Crisis of the Soldiers' and Sailors' Civil Relief Act: A Call for the Ghost of Major (Professor) John Wigmore

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I. INTRODUCTION

Iraq's invasion of Kuwait on August 2, 1990¹ set in motion a chain of events that would change the world community. In the United States, this unprovoked aggression resulted in the activation of hundreds of thousands of military reserves and National Guard personnel in response to the Iraqi's "naked aggression."² As the reservists prepared to enter active military service, a fifty year old law, enacted to protect servicemembers and those making the transition between civilian and military life, rose from obscurity like a phoenix. Surprise and voluminous inquiry erupted, as a new generation of servicemembers and businessmen

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¹ In Two Arab Capitals, Gunfire and Fear, Victory and Cheers, N.Y. TIMES, Aug. 3, 1990, at 8.
were introduced to protections provided by the Soldiers' and Sailors' Civil Relief Act of 1940 (the “SSCRA”).

After the Selective Service Act (“the draft”) terminated in 1973, the Department of Defense initiated the Total Force Policy. The concept involved integration of the reserves with active duty combat forces. The Reserve Component was to be trained for a wartime mission to "provide the military with its 'surge' capacity to mobilize on short notice for a large conflict." Over the past ten years, the military, and especially the United States Army, has shifted more of its combat support resources into the reserves as a fiscal saving measure. With a current military force structure that includes a National Guard and reserve force of approximately 1.6 million, any large-scale operation mandates their activation for mission accomplishment.

The men and women who responded to the nation's needs were initially left guessing whether they were protected from civil and legal problems they could not attend to at home. If they went directly to the SSCRA, it did not offer much help. Instead, the answer came from the legislative history and the Department of Defense's interpretation of the SSCRA. In addition to soldiers and sailors, referred to in the title, reservists, Na-

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5. Patrick E. Tyler & Dan Balz, Bush Decides to Call Up Military Reserves; Iraq to Hold Foreigners at Army, Civil Sites; Cheney Sees Multi-Year Commitment, WASH. POST, Aug. 18, 1990, at 1.
6. Molly Moore, Pentagon May Request Activation of Reserves, WASH. POST, Aug. 16, 1990, at 33. Combat support resources include such career fields as transportation specialists, laundry operators, intelligence specialists, communication experts, water purification specialists, and medical personnel. Id.
7. Id. at 38, col. 1,2. Washington Post staff writer, Molly Moore, indicated strong reliance on the Reserve Component when citing statistics from Pentagon officials: [sixty-one] percent of the Army's hospital personnel are reservists, 54 percent of its intelligence units and 44 percent of those who haul and store ammunition. In the Marine Corps, almost two-thirds of the fuel supply units are in the reserves and the Air Force depends on reserve units for 35 percent of its tactical airlift, 67 percent of its aerial medical evacuation teams and 59 percent of the units that repair battle damage to aircraft. Id.; see also Michael R. Gordon, U.S. May Call Up Some Reservists To Ease the Strain on the Military, N.Y. TIMES, Aug. 15, 1990, at 1.
8. 50 U.S.C. app. § 511 (1990) provides:

(1) The term "person in the military service", the term "persons in the military service", and the term "persons in the military service of the United States", as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy.
tional Guard personnel, the Air Force, the commissioned corps of the Public Health Service, and the National Oceanic and Atmospheric Administration are covered.

This Article provides an overview of the recent 1991 amendments to the SSCRA and focuses on the most common pitfalls in applying the SSCRA. It also explores suggested changes to clarify the SSCRA and attempts to untangle the web of confusion surrounding its interpretations.

II. HISTORICAL BACKGROUND

To understand the language of the SSCRA and the intent of its provisions, a review of its growth from inception is helpful. In the United States, the concept of providing protection to servicemembers unable to deal with civil and legal problems at home dates back to the Civil War.

A. Civil War Origins

With thousands of soldiers away fighting a war, problems predictably arose on the homefront. Congress responded with an act that suspended any action, civil or criminal, against federal soldiers or sailors while they were in the service of the Union and made them immune from service of process and arrest. However, the act only provided temporary relief and the soldiers or sailors returned home to face problems placed on hold during their absence. In addition, several of the states responded to the rec-
ognized needs of the soldier and enacted their own laws providing special protections.\textsuperscript{15}

\section*{B. SSCRA of 1918}

During World War I, Professor John Wigmore was activated and appointed a Major in the Army Judge Advocate General Corps ("JAGC"). He headed a task force to draft a soldiers' and sailors' relief bill for Congress.\textsuperscript{16} Congress enacted Professor Wigmore's mammoth work in the form of the SSCRA of 1918. The SSCRA of 1918 terminated under its own provision six months after the war.\textsuperscript{17}

\section*{C. SSCRA of 1940}

When the clouds of war appeared on the horizon once again in 1940, Congress re-enacted the SSCRA almost verbatim.\textsuperscript{18} After Pearl Harbor, however, the new social and business realities of a different era demonstrated that a major update was necessary. Major William Partlow, Army JAGC, headed a team which drafted major revisions of the SSCRA that were enacted into law in 1942. Since the 1942 revisions, Congress has amended the SSCRA eleven times.\textsuperscript{19}

\textsuperscript{15} 1917 Hearings, supra note 9, at 53-74, provides a survey of all the states that enacted laws protecting soldiers and sailors. It is interesting to note that many were Confederate states responding to the SSCRA passed by Congress protecting Union soldiers.

\textsuperscript{16} The following dialogue transpired after Major Wigmore was introduced by Secretary of War, Newton D. Baker, at the 1917 Hearings:

\begin{quote}
Senator Overman. Major, you are a lawyer yourself?

