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Notes and Comments

Congress as the Mysterious Benefactor: Great Expectations About Service Members’ Access to Technology in Modern Warfare

Staci M. Buss*

I. INTRODUCTION

For decades, Saddam Hussein has tortured, imprisoned, raped and murdered the Iraqi people; invaded neighboring countries without provocation; and threatened the world with weapons of mass destruction. The time has come to end his reign of terror. On your young shoulders rest the hopes of mankind.1

On February 17, 2007, my husband John, a Corporal in the United States Marine Corps, deployed to Iraq to serve in Operation Iraqi Freedom (OIF). John’s deployment was part of President Bush’s troop surge that included the deployment of

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more than 20,000 soldiers to Baghdad, and the extension of the
tours of 4,000 Marines to the Anbar Province, where John served
for six months.\textsuperscript{2} It was during this time I first learned of the
Servicemembers Civil Relief Act (SCRA).\textsuperscript{3} Although the Act has a
specific provision that requires military members to be notified of
the benefits available to them under the Act,\textsuperscript{4} I was not aware of
its existence until I worked as a paralegal for a law firm where we
were stationed.

A client of the firm was also deployed as part of the troop
surge in the middle of his separation proceedings. Just a few days
after he deployed, his spouse petitioned the court for spousal
support. Since the client had already left, we sent an e-mail
notifying him of his option to apply for a stay under SCRA, and
informing him of the necessary paperwork we would need to file
with the court in order to proceed on his behalf.\textsuperscript{5} Another week
passed before we received a response from the client notifying us
that he wished to move for a stay, and that he was preparing the
necessary paperwork. Several days later, the client sent an e-mail
that included a letter from his commanding officer stating he was
deployed overseas and leave was not allowed. The firm
immediately filed a motion with the court to stay the proceeding.
Nevertheless, noting that our client was clearly able to
communicate with his attorney via e-mail, the judge denied the
request for a stay, finding that the deployment in Iraq did not
"materially affect" the client's ability to present defenses.\textsuperscript{6} Thus
began the long and arduous process of presenting a defense to an
action for a party with whom we could not communicate on a
regular basis.

It is evident from this course of events and the history of the
judicial interpretations of the SCRA and its predecessor, the
Soldier's and Sailor Civil Relief Act (SSCRA),\textsuperscript{7} that Congress and
our court systems have failed to appreciate or understand the

\textsuperscript{2} President George W. Bush, President's Address to the Nation (Jan.
\textsuperscript{4} Id. § 515.
\textsuperscript{5} Id. § 522.
\textsuperscript{6} Id. § 522(b)(2)(A).
\textsuperscript{7} Id. § 101 (the SCRA replaced the SSCRA when it was enacted).
difficulties of war. In particular, courts and Congress have failed to acknowledge the new challenges the nation and individual military members\(^8\) face in the Global War on Terrorism (GWOT) as well as the role of technology in these conflicts. Major changes need to be made to the SCRA in order for it to be able to serve its proposed purpose.

This comment will address the history of the SCRA's predecessors, highlighting the Congressional revisions and judicial interpretations up to the promulgation of the SCRA. Further, the comment will examine the reasons for changes to the SCRA, including recent changes in warfare maneuvers and technology since the beginning of GWOT. The comment will conclude by proposing two changes to the Act: providing an automatic six-month stay for combat deployed members and shifting the burden of proof to the non-service member. These modifications to the Act would improve the protections provided to service members.

**II. THE SERVICEMEMBERS CIVIL RELIEF ACT**

When I give you the word, together we will cross the Line of Departure, close with those forces that choose to fight, and destroy them. Our fight is not with the Iraqi people, nor is it with the members of the Iraqi army who choose to surrender. While we will move swiftly and aggressively against those who resist, we will treat all others with decency, demonstrating chivalry and soldierly compassion for people who have endured a lifetime under Saddam's oppression.\(^9\)

The current version of the SCRA was signed into law by President George W. Bush on December 19, 2003\(^10\) with the purpose:

1. to provide for, strengthen, and expedite the national defense through protection extended by this Act to

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8. For ease of reading, any reference to military or service members includes any person serving in the United States Military including Marines, Navy, Army, Air Force, Coast Guard and any reserve units.
servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and

(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of service members during their military service.\(^\text{11}\)

As discussed below, the idea of providing protection to military members has a long history in our court systems, as does the SCRA. Our nation's tumultuous past with turbulent wars was the catalyst for the Act, which has been revised many times since Congress first determined our country needed to protect those who protect us.

### A. The History of Suspended Proceedings for Service Members, the SSCRA, and the SCRA

Early European history shows that relief from civil actions was granted to military members in "the Thirty Years' War, the Napoleonic Wars, the War of 1870, and the First World War."\(^\text{12}\) In the United States, the first evidence of suspended civil actions for soldiers occurred during the War of 1812 when Louisiana suspended all civil cases in which soldiers were involved.\(^\text{13}\) In 1864, Congress became involved in the rights of military members by enacting legislation that created a moratorium on any civil actions brought against any soldiers or sailors of the Union during the Civil War.\(^\text{14}\) Congress noted that the purpose of that act was to keep soldiers and sailors from worrying about their affairs at home.\(^\text{15}\) Several states followed suit, passing their own protections as well.\(^\text{16}\) However, that act was only temporary and the returning fighters were forced to deal with their burdens upon returning home.\(^\text{17}\)

