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In Search of the Uniform: Praises, Problems, and the Quest forConsistency Within the Servicemembers' Civil Relief Act

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Two centuries ago, with the War of 1812 in full force and British soldiers bearing down upon New Orleans, the fledgling legislature of Louisiana adopted a novel defense to support the American military.[1] Recognizing that the unique perils and obligations of military duty demanded an extreme level of attention and exacted an extreme level of stress, Louisiana's legislators decided to follow a model with deep roots in Europe, but no precedent in the young United States, to remove a layer of distraction and strain from the lives of the American troops.[2] Hoping to free American servicemembers from any fears beyond fighting the stalwart enemy, the Louisiana lawmakers passed a bill declaring that "no civil suit or action shall be commenced, or prosecuted before any court of record, or any tribunal of the state, till the first of May next."[3] While would-be plaintiffs quickly challenged the new statute's validity, the state's judiciary ultimately upheld this law as a legitimate exercise of Louisiana's police power.[4]

Decades later, with the nation embroiled in the American Civil War, virtually every state in both the Union and the Confederacy passed similar

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1. H.R. REP. NO. 108-81, at 32 (2003) (listing this statute as the first moratorium law focusing on protecting members of the United States Armed Forces); Johnson v. Duncan, 3 Mart. (o.s.) 530, 546 (La. 1815) ("[A]t the time the act was approved, the enemy was fast approaching, and five days after made his appearance within five miles of the city of New-Orleans. Shortly, after the whole militia of the state was called *en masse* into service, and they were not discharged till the middle of March.").

2. Moratorium measures aimed at individuals serving in the military appeared as early as 555 A.D. in Greece. B. Bernard Wolson, *State Moratory Legislation*, 1 OHIO ST. L.J. 33, 35 (1935). Similar provisions emerged in the laws of ancient Rome and in the laws enacted during the Thirty Years War and the Napoleonic Wars. *Id.*; A.H. Feller, *Moratory Legislation: A Comparative Study*, 46 HARV. L. REV. 1061, 1064 (1933).

3. *See Johnson*, 3 Mart. (o.s.) at 546 (quoting this groundbreaking statute). While some sources deem members of the Armed Forces "service members," this article uses the word "servicemember" to remain consistent with the language of the law that is the focus of this discussion.

4. *Id.* ("The object of this section of the act was . . . to prevent the ill administration of justice which must have been the consequence of keeping the courts open, while the presence of the enemy disallowed any other attempt but that of expelling him. Another object was to facilitate to every member and officer of the court, and to every individual of the community, the means of rendering himself as useful as he could in repelling the invading foe."). *See also* Feller, *supra* note 2, at 1064.

legislation safeguarding military members against civil suits.[5] Perhaps most notably of all, the United States Congress enacted an absolute moratorium on civil actions against servicemembers, and tolled statutes of limitations in civil cases involving any individual serving in the military.[6]

Undoubtedly, such statutes were well-intended.[7] However, these laws also produced an unintended adverse consequence: creditors simply refused to extend credit to borrowers who were members of the American military out of fear that the servicemember would default and leave the creditor without any legal recourse against the debtor in uniform.[8] These statutes also failed to account for situations where servicemembers could reasonably appear in a civil trial or answer some other component of a civil proceeding despite their military status, unnecessarily preventing plaintiffs from obtaining timely resolution of a longstanding debt or other legal matter.[9]

As a result, when the United States entered World War I and discussions regarding federal protections for servicemembers began anew, interested parties (from the Judge Advocate General, to leading academics, to members of Congress) largely agreed that an "arbitrary, inelastic, inflexible" absolute moratorium on civil actions against military members was unnecessary and unwise.[10] However, these policymakers also emphasized the need to protect servicemembers against civil suits in situations where military obligations made it impractical to mount a meaningful defense.[11] Similarly, these leaders paid newfound attention to the number of military members who confronted financial hardships at home, including individuals whose families faced additional financial challenges now that the servicemember was away on military duty rather than working closer to home in a civilian job.[12]

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5. *See* Colin A. Kisor, *Who's Defending the Defenders?: Rebuilding the Financial Protections of the Soldiers' and Sailors' Civil Relief Act*, 48 NAVAL L. REV. 161, 161-62 (2001).