Major Wigmore. Yes, sir.

Senator Overman. You are the author of a great book on evidence, Wigmore on Evidence: and now you are in the Judge Advocate General's Office, under appointment from civil life, with rank as major?

Major Wigmore. Yes, sir . . . .
\end{quote}

1917 Hearings, supra note 9, at 83-84.

\textsuperscript{17} Act of March 8, 1918, ch. 20, § 602, 40 Stat. 440, 449.

\textsuperscript{18} Soldiers' and Sailors' Civil Relief Act: Hearings on H.R. 7029 Before the Committee on Military Affairs of the House of Representatives, 77th Cong., 2d Sess. 11 (1942) (statement of Major William D. Partlow, JAGC) [hereinafter 1942 Hearings]. A few minor changes were made, as found in § 6, Staying of Actions, of the SSCRA of 1918, which provided that "unless, in the opinion of the court, the defendant is not embarrassed by reason of his military service," 1917 Hearings, supra note 9, at 13. The term "embarrassed" was changed to "materially affected" in 1940. S. Rep. No. 4270, 76th Cong., 2d Sess. 7 (1940).

III. 1991 Amendments

As the events surrounding Operation Desert Storm unfolded (Operation Desert Storm incorporated Operation Desert Shield), it became clear that the SSCRA needed amending in certain areas. Many provisions that had offered protection to servicemembers seventy years ago were hopelessly out of date in 1991. Congress responded to a call from the Armed Services for emergency assistance.

A. Eviction Protection

One section needing amendment was the provision designed to protect servicemembers from eviction from rental property without first obtaining a court order.\(^{20}\) Section 530 of 50 United States Code appendix ("U.S.C. app.") provides the servicemember and his dependents with protection from an eviction or distress\(^{21}\) without a court order during the servicemember's period of military service.\(^{22}\) The premises protected must be occupied for dwelling purposes, not business uses. Although this section was one of the few that Congress updated over the years, prior to 1991 Congress had not updated the section in over twenty-five years.\(^{23}\) Before the 1991 amendments, the section protected a servicemember's rental property only if the monthly rental did not exceed $150. While this figure had not been strictly enforced by some courts since the 1970s, when rampant inflation and soaring real estate values made the figure unrealistically low,\(^{24}\) it remained law until Congress passed an amendment raising the minimum rent level to $1,200.\(^{25}\) The new amount was an attempt to provide broad coverage by protecting servicemembers in areas with high costs of living, such as Alaska or Washington, D.C.

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21. Distress is defined as "[a] common-law right of landlord, now regulated by statute, to seize a tenant's goods and chattels in a nonjudicial proceeding to satisfy an arrears of rent." BLACK'S LAW DICTIONARY 426 (5th ed. 1983).
23. This section was in the original Act of 1918 when the rent protection level was only $50. The next time Congress adjusted the amount was in 1942 to $80. Twenty-four years later, in 1966, Congress raised the rent protection level to $150, where it has remained until the 1991 amendments increased the level to $1,200. As this historical progression illustrates, 50 U.S.C. app. § 530 is rarely updated. This makes applying the section difficult, if not useless, as a protection for the needy servicemember as a specific amount becomes outdated with the passage of time.
24. In Balconi v. Drascas, 507 N.Y.S.2d 788 (City Ct. 1986), the court held that the tenant was entitled to the protection of the SSCRA even though her monthly rent exceeded the $150 figure established in 1966. Id. at 790. The court reasoned that the tenant's monthly rent of $340 was modest in 1986 and, if inflation were taken into account, she lived in quarters at a rental value slightly less than $150 in terms of 1966 dollars. Id.
B. Stay of Proceeding

Another section needing immediate attention was 50 U.S.C.A. app. § 521, which provides for a stay of proceeding. Since the SSCRA of 1918, the stay provision has allowed servicemembers to postpone a court response or appearance due to their inability to focus on the case or controversy because of their military service. Due to Operation Desert Storm, Congress responded to servicemembers' modern needs by creating an automatic stay provision. Upon application, the provision stayed judicial actions or proceedings (other than criminal proceedings) until a date after June 30, 1991. The amendment was only temporary, however, and expired by its own terms on July 1, 1991. The provision was intended to protect servicemembers from adverse judgments taken against them in their absence. During the time the amendment was in effect, from August 1, 1990 through June 30, 1991, a servicemember, whether a plaintiff or defendant, had only to request a stay from the court and it would be granted. The amendment placed one restriction on receiving an automatic stay. The servicemember had to be serving outside the state in which the court having jurisdiction over the action was located.

Prior to the 1991 amendment, section 521 required a demonstration that "the ability of [the] plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service" before a court would grant a stay of proceeding. While courts have not established a bright line standard to show material effect, they focus on two main concerns when trying to determine if a servicemember is materially effected by military service. First, courts determine whether

27. 50 U.S.C.A. app. § 521 (1990) provides:
   At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

Id.
29. Id.
30. Id. § 6(b)(2), 105 Stat. at 38. Potentially, this could have effects unintended by the drafters. A servicemember living in southern California or west Texas could have an extremely long drive to the other end of the state and still have to appear in court as directed. On the other hand, a servicemember living just across the state boundary, five minutes from the court, would have the protection of the SSCRA's stay provision.
the servicemember has suffered an economic impairment due to the transition from civilian to military life. The courts normally evaluate the difference between pre-service and in-service income. Second, the courts determine whether the servicemember has suffered a geographic disadvantage due to military duty assignment or if the servicemember’s rights would be adversely effected by virtue of his absence. The 1991 amendment did not require the servicemember to show “material effect” to obtain a stay between the dates of August 1, 1990 and June 30, 1991. It was presumed, as a matter of legislative policy, that Congress did not intend the servicemember to show material effect given the servicemember’s participation in the largest deployment of Reserve Component and National Guard personnel since World War II. Stay provisions after June 30, 1991 are no longer granted automatically, and again require a showing of “material effect,” as mandated before the 1991 amendment was enacted.