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14. *Id.*
15. *Id.* at 175.
16. *Id.*
17. Amy J. McDonough, Gregory M. Huckabee & Christopher C. Gentile,
In response to World War I, on March 18, 1918, Congress enacted the Soldiers' and Sailors' Civil Relief Act, as proposed by Professor John Wigmore, who was an activated Major in the Army.\textsuperscript{18} Unlike the moratorium of 1864, this new Act attempted to balance the rights of those serving and the rights of their creditors\textsuperscript{19} by adding specific provisions\textsuperscript{20} regarding "repossession[s] of property, bankruptcy, foreclosure[s]...[d]efault judgments, stays of proceedings, evictions, mortgage foreclosures, insurance, and installment contracts."\textsuperscript{21} The specified purpose of the Act was "to prevent prejudice or injury to [service members'] civil rights during their term of service and enable them to devote their entire energy to the military needs of the Nation..."\textsuperscript{22} Unfortunately, the Act automatically terminated six months after the war,\textsuperscript{23} and because the war ended in November of the same year the Act was created,\textsuperscript{24} it seems unlikely the Act provided any great relief to soldiers and sailors.

Noting the growing tensions of World War II, prior to the United States officially joining the war, Congress again reenacted the SSCRA in 1940 and again in 1942,\textsuperscript{25} this time without an expiration date.\textsuperscript{26} Both the 1940 and 1942 reenactments were very similar to the 1918 Act.\textsuperscript{27} In 1942, Congress noted "that the normal obligations of the man contracted prior to service induction should be suspended as far as practicable during this tour of duty."\textsuperscript{28} Since the 1942 revisions, the Act remained in place,
receiving only minor updates in 1991 in response to Operations Desert Storm and Desert Shield.\textsuperscript{29} 

After the events of September 11, 2001, the GWOT, and OIF, the SSCRA received a great deal of criticism and many called for its revisions.\textsuperscript{30} On December 19, 2003, these calls for revision were heeded with the enactment of Servicemembers Civil Relief Act,\textsuperscript{31} which was created

[T]o make the Act easier to read and understand by clarifying language and putting into modern legislative drafting form; to incorporate into the Act many years of judicial interpretation; and, to update the Act to take into account generally accepted practice under its provisions and new developments in American life not envisioned by the original drafters.\textsuperscript{32} 

Although the new Act provides many changes to the legislation itself,\textsuperscript{33} its purpose is still based in the same concept: providing protection and relief to service members so they can focus on their military duties and not worry about civil actions or proceedings back home.\textsuperscript{34} One portion of the SCRA that received revisions after September 11, 2001 was 50 U.S.C. app. § 521, regarding the stay of proceedings.\textsuperscript{35}

B. The Revisions and Interpretations of the Stay of Proceedings

When the SSCRA was originally promulgated, prior to the 2003 revision which became the SCRA, the SSCRA provided three methods of relief, all of which hinged upon a service member’s military duties materially affecting his ability to protect himself in civil actions and/or administrative proceedings.\textsuperscript{36} Whether or not

\begin{itemize}
  \item \textsuperscript{29}McDonough, supra note 17, at 671; Huckabee, supra note 18, at 146.
  \item \textsuperscript{30}Michael Tier, \textit{How to Assist the Deploying Military and Their Family}, N.J. LAWYER, June 2007, at 64. \textit{See generally} Huckabee, supra note 18; McDonough, supra note 17.
  \item \textsuperscript{31}50 U.S.C. app. §§ 501-596 (2006); Tier, supra note 30, at 64.
  \item \textsuperscript{32}Tier, supra note 30, at 64 (citing Memorandum from Colonel Steven T. Strong, Director, Legal Policy, Office of the Under Secretary of Defense (Personnel & Readiness) to Service Legal Assistance Chiefs (Oct. 3, 2001)).
  \item \textsuperscript{33}Jarrett, supra note 10, at 175-180.
  \item \textsuperscript{34}Id. at 174.
  \item \textsuperscript{35}See generally McDonough, supra note 17, at 672.
  \item \textsuperscript{36}Mary Kathleen Day, \textit{Material Effect: Shifting the Burden of Proof for Greater Procedural Relief Under the Soldiers' and Sailors' Civil Relief Act}, 27
the service member was materially affected by his duties was determined on a case-by-case basis by the judge presiding over the issue.\textsuperscript{37} Unfortunately, judges were not as liberal as Congress intended when they interpreted whether a service member's duties materially affected him. Indeed, as one scholar noted, "[j]udicial decisions over the years . . . chipped away at [the SSCRA's] important protections."\textsuperscript{38} One of the biggest problems with early interpretations of SSCRA was that many courts interpreted an application for a stay of proceedings as an appearance, and would then enter a default judgment against the service member who did not appear in court.\textsuperscript{39} Hoping to remedy this and many other problems, and to broaden the purpose, the Act was revised in 1942 "to prevent courts from interpreting the Act too narrowly."\textsuperscript{40} Despite the 1942 revisions however, courts continued to take a restrictive view and deny service members' stays, oftentimes finding their service did not materially affect their ability to appear or present valid defenses.\textsuperscript{41} Under the SSCRA, judges denied stays when a service member could not prove it was impossible for him to appear,\textsuperscript{42} when a service member was on active duty in the Korean Conflict,\textsuperscript{43} and when a soldier voluntarily chose an Army career.\textsuperscript{44}

