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Major Samuel W. Kan

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Setting Servicemembers Up for Success: Buying a Home, a Legal and Financial Analysis

Major Samuel W. Kan*

Owning a home is one of the most tried-and-true paths to wealth accumulation in our economy. . . . However, it takes more than a down payment to put people on the path that leads to ownership. Borrowers must be able to sustain their loans over the long term. Part of sustaining a loan is picking the right loan. Over the past several years, there has been an explosion of new and novel mortgage products But to the extent that these new mortgage products promote home buying decisions that are premised on unrealistic rates of home appreciation, they raise concerns. . . . Homeowners need to understand . . . [the] risks and thus financial evaluation, as well as a down payment, is a key ingredient for creating solid footing on the path of homeownership.¹

I. Introduction

Before purchasing a home, servicemembers need to do a thorough legal and financial analysis, considering their housing options, personal situations, and market conditions. To avoid future legal and financial problems, servicemembers should incorporate numerous legal and financial disciplines, including tax law, consumer law, landlord-tenant law, real estate finance law, bankruptcy law, family law, and military law, into this analysis. This article advocates a three-step approach for conducting an effective housing analysis and addresses significant issues servicemembers may encounter in the home buying process.

Part II of this article encourages servicemembers to identify and consider alternatives to buying a home—renting a residence, living in military housing, or residing in privatized military housing. Part II also addresses the advantages and disadvantages of buying a home and then draws a comparison to home-buying alternatives by discussing the advantages and disadvantages of renting a residence, living in military housing, and residing in privatized military housing.

Part III emphasizes the significance of evaluating a decision to purchase a home in light of an individual's personal situation, current market conditions, and the specific real estate property. This step highlights the importance of early financial planning and property selection. Part III not only addresses acquiring the right type of mortgage under the most advantageous terms but also addresses appraising the property in a manner that will maximize an individual's ability to later sell or lease the property. Finally, Part III goes further by discussing the importance of the source of funding for down payments and mortgage payments and the consequences of the property's location in light of family law considerations.

Part IV provides a quantitative starting point for analyzing whether it is more advantageous to purchase a home, rent a residence, or live in military or privatized military housing. As part of this analysis, Part IV stresses the importance of determining the potential income cash flow of a property. By conducting an income cash flow analysis based on renting the property to tenants, servicemembers can identify in advance of buying a property whether they will be able to keep the property after relocating to a new duty assignment. Part IV also recognizes that many factors cannot be easily quantified and will need to be prioritized differently depending on a servicemember's situation. To this end, Part IV suggests using mechanisms such as a decision matrix² to address these significant concerns.

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¹ Mark W. Olson, Governor, Fed. Reserve Bd., Speech at the Community Development Policy Summit, Cleveland, Ohio: Exploring the Benefits and Challenges of an Ownership Society (June 23, 2005) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2005/20050623/default.htm>) [Olson Speech].

² CAPTAIN RICHARD B. STICKERS, DECMAT PROGRAM FOR WINDOWS VERSION 2.2 (1998), available at <http://www.dcsswift.com/military/software.html> (allowing consumers to download the DECMAT software directly from the internet for free). See *infra* Appendix D (allowing decision makers to use a decision matrix to compare different courses of action by prioritizing and evaluating different factors).

II. Step One: Understanding Available Options

Servicemembers should consider all of their housing options before purchasing a home. The full range of housing options typically includes buying, renting, living in military housing, or residing in privatized military housing. At some duty locations, servicemembers may be required to live in military housing, foreclosing the need to consider other housing options. At other locations, military and privatized military housing may not be available, forcing servicemembers to rent or buy. Still, at other locations, servicemembers may have all of these housing options readily available and may need to weigh their options according to their personal financial situation and market conditions. Regardless, servicemembers need to conduct a housing analysis in a manner that maximizes the advantages and minimizes the disadvantages of their choice, thereby reducing unnecessary exposure to legal and financial risk.

A. Buying Property

1. Advantages

As previously stated, owning a home is “one of the most tried-and-true paths to wealth accumulation in our economy.”³ It is not surprising, therefore, that buying a home has numerous financial advantages.⁴ First and foremost, buying a home “builds wealth in two ways: through the ‘forced savings’ of paying down a mortgage, and through appreciation -- the rise in the home’s value over time.”⁵ Simultaneously, buying a home allows servicemembers to diversify their financial portfolios through real estate equity⁶ while taking advantage of the principle of leverage.⁷ Specifically, because real estate investments allow for a higher percentage of debt to fair market value compared to other types of investment, servicemembers might experience a significant rate of return on a small cash investment.⁸

In addition to building wealth, owning a home allows servicemembers to reduce certain expenses by deducting mortgage interest and mortgage interest points,⁹ mortgage prepayment penalties,¹⁰ property taxes,¹¹ and casualty losses.¹² These deductions are especially valuable to servicemembers because they “receive tax-free quarters allowances to pay interest expenses, which are themselves tax deductible.”¹³ Additionally, upon the sale of their principal residence, homeowners can

³ Olson Speech, *supra* note 1.

⁴ The following analysis will vary considerably based on the type of property purchased and the use of the property. Specifically, the analysis of purchasing a single family residence differs from that of a condominium, shares in a cooperative, a mobile home, or a multi-family property partially used as a rental unit. For example, “Cooperatives (coops) are an arrangement in which you don’t hold title to your individual unit; instead, you own stock in a corporation that owns the development.” MARTIN NISSENBAUM ET AL., ERNST & YOUNG’S PERSONAL FINANCIAL PLANNING GUIDE 339 (5th ed. 2004). Although coops are normally less expensive than single family residences and provide amenities similar to apartment complexes, they involve unpredictable maintenance fees and potential mismanagement by the corporation board. *Id.* Condominiums (condos) are “an arrangement in which you actually hold title to the unit you live in; you also own an interest in the development’s land and common areas.” *Id.* at 340.

⁵ Liz Pulliam Weston, *Why It’s Smarter to Buy than Rent*, MSN MONEY, Jan. 15, 2006, <http://moneycentral.msn.com/content/Banking/Homebuyingguide/P72655.asp>.

⁶ See NISSENBAUM, *supra* note 4, at 329.

⁷ See CARLTON H. SHEETS, HOW TO BUY YOUR FIRST HOME OR INVESTMENT PROPERTY WITH NO DOWN PAYMENT STEP BY STEP MANUAL 2-4 to -6 (3d ed. 1997).

⁸ See D. BARLOW BURKE, JR., REAL ESTATE TRANSACTIONS, EXAMPLES AND EXPLANATIONS 363 (1993). For example, transaction costs aside, if a servicemember pays \$100,000 for a home and the home increases in value by \$10,000, the servicemember receives a ten percent return on his investment SHEETS, *supra* note 7, at 2-5. If the servicemember makes a \$10,000 down payment on a mortgage, and the home goes up in value \$10,000, the servicemember makes a 100% return on his investment by using other people’s money. See *id.* This is a simple example of the benefits of leveraged investment. The effects of transaction costs will be considered later in the article. See *infra* pp. 4-6, apps. A and B.

⁹ See INTERNAL REVENUE SERV., DEP’T OF TREASURY, PUB. 17 YOUR FEDERAL INCOME TAX 144-47 (2005) [hereinafter PUB. 17] (discussing the deductibility of mortgage interest points) [hereinafter PUB. 17]; I.R.C. § 163(h) (LEXIS 2006) (discussing the deductibility of mortgage interest). See generally ADMINISTRATIVE AND CIVIL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA 261, REAL PROPERTY GUIDE 1-63 (Dec. 1997) [hereinafter JA 261] (discussing that points are considered tax deductible interest only if they are solely for the use of money and not for lender services). See *infra* pp. 4, 24, apps. A and B.

¹⁰ MAJOR DAVID TRYBULA & LIEUTENANT COLONEL RICHARD HEWITT, ARMED FORCES GUIDE TO PERSONAL FINANCIAL PLANNING 182 (5th ed. 2002).

¹¹ See I.R.C. § 164(a); PUB. 17, *supra* note 9, at 142. See *infra* p. 4.

¹² I.R.C. § 165c(3). See generally JA 261, *supra* note 9, at 1-63 (distinguishing casualty losses that are sudden and unexpected such as damage to a home due to a fire, storm, flood, hurricane, vandalism, or other similar event, from non-casualty losses such as termite damage or progressive deterioration).

¹³ TRYBULA & HEWITT, *supra* note 10, at 182. “If you are . . . a member of the uniformed services and receive a housing allowance that is not taxable, you still can deduct your real estate taxes and your home mortgage interest. You do not have to reduce your deductions by your nontaxable allowance.”

exclude up to \$250,000 (\$500,000 for joint tax returns) of capital gain.¹⁴ Finally, unlike renters, homeowners avoid periodic rent increases.¹⁵

Besides reducing certain expenses, owning a home allows homeowners to protect their financial assets. First, owning a home is a hedge against inflation since homes have “historically appreciated faster than the cost of living.”¹⁶ Second, by buying a home, servicemembers can protect equity invested in their home in the event of bankruptcy.¹⁷ Third, homeowners experience protections from foreclosure. For example, homeowners may exercise redemption rights.¹⁸ Furthermore, servicemembers and their spouses¹⁹ that own homes are protected by the Servicemembers Civil Relief Act (SCRA).²⁰ For example, if a servicemember acquires a home with a mortgage, enters the military, and subsequently breaches the mortgage obligation, the mortgage lender may not sell, foreclose, or seize the property during, or within ninety days after, the period of the servicemember’s military service unless there is a court order granting such action or an applicable agreement.²¹

In addition to protecting assets, homeowners benefit from many intangible advantages such as enjoying the feeling of autonomy that comes from owning a home and the feeling of ease that comes from being able to borrow against home equity if the need arises. Moreover, homeowners do not have to worry about lease renewals, owners objecting to pets residing in the property, property managers preventing property improvements, or landlords exercising their right of entry.²² Furthermore,

INTERNAL REVENUE SERV., DEP’T OF TREASURY, PUB. 530 TAX INFORMATION FOR FIRST-TIME HOMEOWNERS 2 (2005) [hereinafter PUB. 530]. Receiving a housing allowance, however, also has some potential negative implications. See *infra* note 81 and accompanying text.

¹⁴ I.R.C. § 121(a). “Gross income shall not include gain from the sale or exchange of property, if during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer’s principal residence for period aggregating 2 years or more.” *Id.* See *infra* pp. 5, 22-25. This exclusion may be even greater if the homeowner dies after experiencing significant appreciation in his property because the decedent’s beneficiaries may receive a “stepped up” basis equal to “the fair market value of the property at the date of the decedent’s death.” I.R.C. § 1014(a)(1). Decedent is defined as: “A dead person, esp. one who has died recently.” BLACK’S LAW DICTIONARY 412 (7th ed. 1999). Basis is defined as the following: “The value assigned to a tax-payer’s investment in property and used primarily for computing gain or loss from a transfer of the property.” *Id.* at 145. Stepped-up basis is defined as the following: “The basis of property transferred by inheritance. Stepped-up basis equals the fair market value of property on the date of the decedent’s death (or on the alternate valuation date.” *Id.* at 145. The stepped-up basis advantage, however, will be eliminated to a great degree for property acquired from a decedent dying after December 31, 2009. See I.R.C. § 1014(f) (terminating the application of I.R.C. § 1014 to decedents dying after 31 December 2009); I.R.C. § 1022(a) (treating property transferred by a decedent dying after 31 December 2009 as a gift with a basis equal to the lesser of the fair market value or the decedent’s adjusted basis). Adjusted basis is defined as the following: “Basis increased by capital improvements and decreased by depreciation deductions.” BLACK’S LAW DICTIONARY, *supra* at 145. Depreciation is defined as the following: “A decline in an asset’s value because of use, wear, or obsolescence.” BLACK’S LAW DICTIONARY, *supra* at 452.

¹⁵ See KENNETH M. MORRIS & VIRGINIA B. MORRIS, GUIDE TO UNDERSTANDING PERSONAL FINANCE 56 (3d ed. 2000). Homeowners, however, may experience mortgage payment increases if they acquire an adjustable rate mortgage. See *infra* pp. 16-17. In addition, homeowners may experience increases in property tax, homeowner’s fees, and insurance premiums.

¹⁶ NISSENBAUM, *supra* note 4, at 329. This proposition has been demonstrated time after time by numerous studies such as the study conducted by Ali Anari and James Kolari, evaluating applicable data from 1968 to 2000. Ali Anari & James Kolari, *House Prices and Inflation*, in 30 REAL ESTATE ECONOMICS (Mar. 22, 2002) (comparing the relationship between the prices of houses and the prices of nonhousing goods and services; discussing numerous different studies reinforcing the proposition that real estate is the only “complete hedge” against inflation; and showing that real estate has a positive relationship to inflation while common stocks have a negative relationship to inflation).

¹⁷ For example, in the event of bankruptcy it is possible for a debtor to claim a homestead exemption even if the debtor resides elsewhere for a period of time, rents the home to others, or unsuccessfully lists the property for sale as long as the debtor intends to return to the home. See, e.g., *In re Inmon*, 137 B.R. 757 (Bankr. E.D. Ark. 1992); see also 11 U.S.C.S. § 522 (LEXIS 2006). See *infra* p. 6 (discussing federal and state homestead exemptions). Homestead is defined as the following: “The house, outbuildings, and adjoining land owned and occupied by a person or family as a residence. As long as the homestead does not exceed in area or value the limits fixed by law, in most states it is exempt from forced sale for collection of a debt.” BLACK’S LAW DICTIONARY, *supra* note 14, at 738.

¹⁸ See GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 467 (3d ed. 1994). Redemption is defined as the following:

1. The act or an instance of reclaiming or regaining possession by paying a specific price.
2. Bankruptcy. A debtor’s right to repurchase property from a buyer who obtained the property at a forced sale initiated by a creditor. . . .
4. Property. The payment of a defaulted mortgage debt by a borrower who does not want to lose the property.

BLACK’S LAW DICTIONARY, *supra* note 14, at 1282. After defaulting on a mortgage, under certain conditions, “a mortgagor may perform his obligation under the mortgage and have the title to his property restored free and clear of the mortgage.” NELSON & WHITMAN, *supra* note 18, at 467. In addition, in “about half the states, the mortgagor . . . [is] permitted for a specific period after a valid foreclosure sale to redeem ‘from the sale’ by paying to the foreclosure sale purchaser the foreclosure sale price plus, in some instances, certain additional amounts.” NELSON & WHITMAN, *supra* note 18, at 468.

¹⁹ 50 U.S.C.S. app. § 538 (LEXIS 2006).

²⁰ *Id.* app. §§ 533, 501-96. “This Act may be cited as the Servicemembers Civil Relief Act.” *Id.* app. § 501.

²¹ *Id.* app. § 533.

²² See ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 274 (2d ed. 1993). In general, leases:

frequently give landlords a privilege to enter for stated purposes, such as to inspect or to show the premises to prospective new tenants. If the landlord has a duty to make certain repairs, he generally is privileged to enter for that purpose. In the absence of some

those purchasing a home can take advantage of numerous government incentives ranging from grants that encourage first time homeownership²³ to subsidies for those making homes more energy²⁴ or water efficient.²⁵

2. Disadvantages

Unfortunately, numerous disadvantages are also associated with owning a home. Homeowners must pay purchasing costs, such as down payments and closing costs; continuing maintenance expenses, including plumbing and roof repairs;²⁶ escalating taxes, such as property and school taxes; and ongoing insurance premiums, including homeowners insurance and, possibly, private mortgage insurance (PMI).²⁷ Just to cover maintenance and repair costs, homeowners should budget at least one percent of the home's purchase price each year.²⁸ This amount can be considerably greater depending on the home's age, how well the home was maintained previously and the harshness of the climate.²⁹ Additional funds may be necessary to pay for supplemental insurance to cover floods, tornados, hurricanes, earthquakes, and other events not typically covered by homeowners insurance.³⁰ All of these expenses are in addition to a homeowner's monthly mortgage payment. By not planning for these expenses or other unforeseen circumstance, a homeowner may run out of money, default on his loan, and even experience foreclosure.

Although homeowners pay these numerous expenses associated with owning a home, they still may not experience significant tax savings. First, to take advantage of the tax benefits, homeowners must itemize their tax deductions, rather than taking the standard deduction, and determine what taxes and expenses are deductible.³¹ Second, unless homeowners are paying significant mortgage interest and property taxes, they may experience little benefit from itemizing their taxes as compared to taking the standard deduction.³²

specific privilege to enter, it has been held that the landlord may enter to collect rent and to distraint where that is permitted.

Id. Distraint is defined as the following: "To force (a person, usu. a tenant), by the seizure and detention of personal property, to perform an obligation (such as paying overdue rent)." BLACK'S LAW DICTIONARY, *supra* note 14, at 487.

²³ See, e.g., Texas Department of Housing and Community Affairs, *The Texas First Time Homebuyer Program*, <http://www.tdhca.state.tx.us/homeowner/ship/fthb/index.htm> (last visited Feb. 16, 2007) (providing grant funds up to five percent of the mortgage amount); Georgia Department of Community Affairs, Georgia Dream Homeownership Program, <http://www.dca.state.ga.us/housing/Homeownership/programs/downloads/GADreamBrochure.pdf> (last visited Aug. 15, 2006).

²⁴ See, e.g., Virginia Department of Housing and Community Development, Weatherization Assistance Program, <http://www.dhcd.virginia.gov/HOUSING/HEE/Weatherization.htm> (last visited Aug. 15, 2006) (providing financial incentives for weatherizing homes); Database of State Incentives for Renewables & Efficiency, <http://www.dsireusa.org> (last visited Feb. 16, 2007) (providing links by state to federal and state incentives for renewable energy); Database of State Incentives for Renewables & Efficiency, *Residential Solar and Fuel Cell Tax Credit*, http://www.dsireusa.org/library/includes/incentive2.cfm?Incentive_Code=US37F&State=federal¤tpageid=1&ee=1&re=1 (last visited Feb. 16, 2007) (providing up to a \$2,000 tax credit for the purchase and installation of residential solar electric and solar water heating).

²⁵ See, e.g., Austin City Connection, Toilet Replacement Program, <http://www.ci.austin.tx.us/watercon/sftoilet.htm> (last visited Aug. 15, 2006) (offering free replacement water efficient toilets).

²⁶ See Liz Pulliam Weston, *The Hidden Costs of Homeownership*, MSN MONEY, <http://moneycentral.msn.com/content/Banking/Homebuyingguide/P37628.asp?Printer> (last visited Jan. 26, 2006) [hereinafter *Hidden Costs*].

²⁷ See MORRIS & MORRIS, *supra* note 15, at 57, 64. "To guarantee payment" if a buyer defaults, lenders often require buyers to pay for PMI if they make a down payment of less than twenty percent. *Id.* at 64.

²⁸ *Hidden Costs*, *supra* note 26.

²⁹ *Id.*

³⁰ See *id.*; see also Sarah Max, *Should I Buy a House?*, CNNMONEY.COM (Apr. 4, 2005), http://money.cnn.com/2005/03/31/real_estate/homeguide_should_ibuy (addressing the need to keep a large cash reserve greater than four to six months of typical expenses to cover unanticipated expenses).

³¹ See PUB. 17, *supra* note 9, at 131. (For example, while state, local, and foreign real estate taxes can be deducted, taxes for local benefits, trash and garbage pickup fees, and homeowner association charges cannot be deducted. Similarly, homeowners cannot deduct fire or homeowner's insurance premiums, Federal Housing Administration (FHA) or other mortgage insurance premiums, depreciation, or the cost of utilities.)

³² For example, if a joint tax filing homeowner in the twenty-five percent tax bracket pays \$11,000 in mortgage interest and other deductions in 2005, he only receives a \$250 additional tax benefit if he itemizes his deductions instead of taking the \$10,000 standard deduction. Weston, *supra* note 5. Furthermore, the tax benefit will "shrink over time" since the amount of interest paid on a mortgage generally decreases each year while the standard deduction keeps "getting adjusted upward, squeezing your tax break from both directions." *Id.*

To make matters worse, a bipartisan Advisory Panel on Federal Tax Reform established by U.S. President George W. Bush on January 7, 2005,³³ recommended³⁴ “lowering the mortgage interest cap,”³⁵ “converting the mortgage interest deduction to a [fifteen percent] tax credit,”³⁶ and increasing the length of ownership requirement.³⁷ If this proposal becomes law, persons in a higher tax bracket with a higher mortgage will likely see less of a tax benefit than under the current system.³⁸ For example, under current law a homeowner in the twenty-five percent tax bracket paying \$18,000 a year in interest on a \$300,000 loan would reduce his taxable income by \$18,000 and save \$4500 (i.e., \$18,000 x .25) in taxes.³⁹ The same homeowner under the Advisory Panel proposal would only save \$2700 (i.e., \$18,000 x .15).⁴⁰

In addition to experiencing potentially fewer actual tax savings, homeowners may also build less wealth than they anticipate. Specifically, homeowners risk a decrease in their home’s value if the real estate market declines.⁴¹ This is important because a downturn in the market could cause a property’s value to fall below the principal owed on a mortgage, leaving homeowners unable to sell their properties and pay typical costs of sale without being financially liable for significant deficiencies.⁴² For example, if a seller of a home experienced a 5% decline from his home’s purchased price of \$300,000 and

³³ The President’s Advisory Panel on Federal Tax Reform, *America Needs a Better Tax System: Statement by the Members of the President’s Advisory Panel on Federal Tax Reform* (Apr. 13, 2005), <http://www.taxreformpanel.gov/04132005.pdf>.

³⁴ See THE PRESIDENT’S ADVISORY PANEL ON FEDERAL TAX REFORM, REPORT OF THE PRESIDENT’S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA’S TAX SYSTEM (2005), available at http://www.taxreformpanel.gov/final-report/TaxReform_Intro.pdf [hereinafter FEDERAL TAX REFORM]. Current law allows an interest deduction of up to \$1.1 million of mortgage debt. *Id.* at xvi. The proposal provides for a home credit equal to fifteen percent of paid mortgage interest and limits mortgages to an average regional price of housing ranging from about \$227,000 to \$412,000. *Id.* at xvii.

³⁵ Jeanne Sahadi, *Mortgage Tax Changes: Winners & Losers: Here’s a Look at Some Issues Concerning the Tax Reform Panel’s Proposal to Trim Mortgage Breaks*, CNNMONEY.COM (Oct. 25, 2005), http://money.cnn.com/2005/10/25/pf/taxes/homededuction_proposal/index.htm [hereinafter *Mortgage Tax Changes*]. The mortgage interest cap is “the amount of a loan on which homeowners would receive a tax break for interest paid.” *Id.*

³⁶ *Id.* “Deductions reduce your taxable income but favor those who itemize and those in higher tax brackets. Credits, which are dollar-for-dollar reductions of the taxes you owe, benefit all taxpayers equally.” *Id.*

³⁷ FEDERAL TAX REFORM, *supra* note 34, at 75. Comparing the current and proposed laws:

Under current law, up to \$500,000 of capital gains on a home that a taxpayer has owned and used as his principal residence for two out of the last five years may be excluded The Panel recommends that the length of time an individual must own and use a home as a principal residence to qualify for the tax exemption be increased from two out of five years to three out of five years.

Id. at 74-75.

³⁸ *Mortgage Tax Changes, supra* note 35.

³⁹ *Id.*

⁴⁰ *Id.* Theoretically, homeowners may be able to use the new law to their advantage as follows:

It also may be the case for some homeowners that if they no longer can deduct their mortgage they may opt to stop itemizing altogether, instead taking the standard deduction plus the mortgage credit, if that would be allowed. In that case, conceivably they might enjoy tax savings equal to or greater than they would see under the current system.

Id.

⁴¹ See NISSENBAUM, *supra* note 4, at 329.

⁴² See TRYBULA & HEWITT, *supra* note 10, at 157. Typical costs of sale include realtor costs, conveyance taxes, title costs, attorney fees, and inspections. *See id.* at 165-70. There are many indicators that 2006 and 2007 will mark a significant downturn in the real estate market. For example, a report released by the U.S. Department of Housing and Urban Development showed a 17.3% decrease in the sales of new single-family homes compared to 2005. U.S. Department of Commerce, *New Residential Sales in December 2006*, www.census.gov/const/newressales.pdf. Similarly, the National Association of Realtors reports that sales of existing single-family homes fell 8.4%, which marked the largest annual decline in nearly 20 years. John W. Schoen, *Has Housing Market Bottomed Out?*, MSNBC, Jan. 25, 2007, <http://www.msnbc.msn.com/id/16812267>. These declines in sales have accompanied a decrease in the median prices of homes in some areas. For example, the median price of homes in the Northeast of the United States “plunged” 4.8% in 2006. Matt Woolsey, *America’s Best and Worst Housing Markets*, MSNBC, Feb. 1, 2007, <http://www.msnbc.msn.com/id/16929669/>. *See generally* National Association of Realtors, *Median Sales Prices of Existing Single-Family Homes for Metropolitan Areas*, [http://www.realtor.org/Research.nsg/files/MSA_PRICESF.pdf/\\$FILE/MSAPRICESF.pdf](http://www.realtor.org/Research.nsg/files/MSA_PRICESF.pdf/$FILE/MSAPRICESF.pdf) (last visited Feb. 17, 2007) (showing the median prices of homes by year and by quarter). *See infra* notes 206-208 and accompanying text (showing historic examples of market downturns). Making matters even more, some experts such as Federal Reserve Vice Chairman Donald L. Kohn believe that:

[H]ousing starts may be not very far from their trough, but the risks around this outlook still are largely to the downside. Although house prices nationally have decelerated noticeably and appear to have fallen in some markets, they are still high relative to rents and interest rates. Building permits decreased substantially again in November [2006], and inventories of unsold homes have only started to edge lower. We also do not know whether the possible stabilization that seems to be taking hold would be immune to a rise in longer-term interest rates should term premiums increase or the federal funds rate fail to follow the downward path currently built into market expectations.

had to pay 7% of the home's \$285,000 sale's price to cover realtor and other costs of sale, he would have to have \$34,950 (i.e. \$15,000 + \$19,950) in equity just to cover the costs of selling his home without having to bring additional funds to the closing. Furthermore, due to frequent moves and associated transaction costs, military buyers may not experience significant equity growth since they often own their properties for short periods of time.⁴³

Another disadvantage homeowners may experience is fewer bankruptcy protections. Historically, debtors filing for bankruptcy protection could choose between the possible unlimited state homestead exemption⁴⁴ and the limited federal bankruptcy homestead exemption.⁴⁵ These protections have been extremely valuable in the event homeowners become defendants in civil lawsuits.⁴⁶ Due to significant recent changes in the federal bankruptcy code, however, there are numerous limitations to the state homestead exemption.⁴⁷ For example, if a debtor acquires a homestead within 1215 days preceding filing bankruptcy, the debtor can only exempt \$125,000 of his homestead.⁴⁸ Fortunately, this limitation "does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence"⁴⁹ if both residences are located in the same state. Furthermore, a homestead exemption above the \$125,000 is possible if "it is reasonably necessary for the support of the debtor and any dependent of the debtor."⁵⁰

Additional disadvantages may also accompany owning a home. First, military buyers must often engage in a long distance, timely, and costly process of locating a suitable property, acquiring necessary financing, and closing the transaction in time for a permanent change of station (PCS) or deployment. Second, homeowners must often comply with restrictive covenants and city and county codes and pay fees related to homeowner associations.⁵¹ Third, homeowners are less mobile compared to renters because they must sell, rent, or allow their property to remain vacant upon their PCS or deployment.⁵² For servicemembers who do not like these constraints, renting a home may be preferable because renting ensures maximum flexibility and mobility.

Donald L. Kohn, Vice Chairman, Fed. Reserve Bd., Speech at the Atlanta Rotary Club, Atlanta Ga: The Economic Outlook (Jan. 8, 2007) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2007/20070108/default.htm>).

⁴³ See RICHARD J. BUDDIN ET AL., AN EVALUATION OF HOUSING OPTIONS FOR MILITARY FAMILIES 44 (1999), available at http://www.rand.org/pubs/monograph_reports/MR1020/index.html. Servicemembers, however, may be able to keep their homes longer by leasing the property to tenants. See *infra* pp. 23-24.

⁴⁴ See, e.g., TEX. PROP. CODE § 41.002 (LEXIS 2005). Texas has the following unlimited in value homestead exemption:

If used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon.

Id.

⁴⁵ 11 U.S.C.S. app. § 522(b) (LEXIS 2006).

⁴⁶ See generally Buying a Home via the Internet; Homestead Exemption, <http://iml.jou.ufl.edu/projects/Spring02/samsing/Assets/Assets%20Right%20Side/homestead.htm> (last visited 25 Feb. 2006) (drawing attention to the difference between California and Florida law regarding O.J. Simpson's sale of his homestead) (on file with author). Had O.J. Simpson owned a homestead in Florida or Texas, he would have been able to keep his home rather than selling it due to California's small homestead allowance. *Id.* See generally Jack Novak, *Protection Time, the New Bankruptcy Law is Tough on Debtors* (6 June 2005) http://www.forbes.com/free_forbes/2005/0606/146.html (discussing the extremely rewarding practice of individuals such as former Conesco executive Ngairé Cuneo to invest their assets in a home in one of the eight states with historic unlimited homestead exemptions) (on file with author). In addition, servicemembers may want to consider acquiring an umbrella policy or increasing their homeowners and automobile policy coverage to provide appropriate protection from such civil lawsuits.

⁴⁷ See The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 1501(a), Pub. L. No. 108-9 (2005). "Except as otherwise provided in this Act, this Act and the amendments made by this Act shall take effect 180 days after the date of enactment of this Act." *Id.*; see also 11 U.S.C.S. § 101.

⁴⁸ 11 U.S.C.S. app. § 522(p)(1).

⁴⁹ *Id.* app. § 522(p)(2)(B). In other words, as long as a servicemember moves from a previous residence into a current residence within the same state, the servicemember's entire transferred equity can be protected. See *id.*

⁵⁰ 11 U.S.C.S. app. § 522(q)(2).

⁵¹ See NATIONAL MILITARY FAMILY ASSOCIATION & NATIONAL ENDOWMENT FOR FINANCIAL EDUCATION, MILITARY FAMILIES, MONEY & MOBILITY 11 (2002) [hereinafter MONEY & MOBILITY]. Comparing homeowners and renters, renters would have to comply with terms in their leases. Homeowner landlords may want to ensure that leases include terms to ensure that tenants comply with restrictive covenants and city and county codes. For example, if boats are prohibited from being parked in driveways, landlords may want to include such terms in their leases. In short, homeowner landlords can ensure tenants comply with covenants and codes by drafting tight leases, giving tenants little power to modify the property. For example, landlords could prohibit tenants from painting the exterior of the property without first getting permission. In certain areas, painting the exterior of the property may be regulated to allow only certain color schemes. Painting a property with the incorrect color scheme may result in a violation and subsequent violation costs.

⁵² See MORRIS & MORRIS, *supra* note 15, at 57.

B. Renting Property

1. Advantages

Renting maximizes flexibility and mobility. Renters can move into a property by signing a lease⁵³ and can move out after terminating the lease.⁵⁴ Renters have the luxury of being able to ignore the hassles of monitoring the strength of the real estate market and locating a buyer for their property upon their relocation.⁵⁵ Servicemembers can take advantage of this flexibility as their need for space grows due to marriage or birth of a child or shrinks due to divorce or a child's departure from the home.⁵⁶ In addition, the SCRA increases this flexibility by giving military renters and their spouses the ability to terminate their leases early in the event of a PCS or a deployment of ninety days or longer.⁵⁷ Military members may enjoy even more flexibility in their ability to terminate their leases under unforeseen circumstances if their landlords allow them to include military clauses in their leases.⁵⁸

In addition to the principal advantage of flexibility and mobility, renters enjoy the advantages of being able to pursue other financial opportunities while simplifying their lives. First, rather than worrying about steep entrance costs, renters often need little more than a security deposit and a month's rent to move into a property.⁵⁹ Furthermore, depending upon the terms of the lease,⁶⁰ landlords usually are obligated to pay for most repairs and maintenance, property taxes and fees, and even some utilities.⁶¹ A landlord's failure to make necessary repairs may allow the tenant to vacate the property under the theory of constructive eviction.⁶² The overall lower costs of renting give renters the opportunity to invest their money elsewhere rather than having their funds committed in the home purchase and maintenance process.⁶³ Second, renters can quickly and

⁵³ CUNNINGHAM, *supra* note 22, at 273. The majority of states follow the "English rule," that the landlord "impliedly warrants, and has a duty to see to it, that the premises will be free from the presence of a former tenant holding over or from some other person wrongfully in possession." *Id.* In contrast, a minority of states follow the "American rule," that landlords do not impliedly warrant that tenants shall have actual possession under the rationale that the landlord should not be held liable for the wrongful acts of a third party. *Id.* at 274; *see, e.g.,* Julius A. Bauer & Co. v. Chamberlain, 138 N.W. 903 (Iowa 1912).

⁵⁴ CUNNINGHAM, *supra* note 22, at 251. A leasehold "gives the right of possession or occupation" while licenses, easements, and profits "involve only rights of use." *Id.*; *see, e.g.,* Hi-Rise Laundry Equip. Corp. v. Matrix Props., Inc., 466 N.Y.S.2d 375 (1983) (finding that the right to occupy for ten years upon paying rent qualified as a leasehold).

⁵⁵ *See* MORRIS & MORRIS, *supra* note 15, at 57.

⁵⁶ *See* BUDDIN, *supra* note 43, at 39. Compared to those in military housing, renters were more satisfied with their "ability to upgrade their housing as they like (by about 7 percent)." *Id.*

⁵⁷ *See* 50 U.S.C.S. app. § 535 (LEXIS 2006). *See generally* Lieutenant Colonel J. Thomas Parker, *Legal Assistance Note: Servicemembers Civil Relief Act (SCRA) and Uniformed Services Employment and Reemployment Rights Act (USERRA) Amendments and Updates*, ARMY LAW., Mar. 2005, at 22 (explaining recent updates in the SCRA); John Meixell, *Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*, ARMY LAW., Dec. 2003, at 38 (explaining the SCRA's replacement of the SSCRA).

⁵⁸ TRYBULA & HEWITT, *supra* note 10, at 159. A sample military clause is as follows:

In the event the Tenant or spouse is or hereafter becomes a member of the United States Armed Forces, the Tenant may terminate this lease on thirty days' written notice to the Landlord in any of the following events:

- a. If the Tenant or spouse receives permanent-change-of-station orders to depart from the area where the premises are located.
- b. If the Tenant or spouse is relieved from active duty.
- c. If the Tenant or spouse has leased the property prior to arrival in the area and the orders are changed to a different area prior to occupancy of the property.
- d. If the Tenant or spouse is assigned government quarters.
- e. If the Tenant or spouse receives temporary-change-of-station (TCS) orders to depart from the area where the premises are located for more than ninety days.

