleged to have committed the assault are federal law enforcement officers. *Id.*

25. 473 U.S. 52 (1985).

26. *Id.* at 53.

27. *Id.* at 55.

28. *Id.*

29. *Id.*

30. 487 U.S. 392 (1988).

31. *Id.* at 393.

32. *Id.* at 402.

several federal circuits still apply the broader *Shearer* definition of the exception.³⁴

The assault and battery exception adds additional strength to the argument for denying the hypothetical claim discussed above. In *Malone*, for example, the district court applied the assault and battery exception in addition to the discretionary function exception. The court looked to *Shearer* and determined that the claim “arose out of” the rape.³⁵ Although the court allowed that the government could still be liable under *Sheridan* if it owed the plaintiff a duty of due care, it ultimately held that no such duty existed: “The plaintiff cannot argue that the Army owed her a duty arising out of specific military regulations since no such regulations exist in this case. Further, the plaintiff has also failed to establish a general duty to protect owed to her under Georgia law.”³⁶

The fact that *Malone* analyzes both exceptions separately is significant; either exception alone would have been enough to bar the plaintiff’s action against the United States. While *Mal-*

one is not controlling in any federal circuit, it illustrates how a federal court would likely address a claim based on similar facts.

Conclusion

As the day comes to a close, you lean back comfortably in your chair and breathe a sigh of relief. After reading the case law, you now know that what initially appeared to be a nightmare claim is unlikely to result in liability for the Army. The plaintiff’s attorney will find it difficult to navigate past both the discretionary function and assault and battery exceptions to the FTCA. Ultimately, the case may go to trial, but the government is likely to prevail. Practitioners should be mindful of the discretionary function and assault and battery exceptions when they examine claims with similar circumstances. Each of these exceptions could ultimately win the day for the government.

33. *Id.* at 401 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955)). In *Sheridan*, the district court granted the government’s motion for summary judgment on remand. See *Sheridan v. United States*, 773 F. Supp. 786 (D. Md. 1991), *aff’d*, 969 F.2d 72 (4th Cir. 1992).

34. See, e.g., *Leleux v. United States*, 178 F.3d 750 (5th Cir. 1999) (dismissing plaintiff’s negligence claims against the government for sexually transmitted disease she received from navy recruiter); *Wise v. United States*, 8 F. Supp. 2d 535 (E.D. Va. 1998) (dismissing claims against the government for negligent hiring, retention, and training following a sailor’s murder of the plaintiff’s child); *Naisbitt v. United States*, 611 F.2d 1350 (10th Cir. 1980) (holding that the assault and battery exception bars claims of negligence based on assault, battery, rape, and murder, whether or not the employee is on duty at the time of the crimes); *Taylor v. United States*, 513 F. Supp. 647 (D.S.C. 1981) (holding that the Army was not liable for a soldier’s rape and murder of a young girl).

35. *Malone*, 61 F. Supp. 2d 1372, 1380 (S.D. Ga. 1999).

36. *Id.*

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School, U.S. Army

Legal Assistance Note

New Immigration and Naturalization Rules to Assist Soldiers Fighting the War on Terrorism

The War on Terrorism has led to changes in the immigration laws and regulations that greatly benefit soldiers and their spouses. First, active duty soldiers who are not U.S. citizens are now immediately eligible to apply for naturalization. Second, conditional lawful permanent resident alien spouses of soldiers who are deployed in support of Operation Enduring Freedom may request that the Immigration and Naturalization Service (INS) extend their conditional status for one year, and in six-month increments thereafter, until their spouses return from abroad.

On 3 July 2002, President George W. Bush signed Executive Order 13,269,¹ expediting the naturalization of aliens² and non-citizen nationals³ serving in an active duty status⁴ during the War on Terrorism. This executive order made all aliens and noncitizen nationals serving honorably on active duty between 11 September 2001 and a future date, to be determined by executive order, eligible for immediate naturalization under section 329 of the Immigration and Naturalization Act.⁵ This authority does not require a period of residence or any specified period of physical presence in the United States before the soldier's application for naturalization.⁶ The soldier must show, however, that for at least one year before filing for naturalization, he or she has been, and continues to be: (1) of good moral character; (2) attached to the principles of the Constitution; and (3) favoring the good order and happiness of the United States.⁷ Moreover, the government may revoke citizenship granted under this executive order if the soldier is subsequently separated under other than honorable conditions.⁸ Former President

1. 67 Fed. Reg. 45,287 (July 8, 2002).

2. The term "alien" is defined as "any person not a citizen or national of the United States." See 8 U.S.C. § 1101(a)(3) (2000).

3. A "national of the United States" is defined as "a citizen of the United States, or . . . a person who, though not a citizen of the United States, owes permanent allegiance to the United States." *Id.* § 1101(a)(22). Another provision provides that the following are nationals of the United States at birth:

- (1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;
- (2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person;
- (3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession; and
- (4) A person born outside the United States and its outlying possessions of parents one of whom is an alien, and the other a national, but not a citizen, of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than seven years in any continuous period of ten years—

(A) during which the national parent was not outside the United States or its outlying possessions for a continuous period of more than one year; and

(B) at least five years of which were after attaining the age of fourteen.

Id. § 1408; see also *id.* § 1101(a)(29) (providing that "[t]he term 'outlying possessions of the United States' means American Samoa and Swains Island").

4. The term "serving in an active duty status" is defined as service in the United States Army, Navy, Marine Corps, Air Force, Coast Guard, and service in a National Guard unit that is federally recognized as a Reserve Component of the Armed Forces of the United States and called for active duty. 8 C.F.R. subpt. 329.1 (2002).

5. Immigration and Nationality Act, Pub. L. No. 82-414, § 329, 66 Stat. 163, 250-51 (1952) (codified as amended at 8 U.S.C. § 1440). This section provides that the President, by executive order, may authorize any person who, as an alien or U.S. national, has served honorably in the Armed Forces during a period of time as defined below:

a period in which the Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, [to] be naturalized . . . if (1) at the time of enlistment, reenlistment, extension of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, or on board a public vessel owned or operated by the United States for noncommercial service, whether or not he has been lawfully admitted to the United States for Permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence.

6. 8 U.S.C. § 1440(b)(2).

7. 8 C.F.R. § 329.2(d).

8. 8 U.S.C. § 1440(c).

Clinton last used this authority to expedite the naturalization of service members who served on active duty during the Persian Gulf War.⁹

Legal assistance attorneys should advise soldiers to apply for naturalization under this executive order using the procedures found in *The Soldier's Guide to Citizenship Applications*.¹⁰ Department of the Army policy has directed Personnel Service Battalions (PSBs) and Military Personnel Divisions (MPDs) to assist soldiers in filing their applications for naturalization.¹¹

In addition to the executive order authorizing soldiers on active duty to apply for naturalization immediately, the INS has issued rules that will assist soldiers' alien spouses in their immigration process. On 7 January 2002, the INS issued a policy memorandum providing for special procedures if a conditional lawful permanent resident's spouse is a member of the U.S. Armed Forces and is stationed abroad as part of Operation Enduring Freedom.¹²

Generally, a soldier's alien spouse receives only *conditional* lawful permanent resident status if: (1) he or she was married within twenty-four months of the alien spouse obtaining resident status as an immediate relative of the soldier; or (2) the alien spouse received permanent residence after entering the United States under a fiancée "K" visa to marry the soldier.¹³ Ordinarily, the alien spouse and the sponsoring soldier must jointly petition to remove the spouse's conditional status during the ninety-day period before the second anniversary of the date the spouse obtained conditional lawful permanent resident status.¹⁴ Additionally, the alien spouse and sponsoring soldier must generally appear for a personal interview before an INS

officer before the INS will remove the conditional status.¹⁵ If the couple fails to file a petition, or (barring a showing of good cause) fails to appear for the interview, the alien spouse's permanent resident status is terminated as of the second anniversary of the spouse's admission for permanent residence.¹⁶ The spouse is then subject to removal from the United States.

If a sponsoring soldier is deployed in support of Operation Enduring Freedom, the soldier may be unable to sign the joint petition requesting removal of the conditional status or to appear before an INS officer for the personal interview. Fortunately, the INS has recognized this problem and has issued special instructions for such situations.¹⁷ Under the INS policy memorandum, if the soldier's deployment is imminent and the soldier has already filed the petition to remove the conditional status, the INS Service Office must make "every effort" to complete adjudication of the petition prior to the soldier's deployment.¹⁸ If the INS cannot adjudicate the petition before the soldier deploys, the INS places the petition on "overseas hold" pending the soldier's return from abroad.¹⁹

If the soldier has already deployed and his or her spouse's conditional status is due to expire, the INS will accept a petition signed by the conditional resident only, provided the petition is accompanied by evidence that the soldier's spouse is deployed.²⁰ In addition, the policy provides that the service center may approve the petition without an interview, unless the petition's supporting documentation does not warrant approval. In that case, the service center must schedule the case for an interview and place the case on "overseas hold."²¹

The INS will initially extend the alien spouse's conditional resident status for one year.²² If the soldier has not returned

9. See Exec. Order No. 12,939, 59 Fed. Reg. 61,231, *reprinted in* 8 U.S.C. § 1440.

10. U.S. Dep't of Army, *Perscom On Line, The Soldier's Guide to Citizenship Applications* (May 18, 2001), at <https://www.perscomonline.army.mil/tagd/pssd/psb/The%20Soldier's%20Guide%20to%20Citizenship%20Application.htm>. The Adjutant General publishes this guide.

11. *Id.* at 1. Under this policy, all such applications are filed with the Immigration and Naturalization Service, Nebraska Service Center in Lincoln, Nebraska.

12. Memorandum, Immigration and Naturalization Service Policy, subject: Removal of Conditional Resident Status If Conditional Resident Is the Spouse of an Individual Serving Abroad in the U.S. Armed Forces for Operation Enduring Freedom (Jan. 7, 2002) [hereinafter INS Policy Memorandum], *available at* <http://www.usais.org/news/90.pdf>.

13. The U.S. Code definition of "alien spouse" for purposes of conditional permanent resident status is located at 8 U.S.C. § 1186(g)(1).

14. *Id.* §§ 1186a(c)(1)(A), (d)(2). The alien spouse and petitioning spouse must file a Form I-751. U.S. Dep't of Justice, Immigration and Naturalization Service, Form I-751, Petition to Remove Conditions on Residence (June 2002).

15. 8 U.S.C. § 1186a(c)(1)(B).

16. *Id.* § 1186a(c)(2).

17. See INS Policy Memorandum, *supra* note 12.

18. *Id.* at 1.