\footnotesize

\textsuperscript{38} Id. at 58.
\textsuperscript{39} Jarrett, supra note 10, at 175.
\textsuperscript{39} See generally Chandler, supra note 12 (whenever an individual service member filed for a stay, the court would consider that an entrance of appearance, and when no additional paperwork was filed, the Court would enter a default judgment for the plaintiff). This problem was corrected with the SCRA, however, as the Act now mandates that "[a]n application for a stay under this section does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive defense or procedural defense (including a defense relating to lack of personal jurisdiction.)" 50 U.S.C. app. § 522(c) (2006).
\textsuperscript{40} Day, supra note 36, at 47.
\textsuperscript{41} See generally W.E. Shipley, Annotation, Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting matrimonial actions, 54 A.L.R.2d 390, 397-401 (1957); W.E. Shipley, Annotation, Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting negligence actions, 75 A.L.R.2d 1062, 1064-71 (1961).
\textsuperscript{42} Tabor v. Miller, 389 F.2d 645, 647 (3d Cir. 1968), cert. denied, 391 U.S. 915 (1968).
\textsuperscript{43} Parker v. Parker, 63 S.E.2d 366, 367 (Ga. 1951) (Georgia Supreme Court reversed the ruling of the trial court and granted the stay).
\textsuperscript{44} Fluhr v. Fluhr, 52 A.2d 847, 848 (N.J. 1947).
Noticing the Act "was intended to be a shield, but ambiguity had turned it into a sword used against the absent service members," Congress again provided an amendment in 1991, in response to the Gulf Wars, to remedy the problems. Prior to 1991, courts analyzed two aspects of the military member's service to determine if it materially affected his ability to appear: economic status and geographical location. However, this analysis was deemed ineffective, and Congress enacted a temporary amendment in 1991 which provided an automatic stay for cases brought between August 1, 1990 and June 30, 1991. This temporary amendment did not require the service member prove how service materially affected his rights. Rather, the only caveat under the temporary amendment was that the soldier or sailor had to be serving outside the state where the court was located. It appears that this provision was likely an effective method for providing efficient relief to service members. Unfortunately, the temporary amendment terminated automatically in 1991. However, when Congress revamped the SSCRA to create the SCRA, it appeared to provide a type of relief similar to the automatic stay enacted in 1990. In its current form, the SCRA provides service members with an automatic ninety-day stay.

In order to obtain the automatic ninety-day stay under the SCRA, the service member must: (1) submit a letter stating the reasons the service member's military duties materially affect his ability to appear and a date the service member will be available; and (2) a letter from the member's commanding officer providing that duty prevents appearance and that leave is not authorized. An additional stay may be granted or the original ninety-day stay may be extended at the discretion of the court. If the additional stay or extension is denied, however, an attorney must be

45. Huckabee, supra note 18, at 159.
46. McDonough, supra note 17, at 672.
47. Id. at 672-73.
48. Id. at 672.
49. Id.
50. Id.
51. Id.
53. Id. § 522(b).
54. Id. § 522(d).
appointed to represent the military member's interest. Interestingly, despite critics' calls for placing the burden upon the non-service member in the action and many courts' interpretations requiring the non-service member to bear the burden, Congress decided to place the burden upon the service member to prove that his military duties materially affect his ability to appear.

Many writers and practitioners have been quick to offer guidelines and suggestions as to what to expect with the new SCRA. Mark Sullivan has pointed out some of the pitfalls of a judge denying an additional stay and appointing counsel:

Once again, give this some thought. What is the attorney supposed to do—tackle the entire representation of the SM [service member], whom he has never met, who is currently absent from the courtroom and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm's way?

Moreover, despite the Supreme Court's mandate that "the . . . Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation," and some courts' recognition of the importance of granting stays, many problems still exist. Several courts have

55. Id. § 522(d)(2). See also Jarrett, supra note 10, at 176 (citing 50 U.S.C. app. §202(d)) (repealed).
57. Day, supra note 36, at 59-68.
58. 50 U.S.C. app. §522(b).
60. Sullivan, supra note 59, at 32.
61. Id.
continued to deny service members the protections afforded by the Act based on mere technicalities.\textsuperscript{64}

A prominent case which highlights the requirements of the SCRA is \textit{In re Marriage of Bradley}.\textsuperscript{65} A former JAG officer has summed up the case as follows: "[b]ottom line, if you really need the stay, you really need to do it by the book."\textsuperscript{66} In \textit{Bradley}, the husband was stationed in Iraq when he provided the court with a copy of his orders deploying him to Iraq along with a request for a stay in his child custody action.\textsuperscript{67} The trial court noted that the husband failed to provide a date that he would be available for appearance and a letter from his commanding officer stating deployment affected his ability to appear and leave was not authorized.\textsuperscript{68} Even though Bradley's orders more than likely provided the date of deployment, and most know that leave is not allowed during combat deployment, the court found that it must consider the best interest of the child; therefore, the stay was denied.\textsuperscript{69} The Supreme Court of Kansas affirmed the finding that the stay was properly denied.\textsuperscript{70}