C. Professional Liability Insurance

The SSCRA was completely silent in the area of professional liability insurance. As large numbers of medical personnel were ordered to active duty, problems involving insurance arose, and the need for some form of protection became urgent. In their civilian practices, reserve and National Guard health care providers had to maintain required liability insurance policies at all times in order to maintain claims coverage. For many, the cost of maintaining these policies became prohibitive on their military salary. A civilian doctor with a thriving medical practice ordered to active duty will probably serve in the rank of a Major or Lieutenant Commander. This pay grade may create an income reduction of over one-half or more of his civilian salary. Congress permanently amended the SSCRA with a new section allowing individuals engaged in furnishing health care or other services, determined by the Secretary of Defense to be professional services, to suspend payment of liability insurance premiums during their period of active duty. Additionally, the insurer must either

33. Id.
37. Id. § 4(a)(2)(A). The Secretary of Defense has not yet defined the boundaries of this protection. It is expected, however, that reserve and guard attorneys ordered to active duty are also eligible for this protection. The practice of law is considered a “profession” and, as such, the Secretary of Defense’s definition should include attorneys within the category of a “professional service.”
refund premiums already paid for the suspended period or apply those premiums to the policy upon reinstatement if the insured so elects.

To qualify for this protection, the servicemember must have had in effect a professional liability insurance policy that does not continue to cover claims filed during the period of the servicemember's active duty unless premiums are paid for the coverage. Under this new section, the servicemember is entitled to reinstatement of the liability insurance policy at the previous rate upon completion of active duty. The insurers, however, are not liable for claims based on the professional conduct of the servicemember during the period of active duty. The United States government assumes responsibility for those claims under the Federal Tort Claims Act.

D. Powers of Attorney

Congress also extended protection in the section regarding powers of attorney. Generally, this section provides that a power of attorney executed by a servicemember who enters missing status is extended during the period the servicemember is in that status. This amendment automatically extends indefinitely the termination date of a power of attorney for the period of time a servicemember is in a missing status, providing

38. Id. § 4(a)(2)(B).
39. This type of coverage is referred to as a "claims-made" policy. Claims-made policies are the most common form of medical malpractice insurance and insures the policyholder only so long as the premiums are paid. If the policyholder allows the policy to lapse, the professional is unprotected against malpractice claims filed during the period coverage is not in effect. The other type of policy is known as an occurrence policy, which provides coverage for a malpractice claim occurring during a specified policy period, regardless of whether the policy is in effect at the time the claim is filed. The servicemember who maintains a claims-made policy is most at risk if her premiums are unpaid during her active duty and a malpractice claim is filed. The 1991 amendments remedy this dilemma.
40. Pub. L. No. 102-12, § 4, 105 Stat. 34, 35-36 (1991) (to be codified at 50 U.S.C. app. § 592). The subsection also indicates that the servicemember must pay any increase occurring naturally through the passage of time and applied equally to all civilian nonreservist policyholders similarly situated. Id.
41. Id. § 4(b)(2)(B).
42. 28 U.S.C. §§ 1346(b), 2402, 2671, 2672, 2674-2680 (1988). When a servicemember is acting within the scope and course of employment and accidently or negligently injures someone, the injured party may file a claim against the United States government under the Federal Tort Claims Act ("FTCA"). Under the FTCA, the government agrees to waive its sovereign immunity and receive tort claims as a defendant. The government either pays the claim, or some agreed part thereof, or denies the claim in full. If denied, the injured party may then file suit in federal district court. Id.
the "power of attorney . . . expire[d] by its terms after July 31, 1990." Thus, powers of attorney executed after Desert Storm commenced by servicemembers who are in a missing status will remain in effect past the stated expiration date. To illustrate, if a servicemember executed a power of attorney on August 1, 1990 that expired on January 1, 1991, and became reported as missing anytime before January 1, the power of attorney would remain valid for the duration of the servicemember's missing status. The only exception is if the document clearly indicates the power of attorney expires on a specified date, even though that person, after executing the document, enters missing status.

E. Adverse Actions

Due to the large number of reservists and National Guardsmen ordered to duty, concern arose in Congress that servicemembers may be subject to adverse actions by creditors and insurers if they requested relief under the SSCRA. To prevent this, Congress drafted and enacted a new section to prohibit retaliatory action.

Specifically, the new section provides that a servicemember's actual or potential request for relief under the SSCRA shall not itself be the basis for a denial or revocation of credit, an adverse change by the creditor in the terms of an existing credit arrangement, or an adverse report relating to the credit-worthiness of a servicemember to any person or entity engaged in assembling or evaluating consumer credit information. A creditor may not make a determination that the servicemember is unable to pay the civil obligation or liability in accordance with its terms. Furthermore, a creditor may not refuse to grant credit to a servicemember in substantially the amount or for substantially the terms that the creditor offers to civilians who are similarly situated. Finally, an insurer may not refuse to insure a servicemember based solely on the servicemember's actual or potential assertion of rights under the SSCRA. To illustrate, a creditor may not make an adverse notation in a servicemember's credit record because the servicemember requested application of 50 U.S.C.A.

49. Id.
50. Id.
51. Id.
52. Id.
app. § 526's six percent interest cap protection and failed to pay the contract rate of interest.