Rents due will be prorated if departure occurs during the middle of a month.

Id.

⁵⁹ *See* SHEETS, *supra* note 7, at 21-6.

⁶⁰ CUNNINGHAM, *supra* note 22, at 258. A lease "conveys a leasehold, a landed estate, and also contains more or less contractual undertakings, such as promises to pay rent, make repairs, pay taxes, procure insurance, and so forth." *Id.*

⁶¹ MORRIS & MORRIS, *supra* note 15, at 57.

⁶² CUNNINGHAM, *supra* note 22, at 258.

⁶³ MORRIS & MORRIS, *supra* note 15, at 57.

easily take the standard income tax deduction⁶⁴ rather than taking the time to itemize their tax deductions.⁶⁵ Third, renters often benefit from additional amenities, including pools, tennis courts, and common areas, which negates the need to travel and pay expenses for similar entertainment.

2. Disadvantages

Although renting a property simplifies life in many ways, renting also has numerous disadvantages, most involving landlord-tenant laws. First, renters lack the legal right to prevent rent increases following the initial lease period, to modify the property (e.g., installing new carpet or painting the walls a certain color), and to occupy the property beyond their lease termination date, possibly resulting in “involuntary relocation”⁶⁶ at the renter’s expense.⁶⁷ Renters can minimize this relocation disadvantage, however, by signing longer leases (two or three years), including military clauses, and giving timely written notices. Second, landlords can evict renters under certain conditions, such as nonpayment of rent.⁶⁸ Fortunately, the SCRA reduces some of this risk by giving military renters and their spouses numerous protections against eviction.⁶⁹ For example, under the SCRA landlords must generally obtain a court order before evicting a military member or his dependents.⁷⁰ Third, unlike homeowners who can deduct mortgage interest as an itemized income tax deduction, renters cannot deduct their rent payments.⁷¹ Fourth, renters do not build equity and, as a result, cannot borrow against home equity if the need arises.⁷² Fifth, renters do not have the same degree of privacy as homeowners because landlords may access the property in certain situations,⁷³ such as to prevent pests and to show the property to prospective renters.⁷⁴ For those servicemembers who feel constrained by these disadvantages and find renting too expensive, living in military housing may be a viable alternative.

C. Living in Military Housing

1. Advantages

Compared to renting, living in military housing may significantly reduce a servicemember’s overall expenses and result in significant financial savings. According to a RAND Survey of Military Member’s Housing Choices and Preferences, economics has been “the primary reason” families have decided to live in military housing.⁷⁵ Historically, when compared to military housing, renters in the civilian community have had to pay \$167 more per month, while homeowners have had to pay \$356 more per month.⁷⁶ This is not surprising because housing allowances were not “designed”⁷⁷ to cover total housing

⁶⁴ See I.R.C. § 63(c) (LEXIS 2006). For most people, the 2005 standard deduction is \$5000 for single or married filing separately, \$10,000 for married filing jointly or qualifying widow(er) with dependent child, or \$7300 for head of household. PUB. 17, *supra* note 9, at 133.

⁶⁵ See PUB. 17, *supra* note 9, at 133. “You should itemize deductions if your total deductions are more than the standard deduction amount. Also, you should itemize if you do not qualify for the standard deduction . . .” *Id.* at 132.

⁶⁶ NISSENBAUM, *supra* note 4, at 329.

⁶⁷ See MORRIS & MORRIS, *supra* note 15, at 57. Renters may want to find rent controlled accommodations to “hold down living expenses.” *Id.*

⁶⁸ See CUNNINGHAM, *supra* note 22, at 258. State statutes generally give landlords the power to terminate a lease “on account of the tenant’s failure to pay rent or, more or less, to perform other covenants.” *Id.*

⁶⁹ See 50 U.S.C.S. app. § 531 (LEXIS 2006).

⁷⁰ *Id.* In general, a landlord may not evict a servicemember or his dependents from their primary residence when their monthly rent does not exceed \$2400, adjusted for inflation for years after 2003 by the consumer price index housing component, except by court order. *Id.*

⁷¹ NISSENBAUM, *supra* note 4, at 329.

⁷² *Id.*

⁷³ CUNNINGHAM, *supra* note 22, at 274.

⁷⁴ TRYBULA & HEWITT, *supra* note 10, at 158. See *supra* note 22 and accompanying text.

⁷⁵ BUDDIN, *supra* note 43, at 29. “Security, convenience for work, and availability were the next most common reasons for choosing to live on-base.” *Id.* at 11. “Joint-military couples were 14 percent more likely to prefer living in the civilian community, where they can combine their two allowances to afford good housing.” *Id.* at 17. “[S]ervice personnel do not seem to view many of the benefits that have traditionally been associated with on-base housing (e.g., acculturation of junior personnel, support for families whose military member is deployed or simply gone a lot, fostering military values) as critical.” *Id.* at 29. “Furthermore, members believe that their families are as well supported off-base as they are on-base.” *Id.* For example, only twenty-six percent of military housing residents “felt able to count on their neighbors” while about thirty-four percent of homeowners were “confident about getting assistance from neighbors.” *Id.* at 38. In short, “without the economic benefit, most military members see no compelling reason to live on-base.” *Id.* at 29.

⁷⁶ *Id.* at 11 (measuring differences in cost based on numerous surveys taken during the 1990s).

costs.⁷⁸ Fortunately, in 2000, the Department of Defense and Congress “adopted a five-year plan to close a 19 percent gap between BAH [basic allowance for housing] rates and local rental costs nationwide.”⁷⁹ Theoretically, this plan was suppose to eliminate out-of-pocket costs by 2005.⁸⁰

The degree of financial savings from not having to pay rent and utilities, however, is only the historical principal advantage. Some servicemembers benefit from not receiving BAH, which might otherwise be included in child support calculations.⁸¹ Other servicemembers benefit from not needing to pay renter’s insurance due to automatic coverage by the Personnel Claims Act⁸² for certain losses incident to service.⁸³ In addition, servicemembers living on post enjoy the intangible benefits of gate security, access to Department of Defense schools, and short commutes to work.⁸⁴ They also benefit from easy access to the Post Exchange and Commissary.⁸⁵

2. Disadvantages

Living in military housing also involves some significant disadvantages, such as waiting for on-post housing to become available,⁸⁶ moving from off-post to on-post once housing becomes available, dealing with frequent substandard and untimely maintenance,⁸⁷ and accepting substandard properties in extremely poor condition.⁸⁸ In addition, similar to renting, servicemembers do not have total control of the premises.⁸⁹ For example, Army regulations and many local installation

⁷⁷ *Id.* at 52. “The housing allowance is designed to cover 85 percent of an individual’s housing costs. The 15 percent target absorption rate in part reflects the previously un-estimated but perceived value of the military housing benefit . . .” *Id.*

⁷⁸ See MONEY & MOBILITY, *supra* note 51, at 9. As of 2002, “the allowance is meant to cover only about 89 percent of the average cost of housing in that area.” *Id.* To determine the Basic Allowance for Housing (BAH) for a specific location, go to www.dtic.mil/perdiem/bah.html.

⁷⁹ Tom Philpott, *Stateside Housing Allowance Rises for 2006*, STARS & STRIPES, Dec. 27, 2005, at 1, available at <http://www.military.com/features/0,15240,83894,00.html?ESRC=army-a.nl>. Unfortunately, in 2006, some servicemembers who PCS will receive less BAH compared to their counterparts who are already assigned to the gaining unit due to the scheduled end of the BAH geographic rate protection program. *Id.* Geographic rate protection was a temporary program intended to ensure that newly arrived servicemembers would not receive less BAH than those already stationed at the same location. *Id.* “It was a tool to stabilize BAH rates until the gap between allowances and average local rental costs was closed . . .” *Id.*

⁸⁰ See U.S. DEP’T OF VETERAN’S AFFAIRS, EVALUATION OF VA’S HOME LOAN GUARANTEE PROGRAM: FINAL REPORT APPENDICES (2004), available at <http://www.homeloans.va.gov/pdf/final%20report%20appendices.pdf>. “The National Defense Authorization Act for Fiscal Year 2001 repealed the requirement for members to absorb 15 percent of out-of-pocket costs, and the Secretary of Defense has pledged to increase BAH rates so that they will cover 100 percent of housing costs by 2005.” *Id.*

⁸¹ *Pegler v. Pegler*, 895 S.W.2d 580, 582 (Ky. Ct. App. 1995) (excluding from income receipt of on-installation housing for child support calculations). Compare I.R.C. § 134 (LEXIS 2006) (excluding certain military benefits from gross income for income tax purposes) and *D.F. v. L.T.*, 903 So. 2d 657 (La. Ct. App. 2005) (excluding BAH from child support calculations), with *Hixon v. Lundy*, 2004 Iowa App. Lexis 1300 (Ia. Ct. App. 2004) (including BAH in child support calculations) and *Hees v. Hees*, 82 P.3d 107 (Okla. Civ. App. 2003) (treating receipt of on-installation housing as imputed income for child support calculations).

⁸² 31 U.S.C.S. § 3721 (LEXIS 2006).

⁸³ See U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS para. 11-5 (1 July 2003) (covering losses caused by fire, flood, hurricane, unusual occurrence, theft, or vandalism) [hereinafter AR 27-20]; U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 11-5 (8 Aug. 2003) [hereinafter DA PAM. 27-162]. Nevertheless, servicemembers may still want to buy renters insurance if they own valuable property. They may also want renters insurance if they fear the high burden of proof, administrative requirements, and depreciation required by military regulation. See AR 27-20, *supra* note 83, para. 11-14; DA PAM. 27-162, *supra* note 83, para. 11-14.

⁸⁴ See BUDDIN, *supra* note 43, at 37. “Most military housing residents have a commute of less than 10 minutes, and virtually all commute less than 30 minutes. Few renters or owners are within 10 minutes of work, but about 80 percent commute 30 minutes or less. Owners have somewhat longer commutes than do renters.” *Id.*

⁸⁵ See TRYBULA & HEWITT, *supra* note 10, at 156.

⁸⁶ See BUDDIN, *supra* note 43, at 39. Over forty percent of renters listed unavailability of military housing when needed as their first or second most important factor in deciding to rent rather than live in military housing. *Id.*; see also U.S. DEP’T OF ARMY, REG. 210-50, HOUSING MANAGEMENT para. 3-8 (3 Oct. 2005) [hereinafter AR 210-50].

⁸⁷ The Army’s Residential Communities Initiative (RCI) Quality Communities for Army Families, *Frequently Asked Questions*, <http://www.rci.army.mil/programinfo/faq.html> (last visited Mar. 14, 2006) (on file with author). See generally U.S. DEP’T OF ARMY, ARMY FAMILY HOUSING MATER PLAN (AFHMP) FY 04-09, at 3, available at http://housing.army.mil/afh_plan.htm (discussing maintenance).

⁸⁸ See William M. Welch, *Army Housing No Longer Homely*, USA TODAY, Oct. 11, 2005, available at http://www.usatoday.com/news/nation/2005-10-11-army-housing_x.htm [hereinafter *No Longer Homely*]. “The homes for junior officers and enlisted soldiers with families had mold under the floors, rats in the walls and pipes, broken fixtures and the island’s red dirt everywhere.” *Id.* “The Pentagon says 200,000 of its 300,000 units of government-owned family housing (on and off base) are substandard and need replacement or major renovation. It was estimated that doing so would cost \$16 billion and take 30 years.” *Id.* See generally AR 210-50, *supra* note 86, para. 3-12 (discussing substandard housing assignments).

⁸⁹ See BUDDIN, *supra* note 43, at 41. Over thirty-five percent of renters and twenty-three percent of owners listed freedom from military housing rules and regulation as their first or second most important factor in deciding against living in military housing. *Id.*

regulations limit who can live in the property and how long visitors can stay.⁹⁰ Furthermore, the military can terminate a servicemember's housing privilege based on a change in a servicemember's status, "misconduct of the sponsor, his dependents, or guests,"⁹¹ or repeated waste of utilities.⁹² As a result, compared to renters, servicemembers in military housing reportably have been less satisfied⁹³ "concerning the rules governing their housing units (by about 15 percent)."⁹⁴ For those servicemembers frustrated by the strict rules and extremely poor condition of military housing, privatized housing may be an attractive alternative.

D. Living in Privatized Military Housing

1. Advantages

To address the significant shortcomings⁹⁵ and substandard conditions⁹⁶ of military housing, Congress privatized military housing, saving the government money while improving the quality of life for servicemembers and their dependents.⁹⁷ Passing the Military Housing Privatization Initiative in 1996,⁹⁸ Congress authorized the Pentagon to turn over the job of modernizing military housing to "real estate developers in the private sector."⁹⁹ In addition, privatized housing will provide other advantages, including free utilities based on average use,¹⁰⁰ low usage utility rebates, landlord-tenant law protections,¹⁰¹

⁹⁰ See AR 210-50, *supra* note 86, para. 3-17.

⁹¹ *Id.* para. 3-19.

⁹² *Id.*

⁹³ See BUDDIN, *supra* note 43, at 13. "Homeowners are the most satisfied with the quality of their residence and members in military housing are the least satisfied." *Id.*

⁹⁴ *Id.* at 39

⁹⁵ See *id.* at 35.

⁹⁶ See *id.* at 37. The following paragraph explains the condition of military housing:

Military housing is about 80 square feet smaller and 10 years older than civilian rental housing. Military housing has problems with pests and overall condition. Pests are a serious problem for 23 percent of families in military housing as compared with about 7 percent in civilian housing. About 66 percent of members in military housing rank the condition of their housing as good or very good compared to 79 and 95 percent of those living in rental and owned housing, respectively.

Id.

⁹⁷ See *id.* at 2-3, 25. In 1995, the average age of military housing was thirty-three years and much of the housing had already reached the end of its projected life. *Id.* at 2. The Congressional Budget Office recommended that the military should shift away from military housing because it was more costly than civilian housing alternatives. *Id.* at 2. To reduce the cost of military housing, DOD initiated privatization programs. *Id.* at 25; see also 10 U.S.C.S. § 2875 (LEXIS 2006) (authorizing the Secretary concerned to make investments in an eligible entity (e.g., a limited partnership) carrying out projects for the acquisition or construction of housing units suitable for use as military family housing).

⁹⁸ National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186 (1996). This Act amended chapter 169 of title 10, U.S.C., by adding a new subchapter entitled Alternative Authority to Construct and Improve Military Housing (codified as amended at 10 U.S.C. §§ 2871-85). *Id.*

⁹⁹ *No Longer Homely*, *supra* note 88. See generally 10 U.S.C.S. § 2688 (discussing utilities); *id.* §§ 2871-85 (discussing housing issues including government investment for the acquisition or construction of housing for the military). Practically speaking, privatization of military housing means that servicemembers living in Oahu will have homes that will be fifty percent larger, that will include two-car garages, and that will be more modern and environmentally friendly. *No Longer Homely*, *supra* note 88. Army housing in Oahu will be equipped with "thin solar panels that will [make it] . . . the largest solar-powered community in the world." *Id.*

¹⁰⁰ See, e.g., ARMY HAWAII FAMILY HOUSING, RESIDENT OCCUPANCY AGREEMENT para. 13, at 3. The Hawaii agreement includes the following terms:

[A]fter the implementation of the Army's Resident Direct Pay Program . . . the Tenant will be personally responsible for the payment of some or all utilities servicing the Premises and an appropriate adjustment will be made to the amount of the allotment of the BAH for a utility allowance. The Tenant will be responsible for utility costs that are in excess of such utility allowance.

Id.

¹⁰¹ See 42 U.S.C.S. § 3601. *But see* Memorandum, Principal Deputy Assistant Secretary of the Army Installations and Environment, to Director, Installation Management Agency, subject: Residential Communities Initiatives (RCI) Policy for Major Decision Authority (July 8, 2005) (giving garrison commanders authority to bar individuals or otherwise restrict individual's access to the installation as necessary to maintain good order and discipline).

and faster maintenance service standards.¹⁰² Furthermore, servicemembers will experience little difference regarding funding of local moves¹⁰³ and will receive limited renters insurance.¹⁰⁴

2. Disadvantages

Living in privatized housing involves some minor disadvantages. First, servicemembers may experience the constructive receipt of BAH, which may be included in child support calculations.¹⁰⁵ Second, they may have to pay for excessive use of utilities.¹⁰⁶ Third, they will fail to benefit from increases in BAH due to promotions or annual rate adjustments. Fourth, they will lack control over the premises, similar to living in military housing,¹⁰⁷ and will have to deal with the more complex procedures¹⁰⁸ involved in submitting cognizable claims to the government under the Personnel Claims Act.¹⁰⁹ All things considered, however, these disadvantages are relatively minor considering the overall benefits.

E. Considering Advantages and Disadvantages in the Planning Process

Given the many advantages and disadvantages of buying a home, potential homebuyers can easily become frustrated. The bottom line is that the longer a homebuyer plans on owning the same home, the more likely the homebuyer will outlast any negative market downturn and benefit from equity growth, appreciation, and income tax savings. To hold onto a home for a reasonable period of at least three to six years,¹¹⁰ however, servicemembers must be confident they can maintain a stable income that can comfortably cover the mortgage, maintenance expenses, and property tax increases. Maintaining this level of confidence may be difficult if servicemembers are contemplating a change in employment or change in duty station.

In contrast, the shorter a servicemember plans on owning the same home, the more advantageous it is for him to rent housing or live in military or privatized housing. These three options give servicemembers different degrees of flexibility with regard to lease terms, military clauses, autonomy, and responsibility. In addition, these options offer differences in quality of life with regard to location, size, condition, and amenities of the property. By factoring in these numerous issues and prioritizing them based on their individual preferences, servicemembers can better determine which housing alternative best meets their short and long term needs and objectives.

¹⁰² See, e.g., ARMY HAWAII FAMILY HOUSING, ARMY HAWAII FAMILY HOUSING RESIDENT GUIDE AND COMMUNITY STANDARDS HANDBOOK 34 (2005). In Hawaii, the standard for routine maintenance is a response within one working day and completion of the work within three working days. *Id.*

¹⁰³ See U.S. Dep't of Defense, Joint Federal Travel Regulation para. U5355-C3 (C229, 1 Jan. 2006) (authorizing appropriated funds to fund local moves).

¹⁰⁴ E-mail from Colonel Joseph Goetzke, Acting Chief, Personnel Claims and Recovery Division, United States Army Claims Service, to all Claims Judge Advocates (Sept. 8, 2005) [hereinafter Sept. 8 Message] (on file with author). "Most of the partnership agreements with the privatized housing contractors include a requirement for the contractor to provide some coverage for personal property as part of the lease. In some cases, this coverage is as much as \$25,000." *Id.*

¹⁰⁵ See *supra* note 81. Servicemembers living in privatized housing receive BAH on their leave and earning statement (LES), even though the BAH is used to pay for the housing they receive. As a result, servicemembers are "in control" of the income and it is easy for some courts to include servicemembers' BAH in child support calculations.

¹⁰⁶ See *supra* note 100.

¹⁰⁷ See Captain Stacie A. Remy Vest, *Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass*, A.F. L. REV. 7-11 (Spring 2002).

¹⁰⁸ E-mail from Colonel Joseph Goetzke, Acting Chief, Personnel Claims and Recovery Division, United States Army Claims Service, to all Claims Judge Advocates (Sept. 7, 2005) (on file with author). Military Housing Privatization Initiative (or Residential Communities Initiative) housing "will be considered to be provided in kind by the United States Government under 31 U.S.C. § 3721(b)(2)(e) if it is located within the perimeter of . . . military installations." *Id.* Specifically, for a claim to be cognizable, "the privatized quarters must be located within the boundaries of the installation" and servicemembers must first settle their claim with their private insurance carrier. *Id.* Sept. 8 Message, *supra* note 104. "The insurance that is provided as part of the lease of [privatized] quarters is considered to be private insurance and occupants of privatized quarters must file against this insurance coverage AND any other private insurance coverage they have before [the Army] can pay any part of their claim." *Id.*

¹⁰⁹ 31 U.S.C.S. § 3721 (LEXIS 2006).

¹¹⁰ See Weston, *supra* note 5.

III. Step Two: Evaluating a Servicemember's Personal Situation, the Market, and the Property

If servicemembers determine that buying a home is an available and appropriate option, then servicemembers need to evaluate their personal situation, the specific property, and the market in light of property law, real estate financing law, consumer law, tax law, landlord-tenant law, family law, and bankruptcy law.

A. Personal Financial Analysis

Servicemembers who do not have the ability to pay for a home in cash need to ensure that they not only obtain a mortgage to buy a home, but that they also set their mortgage payments in an amount that will allow them to make timely monthly payments to keep the home. By making too small a down payment, overextending their finances, failing to plan for possible contingencies, and relying on significant asset appreciation, servicemembers increase their exposure to default, foreclosure, and bankruptcy.

1. Financing and Leverage

Unlike many other types of investment, real estate allows servicemembers to use the principal of leverage to buy nicer homes than would otherwise be affordable. Of course the disadvantage of benefiting from the use of other people's money is managing the risk involved. One way servicemembers can manage risk is by making an appropriate down payment.

a. The Down Payment

Servicemembers can get a higher return on investment capital if they make a small down payment and experience significant real estate appreciation.¹¹¹ The principal risk of such leverage, however, is the possibility of owing more on the mortgage than the property is worth (i.e., going "up-side down") and not being able to sell the home. This situation is made even worse when renting the property for a positive or break-even cash flow is not an option. As a result, it is useful for homeowners to have a loan-to-value ratio significant enough "to absorb a potential decline in house prices."¹¹² This loan-to-value amount is typically 80% of the value of the property.¹¹³ One significant advantage of making a 20% down payment is that the borrower will not have to pay PMI.¹¹⁴ For many buyers, however, making a 20% down payment is not a viable option. For homeowners unable to make a 20% down payment, a piggyback loan may be an alternative to avoid non-tax-

¹¹¹ See SHEETS, *supra* note 7, at 2-4 to -6.

¹¹² Alan Greenspan, Chairman, Federal Reserve Board, Speech to the American Bankers Association Annual Convention, Palm Desert, California (Sept. 26, 2005) (transcript available at <http://www.federalreserve.gov/boardDocs/Speeches/2005/200509262/default.htm>). See *infra* note 113.

¹¹³ See BLACK'S LAW DICTIONARY, *supra* note 14, at 949. Loan-to-value ratio is defined as:

The ratio . . . [usually] expressed as a percentage, between the amount of a mortgage loan and the value of the property pledged as security for the mortgage. For example, an \$80,000 loan on property worth \$100,000 results in a loan-to-value ratio of 80% - which is . . . [usually] the highest ratio lenders will agree to without requiring the debtor to buy mortgage insurance.

Id. By lending a borrower 80% of the property's appraised value, the lender is protected in the event the property's value drops by up to 20%.

¹¹⁴ JA 261, *supra* note 9, at 1-31. The following statement explains how PMI works:

Under PMI, a private mortgage insurance company insures the loan, thus permitting the lender to go beyond its conventional loan limits of 75% to 80% loan-to-value ratio. In effect, PMI insures the lack of equity . . . Borrowers are charged a premium for the PMI coverage. The premiums vary, but generally they are about 2% of the amount of the loan.

Id.

deductible PMI.¹¹⁵ If servicemembers prefer paying PMI rather than acquiring a piggyback loan, they should terminate paying PMI as soon as they are eligible.¹¹⁶

b. The Impact of Marital Dissolution

The down payment is only the beginning of the financial analysis. Although it may seem unrelated to the home purchasing analysis, servicemembers need to understand the housing consequences involved in the unfortunate event of a divorce. These possible consequences relate to how servicemembers make a down payment and establish title. The effects of a divorce can be financially devastating and may potentially force the sale of a jointly held residence. Consideration of these effects is increasingly important because the probability of divorce in society is high¹¹⁷ and the probability of divorce in the military is increasing.¹¹⁸ Divorce is just another unfortunate possibility servicemembers should consider when attempting to minimize potential loss.

Servicemembers may consider divorce in their housing analysis for many reasons.¹¹⁹ For example, in many common law property states where title determines ownership, servicemembers who use their separate property to buy marital homes may be deemed as having made an implied gift to their spouses, transforming separate property into marital property.¹²⁰ In states following the Sources of Funds Rule, however, servicemembers who can trace their separate property contributed toward a marital home are entitled to a proportionate interest in the property.¹²¹ Furthermore, in community property states that follow the Inception of Title Rule,¹²² homes purchased during marriage using separate property may be characterized as community property, with the separate property-contributing spouse receiving an equitable interest, assuming no

¹¹⁵ See Greenspan, *supra* note 112. "Highly levered home purchases tend to use so-called piggyback mortgages; that is, second liens originated at the time of purchase. These loans are popular, in significant part, because they avoid the non-deductible private mortgage insurance payments required on larger, single loans." *Id.* Although this technique avoids non-tax deductible PMI, it may increase the payments due on the loans as well as the administrative burdens of keeping the multiple loans current. These administrative burdens are important to consider in advance, especially if the loans may be sold to third party lenders. To ensure that the new lenders receive proper payment, servicemembers may want to acquire loans that guarantee that whoever services their loans will continue to service the loans after sale to a third party. For servicemembers who do not have the ability to make a 20% down payment nor have the desire to acquire a piggyback loan, other options may be preferable such as a VA loan. See *infra* note 166 and accompanying text.

¹¹⁶ See 12 U.S.C.S. §§ 4901-02 (LEXIS 2006) (discussing how to terminate PMI). In general, borrowers can cancel PMI by submitting a written request to the servicer after reaching an eighty percent loan-to-value ratio, maintaining a good payment history, being current on mortgage payments, and satisfying other requirements of the holder of the mortgage. See *id.*; see *infra* note 157.

¹¹⁷ Donna Miles, *Military Programs Aim To Reduce Military Divorce Rates*, <http://www.pica.army.mil/Voice2005/050617/050617%20Divorce.htm> (last visited Aug. 24, 2006) [hereinafter *Military Programs*]. Nationwide, approximately 45 to 50% of first marriages end in divorce and 60 to 70% of second marriages end in divorce. *Id.* Since divorces occur at different points during a marriage, it is useful to look at a population's per capita annual divorce rate. For example, the U.S. per capita divorce rate was .4%, .38%, .38%, and .37% in the years 2001, 2002, 2003, and 2004 respectively. Americans for Divorce Reform, *Divorce Rates*, <http://www.divorcereform.org/rates.html> (last visited Aug. 24, 2006). For Army officers, the divorce rate was 2.1%, 1.9%, 3.3%, and 6.0% in the years 2001, 2002, 2003, and 2004 respectively. See E-mail from Debbie Eitelberg, Defense Manpower Data Center, to MAJ Samuel Kan (Mar. 15, 2005) [hereinafter DATA] (on file with author); see also Lisa Burgess, *Divorce Rate Among Active-Duty Army Officers, Enlisted Has Risen Dramatically*, STARS & STRIPES, June 9, 2005, available at http://www.military.com/NewContent/0,13190,SS_060905_Divorce,00.html (citing the same statistics). Combining the officers and enlisted of the Army, Air Force, Marine Corps, and Navy into a single population group, the group's divorce rate was 2.6%, 3.1%, 3.2%, and 3.6% in the years 2001, 2002, 2003, and 2004 respectively. See DATA, *supra* note 117.

¹¹⁸ *Military Programs*, *supra* note 117. In fiscal years 2001, 2002, 2003, and 2004, the Army had 5600, 7000, 7500, and 10,477 divorces respectively among active duty forces. *Id.* Among its 56,000 married officers, the Army had 1900 and 3300 divorces in the fiscal years 2003 and 2004 respectively. *Id.* It is important to note that the military characterizes a servicemember's marital status as married if the servicemember has been divorced and later remarries. See Americans for Divorce Reform, *Military Divorce Statistics*, <http://www.divorcereform.org/mil.html> (last visited Aug. 24, 2006). This characterization makes it difficult to compare divorce statistics. One way to attempt a comparison is to count the number of divorces each year and calculate the percentage with respect to the population group. See *supra* note 117. But see e-mail from Debbie Eitelberg, Defense Manpower Data Center, to MAJ Samuel Kan (Mar. 15, 2005) (showing the Pentagon's unofficial 2005 statistics that the divorce rate among Army officers and enlisted declined to 2.3% and 3.6% respectively) (on file with author); Donna Miles, *Army Divorce Rates Drop as Marriage Programs Gain Momentum*, ARMED FORCES PRESS SERVICE, Jan. 27, 2006, available at [http://www.defenselink.mil/news/Jan2006/](http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/news/Jan2006/) (emphasizing that in 2005, the Army divorce rate decreased from the spike in 2004).

¹¹⁹ See *infra* p. 13 (discussing the source of the down payment) and p. 14 (discussing the source of mortgage payments).

¹²⁰ *E.g.*, *Ardrey v. Ardrey*, 2004 WL 1088385 (Ohio Ct. App. May 17, 2004); *Norman v. Norman*, 2003 WL 724677 (Tenn. App. Mar. 4, 2003); *Carter v. Carter*, 419 A.2d 1018 (Me. 1980).

¹²¹ *E.g.*, *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990) (establishing a preponderance of the evidence standard for tracing marital property back to separate property); *Harper v. Harper*, 448 A.2d 916 (Md. 1982) (demonstrating the Sources of Funds Rule); *Duffey v. Duffey*, 2002 Ohio App. LEXIS 781 (Ohio Ct. App. 2002).

¹²² *E.g.*, *Fisher v. Fisher*, 383 P.2d 840 (Idaho 1963); *Harper*, 448 A.2d 916 (demonstrating the Sources of Funds Rule); *Duffey*, 2002 Ohio App. LEXIS 781.

commingling occurred.¹²³ In short, unless the real estate transaction is handled properly from the beginning, servicemembers contributing separate property to a marital home may risk losing their previously characterized separate property in a later divorce.

To minimize the risk of losing separate property in a divorce, married servicemembers may consider using marital property when making the down payment on a marital residence. If they use separate property for the down payment, servicemembers need to understand the risks involved and document the financial transactions for tracing purposes in the event of divorce. Servicemembers contemplating both marriage and the purchase of a home can simplify these tracing requirements by executing a valid written and signed prenuptial agreement that clearly defines the parameters of marital and separate property and establishes the governing choice of law.¹²⁴ Of course, the prenuptial agreement might be successfully challenged if the agreement suffers from a lack of full disclosure,¹²⁵ if the agreement is not voluntary,¹²⁶ or if the agreement is otherwise unconscionable.¹²⁷

c. The House Payment

Having too large a house payment can leave servicemembers with “too little money for other goals [such as]: retirement, vacations, college funds for the kids . . . [and leave them] vulnerable to foreclosure and bankruptcy.”¹²⁸ In general, lenders recommend that housing expenses, including the mortgage payment, homeowners insurance, and property taxes, not exceed 28% of gross monthly income, while total payments on all debt including credit card debt, car loans, and student loans not exceed 36% of gross income.¹²⁹ These guideline figures are subject to many factors, such as expected maintenance and repair costs, job and income stability and growth, and anticipated inflation and real estate appreciation.¹³⁰ Additional factors¹³¹ homeowners may consider include plans to have children, to send children to college, and to retire.¹³² In today’s world of dual income families, mortgage payments often rely on both incomes leaving “no one on the sidelines to take up the slack” in case of a job loss such as when one partner decides to stay home to raise children.¹³³

¹²³ E.g., *Holland v. Holland*, 35 P.3d 409 (Wyo. 2001); *In re Marriage of Mardsden*, 130 Cal.App.3d 426 (1982) (showing that commingling of separate and community property results in community property); *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. Civ. App. 1963).

¹²⁴ UNIF. PREMARITAL AGREEMENT ACT § 6(a) (1983) [hereinafter UPAA] For example, a prenuptial agreement can specify that a servicemember’s salary, real property titled in the servicemember’s name during the marriage, and any appreciation of the property during the marriage are separate property. The servicemember can make the down payment as well as all subsequent expenses using the servicemember’s salary, eliminating the tracing concerns.

¹²⁵ See *id.*; *Peters-Riemers v. Riemers*, 644 N.W.2d 197 (N.D. 2002).

¹²⁶ UPAA § 6(a), *supra* note 124. Servicemembers may want to ensure their spouses have independent legal advice before entering into a prenuptial agreement. Although often not required, providing consideration to spouses in exchange for entering into the agreement can be one way of protecting the agreement from challenge.

¹²⁷ E.g., *In re Marriage of Pownall*, 5 P.3d 911 (Ariz. Ct. App. 2000); *Hardee v. Hardee*, 588 S.E.2d 264 (S.C. Ct. App. 2001).

¹²⁸ Liz Pulliam Weston, *Don’t Bite Off Too Much House*, MSM MONEY, <http://articles.moneycentral.msn.com/Banking/HomebuyingGuide/Don'tBiteOffTooMuchHouse.aspx> (last visited Aug. 24, 2006) [hereinafter *Too Much House*].

¹²⁹ *Id.*; see also NISSENBAUM, *supra* note 4, at 332. Servicemembers should use their BAH amount as a guide for planning their housing expenses including their mortgage payment. However, due to tax savings, equity growth, and other factors such as cost of living allowances, servicemembers may determine that they can afford to spend more than their BAH amount to cover their housing expenses.

¹³⁰ *Too Much House*, *supra* note 128.

¹³¹ See *id.*

A much bigger proportion of the workforce was covered by traditional defined-benefit pensions 30 years ago -- which means they didn’t have to save massive amounts of money on their own to have a decent retirement. Today, the onus is typically on you to carve enough out of your budget to fund 401(k)s and IRAs.

Id. See *infra* note 132.

¹³² Susan Schmidt Bies, Governor, Fed. Reserve Bd., Speech at the Canisius College Richard J. Wehle School of Business Community Business Luncheon, Buffalo, New York (Apr. 18, 2005) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2005/20050418/default.htm>). “Data from the SCF [Survey of Consumer Finances] indicate that among workers with a retirement savings plan, nearly 60 percent of workers aged 25 to 34 were covered by a defined-benefit plan in 1989; by 2001, this share had declined to 31 percent.” *Id.* Fortunately for military members who retire after serving twenty years of active duty, they enjoy a defined-benefit pension.

¹³³ *Too Much House*, *supra* note 128.

However, the amount of the mortgage payment is only part of the analysis. Just as servicemembers may consider the source of the down payment, servicemembers may contemplate the source of monthly mortgage payments as well as repairs. For example, if a separate property residence appreciates as a result of marital labor or funds, the appreciation of the residence may be considered a marital asset.¹³⁴ To ensure clarity, servicemembers contemplating both marriage and buying a house may consider defining the parameters of marital and separate property appreciation in a prenuptial agreement.¹³⁵ Meanwhile, married servicemembers without a prenuptial agreement may consider ensuring that they use only marital funds to make mortgage payments and repairs to marital property and separate funds to make similar payments on separate property. Once servicemembers determine what type of funds they will use to make payments, they need to secure the most appropriate mortgage and interest rate for their situation.