A similar outcome occurred in \textit{Sottoriva v. Claps}, when an Army reservist was called to active duty and deployed to Iraq, and upon petitioning for a stay, failed to provide a return date for appearance and a letter from his commanding officer.\textsuperscript{71} The Illinois District Court denied the soldier's stay under the SCRA, but did allow a continuance pursuant to Fed. R. Civ. Pro. 56.\textsuperscript{72} The Georgia Court of Appeals also denied a stay under the SCRA in \textit{City of Pendergrass v. Skelton} despite the fact that the National Guardsman in the case submitted a letter from his commanding officer stating he was activated.\textsuperscript{73} Specifically, the court denied

\begin{itemize}
\item \textsuperscript{64} Id. at 24-29.
\item \textsuperscript{65} In re Marriage of Bradley, 137 P.3d 1030 (Kan. 2006). See also Shawver, \textit{supra} note 59, at 19.
\item \textsuperscript{66} Shawver, \textit{supra} note 59, at 19.
\item \textsuperscript{67} Bradley, 137 P.3d at 1032-33.
\item \textsuperscript{68} Id. at 1033-34.
\item \textsuperscript{69} Id. at 1034.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Sottoriva v. Claps, No. 06-3118, 2006 WL 3775945, at *1 (C.D. Ill. Dec. 21, 2006).
\item \textsuperscript{72} Id.
\item \textsuperscript{73} City of Pendergrass v. Skelton, 628 S.E.2d 136, 139-40 (Ga. Ct. App. 2006).
\end{itemize}
the stay because the letter did not state whether the guardsman was deploying to Iraq or when he was activated.\textsuperscript{74}

In \textit{Krutke v. Krutke}, the Wisconsin Appellate Court found that a stay was not warranted despite a father's inability to attend child support proceedings.\textsuperscript{75} At the time, the father was out of state in military training, preparing for a deployment to Iraq. However, because he was represented by counsel, had several months prior to being called up to prepare for the hearing, and the issue was very straightforward and could be submitted to the court without appearance, the stay was denied.\textsuperscript{76}

The SCRA also provides for an additional discretionary stay after the initial mandatory ninety day stay has been granted.\textsuperscript{77} Nevertheless, a survey of SCRA case law reveals that courts have been hesitant to grant these additional discretionary stays. For instances, the California Court of Appeals affirmed the denial of an additional discretionary stay for a father who was deployed to Iraq and sought to reunite with his infant son via a parenting plan created by the Department of Social Services who had custody of the child.\textsuperscript{78} The court relied on the reports of social workers that specifically stated the father had come to visit the son on his emergency leave, but since that visit, and once the father had returned to Iraq, he had failed to show good parenting skills.\textsuperscript{79} The social workers noted that their attempts to contact the father in Iraq via telephone had been unsuccessful.\textsuperscript{80} The trial court found "that petitioner 'ha[d] been given more than a fair opportunity to participate in these proceedings" and the denial of the stay was affirmed.\textsuperscript{81}

Based on case law, it appears the overly technical and stringent requirements of the Act are unreasonable. As discussed below, service members are unable to obtain and provide the proper paperwork in order to have the automatic ninety-day stay

\textsuperscript{74} Id.
\textsuperscript{76} Id.
\textsuperscript{78} George P. v. Superior Court, 24 Cal. Rptr. 3d 919, 925 (2005).
\textsuperscript{79} Id. at 922.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
granted to them. It appears judges are once again “chipping away” at the protections Congress provides to the men and women who serve our country. As will be demonstrated, these misguided decisions are a result of the court’s overly ambitious view of the role that technology and communication play in warfare.

III. REASONS FOR CHANGES TO THE SCRA

Chemical attack, treachery, and use of the innocent as human shields can be expected, as can other unethical tactics. Take it all in stride. Be the hunter, not the hunted: never allow your unit to be caught with its guard down. Use good judgment and act in the best interests of our Nation.

Essentially, there are two main reasons the SCRA needs to be modified: (1) the requirements for receiving the automatic ninety-day stay are unreasonable and do not serve the purpose of the Act; and (2) judges continue to use an overly stringent reading of the SCRA to deny service members the right to a stay of proceedings.

A. The Stay Requirements are Unreasonable

The stay requirements are unreasonable because they are based on the unfounded expectation that new technologies in warfare are being used for communication. The reality is, despite the expansive new technologies that are being used in our everyday life to improve communication, those same technologies are not available to service members in the field. Additionally, communication is not available to the individual military member on a regular and reliable basis.

It is unlikely anyone could ever forget the events of September 11, 2001. The country’s emotions ran high as the nation staggered from the blow, yet the way everyone rallied to support the fallen and to stand together as Americans created an uplifting camaraderie unfelt in this country for many years. However the event affected us individually and personally, “[i]t seemed clear that we were no longer immune from the ravages of

82. Jarrett, supra note 10, at 175.
83. Fick, supra note 1, at 191.
On the anniversary of the attacks, President George W. Bush told the nation we would “rid the world of terror” by pursuing “terrorists in cities and camps and caves across the earth.” The GWOT quickly spread across the Middle East, beginning in Afghanistan, and eventually expanding to include OIF which began on March 20, 2003 with “Shock and Awe.”

Most Americans watched “Shock and Awe” unfold through fuzzy green images on television as bomb after bomb exploded onto the city of Baghdad. Reporters were ecstatic as they repeated over and over again that the images were live and what an amazing opportunity this was; the American people sitting at home were watching a war unfold right before their very eyes for the first time in history. This moment, where we all watched a war as a nation, has given rise to a grave misunderstanding as to technology’s place in modern warfare.