6. Feller, *supra* note 2, at 1081-85; Act of June 11, 1864, ch. 118, 13 Stat. 123; *see also* Wolson, *supra* note 2, at 36 ("[T]he decade prior to the Civil War was replete with moratory statutes, many of which were surprisingly upheld as constitutional.").

7. *See* Robert H. Skilton, *The Soldiers' and Sailors' Civil Relief Act of 1940 and the Amendments of 1942*, 91 U. PA. L. REV. 177, 177-79 (1942); Kisor, *supra* note 5, at 161.

8. *See, e.g.*, Kirk D. Jensen, *Regulatory Theory and the Enforcement of the Financial Protections of the Servicemembers Civil Relief Act*, 55 SANTA CLARA L. REV. 53, 72-73 (2015).

9. *See id.*

10. *Id.* at 73 (quoting 55 CONG. REC. 7787 (1917) (statement of Rep. Webb)).

11. *Id.* at 73 ("Rather than adopt similarly inflexible moratory legislation . . . the bill was intended to give discretion to courts to achieve 'even-handed justice between the creditor and the soldier,' and to avoid where possible the disruption of business interests.").

12. *Id.* at 72-73. This rationale became increasingly prevalent during the 1940s and 1950s, when Congress amended the Soldiers' and Sailors' Civil Relief Act several times. For instance, during the 87th Congress, Congressman Overton Brooks spoke in support of revising the Act with the following justification:

With these considerations in mind, both the House of Representatives and the Senate unanimously passed legislation known today as the Soldiers and Sailors Civil Relief Act of 1918.[13] This set of laws protected military members against default judgments and required courts to stay civil proceedings only if the servicemember's military obligations materially affected his or her ability to appear in court proceedings and meaningfully enter a defense against the suit.[14] Additionally, the Soldiers and Sailors Civil Relief Act installed specific shields for servicemembers against evictions, foreclosures, and repossessions of real and personal property, but only if the servicemember's military duties materially affected his or her ability to satisfy the financial commitment in question.[15]

In the ninety-seven intervening years between this law's passage and the present day, Congress revised and added to this set of statutes on multiple occasions, even changing its name to the Servicemembers' Civil Relief Act (SCRA) in 2003.[16] Currently, the SCRA exists as arguably the most powerful consumer protection weapon in the arsenal of military members serving on active duty, as well as recently discharged veterans and, in several instances, the dependents of active duty servicemembers and newly minted veterans.[17] From provisions staying civil actions and tolling

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> This bill springs from the desire of the people of the United States to make sure as far as possible that men in service are not placed at a civil disadvantage during their absence. It springs from the inability of men who are in service to properly manage their normal business affairs while away. It likewise arises from the differences in pay which a soldier received and what the same man normally earns in civil life.

H.R. REP. NO. 108-81, at 33 (2003).

13. Soldiers' and Sailors' Civil Relief Act, Pub. L. No. 65-103, 40 Stat. 440 (1918).

14. *See id.* at 443-44. The Soldiers' and Sailors' Civil Relief Act of 1918 marked the first appearance of provisions conditioning these protections upon showing that the servicemember's military obligations materially affected his or her ability to meet the obligations in question. *Id*. Such provisions are now a hallmark of the Servicemembers' Civil Relief Act, although this phrase also germinates significant confusion today. *See infra* Part II.

15. *See generally* Soldiers' and Sailors' Civil Relief Act of 1918, 40 Stat. at 440.

16. The original Soldiers' and Sailors' Civil Relief Act expired six months after the conclusion of World War I. Initially, Congress revived the Soldiers' and Sailors' Civil Relief Act in 1940. Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, 54 Stat. 1178 (amended 1990). Subsequently, Congress amended the Soldiers' and Sailors' Civil Relief Act in 1942, 1944, 1948, 1952, 1958, 1960, 1962, 1966, 1972, and 1990 prior to changing the title of the statute to the "Servicemembers' Civil Relief Act" in 2003. Kisor, *supra* note 5, at 163. The most recent large-scale set of amendments occurred in 2003, which was the culmination of a revision effort that began in 1991. Soldiers' and Sailors' Civil Relief Act Amendment of 2003, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified as amended at 50 U.S.C.A. app. §§ 501-96 (West 2004)).