F. Technical Changes

In addition to the substantive amendments, Congress added several purely technical amendments. Most of these amendments are meant to update the SSCRA's language and bring the grammatical usage in line with current legislative drafting practice.54

IV. COMMON PITFALLS

Despite the characterization by the United States Supreme Court of the SSCRA as "so carefully drawn as to leave little room for conjecture,"55 a plethora of case law regarding a number of provisions has arisen since the SSCRA's inception that might cause the Court to reconsider its position.

A. Default Judgments

The default protection has confused a number of unwary practitioners into believing it can be exercised in conjunction with the stay protection of 50 U.S.C.A. app. § 521.56 Specifically, 50 U.S.C.A. app. § 52057 permits the reopening of a default judgment against a servicemember provided the servicemember made no appearance and has "a meritorious or legal defense to the action or some part thereof."58 On its face, section 521

54. Congress made technical changes to 27 sections of the SSCRA. These amendments ranged from inserting "the Air Force" into section 511's definitions, to replacing "Administrator of Veterans' Affairs" with "Secretary of Veterans Affairs" in sections 541 through 545. Pub. L. No. 102-12, § 9, 105 Stat. 34, 39-40 (1991).
57. Id. § 520.
58. Id. Section 520, on default judgments, provides in pertinent part the following protections:

(1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it ap-
appears to allow a servicemember who receives notice of a pending action to contact the court and request a stay because of an inability to appear due to military service. If the request is denied, some servicemembers (and some counsel) erroneously believe section 520's default protection is still available to reopen the default judgment taken against the servicemember in his or her absence.

It must be remembered that both the default and stay sections were incorporated virtually verbatim into the 1940 SSCRA from the 1918 Soldiers' and Sailors' Civil Relief Act. Major (Professor) John Wigmore, on leave from serving as Dean of Northwestern School of Law, devised this specific protection in 1918. Testifying before the Senate Subcommittee of the Committee on the Judiciary regarding the default protection provision, Major Wigmore observed:

Our greatest mechanical difficulty in the whole system is to get to the attention of the court the fact that a man—and there are thousands of absent men—is one of this class of persons, and that is what sections 4 [Representation], 5 [Defaults], and 6 [Staying of Actions] are built up to arrange. Having brought that fact to the attention of the court, and the court having appointed an attorney, we come to the question whether a judgment rendered then could possibly hurt the soldier. We say yes, be-

Id. 59. Id. § 521.
60. See 1942 Hearings, supra note 18 and accompanying text.
cause, although the court may do its best in appointing an attorney, a
large majority of these affairs lie in the personality of the man himself.
He is not there and has not had a chance to explain his case to his attor-
ney, and in spite of all that has been done the judgment is passed.61

Confusion Between Default and Stay Protections. The salient
point is that the default protection was designed to protect a ser-
icemember from actions when no notice or opportunity to present a de-
fense occurs. Under these circumstances, notions of substantial fairness
and equity cry out for relief against such proceedings in the form of re-
opening a default judgment in which no appearance has been made and a
meritorious or legal defense exists.

Herein lies the first pitfall. As mentioned earlier, this protection was
designed for no-notice actions. If the servicemember receives notice of an
action, then the stay provision of section 52162 is the appropriate remedy.
In other words, the default and stay protections were designed for two
mutually exclusive situations: the default protection for no-notice actions
and the stay protection for actions in which the servicemember receives
notice. All too often servicemembers and counsel confuse the two protec-
tions and read them together, believing that if the court denies their re-
quest for a stay, they will always have the default protection to fall back
on. This is not so.

Appearance. The second pitfall is the issue of appearance. If a ser-
icemember makes an appearance of any kind, whether special or general,
the servicemember will be disqualified from exercising the default protec-
tion of section 520 because one of the requirements of the protection is
that no appearance be made.63 The typical situation occurs when the ser-
icemember communicates with the court in some manner requesting re-
lief. The court denies the relief and announces that the servicemember
has made an appearance in the action and now must proceed or face an
adverse judgment. If a default judgment is entered, the servicemember is
unable to reopen the judgment under section 520 (default provision) be-
cause an appearance was made. In Blankenship v. Blankenship,64 defend-
ant’s counsel filed an affidavit asking the court to either quash the com-
plaint and the service or continue the cause.65 The court held that the

61. See 1917 Hearings, supra note 9, at 96 (statement of Major John H. Wigmore).
63. Id. § 520(1); Major Garth K. Chandler, Impact of a Request for Stay Under the
Soldiers’ and Sailors’ Civil Relief Act, 102 MIL. L. Rev. 169 (1983).
64. 82 So. 2d 335 (Ala. 1955).
65. Id. at 337.
servicemember made an appearance, thus depriving the servicemember of the protection to reopen the judgment offered by section 520.66

Similarly, in Reynolds v. Reynolds,67 defendant's counsel filed a motion to dismiss for lack of jurisdiction.68 Once again the procedural "catch 22" was inflicted and counsel's request was deemed an appearance and deprived the servicemember of the protection of section 520.69 Ohio courts followed this same pattern in Vara v. Vara,70 in which a defendant servicemember filed a motion to quash service and was similarly deprived.71 The most painful experience for a servicemember seeking protection occurred in Skates v. Stockton,72 when a legal assistance attorney sent a letter to a trial court invoking the SSCRA and requesting a stay.73 The court deemed the action to constitute an appearance, thus denying the servicemember the opportunity to reopen the default judgment under section 520.74 As these cases illustrate, the appearance issue is a serious problem to invocation of either the default or stay protections.