Modern warfare requires that our Nation’s Armed Forces constantly change tactics while fighting. It is almost certain that OIF is the most technologically advanced war we have ever fought. However, shows such as Modern Marvels® or Future Weapons® that reflect the capabilities of the United States Military in modern warfare evidence the real truth: most of the technological advances being made in the military today are made in weaponry and protection, not communication.

85. Id. at 209 (citing President’s Remarks to the Nation at Ellis Island (Sept. 11, 2002)).
86. Mark W. Bina, Comment, Private Military Contractor Liability and Accountability After Abu Ghraib, 38 J. MARSHALL L. REV. 1237, 1239 (Summer 2005).
87. Id.
Evan Wright, a *Rolling Stone* editor imbedded with the Marines of First Reconnaissance Battalion during the initial invasion of Iraq, summed up the universal military consensus by noting “comms [communications] seldom work as they should.”92 Wright noted:

Dust, magnetism and sun spots all interfere with the radios constantly. In addition, the radios in various battalion networks rely on encryption codes that constantly need to be loaded and synchronized. The system is prone to bad connections, dead batteries, software crashes. . . . Even in the best of times, the radios blink out. . . . Luckily, Person [a Marine in the battalion] is something of a genius when it comes to radios. . . . He has voluminous knowledge of encryption protocols and a sixth sense for how to hot-wire bum radios, often by unplugging all the cables and licking the sockets, all while driving in the darkness. Teams in other platoons whose radio operators aren’t as skilled sometimes resort to leaning out of their doors and shouting.93

Although communication certainly plays an important role in modern warfare, it appears that the advances in the field have been limited. More importantly for this analysis is the fact that the limited communication available in a combat situation is not available to individual military members on a regular basis.

While the government does provide phone centers and internet access in some areas, there are a limited number of these precious resources which, in turn, are only available to off-duty service members. Further, occupying and fighting in a foreign country is a job that requires heightened attention twenty-four hours a day, seven days a week, and patrols can be long and arduous leaving little time for personal phone calls or e-mails. Even though some may contend that some military members use government computers as part of their military occupational specialty (MOS) and would be able to comply with the

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93. *Id.*
requirements of the SCRA, such resources are strictly limited to government use. If a service member is lucky enough to have a personal computer with him and he is in a place with internet access, he will still likely be subjected to rolling black-outs caused either for safety reasons or by the extreme conditions.

Imagine an Army soldier who was involved in a car accident six weeks before his deployment. He does not believe he is at fault, but received a complaint four days before his deployment. He is now a week into his deployment and attempting to move for a stay of proceedings pursuant to the SCRA. In order to meet the requirements of § 522(b)(2)(A), the first thing he must do is find time to compose a letter. That means that after a thirteen to fourteen hour shift of fighting or patrolling, he must go to his room and compose a letter stating why he is unavailable to appear in court and when he will return. Keep in mind, however, that a soldier probably has less than eight hours before his next shift and still needs to eat, clean his weapon, perform a daily exercise routine, and sleep. Of course he will probably want to write a letter to his parents, or maybe he will decide to wait in line at the call center to check in on his wife and kids who he has not spoken to in over a week.

Once he finishes all of those responsibilities, probably sometime late after midnight, he will sit down and compose a quick letter to the court. Unfortunately, he does not know his current return date. His original deployment was only supposed to be six months, but now there is talk of an extension and rumors that he could be here for an additional six months. He could always put his original return date, but that has already been changed three times. Furthermore, he does not have a personal computer or printer; so he will have to borrow a friend's computer, or wait in line at the information center in order to e-mail the letter. If he is able to compose and print the letter, he will then face the dilemma of delivering the letter to the court. Obviously, he could put the letter in the mail. Theoretically, the letter should arrive at the courthouse in seven to ten days, although the last letter he sent his wife took two weeks to get to her.

From this illustration, it is clear that the requirement of providing a letter stating an inability to appear and a return date

is a simple task for someone in the States, but it provides many difficulties in a combat deployment situation. Despite the proposed purpose of the Act, to allow the service member to focus on his duties and serve the country, this provision is causing a major distraction for any deployed service member involved in civil litigation. And any military wife knows, a distracted soldier, is a dead soldier.

Moreover, § 522(b)(2)(B) provides an additional hurdle for the deployed military member: he must find his commanding officer. OIF was largely successful due to military commanders who utilized maneuver warfare techniques to attack the country of Iraq. The tactic required the main force, the Army’s Fifth Corps along with the First Marine Division, to take the most direct route to Baghdad while a smaller force, oftentimes smaller battalions, such as First Recon Battalion, would shift the enemy’s focus by attacking from different angles.