17. *See, e.g.*, Lanourra L. Phillips, Comment, *The Servicemembers Civil "___" Act: Giving the Act the 'Relief' it Deserves*, 34 DAYTON L. REV. 103, 103 (2008) ("This legislation has been described as the 'greatest single statutory source of civil-law protections for American military members and their families.'") (quoting LEG. ASSISTANCE BRANCH OF ADMIN. AND CIV. L. DEP'T. OF J. ADVOC. GEN.'S LEGIS. CTR. & SCH. U.S. ARMY, THE JUDGE ADVOCATE GENERAL'S SCHOOL GUIDE TO THE

statutes of limitations, to safeguards against multiple forms of adverse action, to an annual interest rate cap on debts incurred prior to entering military service, the SCRA stands as a safety net for members of the Armed Forces and their families, affording them special protections in recognition of the unique circumstances inherent to military life.[18]

At the same time, however, the SCRA is not a "get out of debt free card" for military members and their dependents.[19] Instead, the most recent incarnations of these statutes retain similar limits to those imposed through the Soldiers and Sailors Civil Relief Acts.[20] Many provisions within the SCRA constrain the degree of relief available to the military member, and require a showing that the servicemember's military duties materially affected his or her ability to appear in court, to fulfill contractual obligations, or to meet whatever demand is at issue in the civil matter.[21] In this way, the modern-day SCRA continues the nearly century-old goal of trying to strike an appropriate balance between honoring the particular demands and responsibilities of military service and respecting the important needs of creditors and other plaintiffs seeking timely resolution of civil disputes.[22]

This is not an easy balance to achieve. Overall, the current statutes that comprise the SCRA manage to reach this objective to an admirable extent.[23]

SERVICEMEMBERS CIVIL RELIEF ACT 1-2 (Jeffrey P. Sexton ed., 2007) [hereinafter JAG SCHOOL GUIDE]).

18. For details regarding specific SCRA provisions, *see infra* Part I.

19. *See, e.g.*, Roger M. Baron, *The Staying Power of the Soldiers' and Sailors' Civil Relief Act*, 32 SANTA CLARA L. REV. 137, 137 (1992) ("The provisions of the [SCRA] . . . are not intended to *discharge* the civil liabilities of military personnel, but rather merely to *suspend* their enforcement."); Engstrom v. First Nat'l Bank, 47 F.3d 1459, 1462 (5th Cir. 1995)("Although the act is to be liberally construed it is not to be used as a sword against persons with legitimate claims.").

20. *See infra* Part I. As an example, the six percent interest cap, one of the hallmark features of the modern SCRA, first appeared in the Soldiers' and Sailors' Civil Relief Act in the 1940s. Soldiers' and Sailors' Civil Relief Act Amendment of 1942, Pub. L. No. 77-732, § 206, 56 Stat. 769 (1942).

21. *See infra* Part I.

22. R. Chuck Mason, CONG. RESEARCH SERV., R40456, THE SERVICEMEMBERS CIVIL RELIEF ACT (SCRA): DOES IT PROVIDE FOR A PRIVATE CAUSE OF ACTION? 1-2 (2009) ("[The SCRA] seeks to balance the interests of servicemembers and their creditors, spreading the burden of national military service to a broader portion of the citizenry."); Peter M. Evans, *Protecting Those Who Protect Us: A Judicial Primer on the Servicemembers Civil Relief Act*, 45 JUDGES' J. 24, 25 (2006) ("This act does not provide a defense to actions against servicemembers. Rather, it allows a postponement of an action until a time when the defendant is no longer hampered by military service and is therefore able to defend the action properly.").