Waiver of Defenses. Another pitfall lies in the area of waiver of defenses. There is substantial confusion among courts regarding whether a stay request under section 521 may constitute a waiver of a procedural or legal defense. In Kramer v. Kramer,75 a defendant servicemember's letter invoking the SSCRA and requesting a stay was held not to provide personal jurisdiction that otherwise was lacking.76 However, in Artis-Wergin v. Artis-Wergin,77 the court held the letter requesting a stay also served as an appearance and thus waived the issue of personal jurisdiction.78

B. Problems With The Six Percent Interest Cap

Perhaps the most utilized SSCRA provision by National Guard and Reserve Component personnel during Operation Desert Storm was the six

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66. Id. at 340.
67. 134 P.2d 251 (Cal. 1943).
68. Id. at 253.
69. Id. at 255.
70. 171 N.E.2d 384 (Ohio 1961).
71. Id. at 392.
73. Id. at 305.
76. Id. at 458.
77. 444 N.W.2d 750 (Wis. Ct. App. 1989).
78. Id. at 753; see also 62 A.L.R.2d 938 (1958).
percent interest cap provision provided by 50 U.S.C.A. app. § 526. This provision prohibits a creditor from charging interest in excess of six percent on all indebtedness incurred prior to active duty. It does not apply to new indebtedness incurred while on active duty.

The six percent interest protection was added to the SSCRA in 1942 when Congress realized the SSCRA contained no provision that prevented an accumulation of excess interest on servicemembers' indebtedness. Congress was genuinely concerned about prevailing interest rates at which citizens had to borrow money or obtain credit during the Depression era. Referring to this problem on the floor of the House of Representatives, Military Affairs Committee member Overton Brooks (D-La.) addressed the issue by observing that the bill:

covers the case of the soldier who has entered into an obligation to pay interest, which in some States runs as high as 3 1/2 percent per month, and which interest during his absence will accumulate far beyond the value of the property by which it is secured. This bill provides no interest charge during service shall exceed 6 percent per annum and thereby gives full protection to the soldier.

It is understandable that the burden of the national defense should be shared and not shouldered exclusively by soldiers, sailors, airmen, and marines as a matter of public policy. True burden-sharing then, as today, means that the business community must bear part of the sacrifice of the national effort. While the purpose of the protection and the legislative intent indicate Congress sought to lower servicemembers' expenses after entering active duty, implementation of the protection was left ambiguous, and clear guidance for creditors was lacking. The only reference in the provision to creditor action concerns a creditor's right to seek a court

80. Id.
81. Id.
84. The section reads as follows:

No obligation or liability bearing interest at a rate in excess of 6 percent per year incurred by a person in military service before that person's entry into that service shall, during any part of the period of military service bear interest at a rate in excess of 6 percent per year unless, in the opinion of the court, upon application thereto by the obligee, the ability of such person in military service to pay interest upon such obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of such service, in which case the court may make such order as in its opinion may be just. As used in this section the term "interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) in respect of such obligation or liability.
order relieving the creditor of the obligation to lower the interest rate on the servicemember's indebtedness if the creditor believed the servicemember's ability to pay the obligation was not materially effected by the servicemember's military service.85

While the credit business community responded magnanimously to the Armed Services' and the Congressional Research Service's interpretation that the difference between the six percent interest cap and the contract rate is to be forgiven not reamortized,86 there always exist a few financial predators who attempt to take advantage or construe ambiguity to their advantage regardless of the national interest involved.87 Some financial institutions have taken the position that the difference in interest should be reamortized, or the principal portion increased, leaving the payment total the same.88 Clearly, such action defeats the purpose of the provision. Even the House Military Affairs Committee observed this capitalistic predilection when in 1917 it noted in its Committee Report on the overall SSCRA bill:

The Shylock, to whom his pound of flesh is dearer than patriotism, is not the only man against whom the soldier must be given relief. Much more numerous are cases where, between the soldier and his creditor, there is an honest difference of opinion as to the proper division of the burden which the war brings to all in a greater or less degree. The letters which have come to the committee . . . show that this is a real menace and can not be left to care for itself. The need for this protection is urgent. It is immediate . . . . These men should know what is to be done for them. It needs no argument to show that freedom from harassing debts will make them better and more effective, more eager soldiers than if their loyalty

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85. Id. Furthermore, reality dictates that businesses are not going to try and reclaim pennies when their public goodwill is at stake.
88. One Desert Shield-Storm case involving the six-percent cap never went to trial. In United States ex rel. Bennett v. American Home Mortgage, a mortgage company in New Jersey agreed to reduce interest payments on an activated National Guard sergeant's mortgage to six percent, but required continued payments at the preactive service total. When the United States Attorney presented the legislative history of section 526, the mortgage company entered into a consent agreement detailing compliance consistent with the above Department of Defense interpretation.

Id. at 132 n.106.
and zeal is tempered with the knowledge that their country, which demands the supreme sacrifice from them, grudges a small measure of protection to their families and homes. 

While the Armed Services informed Reserve Component personnel of SSCRA protections available to them upon activation, the Armed Services went further to fill in several of the gaps left in the six percent interest cap provision. The Legal Assistance Division in the Office of the Judge Advocate General of each military service department disseminated guidance that servicemembers seeking the interest cap protection had an obligation to inform their creditors in writing of their order to active duty together with a copy of their military orders and a request for application of the interest cap protection. In many cases, form letters were provided to military personnel at in-processing stations.

Despite best efforts, local creditors knew little, if anything, about this provision of the SSCRA because its last widespread use occurred during World War II. If the law requires notice, then this requirement has yet to be effectively fulfilled in the financial community. It is unrealistic and futile, based on the recent experience of the largest activation of reservists and National Guardsmen since World War II, to presume that members of the judiciary, the bar, and business at large are aware of this provision and how it applies to servicemembers and creditors alike. Therefore, this provision remains the chief candidate for revision when Congress once again updates the SSCRA to meet contemporary conditions and provide policy guidance.