This technique required the Iraqi National Guard to fight the war on several fronts rather than the main front straight into the city, and proved to be quite effective. However, the methods employed during maneuver warfare required little communication between individual platoon commanders and field grade officers by relying on mission type orders. Maneuver warfare was also utilized in Operation Desert Storm and each time it has been used, maneuver warfare has required military members to operate for days, weeks, and months with minimal contact with the outside world.
The mission type orders used in maneuver warfare serve as a basis for many military operations; "[i]mplementation of Distributed Operations as an extension of maneuver warfare requires a focus on enhanced small units, which are more autonomous, more lethal, and better able to operate across the full spectrum of operations."\(^{106}\) Throughout deployments, military members are stationed in one area, but have several different assigned missions that require them to move in smaller groups with a company grade officer to lead the completion of the mission.\(^{107}\) During a deployment, military members can be sent on any number of missions, some of which can last as long as thirty days or more. While on these missions, individual military members have minimal access to computers or phones to contact family members and, as discussed above, there is little contact between individual platoons and their commanding officers who could provide the court with the paperwork required in § 522(b)(2)(B).\(^{108}\)

Therefore, it is unreasonable to expect a military member to be able to communicate regularly with their commanding officer regarding a personal matter. This provision of the SCRA provides a new distraction not only to the individual service member trying to obtain the correct paperwork in order to maintain a stay in his proceeding, but it also provides a distraction to his commanding officer. It is unreasonable for Congress to expect the men and women who risk their lives for this country to spend their precious free time writing letters and searching for commanders in order to receive a few days' reprieve from a lawsuit that should be the furthest thing from their minds while they are dodging bullets.

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106. Concepts and Programs, supra note 103, at 9, 32 ("[w]ith its tenets embedded in Naval Power 21, Marine Corps Strategy 21, and Sea Power 21, Expeditionary Maneuver Warfare (EMW) is the capstone concept that guides how the Marine Corps will organize, deploy, employ, and sustain its forces today and in the future.").

107. Id. at 37 ("DO [Distributed Operations] are characterized by the ability to physically disperse networked squad-to battalion-sized units over a battlespace extended in both depth and breath. Contributing to greater situational awareness, capable of precisely directing overwhelming firepower, and readily concentrating to exploit opportunities, Marine forces conducting DO will present a complex puzzle to the adversary and create a competitive advantage for joint warriors.").

B. Judges Continue to Deny Stays

As discussed above, Congress has amended the SCRA on a continual basis to ensure service members are provided the maximum amount of protection while simultaneously providing protection to the creditors of military members as well.\textsuperscript{109} However, as mentioned, history has also shown that judges continue to interpret the Act and its predecessors narrowly.\textsuperscript{110} This has continued even after the SCRA was created and specifically required an automatic ninety-day stay.\textsuperscript{111} A major contributor to this confusion, like that discussed above, is courts' misunderstanding of the place of technology in warfare.

There can be no doubt that technology plays a very important role in our judicial system today. As one scholar has noted:

[B]efore 1972 there was virtually no automation to support the federal judiciary's core functions except electric typewriters. By 1998, the judiciary had a national communications network linking 30,000 employees at 700 sites. It also had installed the Federal Judiciary Television Network, which, by 2000, had some 250 downlink sites across the nation, making it the second largest government satellite network in the U.S.\textsuperscript{112}

Many scholars have also noted the important role that technology has played and will continue to play in our federal system in the future.\textsuperscript{113} "Electronic filing through CM/ECF [Case Management/Electronic Case File] has become the norm in the

\textsuperscript{109} See supra Section IIA.
\textsuperscript{110} See supra Section IIB; see also Hurley v. Deutsche Bank Trust Co. Americas, No. 1:08-CV-361, 2009 WL 701006, at *1 (W.D.Mich. Mar. 13, 2009) (district court judge originally found that the SCRA does not provide a private right of action under which a service member can sue; however, after denying a motion for reconsideration and much outrage in the military community, the judge determined that there was a private right to action).
\textsuperscript{111} 50 U.S.C. app. § 522(b)(1).
\textsuperscript{112} Michael Eric Siegel & Elaine Terenzi, The Chief as a Technology Manager, 65 FED. PROBATION 31, 31 (Sept. 2001).
district and bankruptcy courts [of the federal government].”  
This same type of technology has permeated the State court systems as well.  

Moreover, in interpreting the SCRA and its predecessors, judges have emphasized the advancements made in technology in their opinions. As early as 1981, the District Court for the Western District of Oklahoma denied a motion for a stay under the SSCRA noting the service member defendant would have “ample time to arrange . . . to be deposed by video tape deposition or otherwise.” Similarly, many courts in Georgia have made it clear that they consider technological advances when granting or denying service members’ motions for stays under the Act. The Bankruptcy Court in Georgia denied a stay for a service member stationed in Germany and pointed out:

&C]ommunication has improved tremendously . . . . Air mail can carry written communication from this country to Germany in a period of a few days. Therefore a circle of communication in writing can be expected within two weeks at the most. Regular telephone communication may be obtained with Germany instantly. Court reporters may take depositions in Germany including video tape depositions for use at trials in this country.

Additionally, the Georgia Court of Appeals, when determining whether to grant a stay to a service member, has considered “the availability of modern technology such as conference telephone communications, ‘FAX’ communications and video depositions[,]” as well as the fact “that the ability to communicate across the Atlantic Ocean has improved[,] . . . is

118. Diaz, 82 B.R. at 165.
119. Foster, 431 S.E.2d at 416.
quite commonplace and readily available."120 Courts face the
same misunderstanding as Congress when it comes to the role
that technology plays in warfare. Clearly, judges mistakenly
believe our service members have access to the same technology
that is available in the courthouse.

Obviously, however, there is some other disconnect that is
causing judges to continually deny service members the rights
Congress has attempted to provide, because the problem of narrow
judicial interpretation of the SSCRA and SCRA is not new. Part
of the reason for the continual revisions by Congress has been
narrow judicial interpretations.121 Perhaps the problem is that
judges have become too disconnected from society to understand
the plight of the military member, or perhaps the creditors who
can appear before the judge are more convincing. Either way,
Congress needs to construct a clearer mandate of exactly what is
expected of judges when they are interpreting the Act. At the
same time, however, judges need to realize the difficulties that
men and women in the service are facing. In taking the role of
fact finder, judges must determine the credibility of the parties.
While it is difficult to determine a party's credibility when the
party is not before the judge, there are other indicators which can
alert judges if a service member is attempting to abuse the Act.