19. *Id.*

20. *Id.* at 2. Such evidence may include "a photocopy of the service member's travel orders, a letter from the commanding officer, or other appropriate documentation signed by responsible military personnel. *Id.*

Key Changes for 2002

Form 1040—U.S. Individual Income Tax Return

Tax Rates Reduced

Most of the tax rates on individual income decreased by one-half of one percent in 2002; a new 10% tax rate is a permanent feature of the tax code. The 10% tax bracket, which was implemented as a rate reduction credit in 2001,²⁵ is fully incorporated into the tax rate structure for 2002.²⁶ All tax rates above the 15% tax bracket are reduced by one-half of one percent in 2002.²⁷ The new tax rates on individual income for 2002 are 10%, 15%, 27%, 30%, 35%, and 38.6%.²⁸ The Tax Table and the Tax Rate Schedules published by the Internal Revenue Service (IRS) reflect these changes; they are also listed in the appendix at the end of this note. These annual tax rate reductions will continue through the year 2006.²⁹

Income

Frequent Flier Miles—Line 7: Beginning in 2002, military and civilian employees of the Department of Defense may keep and make use of frequent flyer miles they earn during official travel.³⁰ On 21 February 2002, in *Announcement 2002-18*, the IRS announced that an individual's receipt or personal use of frequent flyer miles (or other in-kind promotional benefits attributable to business or official travel) is not taxable income for the employee.³¹ Travel or other promotional benefits that employees convert to cash, compensation in the form of travel or other promotional benefits, and any in-kind benefit used to disguise compensation will still be considered income.³² *Announcement 2002-18* formalizes the IRS's previous unofficial policy on frequent flyer miles.³³

Coverdell Education Savings Account (ESA) distributions—Line 21: Distributions from Coverdell ESAs will be divided into taxable and non-taxable portions; the taxpayer should report the taxable portion of the distribution on Line 21.³⁴ These distributions are not taxable when taxpayers use

from abroad within the period of the one-year extension, the service center will revalidate the extension of the conditional status in six-month increments.²³ The soldier must remember to contact the INS service center immediately upon his or her return from the deployment so that the INS may adjudicate the request to remove the spouse's conditional status.

The President has given all non-U.S. citizen soldiers on active duty on or after 11 September 2001 the unique opportunity to apply immediately to become U.S. citizens. Legal assistance attorneys should ensure that these soldiers are aware of this opportunity and visit their PSB or MPD to begin the naturalization process. In addition, legal assistance attorneys should be aware of the special rules for removal of an alien spouse's conditional resident status when his or her soldier spouse is deployed as a part of Operation Enduring Freedom. These conditional resident spouses need not worry that they will be subject to removal from the United States because their spouses are deployed to fight in the War on Terrorism. Lieutenant Colonel Pam Stahl.

Tax Law Note

Update for 2002 Federal Income Tax Returns

The Economic Growth and Tax Relief Reconciliation Act of 2001²⁴ (2001 Act) brought several significant changes in federal income tax law for tax year 2002. Congress has reduced tax rates, created several new adjustments and credits, and most notably, relaxed the earned income credit rules, potentially making this credit available to many more service members.

This note highlights key changes to the 2002 *Form 1040*, its schedules, and some related forms that are important for taxpayers in the military community. This note generally lists changes in the order in which they appear on the return, schedules, or forms. Its goal is to inform legal assistance attorneys of updates in tax numerology and changes for the upcoming tax season.

21. *Id.*

22. *Id.* That is, the conditional resident's Form I-551 is extended. See U.S. Dep't of Justice, Immigration and Naturalization Service, Form I-551, Permanent Resident Card (June 1999).

23. *Id.*

24. Pub. L. No. 107-16, 115 Stat. 38 (LEXIS 2002) [hereinafter 2001 Act].

25. I.R.C. § 6428 (codifying the 2001 Act).

26. *Id.* § 1(i)(1).

27. *Id.* § 1(i)(2) (codifying 2001 Act § 101(a)(i)(2)).

28. *Id.* § 1.

29. *Id.* § 1(i)(2) (codifying 2001 Act § 101(a)(i)(2)).

them to pay qualified elementary and secondary school expenses.³⁵

Qualified state tuition program earnings—Line 21: A taxpayer who receives a distribution from a qualified state tuition program may be able to exclude part or all of the earnings from income if used to pay for qualified higher education.³⁶

Adjustments

Educator expenses—Line 23: Eligible educators may now deduct up to \$250 of the cost of books, supplies, computer equipment, and software they use in the classroom.³⁷

Individual Retirement Arrangements—Line 24: The adjusted gross income (AGI) phase-out limitations increased again for 2002, potentially making it easier for employees covered by qualified retirement plans to make deductible contributions to a traditional IRA.³⁸ Because service members are active participants and are covered by a pension or retirement plan, deductible IRA contributions are subject to limitations.³⁹ For taxpayers who file their 2002 taxes as “married filing jointly,” the phase-out begins at \$54,000 and tops out at

\$64,000. In 2007 and thereafter, the maximum range will be from \$80,000 to \$100,000. For single filers (including heads of household), the phase-out begins at \$34,000 and ends at \$44,000. In 2005 and thereafter, the maximum range will be from \$50,000 to \$60,000. For taxpayers who are married but file separately, the limit is remains at \$10,000. The annual IRA contribution limit has risen to \$3000, or \$3500 for those fifty or older.⁴⁰

The 2001 Act increases IRA contribution limits over the next several years. The Act increases the maximum annual dollar contribution limit for IRA contributions to \$3000 for tax years 2002 through 2004, \$4000 for 2005 through 2007, and \$5000 for 2008.⁴¹ After 2008, the limit is adjusted annually for inflation in \$500 increments.⁴² The Act also provides for catch-up contributions. Individuals who have attained age fifty may make additional catch-up IRA contributions. What would otherwise be the maximum contribution limit (before application of the AGI phase-out limits) for an individual age fifty or more before the end of the taxable year increases by \$500 for tax years 2002 through 2005, and \$1000 for 2006 and thereafter.⁴³

Student loan interest deduction—Line 25: The Student Loan Interest Deduction continues to increase for military tax-

30. The new rule states as follows:

Retention of Travel Promotional Items. To the extent provided under subsection (c), a Federal employee, member of the Foreign Service, member of a uniformed service, any family member or dependent of such an employee or member, or other individual who receives a promotional item (including frequent flyer miles, upgrade, or access to carrier clubs or facilities) as a result of using travel or transportation services obtained at Federal Government expense or accepted under section 1353 of title 31, United States Code, may retain the promotional item for personal use if the promotional item is obtained under the same terms as those offered to the general public and at no additional cost to the Federal Government.

National Defense Authorization Act of 2002, Pub. L. No. 107-107, § 1116(b), 115 Stat. 1012, 1241 (2001).

31. I.R.S. Announcement 2002-18, 2002-10 I.R.B. 1 (2002).

32. *Id.*; see *Charley v. Commissioner*, 91 F.3d 72 (9th Cir. 1996) (affirming a Tax Court decision that a shareholder-employee’s conversion of frequent flyer miles provided by the employer to cash was taxable).

33. *Id.* For more information on the rules pertaining to taxation of frequent flyer miles, see Lieutenant Colonel Curtis A. Parker, *TJAGSA Practice Note: IRS Says No Tax Implications for Personal Use of Frequent Flyer Miles*, *ARMY LAW.*, Mar. 2002, at 51-53.

34. U.S. Internal Revenue Service, Form 1040 Instructions, at 29 (2002); I.R.C. § 530(d)(2)(B).

35. I.R.C. § 530(b)(2)(A)(ii).

36. I.R.S. Form 1040, Instructions, at 29 (2002); I.R.C. § 529(c)(3)(A).

37. I.R.C. § 62(a)(2)(D), (d).

38. I.R.C. § 219(g); see ADMINISTRATIVE & CIVIL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 269, FEDERAL TAX INFORMATION SERIES (Dec. 2002) [hereinafter JA 269]; see generally U.S. INTERNAL REVENUE SERVICE, PUB. 590, INDIVIDUAL RETIREMENT ARRANGEMENTS (2002).

39. I.R.C. § 219(g); *Morales-Caban v. Commissioner*, 66 T.C.M. (CCH) 995 (1993); I.R.S. Notice 87-16.

40. I.R.C. § 219(g)(2)(A)(ii).

41. *Id.* § 219(b)(5)(A) (as amended by 2001 Act § 601(a)).

42. *Id.* § 219(C).

43. *Id.* § 219(b)(5)(B).

payers.⁴⁴ For 2002, taxpayers will be able to deduct up to \$2500 of student loan interest.⁴⁵ The Student Loan Interest Deduction is taken as an adjustment to income; taxpayers do not have to itemize their deductions to qualify for this deduction.⁴⁶

The sixty-month limitation no longer applies. Previously, student loan interest deductions were limited to the interest paid during the first sixty months in which interest is required to be paid on an educational loan. Beginning with tax year 2002, the 2001 Act repeals this sixty-month limitation. Further, the 2001 Act increases the income phase-out ranges for eligibility for the Student Loan Interest Deduction to \$50,000 to \$65,000 for single taxpayers and to \$100,000 to \$130,000 for married taxpayers filing joint returns. These are significant increases over last year's amounts (\$60,000 to \$75,000 for couples and \$40,000 to \$55,000 for single taxpayers).⁴⁷ The 2001 Act includes automatic annual adjustments for inflation, affecting income phase-out ranges after 2002.⁴⁸

Tuition and fees deduction—Line 26: Taxpayers will now be able to deduct up to \$3000 of the qualified higher education expenses they paid in 2002 for themselves, their spouses, and their dependents. The deduction is not available if the taxpayer's modified AGI exceeds \$65,000 (\$130,000 for joint returns). There is no gradual phase-out for this deduction; if AGI exceeds this limit by any amount, the taxpayer loses the entire deduction. Taxpayers close to the limit should plan carefully to avoid exceeding this limit and losing the deduction.⁴⁹

Clean-fuel deduction for new hybrid cars—Line 34: Individuals, partnerships, and corporations may deduct up to \$2000 of the incremental cost of buying a motor vehicle that uses a clean-burning fuel.⁵⁰ The IRS announced that buyers of a new Toyota Prius for model years 2001, 2002, and 2003; a

new Honda Insight for model years 2000, 2001, and 2002;⁵¹ and a new Honda Civic Hybrid for model year 2003⁵² may claim a deduction of \$2000 for the year they first put the vehicle into use. The deduction is available whether the taxpayer uses the vehicle for business or personal reasons, whether or not the taxpayer itemizes deductions. Taxpayers may also claim the deduction for a previous year by filing an amended return.⁵³

Calculating Taxable Income and Tax

Standard deduction—Line 38: For 2002, the standard deduction is \$4700 for single filers, \$3925 for married persons filing separately, \$7850 for joint filers and qualifying widow(er)s, and \$6900 for heads of household.⁵⁴

Personal exemptions—Line 40: The exemption amount for 2002 is \$3000. Exemptions phase out if AGI exceeds \$137,300 for single filers, \$103,000 for married persons filing separately, \$206,000 for joint filers and qualifying widow(er)s, and \$171,650 for heads of household.⁵⁵

Credits

Education credits—Line 48: The modified AGI-based phase-out range for the education credits is higher, at \$41,000-\$51,000 (\$82,000-\$102,000 for joint filers).⁵⁶

Retirement savings contributions credit—Line 49: Eligible lower-income taxpayers may now claim a nonrefundable tax credit for a percentage of up to \$2000 of qualified retirement savings contributions.⁵⁷ The percentage (10%, 20%, or 50%) depends on filing status and AGI.⁵⁸

44. For more information on the Student Loan Interest Deduction, see Major Richard Rousseau, *TJAGSA Practice Notes: Internal Revenue Service Restructuring and Reform Act of 1998*, ARMY LAW., Nov. 1998, at 40-41; Major Richard Rousseau, *TJAGSA Practice Notes: Update for 1998 Federal Income Tax Returns*, ARMY LAW., Nov. 1998, at 44-45; Major Richard Rousseau, *TJAGSA Practice Notes: Update for 1999 Federal Income Tax Returns*, ARMY LAW., Dec. 1999, at 30.