2. The Mortgage Analysis

Although navigating through the mortgage waters is complex, servicemembers should take the time to ensure that they take the appropriate steps to set themselves up for success. As Federal Reserve Governor Susan Schmidt Bies explains,

When looking at different loan products, consumers should consider how long they plan to own their home, expectations of future income, their stage of life cycle, and broader financial obligations in choosing among mortgage alternatives. For example, if consumers want to pay off their mortgages before retirement, they must determine if the monthly payment will fully amortize the loan by the target date. If homeowners plan to move in three years, then they should compare prepayment penalties, if any, and interest rates among their mortgage alternatives . . . [Unfortunately,] some consumers do not actively shop for a lender or a mortgage, and they do not compare loan terms in light of their personal circumstances.¹³⁶

Failing to take the proper steps can increase financial risk. To minimize this risk, servicemembers should initially address their credit issues. Then, they should determine the type of mortgage that makes them feel the most secure. Finally, they should select the best length of mortgage for their situation.

a. Applying for Credit

To begin, servicemembers need to understand the importance of building and maintaining a good credit history. Mortgage interest rates and loan approval will depend upon the servicemember's credit¹³⁷ and bankruptcy scores.¹³⁸ First,

¹³⁴ *E.g.*, Chapman v. Chapman, 866 So. 2d 118 (Fla. Dist. Ct. App. 2004) (discussing marital appreciation of separate assets as a result of marital labor and marital funds); Cisneros v. Cisneros, 831 So. 2d 257 (Fla. Dist. Ct. App. 2002) (holding that a husband's physical labor to improve his spouse's residence resulted in marital appreciation). *But see* Fowlkes v. Fowlkes, 590 S.E.2d 53 (Va. Ct. App. 2003) (holding that a husband's \$30,000 separate property contribution to his spouse's house did not convert his spouse's home into marital property); Brown v. Brown, 58 Ariz. 333, 119 P.2d 938 (1941) (holding that the title to the improvements follow the land).

¹³⁵ See *supra* p. 13.

¹³⁶ Susan Schmidt Bies, Fed. Reserve Bd., Speech at the Eller College of Management Distinguished Speaker Series, Tucson Arizona: Economic Outlook and Development in Mortgage Markets (Jan. 18, 2007) (transcript at <http://www.federalreserve.gov/boarddocs/speeches/2007/20070118/default.htm>).

¹³⁷ *Anatomy of a Credit Score*, BUSINESS WEEK, available at <http://moneycentral.msn.com/content/Banking/Yourcreditrating/P136689.asp?Printer> (last visited Aug. 24, 2006) [hereinafter *Credit Score*]. The following example shows the importance of your FICO (Fair Isaac & Co.) score:

On a \$350,000, 30-year fixed mortgage, you'll pay 6.24% in interest and \$2,153 a month if you score between 720 and 850. If your [FICO] score drops to between 620 and 674, your interest rate jumps to 8.05%, and your monthly cost rises to \$2,581. You will pay an additional \$154,131 over the life of the loan, according to a calculator on myfico.com.

Id. The credit bureaus determine credit scores by taking into account the following factors: payment history (35%), debt (30%), length of credit history (15%), new credit (10%), and types of credit used (10%). *Id.*

¹³⁸ *This Secret Score Can Hurt Your Credit*, Bankrate.com, <http://moneycentral.msn.com/content/Banking/Yourcreditrating/P137322.asp?Printer> (last visited Aug. 24, 2006). Bankruptcy scores start in the negative numbers and increase to approximately 2000. *Id.* Bankruptcy scores are complex and use advanced math and data analytics to look ahead to see how likely a consumer is to file for bankruptcy. *Id.* In contrast, credit scores look at a consumer's past history of paying bills. *Id.* Although bankruptcy risk scores have been used for decades, they have not been made available to the general public because "no one wants to disclose the model . . . [and] give away the value of the research . . . conducted." *Id.* "However, Experian is considering making its [bankruptcy] score available to consumers." *Id.* at 2. "The things that improve your bankruptcy risk score are the same ones that improve your credit score: Pay your bills on time and apply for credit sparingly." *Id.* In short, consumers should strive to maintain a high credit score and a low bankruptcy score, by building and maintaining a good credit history. See *id.*

servicemembers should obtain and review their credit score¹³⁹ and credit report¹⁴⁰ well in advance of purchasing a home. The Fair Credit Reporting Act allows consumers to obtain a free credit report once a year upon the consumer's request and under certain circumstances, such as when an application for credit is denied.¹⁴¹ Second, consumers should take appropriate actions¹⁴² to correct errors¹⁴³ that they discover on their reports.¹⁴⁴ Third, consumers should pay off existing debt, cancel unnecessary credit cards, and pay all loan installments on time.¹⁴⁵ Fourth, consumers lacking a good credit history should build a credit history by opening savings and checking accounts and taking out and paying small loans.¹⁴⁶ By taking these steps to build a good credit history, servicemembers can maximize their financing options and take full advantage of the benefits of adjustable-rate and fixed-rate mortgages.

¹³⁹ Liz Pulliam Weston, *7 Fast Fixes for Your Credit Score*, MSM MONEY, <http://moneycentral.msn.com/content/Banking/Yourcreditrating/P116527.asp?Printer> (last visited Aug. 25, 2006). "Despite all the media attention given to free credit reports, you still have to pay to find out your credit score, the three-digit number ranging from 300 to 850 that is the key to your borrowing costs." *Id.* "For the most detailed explanations on your FICO scores, go to the credit education area at [<http://www.myfico.com/>]. A score from one credit bureau costs \$14.95, all three are \$44.85. It's useful to buy all three because large lenders either average the scores or take the middle one." *Credit Score*, *supra* note 137.

¹⁴⁰ Federal Trade Commission, *Building a Better Credit Report*, May 2006, <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre03.htm> [hereinafter *Better Credit Report*]. Consumers who want to get a copy of their credit report from one of the three major credit bureaus can call Equifax at 800-685-1111, Experian at 888-397-3742, or TransUnion at 800-916-8800, or review their websites at www.equifax.com, www.experian.com, and www.tuc.com. *Id.* Although, each of the three national credit reporting agencies sell consumer credit reports, consumers are better advised to get the same reports for free at www.annualcreditreport.com or by calling 1-877-322-8228. "When you request a free credit report, each bureau will offer to calculate a credit score for \$6.95. Experian and TransUnion use proprietary formulas; Equifax uses FICO scores. [Unfortunately the information is not comprehensive and] . . . lenders are less likely to look at these scores." *Credit Score*, *supra* note 137. *But see Credit Bureaus Create FICO Score Rival*, <http://moneycentral.msn.com/content/Banking/Yourcreditrating/P147161.asp?Printer> (last visited Aug. 25, 2006) (discussing the new "VantageScore," which Equifax, Experian, and TransUnion will use to provide consumers more consistent credit scores between the bureaus).

¹⁴¹ 15 U.S.C.S. § 1681j(a)(1)(A) (LEXIS 2006). "In general. All consumer reporting agencies described in subsections (p) and (w) of section 603 [15 U.S.C. § 1681a] shall make all disclosures pursuant to section 609 [15 U.S.C. § 1681g] once during any 12-month period upon request of the consumer and without charge to the consumer." *Id.*

¹⁴² *Better Credit Report*, *supra* note 140. A sample dispute letter is as follows:

I am writing to dispute the following information in my file. The items I dispute also are circled on the attached copy of the report I received.

This item (identify item(s) disputed by name of source, such as creditor or tax court, and identify type of item, such as credit account, judgment, etc.) is (inaccurate or incomplete) because (describe what is inaccurate or incomplete and why). I am requesting that the item be deleted (or request another specific change) to correct the information.

Enclosed are copies (use this sentence if applicable and describe any enclosed documentation, such as payment records, court documents) supporting my position. Please reinvestigate this (these) matter(s) and (delete or correct) the disputed item(s) as soon as possible.

Id.

¹⁴³ MORRIS & MORRIS, *supra* note 15, at 52. Some common errors include mistakes due to confusion of a consumer with someone with a similar name or social security number, failing to remove incorrect information after the issue has been investigated and resolved in the consumer's favor, and failing to add information supplied by the consumer or a consumer's creditor. *Id.*

¹⁴⁴ 15 U.S.C.S. § 1681i(a)(1)(A). The statute states:

In general. Subject to subsection (f), if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and record the current status of the disputed information, or delete the item from the file in accordance with paragraph (5), before the end of the 30-day period beginning on the date on which the agency receives the notice of the dispute from the consumer or reseller.

Id.

¹⁴⁵ SHEETS, *supra* note 7, at 3-8; *see also* TRYBULA & HEWITT, *supra* note 10, at 74. Although having a few credit cards is very useful to establish a good credit history, to facilitate purchases, and to earn frequent flyer miles or other perks, having too many credit cards and using too much available credit can be dangerous. Experian has "identified two groups of heavy card users: the 14% who own more than 10 cards and another, at times overlapping, 14% who use more than 50% of the credit available to them. This last group alone holds an average of nearly seven cards each . . . [and] have credit scores about 30 points below the national average." Marilyn Lewis, *1 in 7 Americans Carry 10 or More Credit Cards*, <http://articles.moneycentral.msn.com/Banking/CreditCardSmarts/1In7AmericansCarries10CreditCards.aspx> (last visited Feb. 16 2007).

¹⁴⁶ SHEETS, *supra* note 7, at 3-10. Those without a credit history can obtain a certificate of deposit (CD) at a bank and then use the CD as collateral for a six-month or longer installment loan from that bank. *Id.* The borrower can invest the money in an interest-bearing account, use the money to pay the loan early, and build a credit history at little cost. *Id.* After paying the loan off early, the borrower can go back to the same bank and apply for an unsecured loan. *Id.* After paying off the unsecured loan, the borrower can repeat the procedure asking for a larger loan each time. *Id.* By practicing this "Credit Pursuit Strategy" at numerous banks simultaneously, a borrower can build a huge unsecured line of credit. *Id.*; *see also* TRYBULA & HEWITT, *supra* note 10, at 72.

b. Fixed-Rate or Adjustable-Rate Mortgage (ARM)

Fixed-rate mortgages provide the primary benefit of comfort because they establish “predictable monthly payments”¹⁴⁷ of principal and interest over the life of the loan. As a result, they are “ideal for purchasers who have a stable income and want predictable housing costs.”¹⁴⁸ Fixed-rate mortgages are probably the “best choice” if the borrower plans on keeping the mortgage for at least five years, and the borrower feels comfortable with the interest rate and monthly payment.¹⁴⁹ For convenience, an amount can be included in the mortgage payment to cover taxes and insurance costs, which will be kept in escrow until the appropriate due date.¹⁵⁰ Since taxes and insurance tend to increase over time, borrowers should plan on having this payment increase gradually over the life of the loan.

In contrast to fixed-rate mortgages, adjustable or variable-rate mortgages charge interest rates that “change at intervals determined at the beginning of the loan.”¹⁵¹ Since the interest rate changes along with market conditions, lenders can shift significant risk to the borrower and, as a result, charge lower interest rates at the beginning of the loan.¹⁵² Since servicemembers move frequently, they may plan to keep their property for only a few years.¹⁵³ As a result, they may be able to benefit from ARMs by paying lower interest rates at the beginning of loans and selling their properties before their interest rates increase.¹⁵⁴ Borrowers using ARMs can manage risk by ensuring that their ARMs are tied to an appropriate adjustment index¹⁵⁵ and have conservative adjustment caps¹⁵⁶ on possible interest rate increases.

c. The Federal Government’s Involvement in the Mortgage Market: Conventional, Veterans Administration (VA), and Federal Housing Administration (FHA) Loans

Conducting the mortgage type analysis, servicemembers should consider VA and FHA loans. For those who can afford to make a twenty percent down payment and avoid PMI,¹⁵⁷ conventional loans are generally the best alternative and the most common.¹⁵⁸ Conventional loans involve “a financial institution lend[ing] its own money and tak[ing] the entire risk of

¹⁴⁷ NISSENBAUM, *supra* note 4, at 332.

¹⁴⁸ TRYBULA & HEWITT, *supra* note 10, at 173.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Escrow is defined as “An account held in trust or as security The general arrangement under which a legal document or property [e.g., money] is delivered to a third person [e.g., the mortgage servicer] until the occurrence of a condition [e.g., the tax bill due date].” BLACK’S LAW DICTIONARY, *supra* note 14, at 564.

¹⁵¹ TRYBULA & HEWITT, *supra* note 10, at 173. An Adjustable-Rate Mortgage (ARM) is defined as: “A mortgage in which the lender can periodically adjust the mortgage’s interest rate in accordance with fluctuations in some external market index. - Abbr. ARM. - Also termed variable-rate mortgage; flexible-rate mortgage.” BLACK’S LAW DICTIONARY, *supra* note 14, at 1027. The adjustment period is defined as follows:

[T]he length of time between adjustments to the interest rate charged [Borrowers] will generally be able to choose adjustment periods ranging from six months to three years. Mortgages with the shortest adjustment period will have the lowest initial rate and the fewest points, since the short adjustment period makes them less risky to the lender.

TRYBULA & HEWITT, *supra* note 10, at 174. In addition, consumers need to understand that their loan may be re-amortized over the life of their loan resulting in higher mortgage payments. See generally THE FEDERAL RESERVE BOARD, CONSUMER HANDBOOK ON ADJUSTABLE-RATE MORTGAGES, (2006), available at <http://www.federalreserve.gov/pubs/arms/armsbrochure.pdf> (informing consumers about the numerous intricacies and dangers of ARMs and their variations).

¹⁵² See TRYBULA & HEWITT, *supra* note 10, at 174.

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* “Adjustment indexes are standard, commonly reported interest rates that determine your interest rate.” *Id.* If rates are expected to increase, “a long-term index (such as the Treasury index)” is preferred since they adjust more slowly. *Id.* In contrast, if rates are expected to decrease, “a shorter-term index (such as the Cost of Funds index)” is preferred since they adjust more quickly. *Id.*

¹⁵⁶ See *id.* The following additional information is helpful for understanding interest caps with respect to loans:

Most loans have a cap on the amount the interest rate can increase each adjustment period (usually 2 percent) and over the life of the loan (usually 6 percent). So a one-year adjustable loan with an initial 7 percent rate [using these sample caps] could increase only to 9 percent at the end of the first adjustment period and to 13 percent over the life of the loan.

Id.

¹⁵⁷ See generally NELSON & WHITMAN, *supra* note 18, at 773. “Several states have statutes requiring lenders to notify borrowers at closing of the right to cancel [PMI] when a specified loan-to-value ratio has been achieved.” *Id.* at 786.

¹⁵⁸ See *id.* at 775 (explaining that in 1991, 87% of home loans were conventional loans while FHA and VA loans were about 8% and 4% respectively).

loss”¹⁵⁹ for the amount loaned. While minimizing total cost, conventional loans provide an equity cushion in the event of a downturn in the real estate market or a loss or reduction of income due to unemployment, change in employment, divorce, or disability.¹⁶⁰ For those unable to make a substantial down payment, however, VA and FHA loans may enable less wealthy borrowers to purchase a home.¹⁶¹ To accomplish this objective, the FHA¹⁶² insures loans rather than lending money.¹⁶³ Similarly, VA loans “guarantee a partial repayment”¹⁶⁴ to a financial institution in the event of default by the borrower, which generally results in lower interest rates for the borrower.¹⁶⁵

Compared to conventional loans, VA loans provide numerous advantages, such as little to no down payment, limitations on closing costs, no PMI, lower credit standards, default assistance to avoid foreclosure, and benefits for veterans with certain disabilities.¹⁶⁶ Other advantages include negotiable interest rates, required appraisals, choice of repayment plans, assumable mortgages, no prepayment penalties, and reasonable loan amounts.¹⁶⁷ The disadvantages include eligibility¹⁶⁸ requirements,¹⁶⁹ funding fees,¹⁷⁰ and higher default rates.¹⁷¹

For those who do not qualify for a VA loan or who are already using their VA loan eligibility, FHA loans may be an attractive alternative.¹⁷² Unlike VA loans that guarantee “only a portion of the loan,” FHA loans insure¹⁷³ “the full amount of selected loans made by private lenders.”¹⁷⁴ Unfortunately, FHA loans generally require a larger down payment¹⁷⁵ than VA

¹⁵⁹ TRYBULA & HEWITT, *supra* note 10, at 176.

¹⁶⁰ See U.S. DEP’T OF VETERAN’S AFFAIRS, EVALUATION OF VA’S HOME LOAN GUARANTEE PROGRAM: FINAL REPORT ES-7 (2004), <http://www.homeloans.va.gov/pdf/final%20report.pdf> [hereinafter FINAL REPORT].

¹⁶¹ See *id.* at 2-8. While “the VA Home Loan program is intended to provide a benefit to veterans . . . HUD’s loan program is intended to fulfill social objectives, that is, help low-income and minority groups gain access to loan markets that they might not have due to low income or discrimination.” *Id.*

¹⁶² See The National Housing Act, 12 U.S.C.S. §§ 1701-42 (LEXIS 2006) (establishing The Federal Housing Administration (FHA) in 1934).

¹⁶³ See NELSON & WHITMAN, *supra* note 18, at 773; see also JA 261, *supra* note 9, at 1-32. Federal Housing Administration loans are loans insured by The Federal Housing Administration, which is “now a part of the Department of Housing and Urban Development (HUD).” JA 261, *supra* note 9, at 1-32.

¹⁶⁴ JON W. BRUCE, REAL ESTATE FINANCE, IN A NUTSHELL 35 (4th ed. 1997). “The predecessor of the present Department of Veterans Affairs, the Veterans Administration, was given authority to guarantee home loans for GI’s by the Servicemen’s Readjustment Act in 1944.” NELSON & WHITMAN, *supra* note 18, at 773; see 38 U.S.C.S. § 3703 (LEXIS 2006).

¹⁶⁵ See TRYBULA & HEWITT, *supra* note 10, at 178.

¹⁶⁶ See FINAL REPORT, *supra* note 160, at 2-8.

¹⁶⁷ See VETERANS BENEFITS ADMINISTRATION, PAM. 26-91-1, VA HOME LOANS: A QUICK GUIDE FOR HOMEBUYERS & REAL ESTATE PROFESSIONALS (Feb. 2005) [hereinafter VA PAM. 26-91-1]. “Loan maximum may be up to 100 percent of the VA-established reasonable value of the property. Due to secondary market requirements, however, loans generally may not exceed \$359,650.” *Id.*

¹⁶⁸ See 38 U.S.C.S. §§ 3701-02 (LEXIS 2006).

¹⁶⁹ See VA PAM. 26-91-1, *supra* note 167, at 3. In general, to be eligible, veterans must have the following:

[A]ctive duty service, that was not dishonorable, during World War II and later periods Veterans with service only during peacetime periods and active duty military personnel must have had more than 180 days’ active service. Veterans of enlisted service which began after September 7, 1980, or officers with service beginning after October 16, 1981, must in most cases have served at least 2 years.

Id.

¹⁷⁰ See *id.* at 6 (explaining funding fees).

A funding fee must be paid by all veterans, except those exempt due to receipt of disability compensation, using the VA home loan program. The funding fee can range from 0.5 percent for Interest Rate Reduction Refinancing Loans (IRRRL) to 3.3 percent for veterans who are subsequent users of the VA home loan program. For all VA loans, the funding fee may be paid in cash or included in the loan.

Id.

¹⁷¹ See FINAL REPORT, *supra* note 160, at ES-7. In 1988, the percentage of delinquent VA loans was between 6 and 7% compared to 2 to 4% for conventional loans. *Id.* In 2003, the VA delinquency rate increased to between 7 and 9% while the delinquency rate of conventional loans increased by only “a fraction of a percentage point.” *Id.*

¹⁷² See TRYBULA & HEWITT, *supra* note 10, at 179.

¹⁷³ See 12 U.S.C.S. § 1709 (LEXIS 2006).

¹⁷⁴ FINAL REPORT, *supra* note 160, at ES-7.

¹⁷⁵ TRYBULA & HEWITT, *supra* note 10, at 179. The “FHA requires 3 percent of the value of the property for loans less than \$50,000. For loans greater than \$50,000, FHA requires a down payment of approximately 5 percent of the value of the property.” *Id.*

loans and charge a mortgage insurance premium on the outstanding balance of the loan.¹⁷⁶ In addition, FHA loans have a significantly higher delinquency rate than both conventional and VA loans, and the FHA loan delinquency rate has been rising. For example, from 1998 to 2003, the percentage of delinquent FHA loans increased from around seven percent to almost thirteen percent.¹⁷⁷

Realizing the high delinquency rate of VA and FHA loans, servicemembers need to beware of excessive leverage and be cognizant of the factors that contribute to increased delinquency, foreclosure, and bankruptcy. Some of these factors include being on active duty, being young, failing to qualify for a conventional mortgage, having a high loan-to-value ratio, and having a lower income.¹⁷⁸ Unfortunately, these factors are typical of most active duty servicemembers. In other words, the statistics show that based on the eligibility and selection criteria, FHA loans are more risky than VA loans, which are more risky than conventional loans. Servicemembers can use each of these tools effectively or at their own peril depending on how they structure their real estate transaction and manage their financial portfolios. In addition, borrowers can manage risk by securing shorter mortgages if they can afford the higher payments.

d. Mortgage Length

The most common mortgages have been longer thirty-year and shorter fifteen-year mortgages. While thirty-year mortgages allow borrowers to buy more expensive houses, pay lower monthly payments, and lock in interest rates over a longer period of time, fifteen-year mortgages allow borrowers to rapidly build up equity, significantly reduce the total amount of interest paid on their loan, and pay off their mortgage in half the time.¹⁷⁹ Borrowers should choose fifteen-year mortgages if they can manage the higher monthly payments and cannot achieve a higher after-tax return by investing elsewhere.¹⁸⁰ In contrast, borrowers should choose thirty-year mortgages if funds are tight, if they need the tax deduction, or if they have enough discipline to invest the difference between the fifteen and thirty-year mortgage payments in an investment with a guaranteed¹⁸¹ higher after-tax rate of return.¹⁸² By investing the payment difference for fifteen years, borrowers could pay off the balance on their thirty-year mortgage in fifteen years and have savings left over.¹⁸³

e. Creative and Possibly Dangerous Financing

Servicemembers need to select the right loan so that they can continue making payments over the long term.¹⁸⁴ Servicemembers must not rely on an “unrealistic rate of home appreciation” when choosing their loan.¹⁸⁵ Purchasing real estate using novel mortgages, such as interest-only mortgages, mortgages with forty-year amortization schedules, and option

¹⁷⁶ See JA 261, *supra* note 9, at 1-34. See generally NELSON & WHITMAN, *supra* note 18, at 776.

¹⁷⁷ FINAL REPORT, *supra* note 160, at ES-7.

¹⁷⁸ See *id.*

¹⁷⁹ See NISSENBAUM, *supra* note 4, at 333.

¹⁸⁰ See *id.* at 334. For example, the monthly payment difference between a fifteen-year (at 8.25% interest) and thirty-year (at 8.5% interest) mortgage of \$150,000 would be approximately \$302 per month. *Id.* at 333. The difference in actual interest paid on the loans is \$153,000. *Id.* In short, a servicemember could choose a thirty-year mortgage rather than a fifteen-year mortgage and invest the \$302 per month difference in a lucrative alternative investment. If the servicemember experienced success in the alternative investment, the servicemember could use the returns to pay off the thirty-year mortgage early. Of course, the alternative investment might not have the same tax benefits as interest payments on a mortgage. See *id.*

¹⁸¹ See, e.g., Defense Finance and Accounting Service, *A Savings Plan for Deployed Service Members*, Mar. 18, 2004, <http://www.dod.mil/dfas/news/releases/2004/04-14.htm> (allowing deployed servicemembers to contribute up to \$10,000 to a Savings Deposit Program and earn a guaranteed 10% annual return).

¹⁸² See TRYBULA & HEWITT, *supra* note 10, at 179-80.

¹⁸³ See *id.*; see *supra* note 180.

¹⁸⁴ Olson, *supra* note 1. To understand the importance of sustaining payments, homeowners should realize the following:

Foreclosure rates in some areas have increased dramatically since the early 1990s -- the same time frame in which the subprime market experienced its most rapid growth Predatory lending is a serious problem that needs to be addressed in a way that preserves incentives for responsible subprime lenders so that worthy borrowers with imperfect credit can become homeowners.

Id. at 7.

¹⁸⁵ *Id.*

adjustable-rate mortgages, increase the risks of making payments over the long term.¹⁸⁶ According to former Federal Reserve Chairman Alan Greenspan, these novel mortgages, “expose borrowers to more interest-rate and house-price risk than the standard thirty-year, fixed-rate mortgage and . . . enable marginally qualified, highly leveraged borrowers to purchase homes at inflated prices.”¹⁸⁷ As a result, if the housing market cools, “these borrowers, and the institutions that service them, could be exposed to significant losses.”¹⁸⁸ A cooling market could result in foreclosure or even bankruptcy if homeowners are unable to sell or rent their property when they need to move to another location upon a PCS.¹⁸⁹

B. Market and Specific Property Analysis

In order to minimize risk, servicemembers should consider purchasing a home that they can either rent, based on an acceptable cash flow, or sell, based on a suitable valuation. If buyers know servicemembers have to sell their property (e.g., the servicemember is moving, cannot afford two mortgages, and cannot rent for an amount sufficient to pay expenses), servicemembers have little bargaining power and are more likely to sell for considerably less than the property’s market value.

1. *The Importance of Being Able to Sell the Property*

a. *Location*

In order to maximize the ability to sell or rent their home, servicemembers need to ensure they select the right property in the right location for the right price. Probably the most common phrase in real estate, “location, location, location,”¹⁹⁰ captures the significant factors that make a home valuable, including the quality and access to the corresponding schools, employment opportunities, and mass transportation systems, as well as the absence of excessive traffic, crime, and hazards.¹⁹¹ In other words, “the same exact home built in one area will have a different value if built somewhere else.”¹⁹² For example, a prospective buyer may seriously consider purchasing a specific property until the buyer discovers that the home is located in a 100-year flood plain.¹⁹³ The seller may perceive the flood plain as a minor issue since there is only a “1 percent chance of

¹⁸⁶ Greenspan, *supra* note 112. An interest-only mortgage is defined as: “A balloon-payment mortgage on which the borrower must at first make only interest payments, but must make a lump-sum payment of the full principal at maturity.” BLACK’S LAW DICTIONARY, *supra* note 14, at 1028. An amortization schedule is defined as: “A schedule of periodic payments of interest and principle owed on a debt obligation; specifically, a loan schedule showing both the amount of principal and interest that is due at regular intervals over the loan term and the remaining unpaid principal balance after each scheduled payment is made.” BLACK’S LAW DICTIONARY, *supra* note 14, at 83. Therefore, a forty-year amortization schedule would allow the borrower to pay off the mortgage in forty years. An option adjustable rate mortgage is:

[A]real killer. It gives homeowners the choice each month of paying the principal and interest, just the interest or an even-smaller minimum amount. Every month you pay the minimum, you're deeper and deeper in the red. And up to 80% of option-ARM buyers pay only the minimum, according to Fitch Ratings. Because the minimum payment doesn't cover the monthly interest, the deferred interest is added to the loan balance. After the loan balance grows to a certain point, the lender will demand that you start paying the full principal and interest -- on your now-bigger loan.

Marilyn Lewis, *Ouch! Your House Payment Just Doubled*, <http://articles.moneycentral.msn.com/Banking/HomeFinancing/OuchYourHousePaymentJustDoubled.aspx> (last visited Feb. 16, 2007). See generally *supra* note 151 and accompanying text (discussing ARMs).

¹⁸⁷ Greenspan, *supra* note 112.

¹⁸⁸ *Id.* Europe's largest bank HSBC announced that bad home loans to high-risk borrowers in the U.S. would be \$10.5 billion, 20% more than anticipated. See Elizabeth Strott, *Housing Woes Slam Big Bank*, MSN MONEY, <http://articles.moneycentral.msn.com/Investing/Dispatch/HousingWoesSlamBigBank.aspx> (last visited Feb. 9, 2007).

¹⁸⁹ See Liz Pulliam Weston, *Borrowers Gamble With Adjustable-Rate Mortgages*, MSM MONEY, <http://moneycentral.msn.ontent/Banking/P49733.asp?Printer> (last visited Aug. 25, 2006). “There are already plenty of signs that consumers are overdosing on debts. Bankruptcies, foreclosures and delinquencies are at or near records -- despite low interest rates and soaring home values.” *Id.* “Frank Nothhaft, chief economist at Freddie Mac, which provides mortgage capital to the nation’s lenders, estimates that adjustables comprise 15% to 20% of the \$6.64 trillion in outstanding single-family mortgage debt.” *Id.*

¹⁹⁰ TRYBULA & HEWITT, *supra* note 10, at 163.

¹⁹¹ See NISSENBAUM, *supra* note 4, at 338.

¹⁹² TRYBULA & HEWITT, *supra* note 10, at 163.

¹⁹³ See generally Jo Ann Howard, Federal Insurance Administrator, Speech at the US/Canada Consultative Group Meeting (Aug. 30-31, 2000) (transcript available at <http://www.fema.gov/nfip/jahsp12.shtm>). In light of Hurricane Katrina, potential homebuyers need to scrutinize location more than ever. Attempting to minimize financial risk, insurance companies like State Farm may stop issuing new homeowner policies in risk prone areas. See Associated Press, *State Farm: No New Home Policies in Miss*, <http://www.msnbc.msn.com/id/17150886/> (last visited Feb. 17, 2007).

having a flood in a century,” however, the buyer may view the flood plain as a major issue because there is approximately a 30% chance of having a flood “over the course of a 30-year mortgage.”¹⁹⁴

Servicemembers need to understand that location is not a purely financial valuation or convenience consideration but also a legal issue involving the attachment of personal jurisdiction.¹⁹⁵ Two ways a court may establish personal jurisdiction over servicemembers include servicemembers choosing a state as a domicile or consenting to a court’s jurisdiction.¹⁹⁶ A third way a court may establish personal jurisdiction over servicemembers includes servicemembers purchasing real property in a state.¹⁹⁷

Personal jurisdiction can become a significant issue for servicemember homeowners in divorce proceedings and situations involving tort liability (i.e., someone is injured on the servicemember’s property). In the case of divorce, a state court may issue a divorce decree without dividing property in order to protect the due process rights of a defendant.¹⁹⁸ A subsequent court with appropriate jurisdiction may then divide the property unless the court entering the divorce decree had jurisdiction to divide the property but failed to do so.¹⁹⁹ This scenario is extremely important for servicemembers who PCS from state to state and who may acquire marital properties in different states. If servicemembers file for divorce after separating from their spouses and relocating to different states, servicemembers may have to file an action for property division in the state where the property is located or the state where their spouses are domiciled.²⁰⁰ Furthermore, by purchasing a home with separate assets in states that divide property on an “equitable” basis, servicemembers risk losing their separate property in the event of divorce.²⁰¹ As a result, servicemembers contemplating divorce as a strong possibility may want to rent rather than buy and later cope with the jurisdiction and property division complications of home ownership.

b. Valuation

Just as important as finding the right location for a home is paying the right purchase price based on the “real” value of the home. One of the traditional methods of calculating valuation is an appraisal based on a market sales analysis, comparing the prices of similar properties that recently have sold in the same neighborhood.²⁰² The major problem with this method of valuation is that appraisals may be inflated or deflated based on whether the market is experiencing a real estate boom or bust. For example, in 2005, a study conducted by Global Insight and National City indicated that “65 metro areas representing 38 percent of the total U.S. housing market . . . [were] extremely overvalued and face[d] a high risk of future price correction.”²⁰³ This overvaluation was accompanied by national signs of a slowdown in the real estate market such as rising inventories and increasing sell times that indicated that the market was heading for a plateau.²⁰⁴ As Federal Reserve Chairman Ben S. Bernanke warned:

¹⁹⁴ *Insuring Against Natural Disasters*, USAA MAG., Spring 2006, at 38; see Insurance Information Institute, *Catastrophes: Insurance Issues*, Feb. 2006, <http://www.iii.org/media/hottopics/insurance/xxx>.

¹⁹⁵ See, e.g., VA CODE ANN. §§ 8.01-328.1 (2006) (giving the state of Virginia personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person’s interest in, use, or possession of real property in the state of Virginia).

¹⁹⁶ See, e.g., *Williams v. North Carolina*, 325 U.S. 226 (1945) (discussing domicile); *In re Marriage of Berry*, 155 S.W.3d 838 (Mo. Ct. App. 2005) (discussing domicile and consent).

¹⁹⁷ See BLACK’S LAW DICTIONARY, *supra* note 14, at 857. Quasi In Rem Jurisdiction is defined as “Jurisdiction over a person but based on that person’s interest in property located within the court’s territory.” *Id.*

¹⁹⁸ See, e.g., *In re Marriage of Berry*, 155 S.W.3d at 838 (refusing to divide marital property as a result of due process concerns since the respondent was not a domiciliary of the state and lacked minimum contacts to the state); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541 (1948) (establishing the divisible divorce doctrine and holding that a court decree was effective only in changing the marital status of the parties because the court lacked personal jurisdiction over the defendant).

¹⁹⁹ E.g., *O’Connell v. Corcoran*, 802 N.E.2d 1071 (2003) (holding that res judicata barred actions for property division at a future date if the court entering the original decree had jurisdiction to divide the property but failed to do so). *But see Bottigii v. Wall*, 765 N.E.2d 819 (Mass. App. Ct. 2002) (holding that res judicata only applies when property division was actually litigated).

²⁰⁰ *In re Marriage of Berry*, 155 S.W.3d at 838.

²⁰¹ See CUNNINGHAM, *supra* note 22, at 243.

²⁰² See SHEETS, *supra* note 7, at 9-10.

²⁰³ GLOBAL INSIGHT AND NATIONAL CITY, HOUSE PRICES IN AMERICA VALUATION METHODOLOGY & FINDINGS (DEC. 2005) <http://www.globalinsight.com/publicDownload/genericContent/3Q2005report.pdf>. *But see* Jim Jubak, *Why There is No Housing Bubble, The Sky is Not Falling*, MSN MONEY, June 10, 2005, <http://moneycentral.msn.com/content/P116257.asp?Printer>.

²⁰⁴ See Les Christie, *Outlook Sours For Real Estate, Many Indicators Point to a Major Slowdown in Home Prices*, CNNMONEY.COM, Nov. 15, 2005, http://money.cnn.com/2005/11/14/real_estate/buying_selling/prices_going_south/index.htm; National Association of Realtors, *Pending Home Sales Index*

[One] sector that is showing signs of softening is the residential housing market. Both new and existing home sales have dropped back, on net, from their peaks of last summer and early fall . . . [and] the reading for March points to a slowing in the pace of homebuilding as well. House prices, which have increased rapidly during the past several years, appear to be in the process of decelerating At this point, the available data on the housing market . . . suggest that this sector will most likely experience a gradual cooling rather than a sharp slowdown. However, significant uncertainty attends the outlook for housing, and the risk exists that a slowdown more pronounced than we currently expect could prove a drag on growth this year and next.²⁰⁵

In short, Chairman Bernanke forecasted the end of the 2000 to 2005 housing boom. However, only history will be able to tell the magnitude or existence of possible market bubbles.