Refer back to the case of Sottoriva v. Claps, discussed above in
Section IIB, where the service member was denied a stay of
proceedings because he did not provide a letter from his
commanding officer or set forth the date that he was to return
from his deployment.122 Anyone who has had any involvement
with the military knows that most military information is
considered for official use and for the purpose of operational
security (OPSEC). In most deployments, the definite and actual
date of departure or return is not made public to the troops and
families until two days before deployment or returning.123
Confidential information causes problems in the legal context
because most court records are public, as mentioned above, and
can be available on the internet. It is certainly not in anyone's

120. Massey, 455 S.E.2d at 307.
121. Jarrett, supra note 10, at 175; see also Day, supra note 36, at 47.
Dec. 21, 2006).
123. See generally Phillips, supra note 56, at 110.
best interest to publicize the traveling dates of the United States Military. Therefore, in this situation, the judge should have allowed the stay because the service member provided all the information available to him, leaving out one detail that, if revealed, could have potentially harmed a large group of people.\textsuperscript{124}

In \textit{George P. v. Superior Court}, the service member was denied an additional stay because his failure to visit his son and participate in parenting classes prior to deployment were dispositive on the issue, and termination of reunification was inevitable.\textsuperscript{125} However, based on the facts presented in the case, it is arguable that the court failed to provide the service member with ample opportunity to comply with the parenting order because he was dealing with the stress of preparing for deployment.\textsuperscript{126} It is difficult for a military family to understand how a judge could find the father had no need of a stay in the proceeding when he was preparing for deployment, and complying with the court-supervised parenting program would be difficult.\textsuperscript{127} Regardless of the judge's knowledge of technology or even military information at all, it was unreasonable to demand that a father participate in a parenting program while deployed.

Of course the immediate response is that the father should appeal the decision; however, given his experience with the court, how likely is the service member to think he will succeed? Moreover, if he was unable to make an appearance and participate in this hearing, how is he to find an attorney to represent him for the appeal? If he does manage to find an attorney, how is he supposed to communicate with that attorney in order to appeal the case?

These cases put service members in a \textit{catch-22} situation. If they are unable to attend or participate in a proceeding and then are denied their stay, there is no readily obtainable remedy. Conversely, if an attorney is appointed to represent an absent service member, how are they to communicate with each other?\textsuperscript{128} Moreover, how is the attorney supposed to find the service

\textsuperscript{124} Sottoriva, 2006 WL 3775945, at *1.
\textsuperscript{125} George P. v. Superior Court, 24 Cal.Rptr.3d 919, 922, 925 (Cal. Ct. App. 2005).
\textsuperscript{126} \textit{Id.} at 921-23.
\textsuperscript{127} \textit{Id.} at 922.
member in order to communicate with him? Section 520 of the Act presents more questions and problems than it answers. Further, the service member is less likely to appeal a judgment denying a stay because, if he is unable to represent his interests in the initial hearing, it is unlikely he will be able to represent his interest on appeal while he continues to serve the country to the best of his ability.

Ultimately, due to bad judicial decisions that have not followed the Supreme Court's mandate to liberally grant stays, service members are forced to resign their fate in personal civil lawsuits. Service members are left to turn their attention to the immediate matter at hand and defend the country that does not protect their rights.129 Although Congress has indicated that the purpose of the Act is to allow service members to focus on their military responsibilities and protect the country,130 Congress surely did not intend for service members to give up their ability to defend themselves in court while defending us overseas. Service members can spend weeks trying to provide the correct paperwork to a court only to learn that their rights are denied because they failed to include information that was unknown or unobtainable.

IV. PROPOSED AMENDMENTS TO THE SCRA

You are part of the world’s most feared and trusted force. Engage your brain before you engage your weapon. Share your courage with each other as we enter the uncertain terrain north of the Line of Departure. Keep faith in your comrades on your left and right and Marine Air overhead. Fight with a happy heart and a strong spirit.131

Since courts have always given great deference to Congress in military matters,132 Congress has the responsibility of amending the SCRA. In light of the unreasonable demands currently being placed on service members attempting to obtain a stay of

131. Fick, supra note 1, at 191.
proceedings pursuant to the SCRA, it is obvious changes need to be made. Two revisions, one previously employed as part of the SSCRA and one suggested by critics of the SSCRA would provide great relief to military members and better serve the proposed purpose of the Act.

A. Automatic Six Month Stay for Combat Deployed Military Members

First, the SCRA should be amended to include an automatic six-month stay on all civil actions or administrative hearings for any military member who is deployed for combat. These members should be required to furnish a copy of their current orders which would provide information regarding deployment. Similar to the moratorium provided from August 1, 1990 to June 30, 1991 during Operations Desert Storm and Desert Shield, this amendment would serve the true purpose of the Act. Military members who are serving during a combat deployment need to be able to physically and mentally apply themselves to the task before them.