45. I.R.C. § 221(b)(1).

46. *Id.* § 62(a)(17).

47. *Id.* § 221(d) (amending I.R.C. § 2219(e) and 2001 Act § 412).

48. *Id.* § 221(f) (codifying 2001 Act § 412).

49. For example, a deductible contribution to a traditional IRA or Thrift Savings Plan (TSP) contributions for future years.

50. I.R.C. § 179A(a)(1)(a), (b)(1)(a)(i).

51. I.R.S. Announcement 2002-93 (2002).

52. I.R.S. Announcement 2002-97 (2002).

53. *Practice Alert*, 48 FED. TAXES WEEKLY ALERT 42 (2002).

54. I.R.C. § 63(c); I.R.S. Form 1040, Instructions, at 34 (2002).

55. I.R.C. § 151; I.R.S. Form 1040, Instructions, at 35 (2002).

56. I.R.C. §§ 25A(d)(2), (h).

Child tax credit—Line 50: New rules apply to determining who is a qualifying child for purposes of the child tax credit. “Qualifying child” will now include a brother, sister, step-brother, or stepsister of the taxpayer, or a descendant of any such individual, who the taxpayer cares for as the taxpayer’s own child.⁵⁹ This change removes such individuals from the definition of “eligible foster child,” and therefore eliminates the requirement that they reside in the taxpayer’s home for the entire tax year.

Adoption credit—Line 51: The maximum adoption credit has risen to \$10,000, and phases out over a higher range of modified AGI (\$150,000-\$190,000).⁶⁰

Earned income credit—Line 64: Several changes to the Earned Income Credit (EIC) rules should clarify taxpayers’ eligibility for the EIC; they will also increase the number of service members eligible for this valuable credit. The definition of earned income no longer includes non taxable items such as Basic Allowance for Housing (BAH), Basic Allowance for Subsistence (BAS), and combat zone excluded pay.⁶¹ Adjusted gross income, rather than modified AGI, is now the measure from which the phase-out for eligibility for the EIC is mea-

sured.⁶² The definition of “qualifying child” has changed.⁶³ Finally, the 2001 Act creates new rules for credit eligibility when multiple taxpayers share the same qualifying child.⁶⁴

Schedule A—Itemized Deductions

Medical and dental expenses—Schedule A, Line 1: These expenses include weight-loss programs for treatment of a specific disease (for example, obesity).⁶⁵

Unreimbursed employee business expenses—Schedule A, Line 20: The standard mileage rate for business travel is 36.5¢ per mile.⁶⁶ A taxpayer should not include any deduction on this line for educator expenses he is claiming on Form 1040, Line 23, or any tuition and fees deduction he is claiming on Form 1040, Line 26.⁶⁷

Total itemized deductions—Schedule A, Line 28: Adjusted gross income over \$137,300 (\$68,650 if married filing separately) will now trigger a reduction in itemized deductions.⁶⁸

57. *Id.* § 25B(a).

58. *Id.* § 25B(b). The applicable percentage (38%, 20%, or 10%) depends on filing status and AGI, as follows:

Joint filers: \$0-\$30,000, 50%; \$30,000-\$32,500, 20%; and \$32,500 to \$50,000, 10% (no credit if AGI is above \$50,000).

Heads of household: \$0-\$22,500, 50%; \$22,500-\$24,375, 20%; and \$24,375-\$37,500, 10% (no credit if AGI is above \$37,500).

All other filers: \$0-\$15,000, 50%; \$15,000-\$16,250, 20%; and \$16,250-\$25,000, 10% (no credit if AGI is above \$25,000).

Id.

59. *Id.* §§ 24(c)(1), 32(c)(3)(B)(i)(II).

60. *Id.* §§ 23(a)-(b).

61. *Id.* § 32(c)(2)(A)(i) (codifying 2001 Act § 303(b)). The definition of earned income will include “wages, salaries, tips, and other employee compensation, if includible in gross income for the tax year, plus net earnings from self-employment. Military taxpayers will no longer be required to include nontaxable combat zone pay, nontaxable-housing allowance, and nontaxable subsistence allowance as earned income.” *Id.*

62. I.R.C. §§ 32(a)(2)(B), (c)(5) (codifying 2001 Act § 303(d)(1)) (codifying 2001 Act § 303(d)(2)(A)). Beginning in 2002, the phase-out of the credit will apply to taxpayers whose AGI (rather than modified AGI) or earned income, whichever is greater, exceeds a phase-out amount. The maximum credit amount will be reduced by the phase-out percentage multiplied by the AGI (or earned income) that exceeds the phase-out amount (as adjusted for inflation). Accordingly, the 2001 Act deletes the definition of “modified AGI.” *Id.*

63. I.R.C. § 32(c)(3)(A)(ii), (B)(i), B(iii) (codifying 2001 Act § 303(e)(2)(B)) (codifying 2001 Act § 303(e)) (codifying 2001 Act § 303(e)(2)(A)). Beginning in 2002, the 2001 Act removes the exception for a foster child from the over-six-month residency requirement. In its definition of “eligible foster child,” the 2001 Act also removes the requirement that the child have the same principal residence as the taxpayer for the entire tax year. The removal of this requirement for eligible foster children extends the over-six-month residency requirement to all children, including foster children, after 2001. *Id.*

64. I.R.C. § 32(c)(1)(C) (codifying 2001 Act § 303(f)). For more information on the changes to the Earned Income Credit, see Lieutenant Colonel Curtis A. Parker, *TJAGSA Practice Notes: Earned Income Credit: New Rules Could Ease Qualification*, ARMY LAW., June 2002, at 36-41.

65. Rev. Rul. 2002-19, 2002-16 I.R.B. 779; I.R.C. § 213.

66. I.R.S. Form 2106, Instructions, at 1 (2002).

67. I.R.C. § 265.

68. I.R.S. Form 1040, Schedule A, Instructions, at A-6 (2002).

Schedule B—Interest and Ordinary Dividends

Increased threshold for those who must complete a Schedule B: For tax year 2002, taxpayers whose ordinary dividends or interest each are less than or equal to \$1500 (an increase from \$400) generally do not have to complete Schedule B.⁶⁹ Taxpayers no longer need to file this schedule to report the receipt and payment of interest separately, unless the total of all interest or dividends the taxpayer received exceeds \$1500. This is not a combined interest and dividend threshold; it applies separately to each. The taxpayer may still need to file Schedule B, even when his interest or dividend income is below \$1500, if the taxpayer cashed U.S. Savings Bonds and used the interest income for qualified education expenses.⁷⁰

Excludable interest on Series EE and I U.S. savings bonds—Schedule B, Line 3: The exclusion for education related savings bond interest phases out at higher income levels. For 2002, the phase-out begins at modified AGI above \$57,600 (\$86,400 on a joint return).⁷¹

Schedule C—Profit or Loss from Business (Sole Proprietorship)

Car and truck expenses (Schedule C, Line 10 and Schedule F, Line 12: The standard mileage rate is now 36.5 cents per mile for business travel.⁷²

Schedule D—Capital Gains and Losses

Sale of main home: Taxpayers affected by the 11 September 2001 terrorist attacks are eligible for a partial home sale exclusion, based on the unforeseen circumstance rule. Home sellers may exclude up to \$250,000 of home sale gain (up to \$500,000 for joint filers) if: (1) during the five years ending on the sale or exchange date, they owned and used the residence as their main home for periods aggregating at least two years; and (2) they did not use the exclusion within the preceding two years. A partial home sale exclusion rule allows home sellers to exclude part or all of their home sale gain, even though they do not fully meet these requirements. The partial exclusion applies only if the home seller's failure to meet either rule occurs because he must sell the home due to "a change of place of employment, health, or other unforeseen circumstances."⁷³ The IRS has said that the 11 September 2001 terrorist attacks are an "unforeseen circumstance" for purposes of the partial home sale exclusion rule.⁷⁴

Mailing Locations for Tax Returns

Some taxpayers will mail their tax returns to a different IRS Service Center this year because the IRS changed the filing location for several areas. Taxpayers should mail tax returns to the address on the envelope they received with their tax package, or note the proper mailing address in the Form 1040 Instruction Booklet.⁷⁵ Lieutenant Colonel Curtis A. Parker.

69. I.R.S. Form 1040, Schedule B, Instructions, at B-1 (2002).

70. I.R.C. § 135; I.R.S. Form 1040, Schedule B, Instructions, at B-1 (2002).

71. I.R.C. § 135; I.R.S. Form 1040, Schedule B, Instructions, at B-1 (2002).

72. I.R.S. Form 1040, Schedule C, Instructions, at C-3 (2002).

73. I.R.C. § 121(c).

74. Notice 2002-60, 2002-36 I.R.B. 482.

75. See I.R.S. 1040, Instructions.

Appendix

Summary of Tax Year 2002 Changes in Tax Rates and Deductions

There are six different tax rate brackets for tax year 2002, taxed at the following marginal tax rates: 10%, 15%, 27%, 30%, 35%, and 38.6%.⁷⁶ The 2002 tax rates by filing status are:

Married Filing Jointly and Qualifying Widow(er):

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$1 - 12,000	10%
12,000 - 46,700	15%
46,700 - 112,850	27%
112,850 - 171,950	30%
171,850 - 307,050	35%
307,050	38.6%

Single:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$0 - 6000	10%
6000 - 27,950	15%
27,950 - 67,700	27%
67,700 - 141,250	30%
141,250 - 307,050	35%
307,050	38.6%

Head of Household:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$0 - 10,000	10%
10,000 - 37,450	15%
37,450 - 96,700	27%
96,700 - 156,600	30%
156,600 - 307,050	35%
307,050	38.6%

Married Filing Separately:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$0 - 6000	10%
6000 - 23,350	15%
23,350 - 56,425	27%
56,425 - 85,975	30%
85,975 - 153,525	35%
153,525	38.6%

76. I.R.C. § 1(a)-(d), (i)(2).

Estates and Trusts:

<u>Taxable Income</u>	<u>Marginal Tax Rate</u>
\$1 - 1850	15%
1850 - 4400	27%
4400 - 6750	30%
6750 - 9200	35%
9200	38.6%

Standard Deduction

- Married filing jointly or qualifying widow(er), 2002: \$7850 (\$7600 in 2001; \$7950 projected for 2003).
- Single, 2002: \$4700 (\$4550 in 2001; \$4750 projected for 2003).
- Head of household, 2002: \$6900 (\$6650 in 2001; \$7000 projected for 2003).
- Married filing separately, 2002: \$3925 (\$3800 in 2001; \$3975 projected for 2003).