Of course, if there is a housing bubble and the bubble pops, losses could be significant. For instance, from 1990 to 1996, the average house price in Los Angeles dropped 20.7%, or 34% after accounting for inflation.²⁰⁶ Similarly, in Oklahoma City prices dropped 26% from 1983 to 1988 and took approximately fifteen years to recover.²⁰⁷ This phenomenon has not only been experienced in the United States. Specifically, Japan experienced “rapidly increasing equity and real estate prices during the 1980s” followed by a “bursting of the bubble” in the 1990s causing real estate prices to plummet and the economy to suffer “a decade of relative stagnation marked by three arguably related recessions.”²⁰⁸

Looking at real estate history and comparing it to today’s environment of additional risks, servicemembers should be concerned. For example, many ARMs and interest only loans will be adjusting within the next few years and a lot of homeowners who overextended their finances to get into the housing market may experience foreclosures.²⁰⁹ A large number of foreclosures could significantly affect the market.²¹⁰ Furthermore, making the situation even more risky, the National Association of Realtors estimates that home “prices, particularly in high costs areas, could decline 15 percent” if recent tax proposals get implemented.²¹¹ Despite these factors, it is difficult to determine the actual risk. As former Federal Reserve Vice Chairman Roger W. Ferguson, Jr. states, detecting a bubble is “arguably impossible in real time” and, as a result, “preparation for a potential problem seems to be the best course of action.”²¹² For lending institutions it means that “good risk management . . . and the pursuit of fiscal prudence and price stability during booms, may ultimately serve as the best

Slowing, Jan. 5, 2006, available at <http://www.realtor.org/PublicAffairsWeb.nsf/Pages/PHSI0106?OpenDocument>. One way to measure the strength of the market is to evaluate the average time it takes to sell properties in a certain area. In strong markets, properties will not stay on the market long before buyers purchase them. In weak markets, properties will stay on the market longer and inventories will increase. Increasing inventories could result in a market correction. According to Economist Dean Baker of the Center for Economic Policy and Research: “a rising inventory of homes in the Washington region could fuel a double-digit price decline if interest rates climb higher. Condo prices could fall by as much as 30 percent, and prices of single-family homes could drop by as much as 15 percent.” Tomoeh Murakami Tse, *Housing Cool-Down is ‘Orderly,’ Fed Chief Says*, WASH. POST, May 19, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/05/18/AR2006051802196_pf.html.

²⁰⁵ Ben S. Bernanke, Chairman, Fed. Reserve Bd., Speech at the Joint Economic Committee, U.S. Congress: Outlook for the U.S. Economy (Apr. 27, 2006) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2006/20060427/default.htm>).

²⁰⁶ Les Christie, *Real Estate: When Booms Go Bust ... Home Prices Can and Do Go Down. Here’s What Declines Have Looked Like in the Past*, CNNMONEY.COM, Sept. 29, 2005, http://money.cnn.com/2005/09/19/real_estate/buying_selling/price_declines/index.htm.

²⁰⁷ *Id.*

²⁰⁸ Roger W. Ferguson, Jr., Vice Chairman, Fed. Reserve Bd., Speech at the Real Estate Roundtable, Washington, D.C.: Recessions and Recoveries Associated with Asset-Price Movements: What Do We Know? (Jan. 27, 2005) (transcript available at <http://www.federalreserve.gov/boarddocs/speeches/2005/2005112/default.htm>).

²⁰⁹ See Kirstin Downey & Sandra Fleishman, *Housing Market Cooling, Data Say, In Washington, Sales Are Down, Inventory is Up*, WASH. POST, Nov. 11, 2005, available at www.washingtonpost.com/wp-dyn/content/article/2005/11/10/AR2005111022241.html?sub=new. “The number of home in the United States foreclosed by lenders rose 42 percent in 2006 from a year earlier in a sign that many homeowners have become overextended in mortgage debt More than 1.2 million foreclosure filings were reported nationwide during 2006, which is a rate of one foreclosure for every 92 households, according to RealtyTrac, Inc.” Reuters, *Foreclosures Surge 42 Percent in 2006*, CNNMONEY.COM, Jan. 25, 2007, http://money.cnn.com/2007/01/25/real_estate/bc.usa.economy.housing.foreclosures.reut/index.htm?postversion=2007012508.

²¹⁰ See Olson, *supra* note 1. “As we all know, foreclosures do not affect just the borrower who loses his home; they affect the entire community. Multiple foreclosures in one neighborhood will bring down the property value for all homeowners in the neighborhood.” *Id.*

²¹¹ National Association of Realtors, *Change to Mortgage Interest Deduction Could Drop Home Prices by 15%, NAR President Warns*, Oct. 28, 2005, <http://www.realtor.org/PublicAffairsWeb.nsf/Pages/ChangetoMIDCouldDropHomePrices?OpenDocument> (discussing possible ramifications of tax proposals). See discussion *supra* p. 5.

²¹² Ferguson, *supra* note 208.

insurance for dealing with the inevitable occasional asset-price breaks observed in our modern economy.”²¹³ This advice is just as useful to the average servicemember making the home buying analysis.

Regardless of a possible bubble, servicemembers who can keep their properties for longer durations should be able to deal with asset-price breaks and, as a result, benefit from appreciation and capital gain tax advantages. Fortunately, servicemembers and other homeowners who move frequently can take advantage of exceptions to the rule requiring homeowners to own (i.e., ownership test) and live (i.e., use test) in their principal residence for at least two of the last five years in order to exclude \$250,000 (\$500,000 for joint returns) of capital gain.²¹⁴ For example, servicemembers may suspend the five-year period for up to ten years of qualified extended duty.²¹⁵ In addition, servicemembers may take advantage of prorated capital gain exclusions if they fail to qualify for the ownership and use tests due to a change in place of employment or certain other unforeseen circumstances.²¹⁶

To take advantage of these capital gain exclusions, however, servicemembers will normally have to own their principal residences for longer periods of time to allow their homes to appreciate. One way to increase the ability to hold onto a property is to ensure that the property can be successfully rented after considering rental income and expenses. In short, when purchasing a property, it is important for servicemembers to evaluate possible rental income²¹⁷ in addition to the ratio of home price to household incomes.²¹⁸

2. *The Importance of Being Able to Rent the Property (Cash Flow)*

One of the most important financial aspects of a homeowner’s decision to make their home available for rent is the homeowner’s ability to maintain a positive or break-even cash flow after paying applicable expenses, such as principal, interest, taxes, maintenance, and management fees.²¹⁹ Purchasing a home based on its fundamental value as a potential income property is vital to this process. In general, the

²¹³ *Id.*

²¹⁴ See I.R.C. § 121(a) (LEXIS 2006).

To claim the exclusion, you must meet the ownership and use tests. This means that during the 5-year period ending on the date of the sale, you must have: Owned the home for at least 2 years (the ownership test), and [l]ived in the home as your main home for at least 2 years (the use test).

INTERNAL REVENUE SERV., DEP’T OF TREASURY, PUB. 523 SELLING YOUR HOME 9 (2005) [hereinafter PUB. 523].

²¹⁵ See I.R.C. § 121(d)(9). “The term ‘Qualified official extended duty’ means any extended duty while serving at a duty station which is at least 50 miles from such property or while residing under Government orders in Government quarters.” *Id.* § 121(d)(9)(i). “The term ‘extended duty’ means any period of active duty pursuant to a call or order to such duty for a period in excess of 90 days or for an indefinite period.” *Id.* § 121(d)(9)(iv). The following example shows how the five-year period can be extended by ten years:

Mary bought a home on April 1, 1989. She used it as her main home until September 1, 1992, when she went on qualified official extended duty with the Navy. She did not live in the house again before selling it on August 1, 2005. Mary elects to use the entire 10-year suspension period. Therefore, the suspension period would extend back from August 1, 2005, to August 1, 1995, and the 5-year test period would extend back to August 1, 1990. During that period, Mary owned the house all 5 years and lived in it as her main home from August 1, 1990, until September 1, 1992, a period of 25 months. She meets the ownership and use tests because she owned and lived in the home for 2 years during this test period.

PUB. 523, *supra* note 214 at 13. “Together, the 10-year suspension period and the 5-year test period can be as long as, but no more, than 15 years. You cannot suspend the 5-year period for more than one property at a time.” *Id.* at 13.

²¹⁶ See I.R.C. § 121(c)(2); PUB. 523, *supra* note 214, at 12-15. To determine the reduced maximum exclusion, servicemembers should fill out Worksheet 3 of I.R.S. Publication 523. See PUB. 523, *supra* note 214 at 15.

²¹⁷ See CARLETON H. SHEETS, REAL ESTATE MASTERY COURSE, A GRADUATE COURSE IN CREATIVE REAL ESTATE INVESTING 13-2 (1997); see also SHEETS, *supra* note 7, at 9-11.

²¹⁸ See GLOBAL INSIGHT & NATIONAL CITY, HOUSE PRICES IN AMERICA VALUATION METHODOLOGY & FINDINGS, UPDATED FOR THE 3RD QUARTER OF 2005 (2005), available at <http://www.nationalcity.com/content/corporate/economicinsight/documents/3q2005report.pdf#search=HOUSE%20PRICES%20IN%20AMERICA%20VALUATION%20METHODOLOGY%20%26%20FINDINGS>.

²¹⁹ See TRYBULA & HEWITT, *supra* note 10, at 289. It is important for potential homeowners to understand the following:

It does you no good for a property to appreciate significantly over a twenty-year period if you couldn’t hold on to it because of cash flow problems. The biggest mistake most new real estate investors make is underestimating the costs associated with real estate management. . . . It is essential to set aside a maintenance reserve of maybe 5 to 10 percent of gross rents to cover . . . “unexpected” costs. Don’t forget that your rental will never be occupied 100 percent of the time and set aside an allowance for this also.

Id.

fundamental price of an asset typically is defined in terms of the discounted present value of the income stream . . . that the asset is expected to provide over time . . . [F]or real estate, it is the discounted value of the rents or services that are expected to accrue to the owner over time.²²⁰

Servicemembers should attempt to purchase homes based on their fundamental value so that they have the option to lease the homes to tenants for an amount that will cover expenses. In general, this rental amount is one percent per month or more of the home's purchase price.²²¹ For example, if servicemembers are considering purchasing a property for \$100,000, they should determine whether or not the property could be leased to tenants for \$1000 per month. If servicemembers can lease the property to tenants for only \$500 per month based on market rental rates, servicemembers may determine that the listed price of the property is too high. Nevertheless, servicemembers may still purchase a property at a possibly inflated price if they need to move into a nice home quickly and few alternative options exist. In addition, they may hope that the property will appreciate significantly over time and make the investment worthwhile. Furthermore, they may need a tax shelter or have plans to increase cash flow.

a. Increasing Cash Flow

If a one percent monthly rent is not possible upon the purchase of a home, servicemembers may be able to increase cash flow. Some common ways to increase cash flow include renting on a bi-weekly basis,²²² eliminating property management fees, renovating the property,²²³ adding low cost amenities, furnishing the property, lowering real estate taxes, and transferring utility costs to tenants.²²⁴ It is not necessarily easy, however, to increase cash flow. For example, servicemembers attempting to increase cash flow by eliminating property management fees may be taking significant risks. Since servicemembers deploy and are often stationed far from their property, eliminating property management fees may be dangerous, especially if servicemembers do not have personal experience managing properties.²²⁵ As a result, servicemembers need to plan for deployment and identify a capable property manager that can take over these responsibilities at a moments notice.²²⁶

Another way servicemembers can increase cash flow is to take advantage of tax law. By renting their property, servicemembers can generally deduct all rental expenses²²⁷ and depreciate the property's basis and improvement costs.²²⁸ As an additional benefit, servicemembers can deduct a loss upon sale of their rental properties.²²⁹ Furthermore, servicemembers

²²⁰ Ferguson, *supra* note 208.

²²¹ CARLTON H. SHEETS, THE PAINLESS GUIDE TO PROFITABLE PROPERTY MANAGEMENT 1-6 (1997) [hereinafter PROPERTY MANAGEMENT].

²²² SHEETS, *supra* note 7, at 21-5. By renting on a bi-weekly rather than a monthly basis, a landlord can get thirteen months of income from a twelve month lease. *Id.* "Owners of properties do this [i.e., rent on a weekly or bi-weekly basis] not only to accommodate tenants who can only afford to pay rent on a weekly basis, but also because they know that they [i.e., property owners] are going to get an additional four weeks rental income a year." *Id.*

²²³ PROPERTY MANAGEMENT, *supra* note 221, at 2-3. Low cost renovations could include painting, replacing old carpet, installing new bathroom and kitchen fixtures, and adding better lighting. *Id.* More complex renovations might include conversion of a single family property into a duplex, assuming zoning and code requirements are met.

²²⁴ *See id.* at 10-2 to -4.

²²⁵ *See* SHEETS, *supra* note 7, at 21-3. At least at the beginning, servicemembers should manage their own property to learn the management business and be able to better manage property managers. *Id.* at 21-3 to -4.

²²⁶ When this author was deployed to Afghanistan in 2004 as the Chief of Client Services, CJTF-76, this author saw servicemembers hand over property management responsibilities to spouses. Unfortunately, some spouses did not have the appropriate experience and mismanaged the properties, which, in some cases, resulted in foreclosure and bankruptcy.

²²⁷ *See* INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 527, RESIDENTIAL RENTAL PROPERTY 3, 8 (2005) [hereinafter PUB. 527]. "You can deduct the cost of repairs to your rental property. You cannot deduct the cost of improvements. You recover the cost of improvements by taking depreciation" *Id.* at 3. Examples of expenses include repairs, advertising, cleaning, maintenance, utilities, insurance, taxes, interest, points charged solely for the use of money, commissions, tax return preparation fees, travel expenses, rental payments, and local transportation expenses. *Id.* at 3-4. Examples of improvements include bedroom additions, kitchen and bath modernizations, heating and air conditioning system installations, roof installations, and other work that adds "to either the value or the life of the property." *Id.* at 3.

²²⁸ *See id.* at 8, 10. In general, for a taxpayer to depreciate property, the taxpayer must own the property and use the property in a business or income-producing activity, and the property must have a determinable useful life greater than one year. *Id.* at 8. Unfortunately, you cannot depreciate land "because land does not wear out, become obsolete, or get used up." *Id.* at 9.

²²⁹ *See* I.R.C. § 165(c) (LEXIS 2006).

selling homes after 1997 and satisfying the objective ownership and use tests²³⁰ may still be able to exclude considerable capital gain upon sale.²³¹

b. Accounting for Depreciation

In their efforts to increase cash flow, servicemembers need to ensure they account for depreciation. Specifically, if they decide to sell the property in the future, they “cannot exclude the part of the gain equal to the depreciation . . . claimed or [that] could have [been] claimed for renting the house.”²³² For example:

Dan sold his main home in 2005 at a \$10,000 gain. He meets the ownership and use tests to exclude the gain from his income. However, he used one room of the home for business [or as a rental unit] in 2004 and has records showing he claimed [or could have but failed to claim] \$1,000 depreciation. He can exclude \$9,000 (\$10,000 - \$9,000) of his gain. He has a taxable gain of \$1,000.²³³

Servicemembers must account for depreciation whether or not they actually claimed depreciation. Fortunately, however, servicemembers *may* treat their homes as principal residences if they rent their homes and their homes appreciate in value, and they may treat their homes as rental properties if they rent their homes and their homes lose value.²³⁴ Having both options, servicemembers may take advantage of tax law when managing their financial assets.

C. Maximizing Financial Options

Servicemembers need to understand their personal situation, the market, and the value of specific properties to maximize their current and future financial options. By buying a home before establishing themselves financially, servicemembers may end up feeling that their home mortgages own them rather than the other way around. Similarly, by paying too much for a home, servicemembers may be constrained from selling or renting their properties. As a result, servicemembers wanting to buy homes should select properties that “make economic sense”²³⁵ so that they have the option to sell or rent their properties in the future. Of course, servicemembers may find it challenging to keep all these options available in light of the numerous legal and financial issues involved in making a housing decision.

IV. Step Three: Making the Decision to Purchase, Rent, or Live in Military or Privatized Military Housing; A Quantitative Starting Point

Servicemembers can easily become overwhelmed with the numerous legal and financial considerations in determining whether to purchase, rent, or live in military or privatized housing. To help start the analysis, servicemembers should begin by making a quantitative comparison concerning the measurable costs associated with each alternative. Specifically,

²³⁰ See Pub. L. No. 105-34, 111 Stat. 788 (1997). See generally Lieutenant Colonel Noël Woodward, *Important News for Servicemembers Who Sold Homes after 6 May 1997 and Paid Income Tax on Gains from Those Sales*, ARMY LAW., Oct. 2004, at 8 (discussing tax law changes due to the Tax Relief Act of 1997 and the Military Family Tax Relief Act of 2003). See *supra* note 214 (discussing the objective ownership and use tests); see *infra* note 234 (discussing the subjective intent test for sales prior to 1997).

²³¹ See I.R.C. § 121.

²³² PUB. 523, *supra* note 214, at 17. “If you were entitled to take depreciation deductions because you used your home for business purposes or as rental property, you cannot exclude the part of the gain equal to any depreciation allowed or allowable as a deduction for periods after May 6, 1997.” *Id.* “Lease of real property for definite duration is depreciable; therefore, it is ‘section 1250 property’ and is subject to depreciation recapture when disposed of.” Rev. Rul. 72-85 (1972) 1972-1 CB 234; 26 U.S.C.S. § 1250 cmt. n.2 (LEXIS 2006).

²³³ *Id.*

²³⁴ See I.R.C. § 121 (discussing gains); *id.* § 165(c) (discussing losses). However, if their homes are not rented out and treated as rental properties, taxpayers cannot deduct the loss upon sale of their homes. See PUB. 523, *supra* note 214, at 4; see also 26 C.F.R. §§ 1.165-9 (LEXIS 2006) (discussing losses). In addition, if their homes are not rented for profit, taxpayers can deduct rental expenses only up to the amount of the rental income. See PUB. 527, *supra* note 227, at 5. The dual benefit of taking advantage of both gains and losses is a welcome change from the subjective test tax law governing the sale of homes occurring prior to 6 May 1997. See generally Major Thomas Keith Emswiler, *The Tax Consequences of Renting and Then Selling a Residence*, ARMY LAW., Oct. 1995, at 20 (discussing the subjective test for sales prior to 1997 concerning the taxpayer’s intent to convert his home into a rental property as part of a “profit-oriented enterprise”). Factors the courts looked to in making this subjective determination included: “(1) the length of time the house was occupied by the individual as his residence . . . ; (2) whether the individual permanently abandoned all further personal use of the house; (3) the character of the property (recreational or otherwise); (4) offers to rent; and (5) offers to sell.” *Grant v. Comm’r*, 84 T.C. 809 (1985).

²³⁵ PROPERTY MANAGEMENT, *supra* note 221, at 2-1.

servicemembers should consider tax benefits, equity growth, foregone interest, and maintenance. In addition, if servicemembers plan to live in the property initially and then rent the property to tenants, they should consider depreciation, management fees, and vacancy. Servicemembers will obviously prioritize different factors based on their individual circumstances and tastes. The following sections run through examples demonstrating a process for making these quantitative comparisons. These examples are summarized in the tables in Appendices A, B, C, and D.

A. To Rent vs. Buy a Home (Appendices A and B)

To begin their analysis, servicemembers should identify the quantifiable expenses and benefits associated with each housing alternative. Next, servicemembers should calculate the tax savings of purchasing a home and itemizing deductions and compare these figures to renting a similar residence and taking the standard deduction. Finally, servicemembers should total their expenses, tax savings, and avoided costs of renting a similar property. To make a comparison to military or privatized housing, servicemembers should substitute their BAH allowance for their avoided rental costs and factor in other costs such as free utilities and renters insurance.

For example, Appendix A shows a hypothetical couple filing a joint tax return, making \$59,400 annually, and deciding whether to purchase a \$300,000 home or rent an equivalent residence. In making this determination, the couple anticipates using savings from a 4% interest bearing account to make a 20% down payment of \$60,000 and cover closing costs of \$10,000. The couple plans on making this down payment to avoid PMI, reduce their monthly mortgage payment, and provide an equity cushion from possible declines in market value.

After identifying the expenses and benefits associated with each housing option, the couple should determine their tax savings between buying and renting a home. By itemizing their deductions of mortgage interest, real estate taxes, and other tax-deductible expenses, the couple in Appendix A reduces their net taxable income from \$59,400 to \$35,900. Although they forego their \$10,000 standard deduction, by purchasing the home and itemizing their deductions they end up saving \$2445 in taxes when compared to renting a similar property. Next, the couple totals their expenses, foregone interest, tax savings, and rental costs avoided to determine whether it is cheaper to buy or rent on an annual basis. In this example, the couple experiences a net benefit of \$1745 annually by purchasing a home.

These tax benefits increase based on the couple's income. Appendix B shows the same example except the couple has a higher annual income. Instead of being in the 15% tax bracket, the couple in Appendix B is in the 25% tax bracket. This example demonstrates that because of the progressive tax system, purchasing a home can be more beneficial if there is more taxable income to shelter. Although the examples in Appendices A and B are the same except for annual income, the couple in Appendix B experiences a tax savings of \$4075 and a net home ownership benefit of \$3375.

Servicemembers must also keep in mind the Alternative Minimum Tax (AMT), which attempts to ensure that persons earning above a certain amount and benefiting from certain tax advantages pay at least a minimum amount of tax.²³⁶ To determine whether the AMT applies, taxpayers should complete IRS form 6251.²³⁷ Fortunately, the President's Advisory Panel on Federal Tax Reform has recommended eliminating the AMT.²³⁸ Until the AMT is officially repealed, however, it will cover more and more middle-class taxpayers each year.²³⁹

Although these examples are rather simplistic, they can be modified based on a servicemember's specific circumstances. For example, a servicemember can factor in quantifiable costs or benefits, such as utilities and transportation costs, for a better-tailored analysis. Similarly, transaction costs for selling the property, appreciation, and capital gain could be estimated for the period of home ownership and broken down into yearly amounts, which also could be factored into the analysis. Unfortunately, statistics cannot adequately measure the numerous intangible costs and benefits such as having the autonomy to decorate or improve one's home. As a result, this type of quantitative analysis must serve as only a starting point in an effective analysis.

²³⁶ See Internal Revenue Serv., Topic 556 - Alternative Minimum Tax, <http://www.irs.gov/taxtopics/tc556.html> (last visited Aug. 28, 2006).

²³⁷ INTERNAL REVENUE SERV., DEP'T OF TREASURY, 2005 INSTRUCTIONS FOR FORM 6251 (REV. JAN. 2006) ALTERNATIVE MINIMUM TAX FOR INDIVIDUALS (2006).

²³⁸ FEDERAL TAX REFORM, *supra* note 34, at 85.

²³⁹ *Id.* In 2006, the AMT is estimated to apply to 21.6 million taxpayers. *Id.* at 86. By 2015, the AMT is estimated to apply to 52 million taxpayers. *Id.*

B. Cash Flow as an Income Property (Appendix C)

Although this rent vs. buy analysis is useful in comparing the quantifiable costs between purchasing, renting, or living in military or privatized military housing, it is practical only if servicemembers remain in the same residence. The analysis is not effective if servicemembers move to another duty station and want to keep their home at their departing station. As a result, before purchasing a property, servicemembers should consider whether the property could be rented with a positive or break-even cash flow. If servicemembers cannot achieve a break-even or positive cash flow, servicemembers may not experience sufficient equity growth and appreciation to cover the transaction costs upon the eventual sale of the property.

For example, Appendix C shows a hypothetical real estate investor considering the purchase of a rental property. First, he calculates his expected rental gross income allowing for vacancy. Second, he totals his expenses including principal, interest, taxes, management fees, maintenance, insurance, and other miscellaneous costs. Third, he offsets his rental gross income by his expenses to determine his cash flow. In this hypothetical case, the real estate investor can maintain an annual \$564 positive cash flow, \$3000 equity growth, and \$436 paper loss. Over time, as the investor holds on to the property, however, the tax benefits will decrease and the investor will have to find a new tax shelter to cover his income from his rental property.

C. The Decision Matrix (Appendix D)

With so much focus on costs and cash flow, servicemembers may fail to see the big picture. To address this concern, servicemembers should consider using a decision matrix.²⁴⁰ A decision matrix can assist servicemembers in making choices that involve “multiple, and often competing, decision criteria” where some factors may be more important than others.²⁴¹ Servicemembers can use a decision matrix as part of their analysis incorporating their cost comparison (e.g., Appendices A and B) and cash flow (e.g., Appendix C) results or as a totally separate analysis tool disregarding cost and cash flow. The U.S. Army has successfully used one such tool, the DECMAT Program for Windows Version 2.2, to train its students at the Combined Arms and Services Staff School and the U.S. Army Command and General Staff College.²⁴² Although the detailed instructions are included in Appendix E, the process can be summarized in five relatively simple steps.²⁴³

First, servicemembers should identify the significant factors bearing on their decision and determine the relative weights of these criteria based on their own personal preferences. Possible factors bearing on the servicemember’s housing decision could include quality of residence, location, cost, and wait time to move in. Other factors could include the possibility of deployment, divorce, bankruptcy, or change in employment. For example, the Pairwise Comparison in Appendix D shows an example where a servicemember slightly favors “quality of residence” to “location,” favors “quality of residence” to “cost” and “wait time,” and strongly favors “quality of residence” to “duration of residence” and “investment.” By specifying these priorities, the DECMAT program automatically assigns numerical weights to each criterion. In the example “quality of residence,” “location,” “cost,” “wait time,” “duration of residence,” and “investment,” received the following weights of 4.93, 3.09, 1.78, 1.78, 1, and 1 respectively.

Second, servicemembers should determine whether the criteria can be measured numerically or whether the possible courses of action can only be ranked against each other based on the criteria. For example, a criterion such as “cost” could be numerically measured in dollars, but a criterion such as “quality of residence” could not be measured easily with a raw numerical figure. However, servicemembers could effortlessly determine whether the “quality of privatized housing” should be ranked higher than the “quality of military housing” and rank the courses of action accordingly.

Third, servicemembers should select the appropriate type of decision matrix. A relative values matrix is probably more appropriate for most servicemembers because it is easy to use and does not require evaluation criteria to be expressed with specific numerical values such as dollars or miles per gallon.²⁴⁴ Although a multiplication matrix is more accurate because it

²⁴⁰ See STIKKERS, *supra* note 2.

²⁴¹ CAPTAIN RICHARD B. STIKKERS, DECMAT 2.2 INSTRUCTIONS 1, Oct. 26, 1998 [hereinafter INSTRUCTIONS]. See *infra* Appendix E.

²⁴² See *id.* at 2.

²⁴³ See *id.* at 1. It should be noted that the author simplified the specific DECMAT procedures.

²⁴⁴ *Id.* at 4.

accounts for “the magnitude of difference among an evaluation criterion’s raw data,” it cannot be used if a single criterion such as “quality of residence” lacks a numerical measure of value.²⁴⁵

Fourth, assuming servicemembers select a relative values matrix, they should evaluate each course of action with respect to each criterion and rank each course of action accordingly. To rank courses of action, servicemembers must specify whether a lower rank or higher rank is better and consistently apply the ranking system throughout the decision matrix to properly determine the outcome.²⁴⁶ For instance, in the hypothetical case in Appendix D regarding the “quality of residence” criterion, “buy,” “privatized housing,” “rent,” and “military housing” are ranked 1, 2, 3, and 4 respectively, with 1, the lower rank, being better. In the event that two courses of action are equal, their rankings are averaged and assigned accordingly.²⁴⁷ For example, in the “location” criterion from the same hypothetical case, “military housing” and “privatized housing” provide similar benefits. As a result, the example assigns them both the same value of 1.5 (i.e., $(1+2) / 2 = 1.5$).

Fifth, servicemembers should compute the values of each course of action to determine which housing alternative is best. If servicemembers apply a “higher rank is better analysis,” the best course of action will have the highest score. Conversely, if servicemembers apply a “lower rank is better analysis,” the best course of action will have the lowest score. For example, in Appendix D, “privatized housing” is the best housing alternative given the priorities of this hypothetical servicemember because it has the lowest score. To test this result, servicemembers can conduct a sensitivity analysis to determine whether the decision would be different if the priorities of the servicemembers changed.²⁴⁸ For example, if servicemembers valued “investment” more (i.e., giving it a weight of 2.77 rather than 1), then “buy” would become the optimal decision.

Although the analysis may seem complex, the DECMAT program is relatively user-friendly and can be used quickly to evaluate different options given the different priorities of servicemembers.²⁴⁹ As a result, servicemembers should consider using the DECMAT or similar tool to evaluate the numerous factors they deem important to their specific situation.

V. Conclusion

Servicemembers need to thoroughly analyze numerous legal and financial disciplines, from tax law and family law to valuation and cash flow, in order to minimize the risks associated with selecting housing options. Failure to consider the numerous disciplines and their consequences as a whole *in advance of selecting a housing option*, can result in events, such as not being able to terminate a lease prior to a deployment, unintentionally submitting oneself to the jurisdiction of a state court, and defaulting on a mortgage. Although owning a home may be one of the best ways to build wealth, buying a home can be disastrous if servicemembers pay too much for a home, buy a home in the wrong location, overextend their finances, or own their home for too short a period of time.

Servicemembers need to consider their housing options and take the necessary steps months to years in advance to ensure minimum risks and maximum rewards. Servicemembers should begin by immediately evaluating their credit, fixing any discrepancies, and taking steps to improve their credit scores to prepare themselves for buying a home or renting an apartment in the future. Simultaneously, servicemembers should strive to eliminate debt, build financial reserves, and increase access to credit. Taking these steps will facilitate buying a home when the timing based on individual circumstances is most advantageous.

Months prior to a PCS, servicemembers should consider taking permissive temporary duty to locate suitable housing alternatives. At that time, servicemembers can identify the housing and rental markets by talking to realtors, housing office representatives, and sponsors. Servicemembers can evaluate the flexibility of landlords to include military clauses as well as review the housing rules and wait times associated with military and privatized housing. Servicemembers can compare costs associated with each housing option and factor in typical issues such as tax benefits and property taxes as well as atypical concerns such as child support and divorce.

²⁴⁵ *Id.*

²⁴⁶ *See id.* at 2.

²⁴⁷ *See* INSTRUCTIONS, *supra* note 241, at 3.

²⁴⁸ *See id.* at 8. “Sensitivity analysis identifies the degree to which the DECMAT results are subject to change with only small changes in the evaluation criteria weights. A solution which is not sensitive to changes in weights provides the decision-maker with confidence that he or she has a valid solution.” *Id.*

²⁴⁹ *See* STICKERS, *supra* note 2.

Servicemembers, especially those anticipating a deployment or PCS shortly after arriving at a new duty station, should also consider selling or renting their prospective home. By considering these issues prior to purchasing a home, servicemembers will be able to determine if they will be able to sell their homes without incurring significant deficiencies or rent their homes while maintaining a break-even or positive cash flow. For those interested in renting out their home but concerned about having negative cash flows, servicemembers can calculate renovation costs into the purchase decision in order to determine whether they could achieve a break-even or positive cash flow.

By considering the numerous legal and financial issues and evaluating them based on their individual circumstances, servicemembers can set themselves up for success regardless of the following: how long they plan to be physically located at a duty station, how strong their finances are at any point in time, or what housing option they ultimately select. In today's world of rising interest, divorce, foreclosure, bankruptcy, and deployment rates, servicemembers need to plan now more than ever to avoid potentially disastrous results in the current unforgiving legal and financial environment.

Appendix A

To Rent vs. Buy a Home (15% Tax Bracket in 2005)²⁵⁰

Step 1. Computing the Tax Deduction Benefit (Assuming Married Filing Joint Return).

| | Rent (\$) | Buy (\$) |
|------------------------------------|---------------|---------------|
| Taxable Income | 59,400 | 59,400 |
| Foregone Interest (\$70,000 x .04) | 2,800 | |
| Standard Deduction | (10,000) | |
| Itemized Deductions | | (2,000) |
| Interest Expense Deduction | | (20,000) |
| Real Estate Taxes | | (1,500) |
| Net Taxable Income | 52,200 | 35,900 |
| Taxable Income Reduction | | 16,300 |
| x Marginal Tax Rate (2005) | | x 15% |
| Tax Savings Due to Purchase | | 2,445 |

Step 2. Comparing Renting versus Buying in terms of Cash Flow and Equity Growth.

| | |
|--|-----------------|
| Homeowner (costs) or Benefits* | |
| Interest Paid on Mortgage | Buy (20,000) |
| Real Estate Taxes | (1,500) |
| Non Tax Deductible Fees such as Association Costs and Trash Fees | (500) |
| Home Owners vs. Renters Insurance Difference | (400) |
| Maintenance | (3,000) |
| Foregone Interest on Other Possible Investments | (2,800) |
| Tax Savings | 2,445 |
| Equity Growth due to Paying Down the Mortgage | <u>3,500</u> |
| Net Cost of Home Ownership | (22,255) |
| Rental Cost Avoided or BAH if on-post | +24,000 |
| Net Benefit or (Cost) of Home Ownership | 1,745 |

*This Analysis may include

Other Quantifiable Costs or Benefits

- Utilities (landlord may pay for some utilities)
- Transportation Costs (if there is a difference in commuting distance to work)
- Transaction Costs and Time Involved in Selling or Renting upon PCS
- Appreciation (or loss in value) of the Property

Other Intangible Costs or Benefits

- Pleasure of Owning and having a High Degree of Privacy
- Having Autonomy to Improve the Property
- Difference in the Size and Quality of the Residence

²⁵⁰ See TRYBULA & HEWITT, *supra* note 10, at 182 (showing a similar example). The examples in this Appendix use the 2005 tax tables. The analysis does not change using a different year's tax tables, but the amounts themselves change. For example, in 2006, the standard deduction for married taxpayers filing jointly increased from \$10,000 to \$10,300. See INTERNAL REVENUE SERV., DEP'T OF TREASURY, PUB. 17 YOUR FEDERAL INCOME TAX 132 (2006).