23. *See, e.g.*, Alfred J. Ludwig, *Special Statutes of Limitation and the Servicemembers Civil Relief Act: Case Closed?*, 71 MO. L. REV. 805, 810 (2006) ("Ultimately, the SCRA enshrines the rights of servicemembers to pursue claims at home while simultaneously protecting those persons who have claims against active servicemembers that might be impossible to reach in a timely fashion."); Baron, *supra* note 19, at 138 ("[T]he [SCRA] also extends protection to the civil adversaries of military personnel. The protections afforded [to servicemembers and their dependents] by the [SCRA] are extensive."). Comparing the specific provisions discussed in Part I with the overly simplistic absolute

Still, in certain sections, the present-day SCRA suffers from a lack of clarity, consistency, and adherence to this law's underlying ideals.[24] Highlighting these areas where the SCRA lacks uniformity — both among its own various provisions and in relation to the ultimate goals of this law — and proposing some potential solutions for these problematic provisions, is the focus of this article.

The article will proceed from here in six parts. Part I provides a more detailed look at the SCRA as it appears today, emphasizing areas where consistency and uniformity among these statutes does successfully exist.[25] Part II delves into the question of what constitutes "material effect" under the modern SCRA, using trends among caselaw through the years in an attempt to more narrowly tailor a largely open-ended phrase, and looks at who bears the burden of proving the existence of material effect to the factfinders in the case.[26] Part III takes up the issue of creditors and other plaintiffs using mandatory arbitration clauses within consumer contracts as a subtle but damaging way to deny SCRA protections to unwitting servicemembers, and demonstrates the inconsistency of such practices with other SCRA provisions that address waiving the protections of these laws.[27] Part IV looks at the SCRA's requirements for appointing counsel, and explains how these provisions can lead to defendants receiving the type of ineffective representation that these provisions are designed to avoid.[28] Part V studies the SCRA's laws tolling the statutes of limitation in civil cases, and questions why this particular set of provisions does not require any showing that military obligations materially affected the servicemember's ability to meet these legal deadlines.[29] Lastly, Part VI calls for a new section within the SCRA tolling expiration of a military member's licenses and certifications if military duties materially affect the servicemember's opportunity to renew these important documents—a measure that will provide a much-needed financial safeguard for the men and women who serve our nation.[30]

I. PURPOSES AND PROTECTIONS: THE SCRA TODAY

Today's edition of the SCRA carries the same purpose that underlies the entire lineage of this law: to "protect those who have been obliged to drop

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moratoriums of the Civil War era demonstrates just how far these measures have come in the realm of seeking equitable results.

24. *See infra* Parts II-VI.
25. *See infra* Part I.
26. *See infra* Part II.
27. *See infra* Part III.
28. *See infra* Part IV.
29. *See infra* Part V.
30. *See infra* Part VI.

their own affairs to take up the burdens of the nation."[31] Applicable to military members on active duty[32] and, in many cases, to recently discharged veterans[33] and to the dependents of servicemembers and veterans,[34] the SCRA is enforceable in all tribunals hearing civil cases in every state, the District of Columbia, and any territory subject to the jurisdiction of the United States.[35]

A party cannot waive rights under the SCRA unless he or she does so during or after the servicemember's qualifying period of active duty military service.[36] This provision guards against the possibility of an individual agreeing to waive SCRA rights before entering the military and having the opportunity to fully comprehend the importance of these specialized consumer protections in his or her life.[37] Furthermore, the SCRA permits only written waivers executed separate from the applicable legal instrument, but clearly specifying the legal instrument to which the waiver applies, preventing drafters from burying SCRA waivers deep within the body of a lengthy contract.[38] Under certain state law antecedents to the SCRA, including New York's Soldiers' and Sailors' Civil Relief Act, requesting that a party waive these rights as a condition to an agreement is an act that carries criminal penalties.[39]

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31. Boone v. Lightner, 319 U.S. 561, 575 (1943).