Reduction of Itemized Deductions

- Married filing separately: \$68,650.
- All other returns: \$137,300.

Personal Exemptions

Higher personal exemption deduction, 2002: \$3000 (up from \$2900 in 2001; \$3050 projected for 2003).

2002 Phase Out Amounts for personal exemptions:

<u>Taxpayer</u>	<u>Begins After</u>
Married filing jointly	\$206,000
Single	\$137,300
Head of household	\$171,650
Married filing separately	\$103,000

Foreign Earned Income Exclusion⁷⁷

Higher exclusion for 2001: \$80,000 (was \$78,000 in 2001; will continue at \$80,000 for future years with indexing for inflation).⁷⁸

Earned Income Credit

Number of Children	Maximum Amount of Credit	Earned Income Amount	Threshold Phase-out Amount	Completed Phase-out Amount
None	\$376	\$4990	\$6150	\$12,060
1	\$2506	\$7350	\$13,550	\$30,201
2	\$4140	\$10,350	\$13,550	\$34,178

77. *Id.* § 911. For more information on Foreign Earned Income Exclusion, see I.R.S. PUB. 54, TAX GUIDE FOR U.S. CITIZENS AND RESIDENT ALIENS ABROAD (2002); I.R.S. PUB. 516, TAX INFORMATION FOR U.S. GOVERNMENT CIVILIAN EMPLOYEES STATIONED ABROAD (2002); I.R.S. PUB. 593, INCOME TAX BENEFITS FOR CITIZENS WHO GO OVERSEAS (2002); JA 269, *supra* note 38.

78. I.R.C. § 911(b).

Auto Standard Mileage Allowances

If a taxpayer can use an automobile for business, medical, charity, and/or moving purposes, the taxpayer is allowed a standard mileage deduction rate. For 2002, the rates are:

Business:	36.5¢ per mile
Charity:	14¢ per mile
Medical or Moving:	10¢ per mile

Claims Report

United States Army Claims Service

Personnel Claims Note

General Principles

When to Use (and How to Reject) a Carrier's Estimate

Several weeks ago, a hypothetical claimant, Soldier X, submitted a claim in which the carrier had damaged some picture frames after shipping them in mirror cartons to an Army field claims office. Soldier X filled out a Department of the Army (DA) Form 1840R and submitted estimates from two frame shops, both of which recommended replacing rather than repairing the frames. The carrier submitted an estimate from a furniture repair shop that recommended repairing the frames. Although the carrier's estimate was the least costly of the three, the Army claims office concluded that the frame shop estimates were more "reasonable" and reimbursed Soldier X for the lower of the two replacement estimates for the damaged items. If the carrier objects to the Army's decision to use a higher estimate, it may appeal the Army's demand to the Defense Office of Hearings and Appeals (DOHA). How would the DOHA decide a hypothetical case such as this one?

The result "depends." While a claims office has some latitude to determine the most reasonable estimate of those submitted by the claimant and the carrier, it must follow the guidance in the agreement between the Department of Defense and the carrier industry.

The Military-Industry Memorandum of Understanding on Loss and Damage Rules (MOU)¹ contains the rules governing repair estimates. The MOU discusses, among other issues, the general principles of processing carrier estimates, how to evaluate estimates submitted by carriers during any of the three "stages" following delivery, and the governing rules at each stage.²

Paragraph III(A) of the MOU requires claims offices to "evaluate itemized repair estimates" from "qualified and responsible firm[s] in the same manner as any estimate submitted by a claimant."³ Accordingly, claims offices should scrutinize carrier estimates as carefully as they would scrutinize estimates provided by claimants, but give serious consideration only to those estimates itemized and prepared by reputable firms. Claims offices are *not* obliged to reimburse claimants based on opinions and estimates prepared by new repair firms whose reputations are unknown, or by established repairers whose reputations are untrustworthy.⁴

Carrier Estimates Received Within Forty-Five Calendar Days of Delivery

Paragraph III(B)(1) of the MOU requires claims offices to *use*—not merely consider—carrier estimates they receive within forty-five calendar days of delivery, if: (1) the estimate is the lowest; and (2) the repair firm that provided it "can and will perform the repairs adequately for the price stated."⁵ In short, a claims office should consider how quickly the firm will complete the repairs, the cost of the repair, and the repairer's qualifications and reliability. Claims offices should judge a firm's promise to repair the property by the firm's reputation within the local military community. If the repair shop has a good reputation, if the carrier proffered its estimate within forty-five calendar days of delivery, and if that estimate is the lowest one presented, the claims office should reimburse the claimant based on this estimate.⁶

1. See Memorandum of Understanding, subject: Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules (1 Jan. 1992), *reprinted in* U.S. DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES CLAIMS PROCEDURES fig. 11-5 (1 Apr. 1998) [hereinafter MOU].

2. See generally *id.*

3. *Id.* para. III(A).

4. See *id.* paras. III(A), (B)(1)-(2).

5. *Id.* para. III(B)(1).

6. See *id.* para. III(A).

On the other hand, if the carrier has submitted the lowest estimate, but there is good cause to select a higher one, then the claims office *must* promptly notify the carrier in writing of his reasons for not using its estimate. This explanation should address the specific reasons the claims office lacks confidence in the repair firm's ability and willingness to perform the repairs adequately for the price stated, based upon the firm's reputation for timely and satisfactory performance.⁷ A claims office should provide this notice to the carrier during the adjudication of the claim—that is, before paying the claimant.⁸ This requirement appears intended to encourage fair and open discussion between the parties. A claims office that uses an estimate higher than the carrier's estimate without giving the carrier advance written notice violates the MOU. In such cases, the carrier is entitled to a refund for the difference between its estimate and the amount of the offset.⁹

Claims offices must not postpone the adjudication and payment of claims while waiting for carriers to submit estimates. The forty-five day period specified in the MOU affords the carrier a reasonable time to obtain and submit its estimates.¹⁰ Although some carriers diligently provide estimates, others do not. If an estimate arrives after the claims office has already paid the claimant, but within forty-five calendar days of delivery, claims offices should apply the standard criteria: (1) whether the estimate is lower than the others; and (2) whether it is from a reliable, reputable firm capable of completing the repairs for the stated price. If the estimate satisfies these criteria, the claims office should recover *the amount of the lower estimate* from the carrier, rather than the higher sum the claims office paid the claimant.¹¹

*Carrier Estimates Received After Forty-Five Calendar Days,
but Before Adjudication*

If the carrier submits the lowest estimate, but does so *more than* forty-five calendar days after delivering the property, the claims office may still be required to use the carrier's estimate. Under section III(B)(2) of the MOU, the claims office will use a carrier's itemized estimate if: (1) the estimate is lowest; (2) the claims office has not already adjudicated the claim; and (3)

if the repair firm "can and will perform the repairs adequately for the price stated."¹²

If the carrier has submitted the lowest estimate but there is good cause to use a higher one, the claims office *must* promptly notify the carrier of the reasons for this conclusion in writing.¹³ If the carrier ignores this written notice or responds without adequately addressing the concerns listed in the notice, the claims office can use the higher estimate as planned.¹⁴

In the hypothetical scenario outlined at the beginning of this note, the carrier submitted its estimate from the furniture repair shop more than forty-five calendar days after the shipment was delivered, but before the claims office adjudicated the action. Although the claims office contacted the carrier, it did not inform the carrier of its reasons for selecting a higher-cost repair estimate. Instead, the claims office argued that it did not have to accept the carrier's lower estimate and challenged the carrier to explain why the estimate the Army used was unreasonable. Addressing a similar case, the DOHA noted:

[T]he MOU does not require use of the carrier's estimate merely because it is lower than the shipper's estimate. If the Army had advised the carrier in writing that the carrier's repairer was not qualified to assess the damages or perform repairs, after considering the carrier's response to the Army's concerns in this regard, we would have found in the Army's favor [T]he procedures require the service to advise the carrier in writing concerning its reason for not using the carrier's estimate when it is lowest overall.¹⁵

Although the DOHA acknowledged that "the Army had a substantial basis for not accepting the carrier's estimate," it upheld the carrier's appeal because the field claims office failed to communicate its reasoning to the carrier.¹⁶ The DOHA ordered the Army to refund the carrier the difference between the value of the low estimate and the amount of the offset.¹⁷

7. *Id.* paras. III(B)(1)-(2).

8. *Id.* para. IV(A).

9. *Id.*; see *In re Stevens Transp. Co.*, No. 98010520, 1998 DOHA LEXIS 252 (May 13, 1998).

10. MOU, *supra* note 1, para. II(A).

11. *See id.*

12. *Id.* para. III(B)(2).

13. *Id.* paras. III(B)(2)-(3).

14. *Id.* para. IV(A).

15. *Stevens Worldwide Van Lines*, No. 97110307, 1997 DOHA LEXIS 878, at *5 (Dec. 4, 1997).

A close reading of the MOU may prompt claims offices to question the difference between Paragraphs III(B)(1) and III(B)(2). Both discuss using “lowest,” “itemized” repair estimates, repair firms that “can and will perform the repairs adequately for the price stated,” and the obligation of the claims office to inform the carrier in writing whenever that office uses a higher estimate.¹⁸ The only difference involves the time frame in which the provisions are effective: Paragraph III(B)(1) concerns estimates submitted *within* forty-five calendar days of delivery,¹⁹ while Paragraph III(B)(2) concerns estimates submitted *more than* forty-five days after delivery, for claims that have not yet been adjudicated.²⁰ Under Paragraph III(B)(1), a claims office must always use a carrier’s low estimate, absent good cause. If a claims office pays the claimant but then receives a lower estimate from the carrier within forty-five calendar days of delivery, the office should use the carrier’s estimate to calculate the appropriate amount to recover from the claimant.²¹ Paragraph III(B)(2), which becomes effective forty-five calendar days after delivery until adjudication, mirrors the rule under Paragraph III(B)(1). During this period, the claims office should still use the carrier’s low estimate, absent good cause.²² Clearly, the drafters of the MOU considered forty-five calendar days sufficient time to submit an estimate and adjudicate a claim.²³ Paragraph III(B)(2) governs the procedures a claims office should use when one of the parties fails to act within this preferred period.²⁴

If the claims office receives a low carrier estimate *after* it pays the claimant, Paragraph III(B)(3), graphically depicted below, governs.²⁵

Fig. 1—Flow Chart for Determining When to Use a Carrier’s Estimate

<i>If the number of days since delivery is . . .</i>		
◀ Less than 45 days ▶	◀ More than 45 days, but before final adjudication and payment ▶	◀ After final adjudication and payment
<i>. . . then apply MOU Paragraph . . .</i>		
III(B)(1)	III(B)(2)	III(B)(3)
<i>. . . which directs claims offices to . . .</i>		
Use the carrier’s low estimate, or inform the carrier in writing of reasons why the estimate is unreasonable.	Use the carrier’s low estimate, or inform the carrier in writing of reasons why the estimate is unreasonable.	Use the carrier’s low estimate, if the carrier can establish that the estimate used by the claims office was unreasonable.