Appendix B

To Rent vs. Buy a Home (25% Tax Bracket in 2005)²⁵¹

Step 1. Computing the Tax Deduction Benefit (Assuming Married Filing Joint Return).

| | Rent (\$) | Buy (\$) |
|------------------------------------|----------------|----------------|
| Taxable Income | 100,000 | 100,000 |
| Foregone Interest (\$70,000 x .04) | 2,800 | |
| Standard Deduction | (10,000) | |
| Itemized Deductions | | (2,000) |
| Interest Expense Deduction | | (20,000) |
| Real Estate Taxes | | (1,500) |
| Net Taxable Income | 92,800 | 76,500 |
| Taxable Income Reduction | | 16,300 |
| x Marginal Tax Rate (2005) | | x 25% |
| Tax Savings Due to Purchase | | 4,075 |

Step 2. Comparing Renting versus Buying in terms of Cash Flow and Equity Growth.

| | | |
|--|--|--------------|
| Homeowner (costs) or Benefits* | | Buy |
| Interest Paid on Mortgage | | (20,000) |
| Real Estate Taxes | | (1,500) |
| Non Tax Deductible Fees such as Association Costs and Trash Fees | | (500) |
| Home Owners vs. Renters Insurance Difference | | (400) |
| Maintenance | | (3,000) |
| Foregone Interest on Other Possible Investments | | (2,800) |
| Tax Savings | | 4,075 |
| Equity Growth due to Paying Down the Mortgage | | <u>3,500</u> |
| Net Cost of Home Ownership | | (20,625) |
| Rental Cost Avoided or BAH if on-post | | +24,000 |
| Net Benefit or (Cost) of Home Ownership | | 3,375 |

*This Analysis may include

Other Quantifiable Costs or Benefits

- Utilities (landlord may pay for some utilities)
- Transportation Costs (if there is a difference in commuting distance to work)
- Transaction Costs and Time Involved in Selling or Renting upon PCS
- Appreciation (or loss in value) of the Property

Other Intangible Costs or Benefits

- Pleasure of Owning and having a High Degree of Privacy
- Having Autonomy to Improve the Property
- Difference in the Size and Quality of the Residence

²⁵¹ See *id.* (showing a similar example).

Appendix C

Cash Flow as an Income Property²⁵²

| Income | Dollars |
|---|----------------|
| Possible Annual Gross Income (\$1,400 x 12 months) | 16,800 |
| Minus 5% Vacancy Allowance (\$16,800 x .05) | <u>(840)</u> |
| Actual Gross Income | 15,960 |
| Expenses | |
| Mortgage Payment (principal of \$3,000, interest, and taxes) | (12,500) |
| 10% Management Fees (\$15,960 x .10) | (1,596) |
| Maintenance/Repairs | (1,000) |
| Insurance | (200) |
| Miscellaneous such as advertising, accounting, and legal fees | (100) |
| Total Expenses | 15,396 |
| Cash Flow (\$15,960 of income minus \$15,396 of expenses)* | 564 |

* In addition to this \$564 cash flow (i.e., income minus expenses) are equity growth (i.e., principal payments reducing the mortgage balance) and tax incentives (i.e., interest deductions, real estate tax deductions, and depreciation deductions).

For example, in this hypothetical case, the landlord could experience \$3,000 of equity growth, while having a tax deduction of \$16,396 (i.e., expenses of \$12,396 [\$15,396 of expenses minus \$3,000 of principal payments] plus depreciation of \$4,000). As a result, the landlord has a property generating a positive cash flow, paying off the mortgage, and simultaneously creating a paper loss of \$436 (e.g., \$16,396 of deductions minus \$15,960 of income = \$436 loss) for legal tax sheltering purposes.

²⁵² See PROPERTY MANAGEMENT, *supra* note 221, at 2-1 (showing a similar example); see also SHEETS, *supra* note 7, at 9-12.

Appendix D

Decision Matrix²⁵³

Pairwise Comparison

| | | | | | |
|---|---|---|---|---|---|
| | 2 | 3 | 4 | 5 | 6 |
| 1 | 2 | 3 | 3 | 4 | 4 |
| 2 | | 2 | 2 | 3 | 3 |
| 3 | | | 1 | 2 | 2 |
| 4 | | | | 2 | 2 |
| 5 | | | | | 1 |

Enter the importance factor of each horizontal evaluation criteria compared to each vertical evaluation criteria

Print

Send Values

Cancel

Override

Help

Legend of Importance Factors
 1 - Equal
 2 - Slightly Favored
 3 - Favored
 4 - Strongly Favored

DECISION MATRIX

Housing Decision

| Weight | 4.93 | 3.09 | 1.78 | 1.78 | 1.00 | 1.00 | Total |
|--------------------------|----------------------|-----------------------|-------------------|----------------------|-----------------------|------------------------|--------|
| Criteria | Quality of Residence | Location of Residence | Cost of Residence | Wait Time to Move In | Duration of Residence | Investment Opportunity | |
| Buy | 1 | 3.5 | 4 | 2 | 4 | 1 | 31.419 |
| Rent | 3 | 3.5 | 3 | 1 | 3 | 3 | 38.721 |
| Live in Military Housing | 4 | 1.5 | 1 | 4 | 1.5 | 3 | 37.749 |
| Privatized Housing | 2 | 1.5 | 2 | 3 | 1.5 | 3 | 27.889 |

Relative Values Matrix
 Less is better
 Consistency Ratio = 99.33

Sensitivity Analysis

Quality of Residence: Not Sensitive
 Location of Residence
 Changes at 1.32, Optimal is Buy
 Cost of Residence: Not Sensitive
 Wait Time to Move In: Not Sensitive
 Duration of Residence: Not Sensitive
 Investment Opportunity
 Changes at 2.77, Optimal is Buy

²⁵³ U.S. DEP'T OF ARMY, 52D ID & FORT RILEY MEMO. 25-50, 52D INFANTRY DIVISION (M) & FORT RILEY STAFF OFFICERS GUIDE (1 Feb. 20yy).

Appendix E

DECMAT 2.2 Instructions²⁵⁴

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1. Introduction
2. Terms
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8. Override of Criteria Weights
9. Consistency Ratio
10. Sensitivity Analysis
11. Reordering the Matrix
12. Matrix Output
13. Saving Data
14. Importing to PowerPoint

1. Introduction.

a. The Decision Matrix (DECMAT) is a tool decision-makers can use to assist them in solving problems with multiple, and often competing, decision criteria. Some of these criteria may be more important than others. This DECMAT program provides a structured approach, first to establish criteria weights and then to apply these weights within the decision matrix. In this way, decision-makers have a relatively objective tool to use for their decisions.

b. This program was developed for use at the Combined Arms and Services Staff School (CAS3) at the U.S. Army Command and General Staff College, Ft. Leavenworth, Kansas. The program author is a 1997 graduate of CAS3. This program is considered freeware and is intended for dissemination throughout the U.S. Army.

2. Terms.

a. Objective: The desired end state or goal of the decision.

b. Evaluation Criteria (or States of Nature): Aspects of the situation over which the decision-maker has no control.

c. Courses of Action (or Strategies): Alternative choices available to the decision-maker.

d. Raw Data (Payoffs): The dependent variable. Results of the interaction between the criteria and the courses of action (i.e., the cost of a course of action given an evaluation criterion).

3. Program Start-Up Window.

a. Upon executing the DECMAT Program, one finds an empty, unlabeled 2x2 DECMAT in the program start-up window. This program has the capability to work up to a 10x15 matrix.

b. This program always calculates values based on lower values being better, both within the matrix and for the total column.

²⁵⁴ INSTRUCTIONS, *supra* note 241.

4. Select Matrix Type and Matrix Set Up.

a. Select the matrix type by dragging down the Matrix menu and highlighting either the Multiplication Matrix or the Relative Value Matrix. An alternate method to select the matrix type is to select the circled M or R on the tool bar to select a Multiplication or Relative Value Matrix, respectively. The default selection is a "Multiplication Matrix."

b. Evaluation Criteria are shown along the top of the matrix. Click on the + or - button with the horizontal arrow (located on the tool bar) to add or delete Evaluation Criteria columns. Add the criteria names to title boxes at the top of the matrix; the title boxes accept two lines of entry. By convention, Evaluation Criteria are shown in order of weight, descending from left to right in the matrix. See Weighting of Criteria for further explanation.

c. Courses of Action are shown along the left side of the matrix. Click on the + or - button with the vertical arrow (located on the tool bar) to add or delete Courses of Action rows. Add the Courses of Action names to the boxes on the left side of the matrix; the Course of Action name boxes accept two lines of entry.

d. Add a matrix title to the box at the top of the matrix.

5. Relative Value Matrix.

a. This matrix type is the easier of the two methods to use; however, this method is also less accurate since it does not account for the magnitude of difference between raw data values.

b. To use the relative value matrix:

(1) For a given evaluation criterion, rank the courses of action based on the payoff raw data.

(2) Assign 1 to the best course of action for a given evaluation criterion and continue rank ordering the rest of the courses of action within that evaluation criterion.

(3) If two or more courses of action have the same raw data value within a given evaluation criterion, average their rankings and assign that average to each of these courses of action.

EXAMPLE:

Two courses of action are tied for the 2d and 3d ranking.

$$(2+3)/2 = 2.5$$

Assign 2.5 to each course of action.

(4) Input the relative values to the DECMAT in the appropriate raw data box corresponding to that combination of Course of Action and Evaluation Criterion.

c. Computation: The relative value method computes the total for each Course of Action by adding the products of each evaluation criterion's relative value times the evaluation criterion's weight along a Course of Action row (see Weighting of Criteria), as follows:

$$(RV_1)(W_1) + (RV_2)(W_2) + \dots + (RV_n)(W_n) = \text{Total REL VAL}$$

Where: RV_n = Relative Value for the Raw Data of the nth Evaluation Criterion

W_n = Weight of the nth Evaluation Criterion

6. Multiplication Matrix:

a. This method is the more accurate of the two methods since it uses the actual raw data payoffs for each course of action in its computation. In this way, the multiplication method can account for the magnitude of difference among an evaluation criterion's raw data for the Courses of Action.

EXAMPLE: In a case where the raw data for a criterion's three courses of action is 3, 21, and 22, the method uses the values of 3, 21, and 22 to determine its solution rather than assigning the less precise relative values of 1, 2, and 3. Notice how the middle value would have an advantage in the relative value matrix by appearing to be closer in value to the best value than it actually is.

b. To use the multiplication matrix:

(1) Input the raw data directly to the DECMAT in the appropriate raw data box corresponding to that combination of Course of Action and Evaluation Criterion.

(2) Min and Max Tabs. Below each Evaluation Criterion column is a tab for Min and Max. The default is that Min is selected. The matrix in the DECMAT program is designed to analyze on the basis that lower values are better. To properly use this matrix:

(a) For each Evaluation Criterion, determine whether the value for that Evaluation Criterion is better as a higher number or as a lower number.

(b) If the Evaluation Criterion is better as a lower value, leave Min selected below that Evaluation Criterion and analyze the next Evaluation Criterion.

(c) If the Evaluation Criterion is better as a higher value, select the Max tab appearing below that Evaluation Criterion. The program will automatically invert this value in the matrix during its computation so that the larger values are expressed numerically as smaller values. The final printout will show these values as inverted fractions.

EXAMPLE: For an automobile purchase, you are considering Fuel Economy as an Evaluation Criterion, measured in miles per gallon (MPG). In this case, higher values are better. By selecting the Max tab below the Evaluation Criterion, you will have the program invert these values. The values of 15 MPG and 20 MPG become 1/15 MPG and 1/20 MPG, respectively, in the matrix as the program calculates the total. The final print out will show 1/15 and 1/20 for these values.

(3) Computation. The multiplication method computes the total for each Course of Action by multiplying each evaluation criterion's raw data value taken to the exponential power of the evaluation criterion's weight (see Weighting of Criteria), as follows:

$$(RD1)(W1) \cdot (RD2)(W2) \cdot \dots \cdot (RDn)(Wn) = \text{Total MULTIPLICATION}$$

Where: RDn = Raw Data of the nth Evaluation Criterion

Wn = Weight of the nth Evaluation Criterion as the exponent

(4) Limitations on the use of the Multiplication Matrix. One cannot use the multiplication method, and therefore must use the relative value method, if either of the following conditions exists:

(a) Evaluation Criterion which cannot be expressed with a numerical value. Do not assign relative values for use in a multiplication matrix, as this introduces inconsistencies derived from using a hybrid matrix.

(b) Raw Data with a zero value. Zero multiplied by anything will always equal zero for the total, no matter how large other criteria values may be. For this situation, one may redefine the evaluation criteria in a way that results in values other than zero. If this cannot be done, one must use the Relative Value Matrix. Do not simply add 1 (or any other value) to the raw data as this will introduce subjective inaccuracies to the matrix.

7. Weighting of Criteria:

a. Some criteria will often be more important than other criteria. This program uses the technique of Pairwise Comparison to lend objectivity to what otherwise would be a subjective ranking of many criteria simultaneously -- something the human mind has difficulty doing. In short, the program translates a verbal comparison of the relative importance of the Evaluation Criteria into numerical values and then uses a mathematical model to determine an appropriate weight that accurately reflects the logic.

b. To determine criteria weights using the Pairwise Comparison techniques:

(1) Step 1: Rank order the evaluation criteria in general importance as you see them at this point.

EXAMPLE:

- 1 Evaluation Criterion #1
- 2 Evaluation Criterion #2
- : :
- : :
- n Evaluation Criterion #n

(2) Step 2: Pull down the Matrix menu and select Criteria Weights. The window for determining Pairwise Comparison will appear.

(3) Step 3: Review the factors for criteria comparison at the bottom right of the screen:

- 1 Equal
- 2 Slightly Favored
- 3 Favored
- 4 Strongly Favored

(4) Step 4: Input the numerical importance factor to the chart by comparing each of the Evaluation Criteria with each of the other criteria. The example below shows the process by which one can determine the pairwise comparison:

EXAMPLE:

-- Which Evaluation Criterion is more important ... Evaluation Criterion #1 or Evaluation Criterion #2?

Answer: Evaluation Criterion #1

-- By what importance factor?

Answer: 3 (Favored)

-- Enter 3 in the box where Evaluation Criteria #1 along the left intersects Evaluation Criterion #2 along the top.

-- Continue to evaluate all pairs until the chart is complete.

(5) Step 5: Conduct a logic check. All pairwise comparison importance factors should increase in value or be equal in value as you move from left to right along a row of the chart.

EXAMPLE:

| | EC#2 | | EC#3 | | EC#4 |
|-------------|-------------|-----|-------------|-----|-------------|
| EC#1 | 3 | --- | 3 | --- | 4 |
| EC#2 | | | 1 | --- | 3 |
| EC#3 | | | | | 3 |

If the values do not increase or remain the same as you move from left to right in the chart, one of two conditions exists:

(a) Evaluation Criteria are originally rank ordered out of sequence. To solve, change the rank order of the Evaluation Criteria and rework the Pairwise Comparison. Change the values of the columns in the DECMAT to show the Evaluation Criteria in the same order.

(b) The logic of the pairwise comparison is incorrect. To solve, review the pairwise comparison factors.

Conduct a similar check within a given Evaluation Criterion. The values should decrease or remain the same as you move from top to bottom in the chart.

(6) Step 6: To print the Pairwise Comparison chart, select "Print." To return to the DECMAT without sending the calculated weights to the matrix, select "Cancel."

(7) Step 7: Select the Send button. The computer calculates the weights for each of the Evaluation Criteria, imports the values to the DECMAT, and returns you to the DECMAT window.

c. The mathematical model which determines the criteria weighting is based on the Eigenvector method as described by Ching-Lai Hwang and Kwangsun Yoon in their monograph Lecture Notes in Economics and Mathematical Systems (186: Multiple Attribute Decision Making: Methods and Applications) (Springer-Verlag, Berlin, 1981). The methodology for solving the Eigenvalues for a specific Eigenvector is described by Anthony J. Pettofrezzo in his book, Matrices and Transformations (Dover Publications, Inc., New York, 1966).

8. Override of Criteria Weights.

a. To override one or more of the Pairwise-Comparison-calculated weights, select Criteria Weights from the Matrix menu. Understand, however, that overriding the Pairwise Comparison weights will introduce an element of subjectivity to the matrix.

b. The "Weight of Evaluation Criteria" screen will appear listing the Evaluation Criteria and their weights.

c. To enter a different weight, delete the Pairwise-Comparison-calculated weight and insert the new value for the weight.

d. Select Print to print the revised weights.

e. Select Cancel to return to the DECMAT. The original weights will remain unchanged.

f. Select Override Off to return to the Pairwise Comparison screen. The original weights will remain unchanged.

g. Select Send Values to input the revised values to the DECMAT and to return to the DECMAT screen.

9. Consistency Ratio.

a. After you have determined the criteria weights, the program determines the Consistency Ratio. The Consistency Ratio is a numerical value measuring how well the Pairwise Comparison values maintain a logical series of relationships. The program uses another mathematical model, based on the least squares method, to measure how well the logic fits.

b. The program shows the Consistency Ratio as a percentage below the right side of the DECMAT.

c. For this particular mathematical model, a Consistency ratio of 95% or more means the logic of the Pairwise Comparison is acceptable enough to use the resultant weights in the DECMAT.

**** NOTE: CAS3's previous version of the DECMAT program used a different mathematical model to model the logic, resulting in an acceptable Consistency Ratio threshold of 90%. The value of 90% in the older model is equivalent to 95% in the new version.**

d. Should you input the Pairwise Comparison so that the resultant Consistency Ratio is below 95%, an error box will appear alerting you of this fact. Re-evaluate your Pairwise Comparison for logic errors.

e. With a large number of Evaluation Criteria, the program model may not catch a single, obvious error in the Pairwise Comparison logic. This limitation to the model makes Step 5 of the Pairwise Comparison very important.

f. The mathematical model which determines the Consistency Ratio is based on the method described by Cliff T. Ragsdale in his book, Spreadsheet Modeling and Decision Analysis: A Practical Introduction to Management Science, 2d Edition (South-Western College Publishing, Stamford, Connecticut, 1997).

10. Sensitivity Analysis.

a. Sensitivity analysis identifies the degree to which the DECMAT results are subject to change with only small changes in the evaluation criteria weights. A solution which is not sensitive to changes in weights provides the decision-maker with confidence that he or she has a valid solution.

b. Together with the Consistency Ratio, Sensitivity Analysis is a measure of the DECMAT's subjectivity. A solution that is "sensitive" to changes in weights is a red flag for the decision-maker to re-evaluate the relationships among the Evaluation Criteria. With a sensitive solution, the decision-maker must review the pairwise relationships of the criteria to see if the criteria relationships really reflect how the decision-maker feels. In other words, the decision-maker must develop confidence in the criteria weighting.

c. The program conducts sensitivity analysis by changing each Evaluation Criterion weight independently, within the range of plus or minus three points, and recalculates the matrix to determine whether the solution changes. The program does not re-calculate when the weights are taken below the value of 1.00. The program resets the criterion weight to its original value before proceeding on to analyze the sensitivity of the next Evaluation Criterion.

d. EXAMPLE: For an Evaluation Criterion weight of 2.38, the program:

(1) Sets the weight incrementally lower (e.g., 2.37, 2.36, etc.), recalculates, and determines the weight where the solution may change. NOTE: In this example, the program does not set the value lower than 1.00 and therefore does not complete the calculation within the full range of -3.

(2) Sets the weight incrementally higher (e.g., 2.39, 2.40, etc.), recalculates, and determines the weight where the solution may change. Stops calculating at the weight of 5.58 to complete the range of +3.

(3) Resets the weight to the original value of 2.38 and moves to analyze the next Evaluation Criterion.

e. To conduct a Sensitivity Analysis, drag down on the "Matrix" menu and select "Sensitivity Analysis."

f. The Sensitivity Analysis screen will appear with the completed results.

(1) To print the Sensitivity Analysis, select “Print.”

(2) To return to the DECMAT screen, select “OK.”

11. Reordering The Matrix.

a. By convention, show the Evaluation Criteria in decreasing order of weight from left to right in the matrix.

b. To reorder a Evaluation Criterion, place the cursor along the top of the matrix above the Evaluation Criterion desired until a hand appears. Click and drag the hand to the desired location for the Evaluation Criterion and release the mouse button. The Evaluation Criterion will be “dropped” at that location, reordering the Evaluation Criteria as a column.

c. Reorder the Courses of Action in similar manner.

12. Matrix Output.

a. The DECMAT program calculates the totals of each Course of Action and shows the values in the far right column of the matrix. The program re-calculates the totals whenever a value is changed.

b. The type of matrix selected (Relative Value or Multiplication) is shown at the bottom right of the matrix.

c. The Consistency Ratio also appears at the bottom right of the matrix.

d. The program circles the recommended solution (the smallest total value).

e. Should the total values be extremely large or small such that the number, the program sets the total values to the same order of magnitude (power of 10) and shows this power of 10 at the bottom right of the matrix. An exception to this occurs when the difference in the numbers is greater than 108.

f. You may print the DECMAT, showing all comments at the matrix’s bottom right, by selecting the printer button along the tool bar or by dragging down on the “File” menu and selecting “Print.”

g. You may print the Pairwise Comparison chart by dragging down on the “Matrix” menu and selecting “Criteria Weights.” When the Pairwise Comparison screen appears, review the values to ensure they are correct and select “Print.”

h. You may print the Sensitivity Analysis by dragging down on the “Matrix” menu and selecting “Sensitivity Matrix.” When the Sensitivity Matrix screen appears, select “Print.”

13. Saving Data. To save your file:

a. Select the disc button on the tool bar or drag down on the “File” menu and select “Save.”

b. Name the file as a “*.dec” file.

c. Select the correct directory and select “OK.”

d. To resave a file, select the disc button on the tool bar or drag down and select Resave. Follow the same procedure as above.

14. Importing to PowerPoint.

a. There is no direct method to import the matrix to PowerPoint.

b. To depict the decision matrix in a PowerPoint presentation:

- (1) Open PowerPoint concurrently with the Decmat program.
- (2) Print Screen in the Decmat program.
- (3) Select Paste in PowerPoint.
- (4) The Decmat screen will appear in a bit map format in PowerPoint.

c. As the bit map format is memory intensive, one may:

- (1) Crop out the tool bar portion of the Decmat screen using the Crop Picture function of PowerPoint.
- (2) Resize the matrix to fit using the object corner.

What Every Soldier and Legal Assistance Attorney Should Know about Servicemembers Group Life Insurance

Captain Wojciech Z. Kornacki¹

President Abraham Lincoln promised servicemembers and veterans “to care for him who shall have borne the battle and for his widow, and his orphan.”² Today, federal law mandates the uniformed services educate servicemembers about the benefits of Servicemembers Group Life Insurance (SGLI).³ Further, U.S. Department of Defense Directive 1341.3 establishes that the uniformed services must cooperate with the U.S. Department of Veteran Affairs regarding servicemembers’ SGLI benefits.⁴ This article describes what Soldiers and legal assistance attorneys (LAAs) should know about SGLI. The first part describes SGLI in the context of other types of life insurance policies available on the U.S. market. The second part examines SGLI’s gradual expansion by analyzing its legislative history and addresses recent changes affecting SGLI. The third part focuses on counseling Soldiers on beneficiary designations and applies lessons learned from beneficiary designation caselaw to SGLI counseling for servicemembers. On 29 September 2005, SGLI celebrated its fortieth birthday. As SGLI continues to evolve and adapt to meet the needs of the servicemembers, it is essential that servicemembers and LAAs understand the new developments.

Part I. What Kind of Life Insurance Policy Is SGLI?

Servicemembers Group Life Insurance is a group life insurance policy.⁵ A group life insurance policy is provided for certain populations of individuals who share similar characteristics. Modern examples of group policies include labor unions, professional associations, or trade groups.⁶ Servicemembers Group Life Insurance automatically insures against death of any member of the uniformed services on active duty.⁷ The term “member” generally includes a person on active duty,⁸ active duty for training,⁹ or inactive duty training¹⁰ in the uniformed services.¹¹ This term also includes cadets and midshipmen of the United States Military, Naval, Air Force and Coast Guard Academies.¹² Uniformed services include all branches of the Armed Forces, Public Health Services (PHS), and National Oceanic Atmospheric Administration (NOAA).¹³ Currently, almost 2.4 million servicemembers are covered under SGLI.¹⁴ An additional 2,050,000 children and 987,000 spouses are also covered under Family SGLI.¹⁵

¹ The author is presently assigned to the 1st Armored Division (Mechanized), Baumholder Law Center, Baumholder, Germany, where he is the Chief of Client Services and Chief of Claims. The author would like to thank the following individuals: Lieutenant Colonel (Retired) Curtis Parker for reviewing drafts of this article and providing many words of encouragement, Major Dana J. Chase for her invaluable and insightful guidance during the final phases of the writing of this article, and Mr. Charles Strong who ensured its proper citation and structural clarity. I am solely responsible for any errors.

² U.S. DEP’T OF VETERANS AFFAIRS, PLAN TODAY PROTECT TOMORROW: BOOKLET FOR SEPARATING SERVICEMEMBERS (2002), available at <http://www.insurance.va.gov/inForceGliSite/buying/sepBooklet.htm>.

³ 38 U.S.C.S. § 1967(d) (LEXIS 2005).

⁴ U.S. DEP’T OF DEFENSE, DIR. 1341.3, SERVICEMEMBERS’ GROUP LIFE INSURANCE (SGLI) para. 3 (12 Jan. 2005).

⁵ VETERAN’S BENEFITS ADMINISTRATION, SERVICEMEMBER’S AND VETERANS GROUP LIFE INSURANCE HANDBOOK 4 (2006), <http://www.insurance.va.gov/sgliSite/handbook/sglivgli%20handbook.pdf> [hereinafter VBA HANDBOOK].

⁶ JOHN APPLEMAN, APPLEMAN ON INSURANCE LAW AND PRACTICE § 2.5 (2d ed. 2005).

⁷ 38 U.S.C.S. § 1967(a)(1)(A).

⁸ Active duty means full time duty in the uniformed services or Armed Forces Academies. *Id.* § 1965(1)(A), 1965(1)(D).

⁹ Active duty for training means full time duty in the uniformed services performed by Reserves for training purposes or by a member, cadet, or midshipman of the Reserve Officers Training Corps while attending field training or practice cruises. Full time duty for training for members of the National Guard or Air National Guard of any State, is defined under 32 U.S.C.S. §§ 316, 502, 503, 504, or 505. *Id.* § 1965(2)(A), 1965(2)(D).

¹⁰ Inactive duty for training means duty other than full time duty prescribed or authorized for Reserves which duty is scheduled in advance by competent authority to begin at a specific time; and in case of a member of the National Guard or Air National Guard of any State, inactive duty for training means duty other than full time duty which is scheduled in advance by competent authority to begin at a specific time and place under 32 U.S.C.S. §§ 316, 502, 503, 504, or 505. *Id.* § 1965(3)(A), 1965(3)(B).

¹¹ *Id.* § 1965(5)(A) (2006) (referring to members as servicemembers).

¹² *Id.* § 1965(5)(D).

¹³ *Id.* § 1965(6).

¹⁴ E-mail from Connie Weedo, Associate Manager, Office of Servicemembers’ Group Life Insurance, to author (Oct. 24, 2005) (on file with author).

¹⁵ *Id.*

Servicemembers Group Life Insurance is a contract between the government and qualified private insurers¹⁶ wherein the government purchases the insurance policy for the benefit of servicemembers.¹⁷ The government partially subsidizes SGLI to lower the high cost of premiums associated with high risks of combat mortality.¹⁸ This subsidy puts a competitive life insurance policy within the servicemember's financial reach. In 1965, the U.S. Department of Veterans Affairs purchased the group life insurance policy from the Prudential Insurance Company of America, which continues to administer SGLI through the Office of the Servicemember's Group Life Insurance (OSGLI).¹⁹

There are two main types of life insurance policies: term and whole.²⁰ Servicemembers Group Life Insurance is a term life insurance policy.²¹ Under term insurance, the insured purchases coverage for a specific period of time. If the insured dies within the specific period, the beneficiary collects the proceeds.²² If the insured outlives the period covered, no money is paid to the beneficiary.²³ Term life insurance does not offer any savings, loan features, or investment opportunities.²⁴ It pays only if an insured dies during the term of the insurance coverage.²⁵ Term life insurance, including SGLI, has no set amount of coverage and can be increased at will, subject to the terms of the policy. A term life insurance policy, including SGLI, does not allow an insured to borrow against it.

A whole life insurance policy provides coverage as long as the insured is alive and pays premiums.²⁶ If the insured dies, the beneficiary collects the proceeds. The insured can also surrender or cancel a whole life policy and receive the accrued cash value.²⁷ Unlike a term life insurance policy, the insured can borrow against a whole life policy. Once a certain amount of coverage is obtained on a whole life policy, it cannot be increased or decreased. A whole life insurance policy is recommended as a way to limit estate or probate taxes, cover burial expenses, and increase liquidity.²⁸

Since SGLI is a term policy, the time when the coverage starts and ends is very important. Generally, a servicemember's SGLI coverage starts on the first day of active duty or active duty for training.²⁹ Servicemembers Group Life Insurance also covers insurable dependents,³⁰ who are defined as the servicemember's spouse and the servicemember's child,³¹ under Family SGLI (FSGLI).³² A member's spouse qualifies for FSGLI coverage upon the date of marriage to the

¹⁶ See *Johnson v. Prudential Ins. Co.* 156 N.W.2d 812 (Neb. 1968).

¹⁷ 38 U.S.C.S. § 1966(a).

¹⁸ *Ridgway v. Ridgway*, 454 U.S. 46, 52 (1981).

¹⁹ U.S. Dep't of Veterans Affairs, History of Servicemember's and Veterans' Group Life Insurance, <http://www.insurance.va.gov/sgliSite/generalinfo/InsHistory.htm> (last visited Sept. 20, 2006).

²⁰ FLORIDA DEP'T OF INSURANCE, LIFE INSURANCE AND ANNUITIES CONSUMERS' GUIDE 7 (2000), available at <http://www.annuitynexus.com/PDFs/flabuyersguide.pdf> [hereinafter FLORIDA DEP'T OF INSURANCE].

²¹ VBA HANDBOOK, *supra* note 5, at 4.

²² Douglas R. Richmond, *Liability Issues in the Sale of Life Insurance*, TORT TRIAL & INS. PRAC. L.J. 878 (Spring 2005).

²³ *Id.* at 879.

²⁴ Fred Waddel, *The Two Kinds of Life Insurance*, Aug. 1998, <http://www.aces.edu/pubs/docs/H/HE-0657/>.

²⁵ *Id.* The only SGLI exception under 38 U.S.C.S. § 1980 is an Accelerated Benefits Option, which allows a terminally ill insured expected to live no more than nine months to receive a one time payment of up to fifty percent of the face value of the coverage minus an interest deduction before he dies. Only the insured, or a servicemember on behalf of a terminally ill spouse can apply.

²⁶ See Massachusetts Division of Insurance, Buying Life Insurance and Annuities in Massachusetts – Part 2, http://www.mass.gov/?pageID=ocaterminal&&L=5&L0=Home&L1=Consumer&L2=Insurance&L3=Life+Insurance&L4=Buying+Life+Insurance+and+Annuities+in+Massachusetts&sid=Eoca&b=terminalcontent&f=doi_Consumer_css_life_BuyLifeInsPartTwo&csid=Eoca (last visited Oct. 19, 2006) (describing whole life insurance policies).

²⁷ FLORIDA DEPARTMENT OF INSURANCE, *supra* note 20, at 11.

²⁸ *Id.* at 9. Life insurance is an important source of liquidity when one is faced with any outstanding tax liability. Since life insurance proceeds are payable sooner than estate taxes are due, one's life insurance policy should be at least equal to or greater than one's estimated estate tax liability.

²⁹ 38 U.S.C.S. § 1967(5)(A) (LEXIS 2006).

³⁰ *Id.* § 1967(a)(1)(A)(ii).

³¹ *Id.* § 1965(10).

³² Family SGLI is a program extended to the servicemember's spouse and dependent children if the servicemember is insured under the SGLI. The FSGLI provides the maximum coverage of \$100,000 for a spouse, or the amount of SGLI the insured servicemember has in force at the time, whichever is lower. As of 1 July 2006, spousal premiums were lowered. Current premiums are available at <http://www.insurance.va.gov/sgliSite/miscellaneous/premiumChanges.htm#fsgli>. Each of the servicemember's dependent children is insured for a maximum of \$10,000 at no cost to the servicemember. Family

servicemember.³³ A servicemember who is also a spouse can be insured under both SGLI and FSGLI. Servicemembers Group Life Insurance coverage for a servicemember's child is effective on the date of the child's birth or the date when the child acquires the status of an insurable dependent of the servicemember.³⁴ Servicemembers Group Life Insurance only covers a servicemember's period of service in the U.S. Armed Forces and 120 days following separation or release.³⁵ A member loses coverage if he is convicted of mutiny, treason, spying, desertion, or refusal to wear the uniform.³⁶ Insurance coverage will also cease when a member claims the status of a conscientious objector,³⁷ is held in civilian confinement for over thirty-one days under a sentence adjudged by civilian authorities, or is confined "by military authorities [for more than thirty-one days] under a court martial sentence involving total forfeiture of pay and allowances."³⁸

Upon separation or release from active duty, SGLI is automatically converted into Veterans Group Life Insurance (VGLI), which only covers against the servicemembers death.³⁹ A former servicemember's full coverage under VGLI continues while the servicemember is making timely payments and fulfilling other policy terms and conditions.⁴⁰ A servicemember's spouse or children are no longer covered under VGLI.⁴¹ A member can also convert SGLI to a commercial whole life policy within the 120 days of separation or release.⁴²

The Congressional intent behind SGLI was to allow active duty servicemembers deployed in combat zones to purchase life insurance at reasonable prices.⁴³ Servicemembers should be advised that SGLI is intended to provide financial security for family members.⁴⁴ There is an underlying dispute, however, between this intent and a servicemember's absolute right to designate any person or entity as the beneficiary.⁴⁵ With SGLI, servicemembers have an option to provide for their families, but they cannot be forced to do so. The insured has the right to change SGLI beneficiaries without their family's consent at any time.⁴⁶ However, spousal notice is required under the SGLI Enhancement Act of 2005.⁴⁷

Servicemembers Group Life Insurance is not assignable⁴⁸ and it does not pay dividends.⁴⁹ Unlike private group life insurance policies, SGLI cannot be divided by state courts, and state divorce decrees and separation agreements have no

coverage is not available for those insured under Veterans Group Life Insurance (VGLI), which provides post-separation insurance, allowing servicemembers to convert their SGLI coverage to renewable term insurance. See U.S. Dep't of Veterans Affairs, Veterans' Group Life Insurance (VGLI), <http://www.insurance.va.gov/sgliSite/VGLI/VGLI.htm> (last visited Sept. 20, 2006).

³³ 38 U.S.C.S. § 1967(a)(5)(E).

³⁴ *Id.* § 1967(a)(5)(F).

³⁵ *Id.* § 1968 (a)(1)(A). The SGLI coverage may be extended up to one year for servicemembers who are totally disabled at the time of separation.