C. Enforcement Possibilities

Some legal practitioners observe that the SSCRA contains few enforcement provisions. This leads some to conclude that when no sanction is provided, ignorance is at least invited. In reality, when it comes to caring for those who must go in harm’s way to protect the national interest, all the king’s horses and all the king’s men are available to take whatever action is appropriate concerning a given SSCRA infraction.

In the same manner that the Department of Veterans Affairs is charged with responsibility for enforcement of the Veterans Re-employment Rights Law, the Department of Justice and the Department of Defense

91. See supra note 87 and accompanying text.
exercise responsibility for securing the SSCRA protections. While the prospect of resorting to the courts is always an available option, the more effective enforcement tool is a complaint to a military installation's Armed Forces Disciplinary Control Board. Each military installation has an administrative board that conducts investigations of complaints. If the board determines that an organization or business is acting contrary to law, it may recommend that the installation commander place the organization off-limits to military personnel. After a commander takes such action, it becomes a military offense for servicemembers to transact any business with an off-limits organization. Furthermore, a report of off-limits action taken is transmitted to the military service's headquarters in Washington for review. If the infraction is egregious enough, it is possible that the military service, as well as the other armed services, may place the organization or business off-limits worldwide to military personnel. Announcement of off-limits action through each Armed Service's Public Affairs Office serves as yet another deterrence against cavalier adherence to the purpose and spirit of the SSCRA. The negative public relations impact resulting from such announcements rivets the attention of even the largest corporations. In addition, complaints to state consumer commissions and secretary of state offices issuing licenses can also have remedial effects.

V. LEGISLATIVE REPAIRS

Patchwork amendment repairs since 1942 have proven insufficient to keep the SSCRA in step with the explosion of modern day technology and societal demands and obligations. The original drafters could not foresee what the world would look like seventy years later. However, our inheritance of the SSCRA brings with it the obligation to keep it vibrant.

93. Memorandum from Stuart M. Gerson, Assistant Attorney General, Civil Division, Dep't of Justice, to all United States Attorneys (Mar. 11, 1991) (discussing requests for representation concerning the Soldiers' and Sailors' Civil Relief Act); Letter from Stuart M. Gerson, Assistant Attorney General, Civil Division, Dep't of Justice, to Terrence O'Donnell, General Counsel, Dep't of Defense (Mar. 12, 1991).

94. See supra note 88 and accompanying text.


96. Id.

97. The general counsel of two large financial institutions transacting credit business in a number of states indicated to The Office of the Judge Advocate General, Army Legal Assistance, that because of the six percent interest cap provision's ambiguity, they were not willing to forgive the difference in contract interest. When apprised of the Department of the Army off-limits sanction possibility, they re-evaluated their company's policy position and adopted the Department of Defense's interpretation over the telephone.
and effective. Similar to Major Partlow's efforts in 1942, major revision of the SSCRA must be undertaken to repair the armor that time has rusted.

A. New Name

To begin, now that there is a new Uniform Service (the United States Air Force), as well as a number of agencies covered by the SSCRA (for example, Public Health Service and National Oceanic and Atmospheric Administration), the characterization of the SSCRA needs to be transformed into the Uniformed Services Civil Relief Act.

B. State Taxation of Servicemembers

Despite the clear prohibition in 50 U.S.C.A. app. § 574 against a non-domiciliary state taxing the military income of a servicemember, several states have used a servicemember's military compensation to increase the tax liability of a spouse. The financial impact on a servicemember and his family is inconsistent with the basic intent of this protection. In United States v. Kansas,98 the state devised a taxation scheme that calculates the tax bracket of a nonmilitary spouse who earned income in the state by adding in the servicemember's military income if the couple filed a joint federal return.100 This scheme increases the servicemember's family tax burden that Congress sought to prevent by section 574. Congress should amend this section to eliminate confusion over the use of a servicemember's military income and to expressly prohibit application of such state tax schemes that increase a military family's tax liability in addition to that levied by their domiciliary state.

C. Reservists' Businesses and Professional Corporations

There is considerable confusion afoot with respect to whether the SSCRA’s protections apply to a reservist’s business or professional corporation. When an accountant or physician is ordered to active duty, they may leave behind a business or corporation that is solely or partially dependent on their services. While they are away performing national service, no income is being generated at home, yet expenses need to be paid. Some courts impute the SSCRA protections to a servicemember’s business while others do not (for example, leases for business equipment or space, and the six percent interest cap). Congress should create a new section to protect reservists’ businesses in the same way the SSCRA pro-

99. 810 F.2d 935 (10th Cir. 1987).
100. Id. at 936.
vides protection for the individual reservist. The business community has grown significantly more sophisticated and complex since the last major revision in 1942.

D. Stay of Proceedings

The stay of proceedings protection has become illusory in that few servicemembers are able to take advantage of the protection of 50 U.S.C.A. app. § 521. This occurred because of a common failure to provide trial courts with sufficient information to make a finding of material effect of military service upon the servicemember's ability to appear. Revitalization of this protection depends upon devising a mechanism that provides judges with more information substantiating the reason servicemembers cannot appear for a prospective hearing.

Understanding that a significant amount of litigation involving requests for stays concern domestic relations cases, there is an urgent need to remedy the problem of a servicemember assigned overseas or on deployment (like Desert Storm) who receives notice of an impending hearing weeks, if not months, after it was mailed. With little or no time to respond from foreign countries or while on deployment, and an insufficient ability to communicate with, let alone retain, legal counsel to effectively represent the servicemember in the action, some form of remedy is critically needed.