16. *Id.* at *6-7.

17. *Id.* at *7.

18. MOU, *supra* note 1, paras. III(B)(2)-(3).

19. *Id.* para. III(B)(1).

20. *Id.* para. III(B)(2).

21. *Id.* para. III(B)(1).

22. *Id.* para. III(B)(2).

23. *See id.* para. II(A).

24. *Id.* para. III(B)(2).

25. *Id.* para. III(B)(3).

Carrier Estimates Received After the Claims Office Sends a Demand to the Carrier

What if the carrier submits the lowest estimate *after* the claims office has already requested reimbursement from the carrier? Under Paragraph III(B)(3) of the MOU, the claims office must consider such estimates during the recovery, rebuttal, or appeal process, which runs until the parties reach an impasse and the carrier requests DOHA review. Note that the MOU does not say that Paragraph III(B)(3) takes effect after “adjudication” or “payment” of the claim, which is when Paragraph III(B)(2) concludes. Instead, Paragraph III(B)(3) takes effect “after the Demand on Carrier has been dispatched to the carrier’s home office.”²⁶ The MOU presumes that “paying” a claim and issuing a demand on the carrier occur virtually at the same time;²⁷ however, if the claims office receives a lower carrier estimate after paying the claimant, but before dispatching the demand, then it must apply the procedures in Paragraph III(B)(2)—inform the carrier in writing why the claims office used a higher estimate, and consider the carrier’s response before sending the demand.²⁸

The standard of proof under Paragraph III(B)(3) is also different than it is before the claims office sends its demand to the carrier. Before the claims office sends its demand, it must inform the carrier why it did not use the lowest estimate. In “post-demand” (or “post adjudication”) cases, however, the burden shifts to the carrier to demonstrate that the estimate the claims office used was “unreasonable” when compared to the market price in the area or in relation to the pre-damage value of the goods.²⁹ In the scenario described at the beginning of this note, the claims office, which had challenged the carrier to show why the use of higher estimates was unreasonable, mistakenly applied the Paragraph III(B)(3) standard to Paragraph III(B)(2) facts. The claims office still had the burden to prove that the carrier’s estimate was unreasonable.

When a field claims office fails to notify the carrier in writing about why it used a higher estimate, the DOHA will likely require that the claims office reimburse the carrier for the difference between the estimate it submitted and the amount offset. Under the MOU’s strictly construed written notification provisions, unless the claims office gives written notice explaining its use of a higher estimate and carefully considers

the carrier’s reply, the carrier’s estimate is presumed to be meritorious and the carrier has an excellent chance of prevailing on appeal. Tom Kennedy.

Tort Claims Note

Damage to Rental Cars

Government travelers on temporary duty (TDY) frequently use rental cars for official travel. When a rental car sustains damage, the rental agency may occasionally attempt to collect the amount of the damage from the traveler. How should travelers and their units respond to such collection attempts?

First, travelers should use their government VISA cards to rent cars for official travel; the credit card agreement with the issuing bank includes primary insurance coverage for all rentals up to thirty-one days.³⁰ This coverage applies to all authorized drivers of rental vehicles; it covers collision, theft, and other damage to the car, as well as towing charges and rental agency charges for loss of the car’s use—with no deductible. The coverage applies to most cars, minivans with a capacity of up to eight passengers, and some sport utility vehicles; it does not apply to trucks or larger vans. The traveler must initiate and complete the rental with the government VISA account and decline the rental agency’s Collision Damage Waiver (CDW) and Liability Damage Waiver (LDW). Travelers must report any losses to VISA within twenty days of the date of loss. The coverage excludes third-party liability and losses caused by intentional acts, such as drunken driving, illegal activity, off-road operation of the rental vehicle, or the traveler’s failure to exercise due caution in safeguarding the vehicle. It also excludes losses due to hostilities of any kind.³¹

Although the VISA web site indicates that this coverage ended on 1 March 2002,³² the coverage remains in effect for all banks issuing government VISA cards. The Army Claims Service recently confirmed that the coverage will continue; the parties have not set any end date for it.³³

Travelers should choose rental agencies carefully to minimize their exposure to rental agency claims. The Military Traf-

26. *Id.* para. III(B)(3).

27. *See id.* paras. III(B), IV(A).

28. *Id.* para. III(B)(2)-(3).

29. *Id.* para. III(B)(3).

30. For details, see VISA USA, *Visa Government Detailed Benefits*, at http://www.usa.visa.com/business/cards/visa_government.html#a (last visited Dec. 16, 2002) [hereinafter VISA Web Site]. VISA does not offer this coverage in Jamaica, Israel, or Ireland.

31. *Id.* To file a claim or for more information about the program, call 1-800-VISA-911 (1-800-847-2911). Practitioners outside the United States may call collect, at 1-410-902-8011. Ensure that you receive a VISA claim number from the VISA Claims Department. *Id.*

32. VISA Web Site, *supra* note 30.

fic Management Command (MTMC) has negotiated an agreement (MTMC Agreement), with many rental agencies in the United States and abroad.³⁴ The MTMC Agreement provides insurance coverage for rental vehicles that U.S. military and civilian employees use for official business; in many cases, this agreement also covers government contractors, Northern Alliance Treaty Organization (NATO) military members and employees, and U.S. government local national employees in some foreign countries.³⁵ Under the MTMC Agreement, the rental agency is primarily liable for the first \$25,000 in damages to the property of third persons,³⁶ and for \$100,000 per person and \$300,000 per incident for personal injury or wrongful death to third parties.³⁷ The MTMC Agreement also states that the rental agency will bear a portion of the responsibility for damage to the rental vehicle. This liability is subject to exclusions similar to those mentioned above: illegal activities, driver negligence, operation of the vehicle off-road or across international boundaries without authorization, or use of the vehicle to push or tow another vehicle.³⁸

Under the pre-November 2001 terms of the MTMC Agreement, the rental agency assumed responsibility for damage caused by the driver's *simple* negligence; vehicle drivers were only responsible for damage caused by their gross negligence or willful misconduct.³⁹

Under Amendment 6 to the MTMC Agreement, Version 2, however, vehicle operators are also responsible for damages caused by their simple negligence.⁴⁰

This change was potentially devastating to units' travel budgets. Before 1 November 2001, few—if any—rental agency claims for damage to their vehicles were payable; most of the exceptions to the general rule of rental agency liability occurred when the driver was acting outside the scope of his duties. Under Amendment 6, however, the rental agency is entitled to compensation *from unit TDY funds* for damages up to the total value of the rental vehicle.⁴¹ Units were presumably expected to collect these amounts from the drivers. Such large, unplanned expenses have the potential to wipe out units' annual travel budgets. Under the federal claims statutes, there is a two-year statute of limitations on claims,⁴² so this threat to unit TDY funds is certain to remain for at least two years from the end of any rental period entered into between 1 November 2001 and 1 October 2002.

Representatives of the four armed services attempted to address the impact of this change by meeting with the Government Rental Car Program Manager in January and March 2002, seeking modifications to Amendment 6. As a result, MTMC and the industry created the new MTMC Agreement, Version 3, effective 1 October 2002.⁴³

The new MTMC Agreement also clarifies several administrative issues regarding claims. First, upon request by the rental agency, a government traveler must now provide an official unit address and telephone number for billing purposes, as opposed to the traveler's home address.⁴⁴ Second, the new amendment requires that the rental agency submit bills for damage to rental vehicles to the unit at its official address.⁴⁵ Third, the rental

33. Telephone Interview with Leator Smith, VISA Program Manager with Bank of America, Arlington, Virginia (Dec. 18, 2002). Besides rental car insurance, VISA provides government travelers with emergency cash services, message relay services, medical and legal referrals, transportation and ticket replacement assistance, lost luggage locator, translation services, and prescription medication services. *Id.*

34. U.S. Dep't of Defense, Military Traffic Management Command, U.S. Government Car Rental Agreement Number 3 (1 Oct. 2002), at <http://www.mtmc.army.mil/CONTENT/6603/CAR3.pdf> [hereinafter MTMC Agreement]. This newest version of the MTMC Agreement replaced Agreement Number 2 and its six amendments. *See id.* The current list of participating companies outside the United States may be found at the MTMC web site. U.S. Dep't of Defense, Military Traffic Management Command, *U.S. Government Car Rental Program, International Rates* (Aug. 30, 2002), at <http://www.mtmc.army.mil/frontDoor/0,1383,OID=3--215-219-514-516,00.html>. Travelers may also call the MTMC Passenger Programs Division at (703) 681-9442.

35. MTMC Agreement, *supra* note 34, para. 8. As of 12 October 2001, Advantage Rent-A-Car, Allstate Rent-A-Car, Gateway Rent A Car Systems, Inc., Leesville Motors, Inc., and Southwest Car Rentals did not extend the Agreement coverage to NATO members in the United States. Allstate and Leesville Motors, Inc., do not extend benefits to contractors. Telephone interview with Christine Braswell, Passenger Programs Office, MTMC (Oct. 12, 2001).

36. MTMC Agreement, *supra* note 34, para. 9a.

37. *Id.* para. 9a.

38. *Id.* para. 9b.

39. *Id.* amend. 5, para. 9b.

40. *Id.* amend. 6, para. 9a.

41. *Id.* amend. 6.

42. Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2000); Military Claims Act, 10 U.S.C. § 2733 (2000).