³⁶ *Id.* § 1973.

³⁷ *Id.*

³⁸ *Id.* § 1968(a)(1)(B). Coverage is automatically restored to the previous level upon a servicemember's re-entrance on active duty in the U.S. Armed Forces.

³⁹ *Id.* § 1968 (b)(1)(A).

⁴⁰ *Id.* (The OSGLI will send an *SGLV Form 8714, Application for VGLI*, to a servicemember within forty-five to sixty days after his or her separation or discharge which the servicemember must fill out and return.)

⁴¹ *Id.* § 1968 (b)(1)(A). A spouse cannot convert her or his FSGLI policy to VGLI, but can convert it to a commercial policy under the same conditions as a servicemember. *Id.* § 1968(b)(3)(A).

⁴² *Id.* § 1968 (b)(1)(B). Servicemembers may convert SGLI to a commercial policy at standard premium rates, without having to provide proof of good health. The conversion policy must be a permanent policy, such as a whole life policy. Servicemembers must select a company participating in the SGLI and VGLI program, apply to the company's local sales office, obtain a letter from the OSGLI verifying coverage and submit the letter with the servicemember's separation documents to the company's agent.

⁴³ *Ridgway v. Ridgway*, 454 U.S. 46 (1981).

⁴⁴ See U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. C-2 (21 Feb. 1996) [hereinafter AR 27-3].

⁴⁵ 38 U.S.C.S. § 1949.

⁴⁶ *Id.* The only restriction is that the Secretary must notify the spouse of the change at the last address of the spouse. However, a failure to provide the notification in a timely manner does not affect the validity of any new election or beneficiary designation made by the servicemember.

⁴⁷ *Id.* § 1967 (f)3. The spouse has to be notified by the Secretary concerned in the following situations: when a married servicemember initially declines to be insured, when a married and insured servicemember decides to lower the coverage, and when a married and insured servicemember decides to designate someone other than a spouse or dependent child as a beneficiary. The spouse does not have to be notified when the spouse already received such a notification and if immediately prior to such a new designation the spouse is not designated as a beneficiary under the SGLI.

⁴⁸ 38 C.F.R. § 9.6. (2006).

effect on original designations.⁵⁰ This provision has withstood the scrutiny of the U.S. Supreme Court.⁵¹ Similarly, a last will and testament, a power of attorney, or any other document does not change or cancel SGLI designations.⁵²

For the last forty years, SGLI coverage has been increasing steadily and currently stands at \$400,000.⁵³ A member's spouse qualifies for \$100,000⁵⁴ of coverage and each child for \$10,000.⁵⁵ A member's coverage can be decreased but only in increments of \$50,000.⁵⁶ The spouse's coverage can be decreased in increments of \$10,000.⁵⁷ The coverage for a servicemember's child may not go below \$10,000.⁵⁸ The FSGLI coverage of civilian spouses may not exceed that of their military spouses.⁵⁹ A servicemember must notify his spouse if he does not designate the spouse as a beneficiary on the SGLI or if he selects less than the full coverage.⁶⁰

Members planning to purchase a commercial life insurance policy are often not sure which policy best suits their needs. Industry experts constantly debate the desirability of term life insurance versus whole life insurance. One fact is certain: term life insurance is usually more transparent because it is less confusing for consumers to understand and it is more easily comparable with other term life insurance policies.⁶¹ Term life insurance also usually offers the greatest return on death benefits based on payments made.⁶²

Other less common types of life insurance policies include universal life, variable life, and variable universal life. A universal life insurance policy is similar to a whole life insurance policy because it provides a death benefit and accumulates cash value on a tax-deferred basis.⁶³ Variable life and variable universal life insurance policies accumulate cash value on a tax-deferred basis and allow the insured to borrow against them. The latter two policies, however, carry some risks as they operate just like any family of mutual funds and do not guarantee cash returns.⁶⁴ Servicemembers should seek specific advice from an insurance agent before selecting a commercial life insurance policy. Legal assistance attorneys should advise servicemembers to carefully select policies, scrutinize prospectuses, and seek a second opinion.

For many reasons, SGLI is unique among other life insurance policies. The coverage begins the minute a servicemember joins the Armed Forces and is assigned to a unit.⁶⁵ Additional coverage for 120 days upon separation or release is provided at no expense to the servicemember. Premiums are not increased as a servicemember ages. Proceeds are payable upon a servicemember's death even if self-inflicted. State courts cannot divide proceeds during divorce or legal separation proceedings, or during actions initiated by creditors.⁶⁶ Servicemembers Group Life Insurance and VGLI proceeds are also not assignable.⁶⁷ Congress specified that SGLI disbursements "shall not be liable to attachment, levy, or seizure by or under

⁴⁹ VBA HANDBOOK, *supra* note 5, at 4. Just like SGLI, VGLI has no cash, loan, paid-up, or extended insurance values and does not pay dividends.

⁵⁰ U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY OPERATIONS/ASSISTANCE INSURANCE para. 12-19 (7 Apr. 2006) [hereinafter AR 600-8-1].

⁵¹ *Ridgway v. Ridgway*, 454 U.S. 46, 56 (1981).

⁵² AR 600-8-1, *supra* note 50, para. 12-19a.

⁵³ 38 U.S.C.S. § 1967(a)(3)(A)(i) (LEXIS 2006).

⁵⁴ *Id.* § 1967(a)(3)(A)(ii).

⁵⁵ *Id.* § 1967(a)(3)(A)(iii).

⁵⁶ *Id.* § 1967(a)(3)(B).

⁵⁷ *Id.*

⁵⁸ *Id.* § 1967(a)(3)(B).

⁵⁹ *Id.* § 1967(a)(1)(3)(C).

⁶⁰ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006).

⁶¹ Richmond, *supra* note 22, at 879.

⁶² *Supra* note 26.

⁶³ Richmond, *supra* note 22, at 881.

⁶⁴ *Id.* at 882.

⁶⁵ 38 U.S.C.S. § 1967(a)(5). *Foreman v. Prudential Ins. Co. and the United States*; *Moore v. Prudential Ins. Co. and the United States*, 657 F.2d 717, 724 (1981). In this consolidated appeal, two first-time National Guard enlistees died in separate accidents before they were scheduled for any active duty training. The court held that they were covered under SGLI because they enlisted, were assigned to Guard units and met the statutory requirements.

⁶⁶ *Ridgway v. Ridgway*, 454 U.S. 46, at 59 (1981).

⁶⁷ 38 C.F.R. § 9.6 (2006).

any legal or equitable process whatever, either before or after receipt by the beneficiary.”⁶⁸ While other life insurance policies place strict requirements on their renewal, SGLI is renewed automatically upon a servicemember’s re-entrance on active duty. Servicemembers Group Life Insurance is designed to meet unique needs of Soldiers, Marines, Sailors, Airmen, cadets, midshipmen, and many other various groups of federal employees and their families.

Part II. World War I and Other Armed Conflicts Leading to the Birth of the SGLI Legislation

History shows that Congress provides life insurance to servicemembers in times of anticipated or ongoing armed conflicts. The United States began providing voluntary insurance to Soldiers upon entering World War I (WWI) with the 1917 amendment of the War Risk Insurance Act of 1914.⁶⁹ Over 90 percent of eligible servicemembers obtained the coverage during WWI.⁷⁰ The act was designed to provide financial support to American families of servicemembers when life insurance was not widely available in the United States. During WWI, 116,516 servicemembers lost their lives on the battlefields of Europe.⁷¹ In 1940, shortly before the United States entered World War II (WWII), Congress passed the National Service Life Insurance Act.⁷² Another 405,399 servicemembers were killed by the end of WWII, many of whom were covered under the first military insurance program.⁷³ Congress, however, allowed the act of 1940 to lapse after the end of the Korean conflict. The government provided temporary insurance but stopped short of a permanent fix. The problem of uninsured servicemembers did not appear on the political agenda again until the Vietnam conflict.

As the U.S. military began to suffer heavy casualties in Vietnam, private life insurance companies were reluctant to provide life insurance coverage at reasonable premiums to servicemembers.⁷⁴ Servicemembers heading to Vietnam who were unable to obtain insurance created the Armed Services Mutual Benefit Association.⁷⁵ Since 1963 this nonprofit military benefit association has been providing life insurance to them.⁷⁶ Recognizing servicemembers’ serious need for life insurance, Congress responded, albeit two years later. On 29 September 1965, Congress passed the new law establishing Servicemembers’ Group Life Insurance.⁷⁷ The initial coverage was limited to \$10,000 for all active duty servicemembers and members of the Commissioned Corps of the PHS and the NOAA.⁷⁸ On 25 June 1970, as the Vietnam conflict escalated, the government increased coverage to \$15,000.⁷⁹ Two years later the government extended coverage to cadets and midshipmen in the U.S. military service academies.⁸⁰ Then, on 24 May 1974, the government again increased coverage to \$20,000 and extended policies to servicemembers of the Ready Reserves and Retired Reserves. In addition, since the Vietnam conflict was drawing to an end and more and more servicemembers were leaving the military, the government also allowed servicemembers to convert their life insurance coverage to a five-year-nonrenewable-term policy—VGLI.⁸¹

Between 1 December 1981 and 6 January 1997, SGLI and VGLI have undergone significant changes. Arguably the most significant change for servicemembers and LAAs mandated that LAAs must provide general information regarding SGLI and VGLI to servicemembers. Legal assistance attorneys must explain a servicemember’s SGLI rights, benefits, and privileges upon the servicemember’s entrance into the U.S. military.⁸² While not binding on LAAs, the *Servicemember’s*

⁶⁸ 38 U.S.C.S. § 1970(g) (LEXIS 2006).

⁶⁹ U.S. Dep’t of Veterans Affairs, History of US Government Involvement, <http://insurance.va.gov/inForceGliSite/generalinfo/InsHistory.htm> (last visited Oct. 19, 2006).

⁷⁰ *Id.*

⁷¹ American Battle Monuments Commission, World War I Listing, <http://www.abmc.gov/search/wwi.php> (last visited Oct. 19, 2006).

⁷² Pub. L. No. 76-801, 54 Stat. 1008 (1940).

⁷³ American Battle Monuments Commission, World War II Listing, <http://www.abmc.gov/search/wwii.php> (last visited Oct. 19, 2006).

⁷⁴ *Ridgway v. Ridgway*, 454 U.S. 46, 50 (1981).

⁷⁵ Armed Services Mutual Benefit Association, Armed Services Mutual Benefit Association, <http://www.asmba.com/index.cfm> (last visited Oct. 19, 2006).

⁷⁶ Armed Services Mutual Benefit Association, What Is ASBMA, http://www.asmba.com/menu_about.cfm. (last visited Oct. 19, 2006).

⁷⁷ 38 U.S.C.S. § 1976 (LEXIS 2006).

⁷⁸ Pub. L. No. 89-214, 79 Stat. 880 (1965).

⁷⁹ Pub. L. No. 91-291, 84 Stat. 326 (1970).

⁸⁰ Pub. L. No. 92-315, 86 Stat. 227 (1972).

⁸¹ Veterans’ Insurance Act of 1974, Pub. L. No. 93-289, § 777(b), 88 Stat. 165 (1974).

⁸² See AR 27-3, *supra* note 44, para. C-2a.

and *Veterans Group Life Insurance Handbook* specifically states that servicemembers should be provided with information regarding the purpose and role of life insurance in financial planning, the difference between term life insurance and whole life insurance, the relationship between SGLI and the VGLI, and the availability of commercial life insurance.⁸³ Other changes in the law included increasing coverage to \$200,000,⁸⁴ renaming the program Servicemembers Group Life Insurance,⁸⁵ extending VGLI to servicemembers of the Individual Ready Reserves and Inactive National Guard, and allowing VGLI to be renewed beyond the initial five-year-period. Members of the Retired Reserved were also extended coverage under VGLI.⁸⁶ Another change allowed servicemembers to convert VGLI into a commercial life insurance policy at any time without waiting the initial five-year enrollment period.⁸⁷

On 9 February 1999, the Accelerated Benefit Option was established allowing SGLI proceeds to be paid out before the servicemembers' death.⁸⁸ Then, on 1 April 2001, the government increased the maximum SGLI coverage to \$250,000.⁸⁹ More changes followed in 2005. On 11 May 2005, Congress passed the Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief Act.⁹⁰ The law increased SGLI coverage to \$400,000 beginning 1 September 2005,⁹¹ costing servicemembers twenty-six dollars per month or three dollars and twenty-five cents for every fifty-thousand dollars. The increase in coverage was temporary, however, until the passage of the Servicemembers Group Life Insurance Enhancement Act of 2005.⁹² The increased coverage is retroactive to 7 October 2001 for servicemembers who took part in *Operations Enduring or Iraqi Freedom*.⁹³ Servicemembers obtaining retroactive coverage, however will not be charged retroactive payments.

The new legislation also allowed servicemembers suffering from traumatic injuries to obtain coverage.⁹⁴ Traumatic SGLI (TSGLI) came into force on 1 December 2005. The TSGLI program is designed to cover a servicemember's expenses of recuperating from traumatic injuries received in the line of duty. The servicemember can, however, use TSGLI benefits for any other purpose as well. Unlike SGLI, spouses and children are not the beneficiaries. The servicemember is the beneficiary and TSGLI proceeds can only go to a guardian or an attorney-in-fact if the servicemember is declared incompetent.⁹⁵ Members are automatically enrolled into TSGLI for a cost of an additional one dollar per month. The TSGLI charge appears on a servicemember's leave and earning statement under the SGLI deduction.

Servicemembers enrolled in SGLI will receive the TSGLI proceeds if they sustain a traumatic injury on or after December 1, 2005 that results in a qualifying loss. "[Traumatic SGLI] coverage will pay a benefit of between \$25,000 and \$100,000 depending on the qualifying loss."⁹⁶ A qualifying loss is specified by statute.⁹⁷ It must result directly from a traumatic injury sustained while the member is covered against the loss and from no other cause.⁹⁸ The loss must occur

⁸³ VBA HANDBOOK, *supra* note 5, at 9.

⁸⁴ National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106 § 646, 110 Stat. 186.

⁸⁵ Veterans' Benefits Improvements Act of 1996, Pub. L. No. 104-275 § 405(a), 110 Stat. 3322.

⁸⁶ Veterans' Administration Health-Care Amendments of 1985, Pub. L. No. 99-166 § 401, 99 Stat. 941.

⁸⁷ Veterans' Benefits Improvements Act of 1996, Pub. L. No. 104-275 § 403(a)(2)(A), 110 Stat. 3322.

⁸⁸ Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 302, 112 Stat. 3315; *see* note 25 for Accelerated Benefit Option Requirements.

⁸⁹ Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419 § 312(a), 114 Stat. 1822.

⁹⁰ Pub. L. No. 109-13, 119 Stat. 231 (2005).

⁹¹ 38 U.S.C.S. § 1967(a)(3)(A)(i) (LEXIS 2006).

⁹² Pub. L. No. 109-80, 119 Stat. 2045 (2005).

⁹³ Pub. L. No. 109-13, 119 Stat. 231 (2005); *see* also U.S. Dep't of Veterans Affairs, Frequently Asked Questions about SGLI, <http://www.insurance.va.gov/sgliSite/SGLI/sgli%20faq.htm#27> (last visited Oct. 22, 2006).

⁹⁴ 38 U.S.C.S. § 1980A. Traumatic injuries include the following injuries: total and permanent loss of sight; loss of hand or foot by severance at or above the wrist or an ankle; total and permanent loss of speech, total and permanent loss of hearing in both ears; loss of thumb and index finger of the same hand by severance at or above the metacarpophalangeal joints; quadriplegia, paraplegia, or hemiplegia; burns worse than second degree, covering 30 percent of the body or face; and coma or the inability to carry out two out of the six activities of daily living due to traumatic brain injury. *See* 38 U.S.C.S. § 1980A(b)(1).

⁹⁵ VBA HANDBOOK, *supra* note 5, at 32.

⁹⁶ U.S. Department of Veterans Affairs, Life Insurance, Frequently Asked Questions about Traumatic SGLI, <http://www.insurance.va.gov/sgliSite/TSGLI/TSGLIFAQ.htm#cov1> (last visited Sept. 21, 2006) (providing the TSGLI Schedule of Payments for Traumatic Losses); *see also* 38 U.S.C.S. § 1980A(d).

⁹⁷ 38 U.S.C.S. § 1980A(b)(1); *see* note 94.

⁹⁸ *Id.* § 1980A(c)(1).

within 365 days of the traumatic injury. The traumatic injury must occur prior to midnight of the day that a servicemember separates from the military. A member who obtained TSGLI proceeds after suffering from a traumatic injury can receive the TSGLI proceeds again if he suffers from a separate traumatic injury.⁹⁹ Servicemembers who suffered a qualifying loss as a direct result of injuries incurred in *Operations Enduring or Iraqi Freedom* on or after 7 October 2001 but before 1 December 2005 are entitled to retroactive TSGLI coverage as well. A member must have SGLI coverage to qualify to receive TSGLI proceeds.¹⁰⁰ Traumatic SGLI coverage is not available for FSGLI and VGLI policy holders. If a servicemember dies before all of the TSGLI benefits are paid, the remaining TSGLI benefits will be paid to the servicemember's beneficiaries as designated under SGLI.¹⁰¹

If a servicemember declines SGLI coverage, family members will lose their coverage under FSGLI. The spouse will also be notified that the servicemember has declined the coverage.¹⁰² If a servicemember selects someone other than his family member as a beneficiary, the spouse will also be notified of such election. No notification is necessary, however, if the servicemember has previously selected a non-family member and elects to change his beneficiary to another non-family member.¹⁰³

The National Defense Authorization Act of 2006 further expanded servicemembers' SGLI benefits.¹⁰⁴ The Act specified that servicemembers who served during *Operations Enduring or Iraqi Freedom* would receive a monthly reimbursement of the first \$150,000 of the SGLI coverage.¹⁰⁵ The Act also requires that servicemembers be notified about these new benefits.

Part III. SGLI Counseling by Legal Assistance Attorneys and Servicemember Designations

A. General Counseling Requirements

All servicemembers must be advised that their SGLI designation questions will be answered by LAAs at no expense to the servicemembers.¹⁰⁶ Servicemembers who decline SGLI coverage or select less coverage than the maximum allowed must also be furnished with general information regarding the purpose and role of life insurance in financial planning, various types of life insurance policies, availability of commercial life insurance, and the relationship between SGLI and VGLI.¹⁰⁷ Each uniformed service is responsible to provide this information to its servicemembers.

B. Designation of Beneficiaries

Servicemembers may designate principal and contingent beneficiaries. The contingent beneficiary will receive the SGLI proceeds if the principal beneficiary dies before the servicemember.¹⁰⁸ Servicemembers can designate beneficiaries either through a usual designation or an unusual designation. A usual designation includes a servicemember's family members as beneficiaries. When a servicemember makes a usual designation, counseling by written handouts provided by LAAs is sufficient.¹⁰⁹ An unusual designation occurs when a servicemember designates an unrelated person, organization, private corporation, or church as a beneficiary.¹¹⁰ When a servicemember elects an unusual designation, he must receive counseling from a designated Soldier in the grade of E7 or above, a civilian employee in the pay grade of GS5 or above, or a

⁹⁹ 38 C.F.R. 9.20(e)(5)(iii) (2006).

¹⁰⁰ 38 U.S.C.S. § 1980A(c)(1).

¹⁰¹ The Internal Revenue Service has not yet ruled on whether TSGLI benefits are taxable. However, *AR 600-8-1, para. 12-37d* states that TSGLI benefits are not taxable because all benefits paid under any law administered by the Department of Veteran's Affairs are exempted from taxation.

¹⁰² 38 U.S.C.S. § 1967(f)(3).

¹⁰³ *Id.* § 1967(f)(3).

¹⁰⁴ Pub. L. No. 109-163, 119 Stat. 3136 (2006).

¹⁰⁵ *Id.* § 613. Monthly allowances are adjusted to a level of coverage selected by a servicemember if it is lower than \$400,000.

¹⁰⁶ *See* AR 27-3, *supra* note 44, para. C-2a.

¹⁰⁷ 38 U.S.C.S. § 1967(d)(1)-(4).

¹⁰⁸ AR 600-8-1, *supra* note 50, para. 12-17b.

¹⁰⁹ *See* AR 27-3, *supra* note 44, para. C-2a.

¹¹⁰ *See* 600-8-1, *supra* note 50, para. 12-18c.

contractor.¹¹¹ At a minimum, the counselor must advise the servicemember that SGLI is intended to provide some form of financial support to his family members and parents and that an SGLI designation is a personal choice to be made after careful consideration. The counselor must notate the date of the counseling on *SGLV Form 8286, SGLI Election and Certificate*.¹¹²

Minor servicemembers can make valid beneficiary designations even if the applicable state law provides otherwise.¹¹³ Unlike other servicemembers, Soldiers are prohibited from designating beneficiaries “by law” or “by will.”¹¹⁴ A number of lawsuits seeking to reinterpret a servicemember’s intent based on previous divorce decrees forced the Army to implement this prohibition.¹¹⁵

Servicemembers should designate each beneficiary by relationship¹¹⁶ or name.¹¹⁷ Courts apply strict interpretations of all designations to avoid administrative burdens on insurers and to avoid second guessing a servicemember’s original intent.¹¹⁸ Legal assistance attorneys must properly counsel servicemembers so that the servicemember’s SGLI designations indicate their true intent and can withstand potential legal challenges. Designations by relationship are preferable if they eliminate the need for a continuation sheet to the *SGLV Form 8286*.¹¹⁹ Designations by relationship may, however, exclude intended beneficiaries from non-traditional families. Unborn children should be designated by relationship.¹²⁰ Designations by relationship also forego the need to include beneficiaries’ names, addresses, and social security numbers.¹²¹

Court involvement has occurred when servicemembers list their stepparents as their parents on the *SGLV Form 8286*.¹²² A stepfather who raised a servicemember but never adopted the servicemember is not entitled to the SGLI proceeds if he was designated as a parent on the *SGLV Form 8286* because the law doesn’t recognize him as such.¹²³ Similar issues exist when servicemembers’ stepchildren are listed as their children. Servicemembers Group Life Insurance caselaw excludes stepchildren and certain illegitimate children.¹²⁴ To overcome this exclusion, the language in the designation must list stepchildren and stepparents by their full names.

During counseling, LAAs must also pay close attention when a servicemember’s parents are divorced and at least one parent has remarried while both natural parents are still alive or when a servicemember has remarried but wants to designate children living with the first spouse as the beneficiaries.¹²⁵ Designations of distant relatives or friends must be carefully scrutinized as well.¹²⁶ Legal assistance attorneys can establish a beneficiary’s relationship to the servicemember and obtain a beneficiary’s full legal name through a thorough interview. A thorough interview ensures a legally proper designation that meets the servicemember’s true intent. It will also prevent lawsuits from delaying the distribution of SGLI proceeds.

¹¹¹ *See id.*

¹¹² *Id.*; Servicemembers’ Group Life Insurance Election and Certificate, Form 8286 (Sept. 2005).

¹¹³ Johnson v. Prudential Ins. Co., 156 N.W.2d 812 (Neb. 1968).

¹¹⁴ AR 600-8-1, *supra* note 50, para. 12-17a.

¹¹⁵ Prudential Ins. Co. of America v. Smith, 762 F.2d 476, 477 (4th Cir. 1985); Prudential Ins. Co. v. Hearon, 833 S.W.2d 31, 32 (Mo. Ct. App. 1992).

¹¹⁶ *Army Regulation 27-3* cites “my child(ren)” as a sample designation by relationship. This designation also includes additional children born after the designation is made. AR 27-3, *supra* note 44, para. C-1a.

¹¹⁷ AR 27-3, *supra* note 44, para. C-1a. A sample designation by name can be “Jane C. Smith.” Also, if the beneficiary is a married woman, use her given first and middle names. For example, use Mary Lisa Smith, instead of Mrs. John Smith.

¹¹⁸ Coomer v. United States, 471 F.2d 1, 6 (5th Cir. 1973); Stribling v. United States, 419 F.2d 1350, 1354 (8th Cir. 1969).

¹¹⁹ AR 27-3, *supra* note 44, para. C-1c(1).

¹²⁰ *Id.*

¹²¹ *Id.* para. C-1c(2).

¹²² Lanier v. Traub, 934 F.2d 287, 290 (11th Cir. 1991).

¹²³ 38 U.S.C.S. § 1965(9) (LEXIS 2006); Prudential Ins. Co. v. Johnson, 200 N.W.2d 115, 118 (N.D. 1972).

¹²⁴ 38 U.S.C.S. § 1965(8).

¹²⁵ These situations warrant special attention because the likelihood of incorrect designation is great. A servicemember may designate children from a previous marriage as “My children from my marriage to Jane C. Smith.” *See* AR 27-3, *supra* note 44, para. C-1c(3). Whenever there is a doubt as to who is the designated beneficiary, LAAs should encourage the servicemember to complete *SGLV Form 8286* to clearly identify the beneficiaries to whom the SGLI proceeds should be paid.

¹²⁶ *See* VBA HANDBOOK, *supra* note 5, at 17. Distant relatives should be designated by their full legal name.

C. Designation of Minor Beneficiaries

Congress gave servicemembers an absolute right to designate any persons or entities as beneficiaries, including minors.¹²⁷ Designating minors as beneficiaries is often the most complex part of all SGLI counseling. Generally, there are three ways of designating minors as beneficiaries: through an outright gift, through a custodianship, or through a trust. In making any designation, the servicemember's relationship to the designee and the designee's name is most important.

When a servicemember designates a minor as a beneficiary outright, the minor will not receive the proceeds directly.¹²⁸ The SGLI program will not distribute proceeds to a minor until the minor is appointed a guardian by a state court.¹²⁹ In addition, most courts require the appointed guardian to post a surety bond. Some states limit, either by month or by year, amounts dispensed to a minor.¹³⁰ All remaining SGLI proceeds will be paid, however, once the minor turns eighteen.¹³¹ Judicial supervision reduces risks of fraud, waste, and abuse.

A servicemember may also designate a minor as a beneficiary through a custodianship under the Uniform Gift to Minors Act (UGMA) and the Uniform Transfer to Minors Act (UTMA), but under certain conditions.¹³² Legal assistance attorneys should advise servicemembers that designating a minor beneficiary using a custodian under the UGMA and UTMA is preferable to designating an individual by name under a verbal agreement that the designated beneficiary will distribute the proceeds to a minor upon the servicemember's death. A servicemember must obtain a verbal or written approval of an intended custodian who can be a person or a financial institution before the actual appointment.¹³³ Courts are usually not involved when a servicemember appoints a custodian.¹³⁴ The appointed custodian is authorized to use the proceeds for the benefit of the minor.¹³⁵ Similar to an outright gift, all remaining SGLI proceeds will be paid to the minor once the minor turns eighteen.¹³⁶ Usually, the appointed custodian will not have to post a surety bond¹³⁷ because there is no court supervision of a custodian under the UGMA and the UTMA. This, however, increases potential for waste and abuse; similarly, lack of court supervision may lead to fraud.¹³⁸

Since each state has a state specific UGMA and UTMA, there must be a connection between a servicemember, a beneficiary, or a custodian, and a particular state.¹³⁹ Legal assistance attorneys should advise a servicemember to include the following language: "John A. Jones, as custodian for each of my children, pursuant to the UGMA and the UTMA of the State of Texas, with distribution to each minor when that minor reaches age 18." This language is preferable to language without specific reference to a state because it clarifies that a servicemember selected the UGMA and the UTMA of the state of Texas. Depending on state laws, servicemembers can also specify the age of distribution.

Finally, the third type of designation to minors is a trust in a will¹⁴⁰ or outside of a will.¹⁴¹ Legal assistance attorneys

¹²⁷ Persons under the age of eighteen years are considered minors. See AR 27-3, *supra* note 44, para. C-1c(5).

¹²⁸ See 38 U.S.C. § 1970(f); see also AR 600-8-1, *supra* note 50, para. 12-18e(2)(a) (one minor who can receive SGLI proceeds directly without an appointment of a guardian is a servicemember's spouse).

¹²⁹ AR 600-8-1, *supra* note 50, para 12-18e(2)(e).

¹³⁰ See *id.* para. 12-18e(2)(c).

¹³¹ See *id.* para. 12-18e(2)(f).

¹³² See *id.* para. 12-18g.

¹³³ *Id.* para. 12-18g.

¹³⁴ See *id.* para. 12-18g(1)(a).

¹³⁵ See *id.* para. 12-18g(1)(c).

¹³⁶ *Id.* para. 12-18g(2)(a).

¹³⁷ See *id.* para. 12-18g(1)(d).

¹³⁸ *Id.* para. 12-18g(2)(c).

¹³⁹ For example, the Virginia Uniform Transfer to Minors Act states: "This chapter applies to any transfer that refers to the Uniform Transfers to Minors Act or this chapter ... by which the transfer is made if, at the time of the transfer, the transferor, the minor, or the custodian is a resident of this Commonwealth or the custodial property is located in this Commonwealth." See VA. CODE ANN. § 31-38 (LEXIS 2006).

¹⁴⁰ See *id.* para. 12-18h.

¹⁴¹ *Id.* para. 12-18i.

must advise the servicemember that a will containing a testamentary trust must be executed prior to SGLI designation.¹⁴² Servicemembers may establish a testamentary trust in a will for anyone, regardless of relationship. Legal assistance attorneys drafting the servicemember's will should insert language on *SGLV Form 8286* directing a trustee to fund a trust established for the benefit of a servicemember's children under the servicemember's will. Next, they should include in the will the combining language addressing SGLI proceeds.¹⁴³

Designating a trustee under a trust in a will is beneficial because the servicemember can specify how the trustee will use the SGLI proceeds for the benefit of the minor children. The servicemember has a greater ability to specify his wishes or desires rather than just simply designating a custodian. The need for a surety bond may be waived in the will but at the servicemember's risk.¹⁴⁴ Legal assistance attorneys should also counsel servicemembers that because the will may have to be probated,¹⁴⁵ the distribution of SGLI proceeds may be delayed¹⁴⁶ and decreased because of additional legal or court fees.¹⁴⁷

A servicemember may also designate a trustee without a will, using a trust established in a trust document. Servicemembers usually will have to pay civilian lawyers, however, to draft and execute a trust document.¹⁴⁸ Here, there is no automatic requirement for court involvement and legal fees will usually be avoided.¹⁴⁹ Since there is no surety bond required, however, servicemembers should be aware that a trustee may commit fraud, theft, or waste of the minor's funds.¹⁵⁰ Conditions may be placed on distribution of the SGLI proceeds (e.g., completion of college).¹⁵¹

D. Distribution of SGLI Proceeds

A servicemember has the following two options when selecting the distribution of proceeds: lump sum or thirty-six equal monthly installments. If the servicemember notates lump sum distribution in the payment option box on *SGLV Form 8286*, the beneficiary may later change such distribution to thirty-six equal monthly installments.¹⁵² If the servicemember notates "36," indicating monthly installment distribution, the beneficiary cannot change such election.¹⁵³ If the servicemember does not select a distribution option, the beneficiary can elect either option.¹⁵⁴ If the proceeds are to be paid in a lump sum, a personal interest bearing checking account, an Alliance account, will be opened for the SGLI or VGLI beneficiaries.¹⁵⁵ The beneficiaries will receive a checkbook for the account. This relieves the pressure on the beneficiaries to "do something with the proceeds."¹⁵⁶ Designations of beneficiaries are only valid if they are in writing, signed by the

¹⁴² *Id.* para. 12-18h.

¹⁴³ The Judge Advocate General's Corps 166th Officer Basic Course Desk Book, Estate Planning, App. A, *Anatomy of A Will*, recommends the following language for a pre-residuary SGLI trust:

If upon my death there are any life insurance policies on my life which name the trust under this Article FOURTH as the beneficiary, I give the proceeds of such insurance to be held and disposed of for the benefit of my children Ted Jones and Sonni Jones (hereinafter referred to as the "Beneficiaries") in accordance with the following provisions . . . :

THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 166TH OFFICER BASIC COURSE DESK BOOK, ESTATE PLANNING app. A (*Anatomy of a Will*) (Mar. 2005).

¹⁴⁴ AR 600-8-1, *supra* note 50, para. 12-18h(1)(a).

¹⁴⁵ *Id.* para. 12-18h(2)(a). A will may have to be probated when heirs or other individuals want to change the terms of a will, or when there are questions to its validity. The probate process involves court hearings, making the will a public document, paying statutory fees to attorneys, executors and administrators, and waiting for creditors to file claims, even if no money is owed. A will may not have to be probated if the will disposes of small value assets or there is no transfer of a real estate title.

¹⁴⁶ *See id.* para. 12-18(2)(b).

¹⁴⁷ *See id.* para. 12-18i(2)(a).

¹⁴⁸ *See id.* para. 12-18i(2)(c).

¹⁴⁹ *See id.* para 12-18i(1)(a).

¹⁵⁰ *See id.* para. 12-18i(2)(b).

¹⁵¹ *See id.* para. 12-18i(1)(d).

¹⁵² OSGLI, SGLI Form 8286 *Directions to Servicemember* ¶ 5, [http://www.insurance.va.gov/sgliSite/forms/8286\(07-06\).pdf](http://www.insurance.va.gov/sgliSite/forms/8286(07-06).pdf) (last visited Oct. 20, 2006).

¹⁵³ *Id.*

¹⁵⁴ 38 U.S.C. § 1970(d).

¹⁵⁵ SGLI FAQ, *What Are Alliance Accounts*, <http://www.insurance.va.gov/SgliSite/SGLI/sgli%20faq.htm#19> (last visited Oct. 20, 2006).

¹⁵⁶ Kathleen T. Rhem, American Forces Press Service, *SGLI Improvements Ease Burden on Beneficiaries*, <http://www.defenselink.mil/news/Oct1999/n101>

insured, and received prior to the death of the insured by his uniformed service.¹⁵⁷ While *SGLV Form 8286* is commonly used, changes to beneficiary designations on “any other document” have been held valid.¹⁵⁸

It has been the experience of the author during Soldier Readiness Programs that a significant number of servicemembers mistakenly believe that SGLI designations are made by completing *DA Form 41, Record of Emergency Data*.¹⁵⁹ If the servicemember uses only *DA Form 41* to annotate his designations, the SGLI proceeds will be distributed as if no designated beneficiary was named.¹⁶⁰

Occasionally, designations fail for various reasons. For example, the beneficiary predeceased the servicemember or the designations were cancelled or terminated. When a designation fails, SGLI proceeds are distributed in the following order: first to the remaining spouse, then the children, then the parents in equal shares, then to the executor or the administrator of decedent’s estate, then to the remaining next of kin, and finally to other next of kin pursuant to the laws of a state of domicile of the servicemember or former servicemember.¹⁶¹ A designated beneficiary will not receive the SGLI proceeds, however, if they contribute to the death of the servicemember.¹⁶² Generally, beneficiary designations automatically terminate 120 days after the servicemember dies or terminates the coverage or when the beneficiary loses his status as an insurable dependent of the servicemember.¹⁶³ Legal assistance attorneys should advise servicemembers to keep their SGLI designations current and update them after significant events in servicemembers’ lives, such as a marriage, death of a beneficiary, or a new child.