If the servicemember fails to appear or obtain a stay, a default judgment will be entered and the servicemember will be prevented from reopening the judgment because of the disqualifications discussed earlier. In this scenario, which is all too common, servicemembers receive no effective protection from the SSCRA, even though their military duty materially effects their ability to exercise their civil rights and effectively represent their interests.

Dissatisfaction with the vague and ineffective language of section 521's stay provision motivated Congress in early 1991 to pass temporary suspension of appearance requirements and create an automatic stay period expiring June 30, 1991. Presumably, if Operation Desert Storm had continued beyond that time, Congress would have extended this protection again for the same reasons. The 102d Congress recognized the shortcoming of this section as originally drafted in 1918 and the realities of current legal process and military service.

Building on Congress' intent to provide some basic form of protection against court action while servicemembers are deployed outside the state, a ninety day automatic stay request is needed as a permanent change to

101. See supra text accompanying notes 62-78.
section 521. With delayed mail delivery endemic in military deployments, and diminished opportunities to consult with legal counsel an inherent reality, particularly in the case of ship deployments, overseas exercises, and transfers to new units, a period of time is needed for servicemembers to participate in the legal process, to have adequate opportunity to consult with military or civilian counsel, and to respond to the courts.

Such stays should be automatic if they meet several important criteria that adequately place the court on notice of when a case may proceed. First, an obligation should be placed on a servicemember to demonstrate material effect by providing a factual basis for supporting the stay request. An important component of this requirement is the responsibility to provide an availability date that will assist the court in properly docketing the case. To assist courts in making factual determinations on the material effect of military service on a member's ability to appear in an action or proceeding, a definition of material effect needs to be included in 50 U.S.C.A. app. § 511 to provide the courts with a discernible standard (such as geographic or economic disadvantage) by which to judge.

In addition, a servicemember's unit commander should be required to provide a letter affirming the unavailability of the servicemember to appear because of the adverse impact on the unit. Equipped with this information, the court can make a more informed judgment as to when the litigation may proceed. In the interim ninety day period, the servicemember is given not only an opportunity to retain and consult with counsel, but also a reasonable period of time to help prepare a defense. The issue of availability of military leave is an important consideration affecting determination of a servicemember's ability to appear. By requiring a commander to specifically address this issue, the court is offi-

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103. See Boone v. Lightner, 319 U.S. 561 (1943) (trial courts must use discretion in determining material effect based on facts presented); Plesniak v. Wiegand, 335 N.E.2d 131 (Ill. Ct. App. 1975) (party must establish that military service is proximate cause of inability to appear); Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981) (affidavit from the commander revealing sailor was serving sea duty and unable to attend court sufficient to establish right to a stay); Hibbard v. Hibbard, 431 N.W.2d 637 (Neb. 1988) (determination of a stay depends upon the facts and circumstances of each case).

104. See Tabor v. Miller, 389 F.2d 645 (3d Cir. 1968) (servicemember did not provide evidence it was impossible for him to appear); Zitomer v. Holdsworth, 449 F.2d 724 (3d Cir. 1971) (servicemember failed to avail himself of SSCRA provisions).


cially informed that personal leave is not available for the

servicemember.\textsuperscript{108}

Recognizing the current nature of military deployments, many of which extend beyond ninety days, further requests for a stay need to be provided for in this section, and the same information discussed earlier\textsuperscript{109} should be included in the requests. This will enable a court to factually determine the material effect of a servicemember’s ability to appear at a prospective date. Unlike the initial application, this further stay request would rely upon the trial court’s discretion for approval. The court must consider the equities of all parties involved in the litigation in granting an additional stay and the material effect of military service upon the servicemember to effectively represent his or her interest. In doing so, the courts should bear in mind congressional intent is that a servicemember’s military service should not place them at a geographic or economic disadvantage.\textsuperscript{110}

Another recommendation for improvement in section 521 is a requirement for appointment of counsel to protect the servicemember’s rights if an additional stay request is denied. Also, a provision should be inserted that provides a ninety day post-service transitional period similar to what Congress has already provided in other SSCRA protections.

Congress should add a subsection which clarifies that once a servicemember has notice of the proceedings and invokes the relief provided in this section, 50 U.S.C.A. app. § 520’s\textsuperscript{111} protections for default judgments may not subsequently be invoked. Section 520’s protections are intended for those circumstances in which a servicemember receives no actual notice of an action or proceeding, or appointed counsel is unable to communicate with the servicemember or even determine if a meritorious or legal defense might exist. It is inappropriate and inconsistent with case law to allow a servicemember two forms of relief, when each was initially adopted to protect servicemembers in mutually exclusive circumstances.\textsuperscript{112}

\textbf{E. Six Percent Interest Cap Protection}

Definitive clarification is needed to assist both servicemembers and businesses in supporting national policy regarding the six percent interest cap protection. First, Congress should address the forgiveness of interest

\textsuperscript{108} See Palo v. Palo, 299 N.W.2d 577 (S.D. 1980) (appellant failed to show leave was unavailable or any attempt was made to obtain leave, and as a result, no protection was afforded under the SSCRA).

\textsuperscript{109} See supra text accompanying notes 103-08.


\textsuperscript{112} See 1917 Hearings, supra note 9, at 96 (statement of Major John H. Wigmore).
above the six percent cap in 50 U.S.C.A. app. § 526.\textsuperscript{113} The legislative history of the 77th Congress provides support for a forgiveness clarification.\textsuperscript{114} To take an opposite view, that Congress intended only to defer, not to forgive, interest above the six percent protection, clearly places the servicemember in precisely the same financial dilemma Congress sought to ameliorate in 1942. Servicemembers could conceivably return from active duty with greater indebtedness than before they started.