43. Telephone Interview with Christine Braswell, Passenger Programs Office, MTMC (Sept. 26, 2002).

44. MTMC Agreement, *supra* note 34, para. 7.

agency may no longer bill the government renter's credit card for the damage.⁴⁶ Fourth, renters no longer need to specify additional drivers on rental contracts.⁴⁷ Fifth, rental companies outside the United States may no longer charge non-waivable excess fees for damage to rental vehicles, unless those fees are mandated by law. Currently, rental agencies often charge such fees to government renters, but all available evidence suggests that these fees are customary rather than required.⁴⁸ Instead, and in return for accepting liability for damage to the rental vehicle, MTMC-participating rental agencies must now impose a government administrative rate supplement of five dollars per vehicle per day.⁴⁹ Finally, rental agencies must now provide a toll-free emergency contact number for government renters to notify the rental agency of a collision or repair, to request a replacement vehicle if necessary, and to seek instructions for the disposition of a disabled vehicle. The renter must notify the company of any collision, fill out a company accident report when requested, and provide the company with copies of any police reports the vehicle operator receives.⁵⁰

Travelers who do not rent cars using their government charge cards should authenticate their official travel status by presenting their travel orders or authorizations; by doing so, they increase the chances that the MTMC Agreement will apply and cover any subsequent damages. The MTMC Agreement does not *require* travelers to do so, but doing so will make it clear that the MTMC Agreement will apply. Under the Travel and Transportation Reform Act of 1998⁵¹ and the MTMC Agreement, travelers *must* use their government charge cards to charge car rentals when they present the card to authenticate their official status.⁵² The terms of the MTMC Agreement

supersede any individual rental agreement, except when the government agency rents under a special, promotional government, affinity, or discounted rental program.⁵³

If damage to the rental vehicle falls under one of the listed exceptions (for example, when the renter drives the vehicle off-road), the rental agency must send any bill for damages to the traveler's unit, not directly to the traveler.⁵⁴ If the unit determines that the traveler was acting within the scope of his employment when the damage occurred, then it must pay the rental agency from unit TDY funds, using its servicing Defense Finance and Accounting Service office.⁵⁵ If the unit determines that the traveler was not acting within the scope of his employment when the damage occurred (for example, driving under the influence of alcohol), then it will inform the rental agency, and the rental agency may proceed against the traveler individually.⁵⁶

Finally, if neither government credit card nor MTMC Agreement coverage is available, unit TDY funds must cover any damages to a rental vehicle resulting from a government driver's in-scope acts.⁵⁷ The traveler is individually responsible for out-of-scope claims of all kinds, except for claims arising outside the United States under the Foreign Claims Act.⁵⁸

Army Regulation 27-20 governs the payment of third-party tort claims not covered under the MTMC Agreement.⁵⁹ Units should instruct all claimants to file the *Standard Form 95* claim form at their servicing military claims offices. Claimants involved in in-scope incidents with cars rented from MTMC Agreement-participating agencies should pursue timely claims

45. *Id.* para. 9(c).

46. *Id.* para. 7.

47. *Id.* para. 8.

48. Telephone Interview with Frances Adams, Air Force Tort and Litigation Service (Sept. 16, 2002).

49. MTMC Agreement, *supra* note 34, para. 2.

50. *Id.* para. 11.

51. Pub. L. 105-264, 112 Stat. 2350 (codified as amended in scattered sections of 5, 12, and 31 U.S.C. (2000)); *see also* U.S. DEP'T OF DEFENSE, JOINT FED. TRAVEL REG. para. 030301A (Nov. 2002) [hereinafter JFTR].

52. MTMC Agreement, *supra* note 34, para. 7.

53. *Id.* "The renter will not be bound by any stipulation in any rental agency agreement that is inconsistent with the agreement provisions." *Id.*

54. *Id.* para. 9c.

55. JFTR, *supra* note 51, ch. 3, para. U3415c(2)(b)-(c).

56. MTMC Agreement, *supra* note 34, para. 9c.

57. JFTR, *supra* note 51, ch. 3, para. U3415c(2)(b)-(c).

58. 10 U.S.C. § 2734 (2000).

59. *See* U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS chs. 3-4 (14 Nov. 2002).

against the participating rental companies to mitigate their damages. Their claims against the United States will be held in abeyance pending the outcome of the claimant's claim against the rental company directly.⁶⁰

The current MTMC Agreement has closed the window on government liability for damage to participating companies' rental cars. For damages to rental vehicles resulting from simple negligence between 1 November 2001 and 1 October 2002, however, unit travel budgets remain exposed to large liability payments. Although amendments to the MTMC Agreement

have reduced units' exposure to liability, unit travel budgets must now absorb an additional five dollars per vehicle per day government administrative rate supplement. Units can limit their exposure to liability by training their travelers to proactively avoid potential liability. Units must stress safe driving, use of the government VISA card, timely reporting of damages to VISA, and the importance of renting from agencies that have signed the MTMC Agreement. Major Dribben.

60. Interview with Joseph H. Rouse, Deputy Chief, Tort Claims Division, U.S. Army Claims Service, Fort Meade, Maryland (August 21, 2002).

CLE News

1. Resident Course Quotas

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

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

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, extension 304.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

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

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

2. TJAGSA CLE Course Schedule

2003

January 2003

5-17 January 2003 JAOAC (Phase II) (5F-F55).

6-10 January 2003 USAREUR Contract & Fiscal Law CLE (5F-F15E).

6-10 January 2003 USAREUR Income Tax Law CLE (5F-F28E).

7 January - 31 January 160th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

13-17 January 2003 PACOM Income Tax Law CLE (5F-F28P).

21-24 January 2003 Hawaii Income Tax Law CLE (5F-F28H).

22-24 January 9th RC General Officers' Legal Orientation Course (5F-F3).

27-31 January 175th Senior Officers' Legal Orientation Course (5F-F1).

27-29 January 2003 Hawaii Estate Planning Course.

27 January - 28 March 9th Court Reporter Course (512-27DC5).

31 January - 11 April 160th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

February 2003

3-7 February 79th Law of War Course (5F-F42).

10-14 February 2003 Maxwell AFB Fiscal Law Course.

10-14 February 2002 USAREUR Operational Law CLE (5F-F47E) (**Cancelled**).

24-28 February 65th Fiscal Law Course (5F-F12).

24 February - 7 March 39th Operational Law Course (5F-F47).

March 2003

3-7 March 66th Fiscal Law Course (5F-F12).

10-14 March 27th Administrative Law for Military Installations Course (5F-F24).

17-21 March 4th Advanced Contract Law Course (5F-F103).

17-28 March	19th Criminal Law Advocacy Course (5F-F34).	9-13 June	10th Fiscal Law Comptroller Accreditation Course (Alaska) (5F-F14-A).
24-28 March	176th Senior Officers' Legal Orientation Course (5F-F1).	9-13 June	33d Staff Judge Advocate Course (5F-F52).
31 March - 4 April	14th Law for Paralegal NCOs Course (512-27D/20/30).	16-20 June	7th Chief Paralegal NCO Course (512-27D-CLNCO).
April 2003		16-20 June	14th Senior Paralegal NCO Management Course (512-27D/40/50).
7-11 April	9th Fiscal Law Comptroller Accreditation Course (Korea).	23-27 June	14th Legal Administrators' Course (7A-550A1).
14-17 April	2003 Reserve Component Judge Advocate Workshop (5F-F56).	27 June - 5 September	161st Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
21-25 April	1st Ethics Counselors' Course (5F-F202).	July 2003	
21-25 April	14th Law for Paralegal NCOs Course (512-27D/20/30).	7 July - 1 August	4th JA Warrant Officer Advanced Course (7A0550A2).
28 April - 9 May	150th Contract Attorneys' Course (5F-F10).	14-18 July	80th Law of War Course (5F-F42).
28 April - 16 May	46th Military Judge Course (5F-F33).	21-25 July	34th Methods of Instruction Course (5F-F70).
28 April - 27 June	10th Court Reporter Course (512-27DC5).	28 July - 8 August	151st Contract Attorneys Course (5F-F10).
May 2003		August 2003	
5-16 May	2003 PACOM Ethics Counselors Workshop (5F-F202-P).	4-8 August	21st Federal Litigation Course (5F-F29).
12-16 May	52d Legal Assistance Course (5F-F23).	4 August - 3 October	11th Court Reporter Course (512-27DC5).
June 2003		11-22 August	40th Operational Law Course (5F-F47).
2-6 June	6th Intelligence Law Course (5F-F41).	11 August 03 - 22 May 04	52d Graduate Course (5-27-C22).
2-6 June	177th Senior Officers' Legal Orientation Course (5F-F1).	25-29 August	9th Military Justice Managers Course (5F-F31).
2-27 June	10th JA Warrant Officer Basic Course (7A-550A0).	September 2003	
3-27 June	161st Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	8-12 September	178th Senior Officers' Legal Orientation Course (5F-F1).
9-11 June	6th Team Leadership Seminar (5F-F52S).	8-12 September	2003 USAREUR Administrative Law CLE (5F-F24E).

15-26 September	20th Criminal Law Advocacy Course (5F-F34).	2-5 December	2003 Government Contract & Fiscal Law Symposium (5F-F11).
16 September - 9 October	162d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	8-12 December	7th Income Tax Law Course (5F-F28).
October 2003		January 2004	
6-10 October	2003 JAG Worldwide CLE (5F-JAG).	4-16 January	2004 JAOAC (Phase II) (5F-F55).
10 October - 18 December	162d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).	5-9 January	2004 USAREUR Contract & Fiscal Law CLE (5F-F15E).
20-24 October	57th Federal Labor Relations Course (5F-F22).	5-9 January	2004 USAREUR Income Tax Law CLE (5F-F28E).
20-24 October	2003 USAREUR Legal Assistance CLE (5F-F23E).	6-29 January	163d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
22-24 October	2d Advanced Labor Relations Course (5F-F21).	12-16 January	2004 PACOM Income Tax Law CLE (5F-F28P).
26-27 October	8th Speech Recognition Training (512-27DC4).	20-23 January	2004 Hawaii Income Tax Law CLE (5F-F28H).
27-31 October	3d Domestic Operational Law Course (5F-F45).	21-23 January	10th Reserve Component General Officers Legal Orientation Course (5F-F3).
27-31 October	67th Fiscal Law Course (5F-F12).	26-30 January	9th Fiscal Law Comptroller Accreditation Course (Hawaii) (5F-F14-H).
27 October - 7 November	6th Speech Recognition Course (512-27DC4).	26-30 January	180th Senior Officers' Legal Orientation Course (5F-F1).
November 2003		26 January - 26 March	12th Court Reporter Course (512-27DC5).
3-7 November	53d Legal Assistance Course (5F-F23).	30 January - 9 April 04	163d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
12-15 November	27th Criminal Law New Developments Course (5F-F35).	February 2004	
17-21 November	3d Court Reporting Symposium (512-27DC6).	2-6 February	81st Law of War Course (5F-F42).
17-21 November	179th Senior Officers' Legal Orientation Course (5F-F1).	9-13 February	2004 Maxwell AFB Fiscal Law Course.
17-21 November	2003 USAREUR Operational Law CLE (5F-F47E).	23-27 February	68th Fiscal Law Course (5F-F12).
December 2003		23 February - 5 March	41st Operational Law Course (5F-F47).
1-5 December	2003 USAREUR Criminal Law CLE (5F-F35E).		