A designated or eligible beneficiary must file a claim of payment on the *SGLV Form 8283, Claim of Death Benefits*, with the OSGLI office upon a servicemember or former servicemember’s death.¹⁶⁴ If the designated beneficiary fails to file a claim of payment within one year of the servicemember’s death, or if the beneficiary is prevented by federal law to file such claim, then the proceeds will be distributed as if the designated beneficiary predeceased the servicemember or former servicemember.¹⁶⁵ The designated beneficiary has two years to file the claim for SGLI benefits.¹⁶⁶ If an eligible beneficiary does not file a claim within two years, the SGLI proceeds will be paid to a person who may be equitably entitled to the proceeds based on the OSGLI’s determination. Such payment bars anyone else from claiming the SGLI proceeds after the two years period.¹⁶⁷ Any settlement of an SGLI claim is strictly a matter between the claimant and the OSGLI.

Part IV. Conclusion

The government has been providing life insurance coverage to servicemembers for almost ninety years. In December 1965, the SGLI became the first permanent, government-subsidized, group life insurance program widely accessible to servicemembers. The SGLI has been specifically created by Congress to meet servicemembers’ unique needs. These needs are affected each time the United States is involved in an armed conflict. Hence, legislative changes to SGLI closely parallel U.S. military global commitments. Legal assistance attorneys must be familiar with SGLI rights, obligations, and privileges and they must carefully counsel servicemembers about the designation of principal and contingent beneficiaries. The servicemember’s intent must withstand legal scrutiny, if challenged.

4999_9910143.html (last visited Sept. 19, 2006).

¹⁵⁷ 38 U.S.C.S. § 1970(a) (LEXIS 2006).

¹⁵⁸ *Prudential Ins. Co. v. Smith*, 762 F.2d 476, 482 (1985).

¹⁵⁹ U.S. Dep’t of Defense, DD Form 93, Record of Emergency Data (Aug. 1998 (EG)).

¹⁶⁰ *See Prudential Ins. Co. v. West*, 324 F. Supp 1049, 1053 (1971).

¹⁶¹ 38 U.S.C § 1970(a).

¹⁶² *Prudential Ins. Co. v. Tull*, 690 F.2d 848, 849 (1982).

¹⁶³ 38 U.S.C. § 1968(a)(5). A beneficiary spouse can lose a status of an insurable dependent when a servicemember divorces the spouse and the unchanged SGLI designation states “to my spouse”, or when servicemember gives up parental rights over a minor child and the designation is “to my child.” Another example is when a servicemember’s parent legally abandons the servicemember, hence loses the status, and the servicemember’s SGLI designation states “to my parent.”

¹⁶⁴ AR 600-8-1, *supra* note 50, para. K-3c.

¹⁶⁵ 38 U.S.C. § 1970(b).

¹⁶⁶ *Id.* § 1970(c).

¹⁶⁷ *Id.*

After Action Review (AAR) of Attendance at the Brazilian Army Command and General Staff College

Major Gary P. Corn*

Introduction

In 2005, I was the first member of the U.S. Army Judge Advocate General's Corps (JAG Corps) to attend a foreign command and general staff college (CGSC). This article provides a summary of my attendance at the Brazilian Army's Command and General Staff College—Escola de Comando e Estado Maior do Exército (ECEME). Through a unique series of events, I was selected and attended the Brazilian Army's ECEME, a ten-month CGSC equivalent, where I studied brigade and division level operations through the lens of a foreign military. This rare opportunity not only afforded me a unique and valuable professional development experience, it served as an extraordinary and effective engagement tool—both legal and military-to-military—with the Brazilian Army and the other foreign students attending the course. Participation in this program was consistent with the Secretary of Defense's Defense Language Transformation Roadmap (DLTR)¹ goal of incorporating regional area education into Professional Military Education and Development and should serve as a model for future JAG Corps' efforts to integrate into this transformation process.

Background

Pursuant to *Army Regulation (AR) 350-1*,² I attended and completed a ten-month course of instruction at the ECEME through the U.S. Army's School of Other Nations (SON) program. The ECEME, the Brazilian Army's senior educational institution, is located on Praia Vermelha in the Urca section of Rio de Janeiro at the foot of the famous Pão de Açúcar, or Sugar Loaf Mountain. The ECEME conducts a two-year staff officer course for majors and lieutenant colonels—the Curso de Comando e Estado Maior (CEEM) (Command and Staff Course)—and a year-long course for colonels—the Curso de Política, Estratégia e Alta Administração do Exército (Course on Politics, Strategy and High Level Administration of the Army), which is an Army War College level course. Additionally, the ECEME houses the Brazilian Army's Center for Strategic Studies.³

Currently, the U.S. Army selects one to three Army officers to attend ECEME each year. In addition, the U.S. Army assigns one lieutenant colonel to the ECEME as an exchange instructor. For Brazilian Army officers, selection to attend the ECEME is highly competitive, and attendance is a prerequisite for promotion to general officer. United States military officers who attend the ECEME can be assured that they are attending school with the future shapers and leaders of the Brazilian Army.

Selection

I was selected to attend the ECEME through the SON program as set forth in *AR 350-1*. Due to the unique nature of the assignment and unusual circumstances that facilitated selection of a judge advocate, however, I was not selected strictly through established procedures.

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¹ The DLTR is a major initiative to develop foreign language and cultural expertise among the Department of Defense's (DOD) military and civilian members. The initiative reflects a long-standing priority of the Secretary of Defense to achieve the following three major goals: create foundational language and cultural expertise in the officer, civilian, and enlisted ranks for both active and reserve forces; create the capacity to surge language and cultural resources beyond in-house capabilities; and establish a cadre of language specialists with advanced levels of proficiency. The DLTR also aims to improve the language skills of the officer corps in general as well as consider language ability in the promotion of general officers. See News Release, U.S. Dep't of Defense, Office of the Assistant Secretary of Defense (Public Affairs), DOD Announces Plan to Improve Foreign Language Expertise (Mar. 30, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050330-2342.html>; see also U.S. DEP'T OF DEFENSE, DEFENSE LANGUAGE TRANSFORMATION ROADMAP (Jan. 2005), available at <http://www.defenselink.mil/news/Mar2005/d20050330roadmap.pdf> [hereinafter DLTR].

² U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND EDUCATION para. 3-34 (9 Apr. 2003). *Army Regulation 350-1* has been superseded by U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT (13 Jan. 2006) [hereinafter AR 350-1]. The U.S. Army's School of Other Nations (SON) program is addressed in paragraph 3-39 and Appendix D of the new regulation. AR 350-1, *infra* para. 3-39 and app. D.

³ Brazilian Army's Command and General Staff College—Escola de Comando e Estado Maior do Exército (ECEME), <http://www.eceme.ensino.eb.br> (last visited Sept. 25, 2006) [hereinafter ECEME].

The SON and Normal Selection Procedures

The Headquarters, Department of the Army, Deputy Chief of Staff, G-3/5/7 (Department of the Army Military Operations – Strategic Plans and Policy) (HQDA, DCS, G-3/5/7 (DAMO-SS)) is the proponent of the SON program. The program’s objective is “to develop closer U.S. Army/foreign Army relationships by placing U.S. Army Intermediate Service College eligible officers in foreign command and staff colleges and in war or national defense colleges that have been accredited as equivalent to [the Intermediate Service College] and [the Senior Service College].”⁴

Under the provisions of *AR 350-1*, the annual Human Resources Command message announcing the Senior Service College selection board will contain a listing of the foreign schools for which the board selects qualified students.⁵ Officers selected “must be outstanding representatives of the U.S. Army and the United States and desire to attend.”⁶ While a number of the eligible foreign schools are listed as branch immaterial, priority consideration is given to officers in the foreign area officer (FAO) specialty, and historically only FAOs, combat arms, or combat support officers have been selected.⁷ Eligible officers submit a letter of desire to their Senior Service College board, which then selects candidates.

My Selection as a Judge Advocate

Because the judge advocate CGSC selection board meets separately from the Army competitive category board, and because by tradition only FAOs and combat arms officers have participated in the SON, my selection required close coordination with the JAG Corps’ Personnel, Plans, and Training Office (PP&TO) and the SON program managers in the Deputy Chief of Staff for Operations (G-3). I expressed interest in participating in the SON program to PP&TO and the program managers beginning in the summer of 2003. In late 2004, the Judge Advocate General approved a concept plan submitted through PP&TO for allowing judge advocates to compete for and attend foreign schools, including CGSC equivalents. Coincidentally, G-3 informed PP&TO in early January of 2005 that a slot had unexpectedly reopened for the Brazilian CGSC course to begin in early February of that year. Because the slot was unanticipated, G-3 had not identified any FAO or combat arms officers to attend. With the support of my chain of command and The Judge Advocate General’s approval, PP&TO coordinated with G-3 and secured my selection to attend the course.⁸ I quickly out-processed my assignment at the U.S. Attorney’s office and reported for the course on 7 February 2005. While attending the course, I was assigned to the U.S. Army Student Detachment, Fort Jackson, South Carolina, with duty at the ECEME, and attached to the U.S. Army Military Attaché in Brasilia for administrative purposes.

The ECEME Course

The ECEME is the Brazilian equivalent of CGSC at Ft. Leavenworth, and upon graduation, students are awarded Military Education Level (MEL) Code 4.⁹ Because the course is conducted in a foreign language, officers are entitled to language incentive pay provided they have a current Defense Language Proficiency Test.¹⁰ Officers incur a two-year active duty service obligation for participation in the SON, which is computed from the date of course completion.¹¹

⁴ *AR 350-1*, *supra* note 2, para. 3-39a. The previous version of *AR 350-1* stated the objective of the SON program in a slightly different manner. “The objective of the SON program is to develop closer U.S./foreign Army relationships by placing U.S. Army board-selected officers in foreign command and staff colleges and in war or national defense colleges that have been accredited as equivalent to the [Command and General Staff Officer Course] for the MEL Code 4 and [the U.S. Army War College] for MEL Code 1.” *Id.* para. 3-34a.

⁵ *Id.* para. 3-39c.

⁶ *Id.* app. D-2.

⁷ *See id.* tbl. D-2.

⁸ This short-notice selection was helped by the fact that I had previously scored at the native-speaker level on the Defense Language Proficiency Test (DLPT).

⁹ Under the current regulation, selection for MEL-4 level foreign schools occurs during normal assignment rotations after officers complete [Intermediate-Level Education]. *Id.* para. 3-39c.

¹⁰ *Id.* para. 3-39e.

¹¹ *Id.* app. D-4b, tbl. D-2.

History

The ECEME marked its centennial during my year of attendance. The first command and staff school of the Brazilian Army was established by a royal decree on 2 October 1905.¹² Initially influenced by German military doctrine, the Brazilian Army turned to the French after the Germans' defeat in the First World War. French influence continued until Brazil's decision to join the allied effort in the Second World War and to send the Brazilian Expeditionary Force, a division task force that fought alongside the U.S. Army in the Italian theater under the command of the U.S. Fifth Army.¹³ The school was installed in its present day location in the 1940s, and U.S. military doctrine grew in influence.¹⁴ Although over the last several decades Brazil has distanced itself from its prior close ties with the U.S. military, its basic tactical, operational, strategic, and leadership doctrine is heavily based in U.S. doctrine, albeit somewhat outdated.

Course Structure and Student Body

For Brazilian Army officers, the CCEM is a two-year course, subdivided into the following distinct but integrated branch-specific courses:

1. The Command and Staff Course (Curso de Comando e Estado-Maior (CCEM) is the primary Command and General Staff Course at the ECEME. The objective of the course is to develop and prepare combat arms¹⁵ and ordnance officers to serve on brigade and higher staffs as well as to command. The course is open to senior captains through lieutenant colonels and lasts for two years. The first year of the course focuses on brigade and division level defensive and offensive operations, military history, strategy, and leadership. The second year focuses on corps and higher level operations.

2. The Staff and Management Course for Quartermaster Officers (Curso de Chefia e Estado-Maior para Oficial Intendente (CCEM/Int)) is no different than the CCEM. Quartermaster and transportation officers attend CCEM alongside combat arms officers for the full two years, with certain aspects of their course directed at logistics specific issues.

3. The Staff and Management Course for Physicians (Curso de Chefia e Estado-Maior para Médicos (CCEM/Med)), is a distinct course with certain blocks integrated into the CCEM, focused on medical corps specific issues. The majority of officers attend for one year, with a small number attending for two years.

4. The Command and General Staff Course for Foreign Officers (Curso de Comando e Estado-Maior para Oficiais de Nações Amigas (CCEM/ONA)), the course I attended, is intended to develop and prepare invited foreign officers to serve on brigade and higher staffs, facilitate the interchange of knowledge and experience, and to strengthen cooperative relationships with the countries represented. Foreign officers attend the first year of CCEM alongside their Brazilian counterparts, participating fully in nearly all aspects of the course. Additionally, as described more fully below, the ECEME organizes a number of specific activities and events for the foreign officers.

Approximately 120 Brazilian officers attend both years of the course. During 2005, eleven foreign officers attended the CCEM/ONA. In addition to myself, there were officers from Angola, Argentina, The Peoples Republic of China, Chile, Ecuador, Guatemala, Peru, Paraguay, Uruguay, and Venezuela.

Curriculum and Course Requirements

As noted, year one of the CCEM focuses primarily on brigade and division level operations, dividing the academic year nearly equally between the offense and the defense. Almost all work is completed in a small group setting; students being broken down into groups of approximately fifteen officers, with four groups to a classroom. Foreign officers are integrated evenly into the small groups, and the groups are periodically reorganized to maximize experiential exchanges and group dynamics training.

¹² ECEME, *supra* note 3.

¹³ The Brazilians also sent a squadron of P-47 Thunderbolts that was commanded by then Lieutenant Colonel Nero Moura, who later served as a brigadier general and Minister of Aviation. He was also my wife's grand-uncle. By all accounts, the Brazilian forces fought valiantly throughout the war.

¹⁴ ECEME, *supra* note 3.

¹⁵ The five combat arms in the Brazilian Army are Infantry, Cavalry (Armor), Artillery, Engineer, and Communications.

For the foreign officers, there is a pre-course during the month of January that focuses solely on language training and is conducted at a different facility in Rio de Janeiro. Because I was not approved to attend the course until late January 2005, I did not attend this pre-course. Generally, it is a good opportunity to begin in-processing requirements at the U.S. Consulate and the ECEME which can be cumbersome and to acclimatize and begin looking for suitable housing. Following the pre-course, the foreign officers were given a one-day orientation at the ECEME prior to course commencement on 15 February 2005.

The school adheres to a fairly strict 0730 to 1630 duty day, with the exception of Fridays, which end at 1200. Generally, the last hour to hour and a half of one to two days a week were set aside for personal physical training. There were also a number of periods each week set aside for research and study, but students were generally not permitted to leave the classrooms during these times.

After approximately a week of orientation, the course began with four days of non-testable group dynamics exercises, which was a good opportunity to meet and interact with classmates. Interestingly, this second week closed with the only block of legal training taught during the entire course—a four hour block of instruction on international humanitarian law from an outside professor. This cursory instruction reflected a general weakness in the integration of legal instruction and issues into the course curriculum.

The following two weeks encompassed the first testable block of instruction—Geostrategy. Forty-two hours of instruction were presented on various theories of geopolitical and national defense strategy, followed by a four hour written exam. Because of perceived sensitivities in the test scenario presented to the Brazilian students, the foreign students were issued a different exam, one that was given to the Brazilian students of a previous year, and were permitted some additional time to complete the exam.

The next thirteen weeks focused on brigade and division defensive operations, presented through the study of various scenarios. A group mission analysis and planning process preceded each scenario. The first scenario presented included the answers to the problems, used in effect as the beginning phase of the teaching process. Each successive problem required greater independent student analysis and planning with greater time pressures. To conclude this period, the students were given a two-day-long individual and group exam, which required students to receive a mission, conduct a mission analysis, plan brigade and division defensive plans, make mid-battle corrective decisions, and present written and graphic plans and answers to a series of questions. The foreign students took the same exam as the Brazilian students but were allowed an additional thirty minutes on each individual session.

Following the exam, the entire class was issued another problem set in preparation for a week-long terrain exercise conducted around the city of Uberlandia in the state of Minas Gerais. New small groups were designated for this exercise, and the groups were required to develop brigade and division plans for a defense and to submit these prior to departing for the exercise. The terrain exercise was then used to ratify and rectify the plans with the benefit of a terrain reconnaissance.

Because Brazil is traversed by many large rivers, its doctrine is dominated by the idea of static-defenses anchored on rivers as major obstacles; the exercise was no different. The exercise was very well planned and organized, with a number of observation points spread out over ten kilometers of both sides of the Paranaiba River north of the city. Over the several days of the exercise, the work groups were bused and trucked on a rotational schedule to the various observation points to conduct in depth terrain analysis and mission planning. Although the substantive work of the exercise was hampered by some of the idiosyncrasies of the Brazilian Army, it was an excellent opportunity to observe the Brazilian officers work in a semi-field environment, to interact with the supporting motorized infantry battalion, and to test my knowledge and understanding of doctrine and tactics in order to contribute a U.S. perspective to the planning.

After a nine-day mid-course vacation, the students returned to the ECEME to begin a nearly identical process to learn offensive operations. Again, at the end of approximately ten weeks of studying brigade and division level offensive operations, the students were given a three-day-long exam. Immediately thereafter, we were issued a new problem set and corps operations order to begin developing plans for the next terrain exercise. We then flew to Cascavel, in the state of Parana, for a week-long terrain exercise similar to the exercise at the end of the defensive operations phase of the course, using the time on the ground to study the concepts learned in the classroom and to ratify and rectify the plans each group developed. Again, the logistical planning and execution of this exercise was excellent, but the substantive instruction and learning was hindered by too much focus on terrain orientation and other aspects more suited to junior level officers.

One very positive aspect of the week in Cascavel was a scheduled visit to both the Itaipú Dam and Ciudad del Este (City of the East) in Paraguay. In addition to these trips, the foreign students were also treated to a raft excursion into the massive Iguazu Falls.

The Itaipú hydroelectric power plant is the largest development of its kind in operation in the world.¹⁶ Built from 1975 to 1991, in a bi-national development on the Paraná River, Itaipú represents the efforts and accomplishments of two neighboring countries, Brazil and Paraguay. The power plant's eighteen generating units add up to a total production capacity of 12,600 Mw (megawatts) and a reliable output of seventy-five million Mw per hour a year. This output provides for ninety-eight percent of all of Paraguay's energy needs and about fifteen percent of Brazil's. It is an extremely impressive facility and operation, and obviously critical to the energy infrastructure of the two countries.

Paraguay's Ciudad del Este sits in the center of what is known as the tri-border region, an area of shared borders between Paraguay, Brazil, and Argentina.¹⁷ Although subject to dispute, many cite this area as a point of convergence between organized crime, narco-trafficking, and Islamic terrorism.¹⁸ There is little question that this region, particularly in Paraguay, is afflicted with international crimes such as money laundering, gunrunning, migration fraud, and drug trafficking due to corruption and a palpable lack of government control. Of additional significance is the presence of an Islamic community of immigrants that represents a slice of the urban population in the tri-border area, mainly Ciudad del Este and Foz do Iguazu, estimated to be nearly 30,000. While this is an often neglected area, it is of critical importance to U.S. national security. Even a brief visit to Ciudad del Este confirmed the general state of lawlessness and the existence of conditions ripe for exploitation by criminal, and possibly terrorist, organizations.

This terrain exercise took us through the end of October. The remaining month of the course was dedicated to completion of writing requirements, study of military history, instruction on leadership, and sponsored travel for the foreign officers.

The writing requirements for the course were demanding. In addition to having to submit a book review in Portuguese, each student was required to write a lengthy scholarly paper. For the Brazilians, the requirement is to write either a thesis or a dissertation, for which they are given the full two years of the course and receive a recognized post-graduate degree. The foreign students are required to write a monografia, or paper, of at least eighty pages, to be completed within the ten months of the course. My topic was a comparative analysis of the U.S. Army JAG Corps with the military legal structure of the Brazilian Army. Although the school authorized the foreign students to submit the paper in either English or Spanish, I submitted mine in both English and Portuguese as a courtesy and to maximize its utility.

Specific Programs for the Foreign Students

In addition to the normal course requirements, the ECEME incorporated a number of activities specific to the foreign students. These included a number of field study trips to military units and institutions and to major industrial centers, as well as a travel program for the families.

1. Study Trips: Throughout year, the ECEME planned, funded, and executed a number of study trips for the foreign students.

a. A four and a half day trip to São Paulo during which we toured the following: the Academia Militar das Agulhas Negras (Brazilian Army's Military Academy), in Resende en route to São Paulo; Daimler Chrysler of Brazil in São Paulo; the Comando Military do Sudeste (Southeastern Military Command) in São Paulo; the Brazilian aircraft manufacturer EMBRAER (Empresa Brasileira de Aeronáutica) in São Paulo; Instituto Nacional de Pesquisa Espaciais (National Institute for Aerospace Research) in São Jose dos Campos; the headquarters and garrison of the 6th Light Infantry Battalion (6o Batalhão de Infanteria Leve); and the Army Aviation Command (Comando de Aviação do Exército) in Taubaté.

b. A four day trip to Brasília, the Capital of Brazil, to visit the Planalto Military Command (Comando Militar do Planalto), the functional equivalent of the Military District of Washington, and the 11th Regional Military Command

¹⁶ See Itaipu Binacional, <http://www.itaipu.gov.br/> (last visited Oct. 25, 2006).

¹⁷ See Posture Statement of General Bantz J. Craddock, United States Army Commander, United States Southern Command, Before the 109th Congress House Armed Services Committee at 2, 20 (Mar. 16, 2006), available at <http://www.house.gov/hasc/3-16-06SOUTHCOMTestimony.pdf>.

¹⁸ See, e.g., Jessica Stern, *The Protean Enemy*, FOREIGN AFFAIRS (July/Aug. 2003); Colonel (Ret.) William W. Mendel, *Paraguay's Ciudad del Este and the New Centers of Gravity*, COMBINED ARMS CTR MIL. REV. (Mar./Apr. 2002), available at <http://usacac.leavenworth.army.mil/CA/milreview/English/MarApr02/mendel.htm>.

(Comando da 11a Região Militar), responsible for the federal district and the states of Goiás and Tocantins, and the historic city of Salvador in Bahia.¹⁹

c. A series of day trips to military schools and organizations in the Rio de Janeiro area, such as the Coastal and Anti-Aircraft Artillery School (Escola de Artilharia de Costa e Anti-Aérea), the Ordnance School (Escola de Material Bélico), and the historic 32d Motorized Infantry Battalion (32o Batalhão de Infantaria Motorizado).

All of these trips provided superb opportunities to observe the Brazilian Army up close and at work, to visit historic units such as 6th Light Infantry Battalion that participated in the Brazilian Expeditionary Force in the Second World War, and to see some of the highlights of the Brazilian industrial sector. They also afforded an excellent opportunity to interact on a social and professional level, and thereby deepen friendships, with the ten other foreign officers attending the course and the Brazilian officers who accompanied us.

2. Family Program: In addition to the study trips, the ECEME organized a series of weekend trips to various historic and tourist sites within driving distance of Rio de Janeiro. These trips were excellent opportunities for the families of the foreign students, and a number of Brazilian facilitators, to interact and cement bonds and friendships. Because my wife is Brazilian and I have a general familiarity with Rio de Janeiro and the surrounding areas, I took an active part in assisting with these trips and invited several of the other foreign officers on additional weekend trips in the area, all of which strengthened my contacts with these officers and their families.

Engagement Opportunities

One of the most valuable aspects of my time in Brazil was the exceptional legal and military-to-military engagement opportunities. I not only represented the United States Army each and every day of class, but I took every opportunity to interject operational legal issues into all aspects of the course. It quickly became evident that this perspective is sorely lacking in the Brazilian military mindset, and therefore in the ECEME curriculum. In general, however, the Brazilian students and instructors recognize this deficiency, want to see it fixed, and highly appreciated my perspective, experience, and insights. This recognition gave me the opportunity to offer my viewpoint almost daily in class and to have extensive follow on discussions. In addition to this very important general engagement, I had a number of specific opportunities, which are detailed below.

1. Sponsorship: Each foreign officer had at least one sponsor in the course. I was fortunate to have two sponsors—an artillery officer and an army physician. The sponsorship program quickly led to close relationships and the opportunity for many frank and open discussions about U.S. policy, the U.S. Army, and the role of attorneys in the U.S. military.

2. Representational Opportunities: Each foreign officer was required to make a presentation to the entire ECEME on the day of their respective national independence days. The foreign officers also participated in a Dance of Nations where each international student put up a table and display with items, information, and food from our respective countries.

3. Specific Legal Briefings: I was asked to provide several briefings on the JAG Corps, its role in the U.S. Army, and the relationship between the U.S. military and the U.S. judiciary. Specifically, I provided a two-hour brief to the students in the Course on Politics, Strategy, and High Level Administration of the Army (Curso de Política, Estratégia e Alta Administração do Exército) on the relationship between the U.S. military and the judiciary (i.e., Federal litigation). This is a problematic area for the Brazilian Army due to peculiarities of the Brazilian legal system and history of the army's role in internal affairs in Brazil.

In addition, I was flown, at the Brazilian Army's expense, to the Cabinet of the Commander of the Army (Gabinete do Comandante do Exército) to provide a similar brief to senior officers in the Army headquarters along with a class of new officers in the nascent legal support branch of the Brazilian Army. The brief was very successful and allowed me to establish important contacts with some of the few military attorneys in the force.

¹⁹ The trip to Salvador was a last minute substitute for the originally planned trip to visit Manaus, the Amazon basin, and the Military Command of the Amazon (Comando Militar da Amazônia), which was unfortunately cancelled due to lack of anticipated air assets.

Finally, I was invited to be a guest speaker at the 28th Seminar on Military Criminal Law, hosted by the Eastern Military Command (Comando Militar do Leste (CML)), with an audience of university students, academics, and military officers from the different services. The CML is one of the most important and influential regional commands in the Brazilian Army, with one of the most robust legal offices and an active criminal law practice. This brief was very well received, and again afforded me an opportunity to make significant contacts with military attorneys.

4. Airborne Operation: The Brazilian Army extended an invitation to all airborne qualified foreign students to participate in an airborne refresher course and jump with the Airborne Infantry Brigade stationed in Rio de Janeiro. Through special request, I obtained permission from the Department of the Army to participate in this training. I attended refresher training at the Brazilian Army's Airborne Training Center (Centro de Instrução Pára-quedista General Penha Brasil) on 16 November 2005, jumped (after typical scratches and delays) on 20 November 2005 along with five of the other foreign students and several other students attending the Brazilian equivalent of the Captain's Career Course, and was awarded Brazilian Airborne Wings at a special ceremony on 23 November 2005. This great experience allowed for military-to-military engagement and relationship building and served to reinforce the example of the soldier-lawyer ethos of the U.S. Army JAG Corps.

5. Defense Attaché Office/Military Group (DAO/MILGROUP) Support: As noted above, I was attached to the Army Attache's office in Brazilia while attending the course, with administrative support provided by the U.S. Consulate in Rio de Janeiro and the Assistant Defense Attache. There is a small, but active U.S. military community in Rio, many of whom are students. It is not unusual for the DAO or the MIL Group to rely on in-country students to assist in different missions and requirements, and the group as a whole operates very much as a team. Some of the assistance I provided included the following: accompanying the Deputy Consul General to the Brazilian Military's Victory in Europe Day celebration; serving on the escort team for a visit by the U.S. Southern Command commander; organizing a visit and lecture at the ECEME by the United States Army South commander; and serving as a Portuguese translator for the Southern Command commander during the 1st Southern Cone Defense Conference in Buenos Aires, Argentina.

These activities, as well as the weekly interaction with the consulate staff and DAO and MIL Group community, were very positive professional development, giving great insights into this important aspect of U.S. military operations.

Conclusion

"Post 9/11 military operations reinforce the reality that the Department of Defense needs a significantly improved organic capability in emerging languages and dialects, a greater competence and regional area skills in those languages and dialects, and a surge capability to rapidly expand its language capabilities on short notice."²⁰ This critical recognition, based on the well founded assumption that "[r]obust foreign language and foreign area expertise are critical to sustaining coalitions, pursuing regional stability, and conducting multi-national missions especially in post-conflict and other than combat, security, humanitarian, nation-building, and stability operations,"²¹ is by no means inapplicable to the JAG Corps. To the contrary, recent experiences demonstrate that judge advocates are playing an ever increasing role in the full spectrum of military operations at both the planning and execution phases.

More and more commanders are reaching out to their judge advocates to perform non-traditional functions, especially in the post-conflict, nation building phases of our operations, and often tasking them as the lead element for planning and execution. Having a corps of language qualified, regional expert judge advocates will only serve to enhance the Corps' overall utility, capability, and force-multiplying value. There is no better mechanism to achieve this end than integrating judge advocates into the foreign-schooling programs.

Through my attendance at the ECEME, I exponentially strengthened both my Spanish and Portuguese skills. I gained invaluable experience and insights into not only Brazil's military, society, and government and political structure, but into several other Latin American countries and the region as a whole. I developed important contacts in the militaries of several Latin American countries as well as Angola and the Peoples Republic of China. I also established useful contacts within our own Foreign Area Officer community and gained valuable insights into the Defense Attaché, Military Group, and State Department organization and operations.

²⁰ DLTR, *supra* note 1.

²¹ *Id.* at 3.

This was a valuable investment for both the Army and the JAG Corps, and should be replicated in the future. In addition to the training and experience, integrating judge advocates into the foreign-schooling programs can serve as an excellent recruiting and retention tool and supports the specific goals of DOD's Defense Language Transformation Roadmap. For additional information, interested judge advocates should contact PP&TO.

Book Review

IN THE COMPANY OF HEROES¹

REVIEWED BY LIEUTENANT COLONEL JOHN SIEMIETKOWSKI²

*Ranger! Ranger! You die Somalia!*³

Introduction

On 3 October 1993, Somali insurgents shot down a Blackhawk helicopter piloted by Chief Warrant Officer Three (CW3) Michael Durant. As the only survivor of the crash, the Somalis captured Durant and held him prisoner for ten days. Ten years after the battle of Mogadishu, Durant, one of the central combatants of those terrible days in Somalia, published his personal memoir of the fight, his captivity, and his eventual release. Equally as riveting as Mark Bowden's *Black Hawk Down*,⁴ *In the Company of Heroes* is a hard-to-put-down tale of courage, humor, and, ultimately, survival. Though some readers may tire of the author's swagger and sarcasm, the book is riveting and provides valuable lessons about preparing for and surviving captivity.

"Ranger! Ranger! You die Somalia!" sums up the abject terror felt by Durant upon his capture and initial torture by the Somalis. The Somalis yelled this at Chief Durant as they dragged him away from his burning helicopter and tore at his clothes,⁵ as they rifled through "every pocket of [his] trousers" in search of valuables,⁶ and as they "jabbed AK-47 barrels in [his] face."⁷ Just as the phrase became a mantra for Durant's Somali tormentors, it almost becomes an incantation that forms the backdrop for Durant's gripping narration.

A Peripatetic Format

In the Company of Heroes jumps among places and times central to the author's life, despite the book's focus on Somalia in October 1993. The author devotes a prologue and nine chapters to harrowing accounts of his capture and captivity in Somalia. He intersperses these Somalia memories with chapters devoted to his earlier training and assignments. For example, following Chapter Two, *A Prisoner of Hate*,⁸ which describes his initial capture, Durant details his early career flying medical evacuations (medevacs).⁹ Even within chapters, Chief Durant sometimes wanders from one time and place to another. When detailing the clutching and grabbing of the angry Somali mob, Durant deviates and mentally "return[s] to [his] home in New Hampshire," describing the people and activities of his childhood.¹⁰ When recounting a mission during his assignment to Korea, he also suddenly returns to memories of being "a young kid in a small New England town."¹¹

At first, this itinerant format is annoying to the reader. It is difficult to switch from reading about the author falling asleep in captivity, "feeling the hot tears running from the corners of my eyes and into my ears,"¹² to reading on the next page of text about the author's thoughts in 1998 about being a medevac pilot.¹³ After digesting a chapter that concludes with the

¹ MICHAEL J. DURANT & STEVEN HARTOV, *IN THE COMPANY OF HEROES* (2003).

² Drilling Individual Mobilization Augmentee, Criminal Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

³ DURANT & HARTOV, *supra* note 1, at 42, 49-50, 56, 58.

⁴ MARK BOWDEN, *BLACK HAWK DOWN* (1999). For a review of *Black Hawk Down*, see Major Tyler J. Harder, *Mark Bowden's Black Hawk Down*, 166 MIL. L. REV. 199 (2000) (book review).

⁵ DURANT & HARTOV, *supra* note 1, at 42.

⁶ *Id.* at 49-50.

⁷ *Id.* at 56 ("Ranger, Ranger, kill many Somalis! You die Somalia!").

⁸ *Id.* at 45.

⁹ *Id.* at 67 (Chapter Three, *Korea*).

¹⁰ *Id.* at 45.

¹¹ *Id.* at 71.

¹² *Id.* at 141.

¹³ *Id.* at 143.

author stating, “I had no idea if it would be one night of captivity or a thousand,”¹⁴ the reader wants to know what happened when Durant woke up the next day in Somalia. Instead, the author returns to reminiscing about Korea in November 1985.

Durant, however, carefully weaves his movement of time and place so that the reader arrives at the understanding the author seeks to achieve. Durant’s interlacement of stories allows his memories to feed off of each other. For example, when Durant deviates from his searing description of being carried aloft by the Somali mob to discuss his New Hampshire childhood, the morphing of his childhood memories into his present terror accentuates that terror all the more:

Her [Durant’s high school girlfriend] smile was wide and snow white, and I felt my chest flutter with the promise of romantic adventure as I raised my hand and she reached out for me . . . Then suddenly her smile turned into a vicious snarl, her fingers grabbed for my crotch, and she screamed and squeezed with all her might.¹⁵

At another point, Durant leaves his Somalia narrative to state, “I had never been so cold in my life.”¹⁶ Referring there to his survival, evasion, resistance, escape (SERE) training, this is a perfect transition between times and places as Durant recounts how he called upon his SERE training when his captors asked him to videotape a statement.¹⁷ Later, there is an unlikely transition between Durant’s description of U.S. helicopters flying overhead, and his reminisces of the first Gulf War.¹⁸ Even here, though, the transition makes sense simply because Durant seems puzzled that of all the places he could dream about, he “returned instead to memories of Iraq.”¹⁹

In addition to juxtaposing these times and places, removing the reader from Somalia does not necessarily lead to boring text. Wholly apart from the emotive retelling of his Somali captivity, Durant’s non-Somali chapters would make for interesting reading all by themselves. The author introduces his *Korea* chapter by stating “The wounded soldier in the back of my chopper was going to die.”²⁰ He then recounts a nail-biting tale of flying through a dangerous snow storm to take that Soldier to the hospital.²¹ In describing his role in Panama in 1989, Durant states, “Then the Panamanians opened up with everything they had” as he recounts the airborne operation.²² In similar riveting fashion, Durant opens his *Iraq* chapter with, “A SCUD missile launcher loomed in my gunsight, and I knew I had it dead to rights.”²³ Such peripatetic wandering between times and places also breaks up the tension inherent in retelling Durant’s horribly mesmerizing story of capture and captivity.