32. The rather elaborate federal law nuances of precisely what constitutes "active duty" military service could fill an entire article. For the sake of brevity in this discussion, active duty military service generally refers to anybody covered under the definition in 10 U.S.C. § 101(d)(1). Overall, this includes service in the "uniformed services" defined in 10 U.S.C. § 101(a)(5), which encompasses the United States Army, Navy, Air Force, Marines, and Coast Guard. 10 U.S.C.S. § 101(a)(5) (LexisNexis 2016)). It also includes service in the commissioned corps of the National Oceanic and Atmospheric Administration or the United States Public Health Service. *Id.* Members of the National Guard called to service for a period of more than thirty consecutive days in response to a national emergency under 32 U.S.C. § 502(f) also typically receive credit for active duty military service. *See* 50 U.S.C.S. § 3911 (LexisNexis 2016).

33. Protections available within a limited window after discharge from military service include safeguards against any foreclosure, forced sale, or seizure of mortgaged property. *See* 50 U.S.C.S. § 3953(c) (LexisNexis 2016) (storage liens); 50 U.S.C.S. § 3958(a)(1) (LexisNexis 2016) (liens); 50 U.S.C.S. § 4000(a) (LexisNexis 2016) (income taxes). Further details regarding these particular program follow later in this article. *See infra* notes 56-73 and accompanying text.

34. The SCRA defines the term "dependent" in 50 U.S.C. § 3911(4). 50 U.S.C.S. § 3911(4) (LexisNexis 2016). Interestingly, an individual for whom the servicemember provided more than one-half of the financial support in the one hundred and eighty days prior to formally requesting SCRA protection also qualifies as a dependent. *See, e.g.*, Balconi v. Dvascas, 507 N.Y.S.2d 788, 790 (N.Y. Civ. Ct. 1986).

35. 50 U.S.C.S. § 3912(a) (LexisNexis 2016).

36. 50 U.S.C.S. § 3918 (LexisNexis 2016).

37. *See id.*

38. 50 U.S.C.S. § 3918(a)-(b).

39. N.Y. MIL. LAW § 318(2)(a) (2015). Today, most states maintain their own version of the SCRA, applying consumer protections for servicemembers, recently discharged veterans, and their dependents to members of their state's militia forces as well as individuals called to active duty military service. *See, e.g.*, OHIO REV. CODE ANN. § 1349.04 (LexisNexis 2016). While these state laws cannot provide fewer or less-inclusive protections than the safeguards contained in the federal SCRA, a number

Similar to its predecessor statutes dating back to World War I, the SCRA safeguards defendants against default judgments when military service prevents the defendant's participation in the case.[40] A court cannot enter a default judgment in a civil proceeding until the plaintiff files an affidavit declaring that the defendant is not presently serving in the military or stating that the plaintiff cannot reasonably determine whether the defendant is engaged in military service.[41] The court has the power to request a reasonable bond from the plaintiff to indemnify the defendant if the defendant subsequently proves that military service did prevent his or her participation in the proceeding.[42] If the court does enter a default judgment against a presently serving defendant, then the defendant may move to reopen the judgment at any point during his or her active duty service or within sixty days after separating from the military.[43]

If the court learns that the defendant is presently serving in the military, then the court cannot enter any judgment — even a temporary order — without first appointing an attorney to represent the defendant.[44] Upon the appointed counsel's motion, or upon the court's own motion, the court must stay the proceedings for at least ninety days if: (1) appointed counsel is unable to contact the defendant or determine whether a meritorious defense for the defendant exists; or (2) a defense may exist that no one can reasonably present without the defendant present.[45]

A servicemember defendant may also move directly for a stay of at least ninety days.[46] Under the SCRA, a tribunal needs to grant the motion only if the servicemember's military obligations "materially effects" his or her ability to participate in the proceedings.[47] This application for a stay must include a letter from the servicemember's commanding officer stating that the servicemember is not authorized leave to take part in the civil case.[48]

Additional stays are available if the servicemember's military duties continue to materially affect his or her opportunity to directly mount a defense.[49] Overall, courts and other tribunals "have long construed the 'stay' provision of [the SCRA] liberally, retaining broad discretion to

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of these state statutes do offer additional or more inclusive protections than what the federal SCRA provides. *See id.*; *see also* OHIO REV. CODE ANN. § 1349.02 (LexisNexis 2016); OHIO REV. CODE ANN. § 1349.03 (LexisNexis 2016).