March 2004		7-11 June	34th Staff Judge Advocate Course (5F-F52).
1-5 March	69th Fiscal Law Course (5F-F12).	12-16 June	82d Law of War Workshop (5F-F42).
8-12 March	28th Administrative Law for Military Installations Course (5F-F24).	14-18 June	8th Chief Paralegal NCO Course (512-27D-CLNCO).
15-19 March	5th Contract Litigation Course (5F-F102).	14-18 June	15th Senior Paralegal NCO Management Course (512-27D/40/50).
15-26 March	21st Criminal Law Advocacy Course (5F-F34).	21-25 June	15th Legal Administrators' Course (7A-550A1).
22-26 March	181st Senior Officers' Legal Orientation Course (5F-F1).	25 June - 2 September	164th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
April 2004		July 2004	
12-15 April	2004 Reserve Component Judge Advocate Workshop (5F-F56).	12 July - 6 August	5th JA Warrant Officer Advanced Course (7A-550A2).
19-23 April	6th Ethics Counselors' Course (5F-F202).	19-23 July	35th Methods of Instruction Course (5F-F70).
19-23 April	15th Law for Paralegal NCOs Course (512-27D/20/30).	27 July - 6 August	153d Contract Attorneys' Course (5F-F10).
26 April - 7 May	152d Contract Attorneys' Course (5F-F10).	August 2004	
26 April - 14 May	47th Military Judge Course (5F-F33).	2-6 August	22d Federal Litigation Course (5F-F29).
26 April - 25 June	13th Court Reporter Course (512-27DC5).	2 August - 1 October	14th Court Reporter Course (512-27DC5).
May 2004		9-20 August	42d Operational Law Course (5F-F47).
10-14 May	53d Legal Assistance Course (5F-F23).	9 August - 22 May 05	53d Graduate Course (5-27-C22).
24-28 May	182d Senior Officers Legal Orientation Course (5F-F1).	23-27 August	10th Military Justice Managers' Course (5F-F31).
June 2004		September 2004	
1-3 June	6th Procurement Fraud Course (5F-F101).	7-10 September	2004 USAREUR Administrative Law CLE (5F-F24E).
1-25 June	11th JA Warrant Officer Basic Course (7A-550A0).	13-17 September	54th Legal Assistance Course (5F-F23).
2-24 June	164th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).	13-24 September	22d Criminal Law Advocacy Course (5F-F34).
7-9 June	7th Team Leadership Seminar (5F-F52S).		

October 2004

4-8 October 2004 JAG Worldwide CLE
(5F-JAG).

3. Civilian-Sponsored CLE Courses

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

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys
in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar
Association
Committee on Continuing Professional
Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744

(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	31 December, admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program, hours must be completed in compliance period July 1 to June 30
Kentucky	10 August; 30 June is the end of the educational year
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually

Missouri	31 July annually	Washington	31 January triennially
Montana	1 April annually	West Virginia	31 July biennially
Nevada	1 March annually	Wisconsin*	1 February biennially
New Hampshire**	1 August annually	Wyoming	30 January annually
New Mexico	prior to 30 April annually	* Military Exempt	
New York*	Every two years within thirty days after the attorney's birthday	** Military Must Declare Exemption	
North Carolina**	28 February annually		
North Dakota	31 July annually		
Ohio*	31 January biennially		
Oklahoma**	15 February annually		
Oregon	Period end 31 December; due 31 January		
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December		
Rhode Island	30 June annually		
South Carolina**	1 January annually		
Tennessee*	1 March annually		
	Minimum credits must be completed by last day of birth month each year		
Texas	Minimum credits must be completed by last day of birth month each year		
Utah	31 January		
Vermont	2 July annually		
Virginia	31 October annually		

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

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2003**, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2004 ("2004 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2004 JAOAC will be held in January 2004, and is a prerequisite for most JA captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2003). If the student receives notice of the need to re-do any examination or exercise after 1 October 2003, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2004 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel J T. Parker, telephone (800) 552-3978, ext. 357, or e-mail JT.Parker@hqda.army.mil.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2002-2003 Academic Year)

<u>DATE</u>	<u>TRNG SITE/HOST UNIT</u>	<u>GENERAL OFFICER AC/RC</u>	<u>SUBJECT</u>	<u>ACTION OFFICER</u>
1-2 Feb 03	Columbus, OH 9th LSO	BG Black/ COL(P) Schneider	Administrative Law (Legal Assistance); Contract Law	1LT Keith Blosser (614) 554-4355 kblosser@columbus.rr.com
1-2 Feb 03	Seattle, WA 70th RSC/WAARNG	MG Marchand/ BG Arnold	International Law; Criminal Law	LTC John Felleisen (253) 798-7894 john.felleisen@usarmy.mil
15-16 Feb 03	Indianapolis, IN INARNG	BG Wright/ COL(P) Schneider	Contract Law; International Law	LTC George Thompson (317) 247-3491 george.Thompson@in.ngb.army.mil
21-23 Feb 03	Salt Lake City, UT 96th RSC/87th LSO	BG Black/ BG Pietsch	Contract Law; Administrative Law	LTC Lawrence A. Schmidt (801) 523-4322/4408 Lawrence.Schmidt@ut.ngb.army.mil
21-23 Feb 03	W. Palm Beach, FL 174th LSO/FLARNG	MG Marchand BG Arnold	Administrative Law; International Law	COL John Mantooth (305) 779-4022 john.mantooth@se.usar.army.mil LTC Elizabeth Masters (904) 823-0132 Elizabeth.masters@fl.ngb.army.mil
8-9 Mar 03	Washington, DC 10th LSO	BG Black BG Pietsch	Criminal Law; Administrative Law	CPT Mike Zito (301) 599-4440 mzito@juno.com
22-23 Mar 03	West Point, NY	TBA	Eastern States Senior JAG Workshop	COL Randall Eng (718) 520-3482 reng@courts.state.ny.us
26-27 Apr 03	Boston, MA 94th RSC	MG Marchand/ BG Arnold	Administrative Law; Contract Law	SSG Neoma Rothrock (978) 796-2143 neoma.rothrock@us.army.mil
16-18 May 03	Kansas City, MO 89th RSC	BG Carey/ BG Pietsch	Criminal Law; International Law	MAJ Anna Swallow (316) 781-1759, est. 1228 anna.swallow@usarc-emh2.army.mil SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
17-18 May 03	Birmingham, AL 81st RSC	BG Wright/ BG Arnold	Criminal Law; International Law	CPT Joseph Copeland (205) 795-1980 joseph.copeland@se.usar.army.mil
	Charlottesville, VA OTJAG	All General Officers scheduled to attend	Spring Worldwide CLE	

* Prospective students may enroll for the on-sites through the Army Training Requirements and Resources System (ATRRS) using the designated Course and Class Number.

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available Through the DTIC, see the September 2002 issue of *The Army Lawyer*.

3. Regulations and Pamphlets

For detailed information, see the September 2002 issue of *The Army Lawyer*.

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

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

b. Access to the JAGCNet:

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

(a) Active U.S. Army JAG Corps personnel;

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

(c) U.S. Army JAG Corps civilian personnel;

(d) FLEP students;

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

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

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

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

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

(c) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “password” in the ap-

propriate fields.

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

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

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

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

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2002 issue of *The Army Lawyer*.

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General’s School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (434) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, <http://ako.us.army.mil>, and then forward your office e-mail to this new account during your stay at the School. Dial-up internet access is available in the TJAGSA billets.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will

connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (434) 972-6264. CW3 Tommy Worthey.

7. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribu-

tion of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Dan Lavering, The Judge Advocate General's School, United States Army, ATTN: JAGS-ADL-L, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 488-6306, commercial: (434) 972-6306, or e-mail at Daniel.Lavering@hqda.army.mil.

Author Index

The Army Lawyer
January 2002-December 2002

-A-

American Bar Association Task Force on Terrorism and the Law, *Report and Recommendations on Military Commission*, Mar. 2002, at 8.

-B-

Bovarnick, Major Jeff A. & Captain Jackie Thompson, *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, June 2002, at 13.

-C-

Causey, Lieutenant Colonel Nathanael, *Contractor Challenges to the Government's Evaluation of Past Performance During the Source Selection Process: "Thou Protesteth Too Much?"*, Aug. 2002, at 25.

Cook, Lieutenant Colonel Holly O'Grady, *Leader Development: Tactics, Techniques, and Procedures for Working with Union Employees*, Oct./Nov. 2002, at 13.

-D-

Davidson, Lieutenant Colonel (Ret.) Michael J., *Claims Involving Fraud: Contracting Officer Limitations During Procurement Fraud Investigations*, Sept. 2002, at 21.

-E-

Ekman, Major Christina E., *New Developments in the Law of Discovery: When is Late Too Late, and Does Article 46, UCMJ, Have Teeth?*, May 2002, at 18.

-F-

Faculty, Contract and Fiscal Law Department, TJAGSA, *Contract and Fiscal Law Developments of 2001—The Year in Review*, Jan./Feb. 2002, at i.

-G-

Garrett, Lieutenant Colonel James F., *Foreword, Military Justice Symposium—Volume I*, Apr. 2002, at 1.

Garrett, Lieutenant Colonel James F., *Recent Developments in Unlawful Command Influence: "I really didn't say everything I said!"*, May 2002, at 13.

-H-

Harder, Major Tyler J., *All Quiet on the Jurisdictional Front . . . , Except for the Tremors from the Service Courts*, Apr. 2002, at 3.

Harder, Major Tyler J., *Recent Developments in Sentencing: Tying Up Loose Ends*, May 2002, at 44.

Hargis, Lieutenant Colonel Michael J. & Lieutenant Colonel Martin H. Sitler, U.S. Marine Corps, *Annual Review of Developments in Instructions—2001*, Aug. 2002, at 1.

Hoegel, Captain Howard H. III, *ROE . . . also a Matter of Doctrine*, June 2002, at 1.

Holzer, Major Mark W., *Purple Haze: Military Justice in Support of Joint Operations*, July 2002, at 1.

Huestis, Major Bradley J., *New Developments in Pretrial Procedures: Evolution or Revolution?*, Apr. 2002, at 20.

-L-

Lacey, Major Michael O., *Military Commissions: A Historical Survey*, Mar. 2002, at 41.

Landrum, Lieutenant Colonel Bruce D., U.S. Marine Corps, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, Sept. 2002, at 1.

Larkin, Captain Kurt G., *The "Discretionary Function" and "Assault and Battery" Exceptions to the Federal Tort Claims Act (FTCA): When They Apply and How They Work Together*, Dec. 2002, at 13.

-M-

MacDonnell, Major Timothy C., *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, Mar. 2002, at 19.

McCormick, Major Michael J., *A Primer on the European Union and Its Legal System*, Dec. 2002, at 1.

-N-

Nardotti, Major General (Ret.) Michael J., *Military Commissions*, Mar. 2002, at 1.

-P-

Patoir, Major Steven R., *Bid Protests: An Overview for Agency Counsel*, July 2002, at 29.

-R-

Roberston, Major David H., *Truth is Stranger than Fiction: A Year in Professional Responsibility*, May 2002, at 1.

Rose, Major Charles H., III, *New Developments in Evidence: Counsel, Half-Right Face, Front Leaning Rest Position—Move!*, Apr. 2002, at 63.

-S-

Sitler, Lieutenant Colonel Martin H., U.S. Marine Corps, & Lieutenant Colonel Michael J. Hargis, *Annual Review of Developments on Instructions—2001*, Aug. 2002, at 1.

Smith, Major Kevin D., *Navigating the Rape Shile Maze: An Advocate's Guide to MRE 412*, Oct./Nov. 2002, at 1.

Stahlman, Lieutenant Colonel Michael R., U.S. Marine Corps, *New Developments in Search and Seizure: More Than Just a Matter of Semantics*, May 2002, at 31.