Current deployments for the Air Force, Navy, and Marine Corps are scheduled on a six to seven month rotation. This proposed revision would allow the airmen, sailors, and Marines time to complete their military duties and then return home to address the civil matters. However, the Army is currently serving combat deployments in a twelve-month rotation. Nevertheless, the six-month stay would provide the service member with ample time to prepare the necessary paperwork for an additional stay and submit it to the court during the two week leave that is allotted after the first six months of deployment. An Army soldier would be prepared during his leave to either submit information for the case or to provide ample paperwork to the court indicating he is unable to appear.

133. 50 U.S.C. app. § 522.
134. McDonough, supra note 17, at 672.
135. See Day, supra note 36, at 59-68.
137. McDonough, supra note 17, at 672.
139. Id.
Service members who are preparing for or working up to a deployment, a process that takes approximately six months, should still be entitled to an automatic ninety-day stay as the Act now provides with the burden shifted as discussed below. These members should not be entitled to the six-month automatic stay because pre-deployment training mostly takes place in the United States, and they will have access to the same technologies available to the courts. Also, this will require service members to responsibly manage their time by balancing their individual needs of participating in a civil suit with their military responsibilities, which will also be a part of their responsibilities once deployed. While many service members serve overseas in non-deployment situations, the automatic six-month stay should not apply to them because they will have greater access to newer technologies, which will allow them to communicate with the courts. As discussed above, combat deployed sailors, soldiers, and Marines have limited time and access to means to manage these types of affairs while deployed.140

Arguably, service members could attempt to falsely claim to be deployed; however, limiting the automatic six month stay to only those members serving in combat deployments will still allow deference to the rights of creditors and limit abuse by service members. As discussed below, service members will be able to provide copies of their orders that will clearly indicate deployment status and lessen the opportunities of abuse of the stay by service members. By allowing the service member who is deployed the comfort of knowing he will not have to stress or worry about a civil action, our men and women in the military will be able to focus on protecting our country and providing a better future for us all.

B. Burden Shifted to Non-Service Member

Second, when a service member is not deployed in a combat situation, for example, when he or she is working up for a deployment or stationed overseas, the burden should be upon the non-service member to prove the military member is not materially affected by his military service. This burden shift will better serve the purpose of the SCRA. Initially, a noncombat deployed service member applying for the automatic ninety-day

140. See supra Section III.
stay under the Act\textsuperscript{141} should provide a copy of his most current orders to the court. The orders will provide the court with the service member's current location and unit. Further, this information will provide the court with an initial indication of the service member's responsibilities and duties.

The burden should then shift to the non-service member to provide evidence that the service member is not materially affected by his duties and should be able to appear. Such evidence could include regular communications between the service member and the opposing party or counsel and a service member's travels to and from the United States if stationed abroad. This evidence could easily be obtained through the discovery process. Moreover, the Department of Defense provides several websites that allow litigants to locate the status of service members for free, simply by providing limited information such as the service member's name and birth date.\textsuperscript{142} The Department's willingness to provide this information could be viewed as an indication that the government would support this method of proof. This does not create an undue burden on the non-service member party as the information is easily obtained without the service member's participation, and would allow the service member to continue to focus on military duties.

By shifting the burden to the non-service member party, the court will receive the information sooner and be able to adjudicate the matter in a more efficient manner. Rather than waiting for a service member stationed overseas to provide all of the information required in the current version of the Act, the information will be readily available. Moreover, the orders that would initially be provided with the motion for a stay would provide the court with a general idea of the service member's responsibilities. Once again, this proposed change of shifting the burden to the non-service member would fulfill the purpose of the Act by allowing the service member to focus on his duties of protecting the country. Overall, shifting the burden to the non-service member would adjudicate the matter more efficiently and

\textsuperscript{141} 50 U.S.C. app. § 522.
provide better protections for service members as well as the country as a whole.

V. CONCLUSION

For the mission’s sake, our country’s sake, and the sake of the men who carried the Division’s colors in past battles—who fought for life and never lost their nerve—carry out your mission and keep your honor clean.143

Many arguments can be made that the changes suggested here are not necessary: OIF and Operation Enduring Freedom are nearly over, the new administration seems unlikely to bring about more conflicts, the current Act provides enough protections despite the suggested changes, etc. However, war is not unique to American history and is a burden carried by mankind throughout the generations. As much as we would like to convince ourselves that the most recent war we endured will be the last, it certainly shall not. We will always have to call upon the brave and the eager to step up and fight on our behalf, either because we as individuals are unwilling or unable. The sacrifice we ask our military members to make is the greatest that a country can ask of its people. Time and time again we have amended these acts of Congress to provide service members with the protection we think they deserve, in return for the sacrifices they make.

Unfortunately, we have reached a point where we have come too far. We are no longer providing protection for our service members; instead, we are actually demanding more of them. We are asking them to not only leave their families and fight on foreign soil, but we are also asking them to take the time to clean up anything they have left behind simply because we have more technology available to us. As history has progressed, we have learned from our mistakes and urged Congress to amend the Act to fix those mistakes. But many times, the amendments have come too late to have any real impact on those who are hurt by it.

Now, in a time where the entire nation is looking forward to a more peaceful future, we should stop and take time to reflect back on the improvements we can make. By making two changes to the Act, providing a six month stay for combat deployed military

143. Fick, supra note 1, at 191.
members and shifting the burden regarding ability to appear to the non-service member, our service members will be provided with the protections they deserve. The peace of mind that we can offer a soldier, sailor, or Marine tomorrow, provides a brighter future for us all.