40. *See* Baron, *supra* note 19, at 138.
41. 50 U.S.C.S. § 3931(b) (LexisNexis 2016).
42. 50 U.S.C.S. § 3931(b)(3).
43. 50 U.S.C.S. § 3931(g).
44. 50 U.S.C.S. § 3931(b)(2).
45. 50 U.S.C.S. § 3931(d).
46. 50 U.S.C.S. § 3932(a) (LexisNexis 2016).
47. 50 U.S.C.S. § 3932(b).
48. 50 U.S.C.S. § 3932(b)(2)(B).
49. *See* 50 U.S.C.S. § 3932(d).

consider any and all stay-related factors."[50] The SCRA fully suspends any fines or penalties that would otherwise accumulate against a servicemember defendant during the duration of the stay.[51] In addition, a defendant's military service tolls any civil cause of action's statute of limitations for the duration of the defendant's active duty military service, even if the cause of action arose prior to the defendant entering active duty.[52]

Perhaps the most frequently cited—and most frequently misconstrued—SCRA provision establishes a maximum interest rate on certain financial obligations.[53] If a servicemember incurs a debt prior to entering military service, the creditor holding the debt cannot require repayment at an interest rate higher than six percent if the debtor's military service "materially affects" his or her ability to repay that debt at a higher rate.[54] This provision also applies to pre-military service debts that a servicemember owes jointly with his or her spouse, regardless of which party initially incurred the debt.[55] To utilize this protection, the servicemember must provide written notice, including a copy of his or her military orders, to the creditor no later than 180 days following the individual's date of discharge from the Armed Forces.[56] In situations where this section applies, the creditor must fully forgive any interest charged above the six percent cap, which accordingly reduces the required amount of any periodic payments as of the date of entry into active duty service.[57] Merely deferring or postponing an interest rate above six percent does not satisfy the demands of this law.[58]

The SCRA establishes several protections for military members' homes. For example, a landlord cannot evict a servicemember or a servicemember's dependents from a rented home while the military member is on active duty, as long as the monthly rent for the abode falls below an annual congressionally-established rent ceiling.[59] Foreclosures, forced sales, or seizures of mortgaged property are invalid if made while the servicemember mortgagor is on active duty or within one year after his or her date of

50. Atkins v. Alameda Cnty., No. C-03-3566, 2004 U.S. Dist. LEXIS 3493, at *7 (N.D. Cal. Mar. 8, 2004).

51. 50 U.S.C.S. § 3933(a) (LexisNexis 2016).

52. 50 U.S.C.S. § 3936(a) (LexisNexis 2016).

53. 50 U.S.C.S. § 3937 (LexisNexis 2016).

54. 50 U.S.C.S. § 3937(a); 50 U.S.C. § 3937(b).

55. 50 U.S.C.S. § 3937(a)(1).

56. 50 U.S.C.S. § 3937(b)(1).

57. 50 U.S.C.S. § 3937(a).

58. U.S. ATTY'S OFFICE DIST. OF ARIZ., *Servicemembers Civil Relief Act* 1, *available at* http://www.justice.gov/sites/default/files/usao-az/legacy/2011/01/07/Servicemembers_Civil_Relief_Act.pdf. For many years, federal student loans were not subject to this six percent interest cap. However, under the Higher Education Opportunity Act, federal student loans incurred after August 14, 2008 are now subject to the six percent interest cap under the SCRA. *See id.*

59. 50 U.S.C.S. § 3951(a) (LexisNexis 2016).

discharge.[60] Notably, however, an individual's military service does not provide justification for any party to void, breach, or otherwise negate the original mortgage agreement.[61] In this manner, the SCRA finds an appropriate balance between the rights of the creditor and the unique circumstances of the servicemember debtor, protecting the servicemember's most essential interests, but refusing to allow military service to become a tool for the servicemember to completely avoid his or her agreed-upon obligations.[62]