A Gripping Tale

Durant’s story is unavoidably spell-binding. Even if *In the Company of Heroes* was poorly written, the facts themselves would keep readers awake long into the night. Matching those facts with a compelling, first-person narrative captures readers and ensures them long nights and rapid pulse rates.

Even before describing his mission, capture, and captivity, Durant’s vivid account of the *smells* of Somalia brings the scene to life:

I think it was the first time that I really smelled Somalia . . . the heavy stench of fetid garbage, mixed with nostril-flaring fumes of JP-4 jet fuel. We were right on the ocean, the wind usually blowing from the southwest, carrying the brine of the sea. Coffee was constantly brewing in the [Joint Operation Center],

¹⁴ *Id.* at 65.

¹⁵ *Id.* at 46.

¹⁶ *Id.* at 100.

¹⁷ *Id.* at 99-100.

¹⁸ *Id.* at 280-83.

¹⁹ *Id.* at 281.

²⁰ *Id.* at 67.

²¹ *Id.* at 67-71, 85-87.

²² *Id.* at 229.

²³ *Id.* at 283.

and it blended with the cold concoctions from the mess hall, floating above a thin layer of urine and feces fog from the Porta Potties.²⁴

Durant offers other similarly engaging observations as his ill-fated mission prepared to launch and later as he approached the target area. Referring to his sense of uneasiness about flying in daylight, Durant states, “For a second, something crawled up my stomach.”²⁵ Discussing his initial view as his chopper took off, Durant writes, “I am not a man who believes in omens, but there were sharks in the water.”²⁶ Using verbs like “flying,” “hover,” “echoed,” “tiptoeing,” “deployed,” “snagged,” “nudged,” “scraping,” and “banging,” the author describes the deployment of his “chalk” of Rangers from his helicopter.²⁷ At points like this, which are common throughout, the book simply is very hard to put down. For example, Durant provides the following description of the crash of his helicopter:

I heard a rapidly accelerating whine, an unearthly, building scream, and then the tail rotor assembly completely disintegrated into vapor with an earsplitting BANG . . . Super Six-Four started to spin so fast that the sky and ground became nothing but two blurred strips of blue and brown in front of my eyes . . . I was hurled against the harness, my hands desperately yanking and twisting the controls . . .²⁸

Regaining consciousness after the crash, Durant realized the extent of his back injury.

Two of my vertebrae had smacked together on impact, displacing the disk between them and pulverizing each other. Every muscle in my back must have tried to prevent that catastrophe and been ripped apart in the effort, and it felt like some evil giant had me on his worktable, squeezing my spine in an iron vise. I stopped moving and just tried to breathe without passing out.²⁹

The pilot next assessed his leg injury.

My right leg felt strangely numb, and as soon as I tried to move it I knew that the femur had broken clean in half over the edge of my Kevlar seat. My M-9 pistol was still strapped to my right thigh, and as its weight shifted I could feel the splintered ends of my bones grinding against one another.³⁰

Details like this are so graphic that the reader can almost feel back and leg pain when reading Durant’s account.

Durant’s writing makes the reader *empathize* with his in extremis situation. Describing the sound of the approaching mob, Durant says,

It was the sound of approaching death, just overwhelmingly terrifying, and I knew that as soon as they came around the nose of that helicopter and saw me, they were going to chop me to pieces. That’s what they had done to the Nigerians. That’s what they did to *everybody*. We had heard eyewitness accounts of them playing soccer with the skulls of their enemies.³¹

Durant further relates the mob clubbing him with the “severed arm of one of my comrades,” throwing dirt into his eyes and mouth as they carried him aloft, and feeling pain as his “broken femur cleaved into the back of my leg, the sharp bone puncturing right out through my skin.”³² In similar gripping fashion, Durant describes noticing the broken bones in his face³³ and his surprised horror as a Somali shot him when he was chained and in his makeshift prison cell.³⁴ Even when the action

²⁴ *Id.* at 5.

²⁵ *Id.* at 7.

²⁶ *Id.* at 13.

²⁷ *Id.* at 17.

²⁸ *Id.* at 23, 24.

²⁹ *Id.* at 26.

³⁰ *Id.*

³¹ *Id.* at 40.

³² *Id.* at 43.

³³ *Id.* at 94.

³⁴ *Id.* at 95.

slows down, Durant's description of relatively mundane activities is fascinating: "Then [the guard] came up with a small wooden stick . . . I soaked the stick in water, rubbed the frayed end over my teeth, and rinsed. I ended up with a few splinters in my gums. . . ."³⁵

Likewise, when recounting his thoughts during captivity, Durant's story is emotive: "I decided it was going to be a long wait . . . I would have to slow the metabolism of my hope."³⁶ Similarly, when hearing his friend's voice calling out from an overhead chopper, "'Mike Durant . . . We will not leave without you,'" the author "swallowed hard, my streaming eyes following the sweet drone of that helo's rotors," as he silently said, "I know you won't Dan . . . I know you won't!"³⁷ Durant reveals further introspection when relating his emotions upon receiving pictures of his wife and young son. "I waited till [his guard] left, and then I stared at my family for an hour, slowly caressing their images with my fingers."³⁸ Revealing his non-warrior side, Durant recounts his emotions upon learning that the Somalis were to release him: "I could almost feel the walls of my defenses cracking, like thin fissures appearing in the face of a dam."³⁹

Finally, when recounting his release, Durant continues his gripping narrative. He describes his excitement at receiving medical treatment, "Morphine? Did he say morphine?";⁴⁰ the incongruity of his guard carrying United Nations credentials while wearing a "Viva Aidid" t-shirt;⁴¹ and the shock of the American who first saw him, "Holy Mother of God! It's Mike Durant! *Medic!*"⁴²

Swagger and Sarcasm

Though it detracts little from the book, some readers may tire of Durant's swagger and sarcasm. Chief Durant comes across as a John Wayne gunslinger and a classic wise-guy. Early on Durant writes, "Mogadishu was Tombstone, and we were Wyatt Earp."⁴³ In discussing his colleagues, Durant describes them as "the kind of professionals who could pick off a rabbit from a roller coaster with a BB gun. To me, they were Batman and Robin, only much better."⁴⁴ In recounting his Korea assignment, Durant writes, "There were other officers, a fixed-wing pilot, and the kinds of Army nurses people envision from M*A*S*H. For a time, I had a fine relationship with a nurse . . ."⁴⁵ When describing a visit from a Somali doctor, he recalls thinking to himself, "What I need is a double dose of morphine and bottle of Jack."⁴⁶

At times Durant's prose exhibits much bravado, but clearly it is not false bravado. Durant's training and combat missions earned him the right to brag long before he went to Somalia. Moreover, Durant demonstrates his awareness of knowing when to boast about "Tombstone" and when to recognize reality by stating, "I could use the John Wayne standard and give up only the Big Four [when being interrogated on camera]. That worked great in the movies, but here my goal was survival, not fruitless heroism."⁴⁷

Durant's comments from capture through captivity also offer prime examples of sarcasm. For example, Durant states the following: "Hey, maybe you guys would consider exchanging me for a Mercedes with a CD player and a Mohamed Aidid hood ornament;"⁴⁸ "making Custer's Last Stand look like nothing more than a rained-out corporate picnic;"⁴⁹ "This is just

³⁵ *Id.* at 131.

³⁶ *Id.* at 178.

³⁷ *Id.* at 212.

³⁸ *Id.* at 311.

³⁹ *Id.* at 319.

⁴⁰ *Id.* at 325.

⁴¹ *Id.* at 328.

⁴² *Id.* at 329.

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 28.

⁴⁵ *Id.* at 81.

⁴⁶ *Id.* at 114.

⁴⁷ *Id.* at 116.

⁴⁸ *Id.* at 52-53.

⁴⁹ *Id.* at 54.

what I need A minus-three-star hotel and a restless roommate;”⁵⁰ “Combat rations. That was the result of my failing to specify a menu request;”⁵¹ “Don’t bother making up the room. And I’ll just go down to the lobby for the buffet;”⁵² “Whatever you say, man. Enjoy your Third World Alka-Seltzer;”⁵³ and “And don’t forget the buxom nurse twins and the beer keg.”⁵⁴

Though this sarcasm becomes tiring at times, the reader senses that it is just Durant’s character. Furthermore, Durant likely needed that sarcasm and sense of humor to mentally survive capture and captivity. When you are forced to use the same bowl for relieving yourself *and* washing yourself,⁵⁵ you have to keep your sanity somehow, and humor and sarcasm obviously helped Durant through his ordeal.

In addition to swagger and sarcasm, the book also has a few other shortcomings. Though the book contains some maps of Mogadishu, it would be helpful to see sketches of the rooms where the Somalis held the author captive. It would also be interesting to learn more about the breakup of the author’s marriage a few years after his return from Somalia.⁵⁶ Though inappropriate to pry too far into Durant’s personal life, it nonetheless would be intriguing to know what effect, if any, his Somali experience had on the end of his first marriage and on his subsequent remarriage.

Surprises

While the entire book is fascinating, Durant surprises the reader several times with interesting facts that only an insider would know. In his *Acknowledgements*, Durant thanks Ross Perot first,⁵⁷ and later describes Perot’s quiet support to his family and all Special Operations families.⁵⁸ At the other extreme, Durant recounts his surprise and anger at Colonel (retired) David Hackworth’s personal attack on his conduct while in captivity.⁵⁹ Though most readers will have heard of the rescue attempt by Medal of Honor winners’ Randy Shugart and Gary Gordon, Durant’s account of his time with them as the Somalis swarmed towards the downed chopper is the only first-hand account of their on-the-ground heroism.⁶⁰ Later, the author shares a very personal letter sent to him by Shugart’s widow⁶¹ and recounts an almost spooky experience he had when checking out a book in Gary Gordon’s hometown library.⁶² Durant even admits to having an erotic dream while in captivity.⁶³

For judge advocates, the most interesting surprise in the book is likely to be where Durant describes the first American he saw upon his release at the United Nations compound:

The van doors suddenly opened again, and standing there with his mouth gaping was a *lawyer*. He was an American major, the Task Force Ranger JAG officer, and I recognized him instantly . . . And I would never be so happy to see a lawyer again. He stood there for a moment in shock, and then he yelled. “Holy Mother of God! It’s Mike Durant! *Medic!*”⁶⁴

⁵⁰ *Id.* at 123.

⁵¹ *Id.* at 131.

⁵² *Id.* at 196.

⁵³ *Id.* at 208.

⁵⁴ *Id.* at 261.

⁵⁵ *Id.* at 175.

⁵⁶ *See id.* at 356-57.

⁵⁷ *Id.* at v.

⁵⁸ *Id.* at 342-44.

⁵⁹ *Id.* at 351.

⁶⁰ *Id.* at 28-39.

⁶¹ *Id.* at 347-49.

⁶² *Id.* at 359.

⁶³ *Id.* at 134.

⁶⁴ *Id.* at 328-29. The Judge Advocate General officer was Lieutenant Colonel (Retired) Gary Walsh. Telephone interview with Lieutenant Colonel (Retired) Gary Walsh (Aug. 31, 2006).

Lessons Learned

In the Company of Heroes is chock-full of lessons for all Soldiers, especially those deploying to combat areas. Though no Soldier ever wants to think about capture, Durant offers valuable lessons to commit to memory. Upon his initial capture by the Somali mob, Durant's focus was, "If I can survive for five [minutes], then I'll worry about the next five."⁶⁵ Durant also describes locking his elbows a certain way when being chained to help loosen his arms,⁶⁶ the importance of staying hydrated even when you don't feel like drinking,⁶⁷ tolerating pain when it is "pain with a purpose,"⁶⁸ and the importance of "establishing a connection" with his captors.⁶⁹ The author also notes lessons learned upon his release and return to the U.S., such as dealing with news media⁷⁰ and distinguishing between real friends and phony friends.⁷¹ Continuing to alternate between advice for combat and non-combat situations, Durant exhorts pilots to "carry all the ammunition and water they can,"⁷² and emphasizes the importance of family support groups.⁷³ Finally, in somewhat of a shot at political leaders, Durant expresses his unit's frustration at not being allowed to complete the mission: "It is difficult enough to bury a fallen comrade, but even harder to look into the eyes of his family, knowing that the objective for which he died has been deemed unobtainable by the very men who sent him to his death."⁷⁴

Conclusion

Michael Durant's *In the Company of Heroes* is a must-read for anyone who even remotely liked *Black Hawk Down*. A gripping read, the book also provides valuable lessons and even some insider surprises. Though some may tire of the author's swagger and sarcasm, no reader will begrudge Durant the right to tell this riveting story of courage, humor, and survival.

⁶⁵ *Id.* at 41.

⁶⁶ *Id.* at 56-57.

⁶⁷ *Id.* at 59, 91-92.

⁶⁸ *Id.* at 128.

⁶⁹ *Id.* at 171.

⁷⁰ *Id.* at 337, 344.

⁷¹ *Id.* at 336-37, 350.

⁷² *Id.* at 357.

⁷³ *Id.* at 358.

⁷⁴ *Id.* at 347.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), 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, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).
Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, 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. TJAGLCS CLE Course Schedule (June 2006 - October 2007) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

| ATTRS. No. | Course Title | Dates |
|----------------|--|--|
| GENERAL | | |
| | | |
| 5-27-C22 | 55th Graduate Course | 14 Aug 06 – 24 May 07 |
| 5-27-C22 | 56th Graduate Course | 13 Aug 07 – 22 May 08 |
| | | |
| 5-27-C20 | 172d JA Officer Basic Course | 4 – 16 Feb 07 (BOLC III) Ft. Lee 16 Feb – 2 May 07 (BOLC III) TJAGSA |
| | | |
| 5-27-C20 | 173d JA Officer Basic Course | 1 – 13 Jul 07 (BOLC III) Ft. Lee 13 – Jul – 26 Sep 07 (BOLC III) TJAGSA (Tentative) |
| | | |
| 5F-F70 | 38th Methods of Instruction Course | 26 – 27 Jul 07 |
| | | |
| 5F-F1 | 196th Senior Officers Legal Orientation Course | 26 – 30 Mar 07 |
| 5F-F1 | 197th Senior Officers Legal Orientation Course | 11 – 15 Jun 07 |
| 5F-F1 | 198th Senior Officers Legal Orientation Course | 10 – 14 Sep 07 |
| | | |
| 5F-F52 | 37th Staff Judge Advocate Course | 4 – 8 Jun 07 |

| | | |
|-------------------------------------|--|--------------------|
| 5F-F52-S | 10th Staff Judge Advocate Team Leadership Course | 4 – 6 Jun 07 |
| 5F-JAG | 2007 JAG Annual CLE Workshop | 1 – 5 Oct 07 |
| JARC-181 | 2007 JA Professional Recruiting Seminar | 17 – 20 Jul 07 |
| NCO ACADEMY COURSES | | |
| 512-27D30 (Phase 2) | Paralegal Specialist BNCOC | 28 Jan – 2 Mar 07 |
| 512-27D30 (Phase 2) | Paralegal Specialist BNCOC | 2 Apr – 4 May 07 |
| 512-27D30 (Phase 2) | Paralegal Specialist BNCOC | 2 Apr – 4 May 07 |
| 512-27D30 (Phase 2) | Paralegal Specialist BNCOC | 11 Jun – 13 Jul 07 |
| 512-27D30 (Phase 2) | Paralegal Specialist BNCOC | 13 Aug – 14 Sep 07 |
| 512-27D40 (Phase 2) | Paralegal Specialist ANCOG | 28 Jan – 2 Mar 07 |
| 512-27D40 (Phase 2) | Paralegal Specialist ANCOG | 11 Jun – 13 Jul 07 |
| 512-27D40 (Phase 2) | Paralegal Specialist ANCOG | 13 Aug – 14 Sep 07 |
| WARRANT OFFICER COURSES | | |
| 7A-270A1 | 18th Legal Administrators Course | 2 – 6 Apr 07 |
| 7A-270A2 | 8th JA Warrant Officer Advanced Course | 16 Jul – 3 Aug 07 |
| 7A-270A0 | 14th JA Warrant Officer Basic Course | 29 May – 22 Jun 07 |
| ENLISTED COURSES | | |
| 512-27DC5 | 22d Court Reporter Course | 29 Jan – 30 Mar 07 |
| 512-27DC5 | 23d Court Reporter Course | 23 Apr – 22 Jun 07 |
| 512-27DC5 | 24th Court Reporter Course | 30 Jul – 28 Sep 07 |
| 512-27DC6 | 8th Court Reporting Symposium | 29 Oct – 3 Nov 07 |
| 512-27D/20/30 | 18th Law for Paralegal NCOs Course | 26 – 30 Mar 07 |
| 512-27D/40/50 | 16th Senior Paralegal Course | 18 – 22 Jun 07 |
| 512-27D-CSP | 1st BCT NCOIC Course | 18 – 22 Jun 07 |
| ADMINISTRATIVE AND CIVIL LAW | | |
| 5F-F21 | 6th Advanced Law of Federal Employment Course | 17 – 19 Oct 07 |
| 5F-F22 | 61st Law of Federal Employment Course | 15 – 19 Oct 07 |
| 5F-F23 | 60th Legal Assistance Course | 7 – 11 May 07 |
| 5F-F23 | 61st Legal Assistance Course | 29 Oct – 2 Nov 07 |

| | | |
|---------|--|-------------------|
| 5F-F24 | 31st Admin Law for Military Installations Course | 19 – 23 Mar 07 |
| 5F-F29 | 25th Federal Litigation Course | 30 Jul – 3 Aug 07 |
| 5F-F202 | 5th Ethics Counselors Course | 16 – 20 Apr 07 |
| 5F-F23E | 2007 USAREUR Legal Assistance CLE | 22 – 26 Oct 07 |
| 5F-F24E | 2007 USAREUR Administrative Law CLE | 17 – 21 Sep 07 |
| 5F-F26E | 2007 USAREUR Claims Course | 15 – 19 Oct 07 |

CONTRACT AND FISCAL LAW

| | | |
|---------|--|-------------------|
| 5F-F10 | 157th Contract Attorneys Course | 5 – 13 Mar 07 |
| | 158th Contract Attorneys Course | 23 Jul – 3 Aug 07 |
| 5F-F12 | 76th Fiscal Law Course | 30 Apr – 4 May 07 |
| 5F-F13 | 3d Operational Contracting Course | 14 – 16 Mar 07 |
| 5F-F102 | 6th Contract Litigation Course | 9 – 13 Apr 07 |
| 5F-F14 | Comptrollers Accreditation Fiscal Law Course (Ft. Monmouth, NJ) | 5 – 8 Jun 07 |

CRIMINAL LAW

| | | |
|--------|---|--------------------|
| 5F-F31 | 13th Military Justice Managers Course | 10 – 14 Oct 07 |
| 5F-F33 | 50 th Military Judge course | 23 Apr – 11 May 07 |
| 5F-F34 | 28th Criminal Law Advocacy Course | 10 – 21 Sep 07 |
| 5F-F35 | 31st Criminal Law New Developments Course | 5 – 8 Nov 07 |
| 5F-301 | 10th Advanced Advocacy Training | 29 May – 1 Jun 07 |

INTERNATIONAL AND OPERATIONAL LAW

| | | |
|--------|-------------------------------------|--------------------|
| 5F-F42 | 3d Advanced Intelligence Law Course | 27 – 29 Jun 07 |
| | 48th Operational Law Course | 30 Jul – 10 Aug 07 |
| 5F-F42 | 87th Law of War Course | 29 Jan – 2 Feb 07 |
| 5F-F42 | 88th Law of War Course | 9 – 13 Jul 07 |
| 5F-F44 | 2d Information Operations Course | 16 – 20 Jul 07 |
| 5F-F45 | 7th Domestic Operational Law Course | 29 Oct – 2 Nov 07 |
| 5F-F47 | 47th Operational Law Course | 26 Feb – 9 Mar 07 |
| 5F-F47 | 48th Operational Law Course | 30 Jul – 10 Aug 07 |

3. Naval Justice School and FY 2007 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

| Naval Justice School Newport, RI | | |
|---|--|---|
| CDP | Course Title | Dates |
| 0257 | Lawyer Course (020) Lawyer Course (030) Lawyer Course (040) | 22 Jan – 23 Mar 07 4 Jun – 3 Aug 07 13 Aug – 12 Oct 07 |
| BOLT | BOLT (020) BOLT (020) BOLT (030) BOLT (030) | 26 – 30 Mar 07 (USMC) 26 – 30 Mar 07 (NJS) 6 – 10 Aug 07 (USMC) 6 – 10 Aug 07 (NJS) |
| 900B | Reserve Lawyer Course (010) Reserve Lawyer Course (020) | 7 – 11 May 07 10 – 14 Sep 07 |
| 914L | Law of Naval Operations (Reservists) (010) Law of Naval Operations (Reservists) (020) | 14 – 18 May 07 17 – 21 May 07 |
| 850T | SJA/E-Law Course (010) SJA/E-Law Course (020) | 29 May – 8 Jun 07 6 – 17 Aug 07 |
| 850V | Law of Military Operations (010) | 11 – 22 Jun 07 |
| 786R | Advanced SJA/Ethics (010) Advanced SJA/Ethics (020) | 26 – 30 Mar 07 (San Diego) 16 – 20 Apr 07 (Norfolk) |
| | National Institute of Trial Advocacy (020) | 14 – 18 May 07 (San Diego) |
| 0258 | Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) | 12 – 16 Mar 07 (New Port) 7 – 11 May 07 (New Port) 23 – 27 Jul 07 (New Port) 24 – 28 Sep 07 (New Port) |
| 4048 | Estate Planning (010) | 23 – 27 Jul 07 |
| No CDP | Prosecuting Trial Enhancement Training (010) | 22 – 26 Jan 07 |
| 7485 | Litigating National Security (010) | 5 – 7 Mar 07 |
| 748B | Naval Legal Service Command Senior Officer Leadership (010) | 20 – 31 Aug 07 |
| 3938 | Computer Crimes (010) | 21 – 25 May 07 (Norfolk) |

| | | |
|------|--|--|
| 961D | Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020) | TBD TBD |
| 961M | Effective Courtroom Communications (020) | 26 – 30 Mar 07 (San Diego) |
| 961J | Defending Complex Cases (010) | 16 – 20 Jul 07 |
| 525N | Prosecuting Complex Cases (010) | 9 – 13 Jul 07 |
| 2622 | Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130) | 26 – 30 Mar 07 (Pensacola, FL) 2 – 6 Apr 07 (Quantico, VA) 9 – 13 Apr 07 (Camp Lejeune, NC) 23 – 27 Apr 07 (Pensacola, FL) 23 – 27 Apr 07 (Naples, Italy) 4 – 8 Jun 07 (Pensacola, FL) 9 – 13 Jul 07 (Pensacola, FL) 27 – 31 Aug 07 (Pensacola, FL) |
| 961A | Continuing Legal Education (EUCOM) (020) | 23 – 24 Apr 07 (Naples, Italy) |
| 7878 | Legal Assistance Paralegal Course (010) | 16 Apr – 20 Apr 07 |
| 3090 | Legalman Course (010) Legalman Course (020) | 16 Jan – 30 Mar 07 16 Apr – 29 Jun 07 |
| 846L | Senior Legalman Leadership Course (010) | 23 – 27 Jul 07 |
| 049N | Reserve Legalman Course (Phase I) (010) | 9 – 20 Apr 07 |
| 056L | Reserve Legalman Course (Phase II) (010) | 23 Apr – 4 May 07 |
| 846M | Reserve Legalman Course (Phase III) (010) | 7 – 18 May 07 |
| 5764 | LN/Legal Specialist Mid Career Course (020) | 17 – 28 Sep 07 |
| 961G | Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020) | TBD TBD |
| 4040 | Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030) | 19 – 30 Mar 07 (Newport) 7 – 18 May 07 (Norfolk) 16 – 27 Jul 07 (San Diego) |
| 4046 | SJA Legalman (020) | 29 May – 7 Jun 07 (Newport) |
| 627S | Senior Enlisted Leadership Course (090) Senior Enlisted Leadership Course (100) Senior Enlisted Leadership Course (110) Senior Enlisted Leadership Course (120) Senior Enlisted Leadership Course (130) Senior Enlisted Leadership Course (140) Senior Enlisted Leadership Course (150) Senior Enlisted Leadership Course (160) Senior Enlisted Leadership Course (170) Senior Enlisted Leadership Course (180) | 20 – 22 Mar 07 (San Diego) 28 – 30 Mar 07 (Norfolk) 25 – 27 Apr 07 (Norfolk) 24 – 26 Apr 07 (Bremerton) 1 – 3 May 07 (San Diego) 23 – 25 May 07 (Norfolk) 17 – 19 Jul 07 (San Diego) 18 – 20 Jul 07 (Great Lakes) 15 – 17 Aug 07 (Norfolk) 28 – 30 Aug 07 (Pendleton) |

| Naval Justice School Detachment Norfolk, VA | | |
|--|---|---|
| 0376 | Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) | 5 – 23 Mar 07 30 Apr – 18 May 07 4 – 22 Jun 07 23 Jul – 10 Aug 07 10 – 28 Sep 07 |
| 0379 | Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080) | 5 – 16 Mar 07 2 – 13 Apr 07 4 – 15 Jun 07 30 Jul – 10 Aug 07 10 – 21 Sep 07 |
| 3760 | Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) | 26 Feb – 2 Mar 07 2 – 6 Apr 07 25 – 29 Jun 07 16 – 20 Jul 07 (Great Lakes) 27 – 31 Aug 07 |
| 4046 | Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (030) | 18 – 29 Jun 07 |

| Naval Justice School Detachment San Diego, CA | | |
|--|---|--|
| 947H | Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) | 26 Feb – 16 Mar 07 7 – 25 May 07 11 – 29 Jun 07 30 Jul – 17 Aug 07 10 – 28 Sep 07 |
| 947J | Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080) | 2 – 13 Apr 07 7 – 18 May 07 11 – 22 Jun 07 30 Jul – 10 Aug 07 |
| 3759 | Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080) | 2 – 6 Apr 07 (San Diego) 23 – 27 Apr 07 (Bremerton) 4 – 8 Jun 07 (San Diego) 20 – 24 Aug 07 (San Diego) 27 – 31 Aug 07 (Pendleton) |
| 4046 | Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (010) | 26 Feb – 9 Mar 07 |

4. Air Force Judge Advocate General School Fiscal Year 2007 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445, for information about attending the listed courses.

| Air Force Judge Advocate General School, Maxwell AFB, AL | |
|---|--------------------|
| Course Title | Dates |
| Paralegal Craftsman Course, Class 07-02 | 13 Feb – 20 Mar 07 |
| Judge Advocate Staff Officer Course, Class 07-B | 20 Feb – 20 Apr 07 |
| Paralegal Apprentice Course, Class 07-03 | 2 Mar – 13 Apr 07 |
| Environmental Law Update Course (DL), Class 07-A | 26 – 30 Mar 07 |
| Paralegal Craftsman Course, Class 07-003 | 2 Apr – 4 May 07 |
| Interservice Military Judges' Seminar, Class 07-A | 10 – 13 Apr 07 |
| Advanced Trial Advocacy Course, Class 07-A | 23 – 27 Apr 07 |
| Paralegal Apprentice Course, Class 07-04 | 22 Apr – 5 Jun 07 |
| Environmental Law Course , Class 07-A | 30 Apr – 4 May 07 |
| Reserve Forces Judge Advocate Course, Class 07-A | 7 – 11 May 07 |
| Reserve Forces Paralegal Course, Class 07-A | 7 – 18 May 07 |
| Operations Law Course, Class 07-A | 14 – 24 May 07 |
| Military Justice Administration Course, Class 07-A | 21 – 25 May 07 |
| Accident Investigation Board Legal Advisors' Course, Class 07-A | 4 – 8 Jun 07 |
| Staff Judge Advocate Course, Class 07-A | 11 – 22 Jun 07 |
| Law Office Management Course, Class 07-A | 11 – 22 Jun 07 |
| Paralegal Apprentice Course, Class 07-05 | 18 Jun – 31 Jul 07 |
| Advanced Labor & Employment Law Course, Class 07-A | 25 – 29 Jun 07 |
| Negotiation and Appropriate Dispute Resolution Course, Class 07-A | 9 – 13 Jul 07 |
| Judge Advocate Staff Officer Course, Class 07-C | 16 Jul – 14 Sep 07 |
| Paralegal Craftsman Course, Class 07-04 | 7 Aug – 11 Sep 07 |
| Paralegal Apprentice Course, Class 07-06 | 13 Aug – 25 Sep 07 |

| | |
|--|----------------|
| Reserve Forces Judge Advocate Course, Class 07-B | 27 – 31 Aug 07 |
| Trial & Defense Advocacy Course, Class 07-B | 17 – 28 Sep 07 |
| Legal Aspects of Sexual Assault Workshop, Class 07-A | 25 – 27 Sep 07 |

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2006 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2007**, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2008. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2008 JAOAC will be held in January 2008 and is a prerequisite for most judge advocate 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, TJAGLCS, for grading by the same deadline (1 November 2007). If the student receives notice of the need to re-do any examination or exercise after 1 October 2007, 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 1 November 2007 will not be cleared to attend the 2008 JAOAC. 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 additional questions regarding attendance at Phase II (Residence Phase) or completion of Phase I writing exercises, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil.

For system or help desk issues regarding JAOAC or any on-line or correspondence course material, please contact the Distance Learning Department at jagc.training@hqda.army.mil or commercial telephone (434) 971-3153.

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

| Jurisdiction | Reporting Month |
|---------------------|---|
| 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 every three years |

| | |
|------------------|---|
| Georgia | 31 January annually |
| Idaho | 31 December, every third year, depending on year of admission |
| Indiana | 31 December annually |
| Iowa | 1 March annually |
| Kansas | Thirty days after program, hours must be completed in compliance period 1 July to June 30 |
| Kentucky | 10 August; completion required by 30 June |
| Louisiana** | 31 January annually; credits must be earned by 31 December |
| Maine** | 31 July annually |
| Minnesota | 30 August annually |
| Mississippi** | 15 August annually; 1 August to 31 July reporting period |
| Missouri | 31 July annually; reporting year from 1 July to 30 June |
| Montana | 1 April annually |
| Nevada | 1 March annually |
| New Hampshire** | 1 August annually; 1 July to 30 June reporting year |
| New Mexico | 30 April annually; 1 January to 31 December reporting year |
| New York* | Every two years within thirty days after the attorney's birthday |
| North Carolina** | 28 February annually |
| North Dakota | 31 July annually for year ending 30 June |
| 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 |
| Texas | Minimum credits must be completed and reported by last day of birth month each year |
| Utah | 31 January annually |
| Vermont | 2 July annually |
| Virginia | 31 October Completion Deadline; 15 December reporting deadline |
| Washington | 31 January triennially |
| West Virginia | 31 July biennially; reporting period ends 30 June |
| Wisconsin* | 1 February biennially; period ends 31 December |
| Wyoming | 30 January annually |

* Military exempt (exemption must be declared with state).

**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2006-2007).

| Date | Unit/Location | ATTRS Course Number | Topic | POC |
|--------------|--|---------------------|--|---|
| 3-4 Mar 07 | 10th LSO Ft. Belvoir, VA | Class: 006 | Contract & Fiscal Law Administrative & Civil Law/Legal Assistance | MAJ Arthur Kaff (703) 588-6762 arthur.kaff@us.army.mil |
| 10-11 Mar 07 | 63d RRC/78th LSO Anaheim, CA | Class: 007 | Contract & Fiscal Law Criminal Law | MAJ DeEtte Loeffler (619) 241-6966 deette.loeffler@us.army.mil |
| 17-18 Mar 07 | Wisconsin NG JAG/Paralegal Readiness Conference Fort McCoy, WI | NA | TCAP; Ethics and Deployment After Action Reports | MAJ David Dziobkowski (608)242-3073 david.dziobkowski@wimadi.ang.af.mil |
| 20-22 Apr 07 | 90th RRC Tulsa, OK | Class: 008 | Domestic Operations; Deployment Law; Administrative & Civil Law | LTC Baucum Fulk (501) 771-8765 baucum.fulk@us.army.mil |
| 28-29 Apr 07 | Indiana ARNG Indianapolis, IN | Class: 009 | Contract & Fiscal Law Administrative & Civil Law/Legal Assistance | LTC Brian Dickerson (317) 247-3491 brian.c.dickerson@in.ngb.army.mil |
| 4-6 May 07 | 213th LSO Atlanta, GA | Class: 010 | International & Operational Law Contract & Fiscal Law | LTC Robin Allen (404) 562-9583 allen.robin@epamail.epa.gov |
| 4-6 May 07 | 89th RRC Kansas City, KS | Class: 014 | TCAP; Administrative & Civil Law | LTC Ismael Sanabria (316) 681-1759, ext. 1341 Ismael.sanabria@usar.army.mil |
| 19-20 May 07 | 139th LSO Nashville, TN | Class: 011 | Contract & Fiscal Law Criminal Law | LTC Kymberly Haas (615) 256-3148 attorneykhaas@aol.com |
| 19-20 May 07 | 91st LSO Oak Brook, IL | Class: 012 | International & Operational Law Administrative & Civil Law/Legal Assistance | CPT Bradley Olson (309) 782-3361 bradley.olson@us.army.mil |
| 22-24 Jun 07 | 94th RRC Boston/Devins, MA | Class: 013 | International & Operational Law Administrative & Civil Law/Legal Assistance | CPT Susan Lynch (978) 784-3933 susan.lynch@usar.army.mil |

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to

classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

- AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.
- AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95.

- AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

- A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).
- AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).
- AD A326002 Wills Guide, JA-262 (1997).
- AD A346757 Family Law Guide, JA 263 (1998).
- AD A384376 Consumer Law Deskbook, JA 265 (2004).
- AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).
- AD A360700 Tax Information Series, JA 269 (2002).
- AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).
- AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).
- AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).
- AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).
- AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).
- AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).
- AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

- AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
 ** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. 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 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) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;
- (e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the 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 log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

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

(3) 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 appropriate fields.

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

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

(6) 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.

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

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the March 2006, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS 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 TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution 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 Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

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