Second, Congress should address how the interest cap is to be obtained. The requirement for an application (that is, a letter) to invoke the six percent protection needs to be stated. The original narrative provides the servicemember no clear guidance on how it should be initiated and the legislative history provides no insight. Logically, the burden should be on the servicemember, or legal representative, to request application of the six percent interest protection.

Third, Congress should require that a servicemember applying for the interest cap protection should include a copy of military orders with the request. The purpose is to officially place the creditor on notice that the servicemember is ordered to duty in accordance with specific statutory authority. The orders also indicate the period of time for which the servicemember is ordered to duty (for example, ninety or one hundred eighty days). If there is an extension of the servicemember's duty obligation, the servicemember will be furnished amended orders extending the time period. These orders should also be transmitted to the creditor so the creditor's accounting mechanism can be appropriately programmed. This approach not only provides guidance to the creditor on when and how long the interest protection should be applied, but also places the lender on official notice of the servicemember's activation and requires the lender to act after receiving proper notice.

\section*{F. Eviction Protection}

One section of the SSCRA in frequent need of updating is 50 U.S.C.A. app. § 530, the “maximum rent” provision.\textsuperscript{115} During the period of military service, this provision protects a servicemember and the ser-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{113} 50 U.S.C.A. app. § 526 (1990).
\item \textsuperscript{114} See H.R. REP. No. 2198, 77th Cong., 2d Sess. 4 (1942).
\item \textsuperscript{115} The pre-1991 section and paragraph read as follows:
\begin{quote}
(1) No eviction or distress shall be made during the period of military service in respect of any premises for which the agreed rent does not exceed $150 per month, occupied chiefly for dwelling purposes by the wife, children, or other dependents of a person in the military service, except upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession.
\end{quote}

\end{itemize}
\end{footnotesize}
vicemember's dependents from eviction without a court order if the rental on the premises does not exceed a sum stated in the statute. Prior to the March 1991 amendments, this figure was $150.116 The 1991 amendment to this section placed the figure at $1,200.117

A proposed change to this section would be to provide a sliding scale based on the servicemember's housing allowances in addition to the fixed sum recently amended. This addition would help protect servicemembers and their dependents in the future, when $1,200 becomes unrealistically low. Congress' heavy workload prevents revising this section as often as necessary to make the needed amendments as rental rates go up. To make this section effective in the future, this proposal provides an alternative to the fixed amount with one that increases yearly along with the rental markets.

Another much needed update is in the area of personal property leases. The way 50 U.S.C.A. app. § 531 currently reads, only leases "with a view to purchase" are given protection from repossession or rescission.118 Amending language could be added that includes nonpurchase, closed-end leases of personal property such as automobiles, business machines, and farm and industrial equipment. The suggested addition would update the protection of this section to reflect current realities and conform to the original intent of Congress to provide materially effected servicemembers temporary relief from civil liabilities.119 The need for this updated language is demonstrated by reservists ordered to active duty who expressed two main areas of concern. The first concern arises when a servicemember is leasing an automobile and is ordered to and sent to a duty station where use of the automobile is impossible (like Saudi Arabia). As the section now reads, the servicemember must continue to pay the monthly lease and the insurance premiums throughout the term of the lease.

The second concern arises when the small business owner has leased equipment like a copier or FAX machine and is ordered to active duty. The machines may go unused for extended periods of time, but the lease

116. Id.
119. The legislative history of 1940 reveals the reason for amending 50 U.S.C.A. app. § 301(1) (1990) (50 U.S.C. app. § 531(1)) of the 1940 Act to include the term "lease," where it had not been before, was to preclude contracts that attempt to circumvent the Act by providing for the lease of property for a period of time and later purchase at a certain price exclusive of the lease payments. Lessor/creditor argued at that time that payments on the lease under such a contract were not deposits or installments, and, therefore, not entitled to the protection of this section. 1942 Hearings, supra note 18, at 17 (statement of Major John Partlow).
requires payment. Without the proposed amending language, relief under section 531 may only be obtained if there was a clear "view to purchase" the leased property. At the time this section was written in 1940 and amended in 1942, closed-end leases of automobiles and business machines were rare or non-existent.

VI. CONCLUSION

Case law, seventy years of practical application, and the legion of active and reserve servicemembers indicate that the SSCRA protective armor is rusted and in sore need of repair. We now have a legislative window of opportunity for improving and clarifying the SSCRA that may not come this way again for another generation. Historically, during peacetime, military personnel problems enjoy a low priority on Congress' legislative agenda. For the moment, as a result of the proficiency and professionalism demonstrated by the members of the Armed Forces, both active and reserve, in Operation Desert Storm, Operation Provide Comfort, and the Kuwait reconstruction effort, national attention is focused on the people who have gone in harm's way on behalf of all Americans. Now is the time to address these very real problems of soldiers, sailors, airmen, marines, and family members and request constructive attention. They answered the call when the nation needed them. Now we need to provide in peacetime what we are willing to provide during war. Perhaps noted evidence authority and World War I judge advocate John H. Wigmore characterized the issue at stake best when he observed: "'You drop everything you have; drop all your relations and all your business affairs, and all the property you have, and we will take you, and maybe your life.' We say to him, 'Leave your family; leave your affairs, and sacrifice a great deal actually and sacrifice everything potentially.'"\textsuperscript{120}

\textsuperscript{120} 1917 \textit{Hearings, supra} note 9, at 97.