Stahlman, Lieutenant Colonel Michael R., U. S. Marine Corps, *New Developments on the Urinalysis Front: A Green Light in Naked Urinalysis Prosecutions?*, Apr. 2002, at 14.

-T-

Thompson, Captain Jackie & Major Jeff A. Bovarnick, *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, June 2002, at 13.

-V-

Velloney, Major David D., *Recent Developments in Substantive Criminal Law: Broadening Crimes and Limiting Convictions*, Apr. 2002, at 41.

Subject Index

The Army Lawyer
January 2002-December 2002

-C-

Claims Involving Fraud: Contracting Officer Limitations During Procurement Fraud Investigations, Lieutenant Colonel (Ret.) Michael J. Davidson, Sept. 2002, at 21.

CONTRACTS (see also PROCUREMENT)

Bid Protests: An Overview for Agency Counsel, Major Steven R. Patoir, July 2002, at 29.

Claims Involving Fraud: Contracting Officer Limitations During Procurement Fraud Investigations, Lieutenant Colonel (Ret.) Michael J. Davidson, Sept. 2002, at 21.

Contract and Fiscal Law Developments of 2001—The Year in Review, Faculty, Contract and Fiscal Law Department, TJAGSA, Jan./Feb. 2002, at i.

CONTRACTORS

Contractor Challenges to the Government's Evaluation of Past Performance During the Source Selection Process: "Thou Protesteth Too Much?", Lieutenant Colonel Nathanel Causey, Aug. 2002, at 25.

COURTS-MARTIAL

Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts, Major Timothy C. MacDonnell, March 2002, at 19.

-D-

New Developments in the Law of Discovery: When is Late Too Late, and Does Article 46, UCMJ, Have Teeth?, Major Christina E. Ekman, May 2002.

-E-

EVIDENCE

New Developments in Evidence: Counsel, Half-Right Face, Front Leaning Rest Position—Move!, Major Charles H. Rose, III, Apr. 2002, at 63.

-F-

FEDERAL TORT CLAIMS ACT

The "Discretionary Function" and "Assault and Battery" Exceptions to the Federal Tort Claims Act (FTCA): When They Apply and How They Work Together, Captain Kurt G. Larkin, Dec. 2002, at 13.

FOURTH AMENDMENT

New Developments in Search and Seizure: More Than Just a Matter of Semantics, Lieutenant Colonel Michael R. Stahlman, United States Marine Corps, May 2002, at 31.

INSTRUCTIONS

Annual Review of Developments on Instructions—2001, Lieutenant Colonel Martin H. Sitler, U.S. Marine Corps & Lieutenant Colonel Michael J. Hargis, Aug. 2002, at 1.

Annual Review of Developments on Instructions—2001, Lieutenant Colonel Michael J. Hargis & Lieutenant Colonel Martin H. Sitler, U.S. Marine Corps, Aug. 2002, at 1.

INTERNATIONAL AND OPERATIONAL LAW

A Primer on the European Union and Its Legal System, Major Michael J. McCormick, Dec. 2002, at 1.

Globalization of Justice, The: The Rome Statute of the International Criminal Court, Lieutenant Colonel Bruce D. Landrum, U.S. Marine Corps, Sept. 2002, at 1.

ROE . . . also a Matter of Doctrine, Captain Howard H. Hoege, June 2002, at 1.

-J-

JURISDICTION

All Quiet on the Jurisdictional Front . . . , Except for the Tremors from the Service Courts, Major Tyler J. Harder, Apr. 2002, at 3.

-M-

MILITARY COMMISSIONS (see also Military Tribunals)

American Bar Association Task Force on Terrorism and the Law, Report and Recommendations on Military Commission, Mar. 2002, at 8.

Military Commissions, Major General (Ret.) Michael J. Nardotti, Mar. 2002, at 1.

Military Commissions: A Historical Survey, Major Michael O. Lacey, Mar. 2002, at 41.

Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts, Major Timothy C. MacDonnell, Mar. 2002, at 19.

MILITARY JUSTICE

Foreword, Military Justice Symposium—Volume I, Lieutenant Colonel James F. Garrett, Apr. 2002, at 1.

Purple Haze: Military Justice in Support of Joint Operations, Major Mark W. Holzer, July 2002, at 1.

Recent Developments in Substantive Criminal Law: Broadening Crimes and Limiting Convictions, Major David D. Veloney, Apr. 2002, at 41.

Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne, Major Jeff A. Bovarnick & Captain Jackie Thompson, June 2002, at 13.

MILITARY RULE OF EVIDENCE (MRE) 412

Navigating the Rape Shile Maze: An Advocate's Guide to MRE 412, Major Kevin D. Smith, Oct./Nov. 2002, at 1.

MILITARY TRIBUNALS

American Bar Association Task Force on Terrorism and the Law, Report and Recommendations on Military Commission, Mar. 2002, at 8.

Military Commissions, Major General (Ret.) Michael J. Nardotti, Mar. 2002, at 1.

Military Commissions: A Historical Survey, Major Michael O. Lacey, Mar. 2002, at 41.

Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions

Between the Two Courts, Major Timothy C. MacDonnell, Mar. 2002, at 19.

-P-

PRETRIAL PROCEDURE

New Developments in Pretrial Procedures: Evolution or Revolution?, Major Bradley J. Huestis, Apr. 2002, at 20.

PROCUREMENT (see also CONTRACTS)

Contract and Fiscal Law Developments of 2001—The Year in Review, Faculty, Contract and Fiscal Law Department, TJAGSA, Jan. 2002, at i.

PROFESSIONAL RESPONSIBILITY

Truth is Stranger than Fiction: A Year in Professional Responsibility, Major David H. Robertson, May 2002, at 1.

-S-

New Developments in Search and Seizure: More Than Just a Matter of Semantics, Lieutenant Colonel Michael R. Stahlman, U. S. Marine Corps, May 2002, at 31.

SENTENCING

Recent Developments in Sentencing: Tying up Loose Ends, Major Tyler J. Harder, May 2002, at 44.

-U-

UNIFORM CODE OF MILITARY JUSTICE

Recent Developments in Substantive Criminal Law: Broadening Crimes and Limiting Convictions, Major David D. Veloney, Apr. 2002, at 41.

UNION EMPLOYEES

Leader Development: Tactics, Techniques, and Procedures for Working with Union Employees, Lieutenant Colonel Holly O'Grady Cook, Oct./Nov. 2002, at 13.

UNLAWFUL COMMAND INFLUENCE

Recent Developments in Unlawful Command Influence: "I really didn't say everything I said!", Lieutenant Colonel James F. Garrett, May 2002, at 13.

URINALYSIS

New Developments on the Urinalysis Front: A Green Light in Naked Urinalysis Prosecutions?, Lieutenant Colonel Michael

Index of TJAGSA Practice Notes

The Army Lawyer
January 2002-December 2002

ADMINISTRATIVE & CIVIL LAW NOTE

Army Substance Abuse Program, Sept. 2002, at 51.

CRIMINAL LAW NOTE

Army Publishes Significant Revision to AR 27-10, Sept. 2002, at 48.

ENVIRONMENTAL LAW NOTES

Army Corps of Engineers Finalizes Regulations on Nationwide Permits, Mar. 2002, at 50.

Mitigation Measures in Analyses Under the National Environmental Policy Act (NEPA), Sept. 2002, at 44.

ETHICS NOTE

The General Officer Aide and the Potential for Misuse, Major Tuckey, Aug. 2002, at 36.

FAMILY LAW NOTE

A QuickLook at Parental Alienation Syndrome, Mar. 2002, at 53.

LEGAL ASSISTANCE NOTES

"As Is"—Four Letters, Two Words Your Client Didn't Bother to Read or Understand, July 2002, at 47.

"Identity Theft" and DD Form 214: Georgia's Legislative Solution a Model for Others?, Aug. 2002, at 50.

New Immigration and Naturalization Rules to Assist Soldiers Fighting the War on Terrorism, Dec. 2002, at 17.

State-by-State Analysis of Divisibility of Military Retired Pay, Aug. 2002, at 42.

What Do You Mean, I Need a Permission Slip Before I Can Ship My Car Overseas?, Mar. 2002, at 48.

TAX LAW NOTES

Earned Income Credit: New Rules Could Ease Qualification, June 2002, at 36.

IRS Says No Tax Implications for Personal Use of Frequent Flyer Miles, Mar. 2002, at 51.

Individual Paid Subscriptions to *The Army Lawyer*

Attention Individual Subscribers!

The Government Printing Office offers a paid subscription service to *The Army Lawyer*. To receive an annual individual paid subscription (12 issues) to *The Army Lawyer*, complete and return the order form below (photocopies of the order form are acceptable).

Renewals of Paid Subscriptions

To know when to expect your renewal notice and keep a good thing coming . . . the Government Printing Office mails each individual paid subscriber only one renewal notice. You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSUE" on the top line of the mailing label as shown in this example:

A renewal notice will be sent when this digit is 3.



ARLAWSMITH212J	ISSUE00 <u>3</u> R 1
JOHN SMITH	
212 MAIN STREET	
FORESTVILLE MD 20746	

The numbers following ISSUE indicate how many issues remain in the subscription. For example, ISSUE001 indicates a subscriber will receive one more issue. When the number reads ISSUE000, you have received your last issue unless you

renew. You should receive your renewal notice around the same time that you receive the issue with ISSUE003.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

Inquiries and Change of Address Information

The individual paid subscription service for *The Army Lawyer* is handled solely by the Superintendent of Documents, not the Editor of *The Army Lawyer* in Charlottesville, Virginia. Active Duty, Reserve, and National Guard members receive bulk quantities of *The Army Lawyer* through official channels and must contact the Editor of *The Army Lawyer* concerning this service (see inside front cover of the latest issue of *The Army Lawyer*).

For inquiries and change of address for individual paid subscriptions, fax your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, D.C. 20402



Order Processing
Code: 5937

Easy Secure Internet:
bookstore.gpo.gov

Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2250

Mail: Superintendent of Documents
PO Box 371954
Pittsburgh, PA 15250-7954

YES, enter my subscription(s) as follows:

_____ subscription(s) of the *Army Lawyer* (ARLAW) for \$45 each (\$63 foreign) per year.

_____ subscription(s) of the *Military Law Review* (MILR) for \$20 each (\$28 foreign) per year. The total cost of my order is \$_____.

Prices include first class shipping and handling and is subject to change.



Check method of payment:

Check payable to Superintendent of Documents

SOD Deposit Account

VISA MasterCard Discover/NOVUS American Express

(expiration date)

Thank you for your order!

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

Authorizing signature

11/02

By Order of the Secretary of the Army:

ERIC K. SHINSEKI
General, United States Army
Chief of Staff

Official:



JOEL B. HUDSON
Administrative Assistant to the
Secretary of the Army
0301602

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-ADL-P
Charlottesville, VA 22903-1781

PERIODICALS

PIN: 080515-000