Similar safeguards for military members and recently discharged veterans exist regarding installment contracts,[63] residential leases,[64] motor vehicle leases,[65] storage liens,[66] life insurance policies,[67] income taxes,[68] property taxes,[69] and several other areas in which a servicemember might incur debts or seek to assert property rights.[70] Even phone service contracts receive a special set of provisions within the SCRA, thanks to a recent amendment allowing servicemembers to terminate an agreement for phone services without any penalties if the military member enters into a phone service contract and subsequently receives orders to relocate to an area that does not support the existing service.[71]

However, the SCRA also incorporates limitations on the servicemember's rights in many of these areas, preventing the debtor from leveraging military service as a reason to escape all contractual duties and thus establishing a needed level of protection for opposing parties.[72] Additionally, if a dispute between parties reaches the judicial system, the SCRA typically grants courts considerable latitude to reach a solution that

60. 50 U.S.C.S. § 3953(b).

61. *See, e.g.*, *id.* (the court possesses the power to revise, on its own motion, the contract in question and the corresponding obligation from the veteran debtor "to preserve the interests of all parties.").

62. *See* Mason, *supra* note 22, at 1-2.

63. 50 U.S.C.S. § 3952 (LexisNexis 2016).

64. 50 U.S.C.S. § 3955 (LexisNexis 2016).

65. 50 U.S.C.S. § 3955(b)(2).

66. 50 U.S.C.S. § 3958 (LexisNexis 2016).

67. 50 U.S.C.S. § 3957 (LexisNexis 2016).

68. 50 U.S.C.S. § 4000.

69. 50 U.S.C.S. § 4001(d) (LexisNexis 2016).

70. *See, e.g.*, 50 U.S.C.S. § 3952(a) (providing protections against breach of contract actions when a servicemember's military service materially affects his or her ability to meet contract terms); 50 U.S.C.S. § 3954 (LexisNexis 2016) (governing settlements of cases pertaining to personal property).

71. 50 U.S.C.S. § 3956 (LexisNexis 2016).

72. Primarily, these limits condition the application of these protections upon some showing that military service materially affected the party's ability to meet the obligation(s) under dispute. *See, e.g.*, 50 U.S.C.S. § 3937(c); 50 U.S.C.S. § 3932(b), (d); 50 U.S.C.S. § 3933(b); 50 U.S.C.S. § 3934(a) (LexisNexis 2016); 50 U.S.C.S. § 3931(g); 50 U.S.C.S. § 3957(c).

the court deems equitable, including restructuring a contract to reflect changes in circumstances among the parties involved.[73]

Servicemembers who recognize that they may imminently face financial distress regarding obligations they incurred before entering military service may commence an action before the creditor initiates proceedings, petitioning for anticipatory relief under the SCRA anytime during active duty service or within 180 days of discharge.[74] If the individual's military service materially affected his or her ability to satisfy the debt or other obligation, the court can stay enforcement for a time period equal to the debtor's length of military service.[75] Creditors cannot impose any penalties upon a party for obtaining anticipatory relief under the SCRA.[76] The servicemember remains under a legal duty to pay the amount of all deferred payments after the stay ends.[77] Anticipatory relief can become a useful alternative to bankruptcy for servicemembers, recently discharged veterans, and their families, allowing them temporary relief while avoiding bankruptcy's adverse impacts upon the servicemember's credit history,

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73. *See, e.g.*, 50 U.S.C.S. § 3952(c)(3) (the SCRA permits the court to enter orders that are "equitable to preserve the interests of all parties[]" regarding a servicemember's partially unpaid installment contract.). The SCRA grants similar latitude to the court to take actions such as restructuring a lease between a landlord and a SCRA-covered tenant, revising the terms of an existing mortgage or trust deed, and adjusting the obligations under an existing storage lien. 50 U.S.C.S. § 3951(b)(1)(A); 50 U.S.C.S. § 3951(b)(2); 50 U.S.C.S. § 3953(b)(2); 50 U.S.C.S. § 3958(b)(2).

74. 50 U.S.C.S. § 4021(a) (LexisNexis 2016). Importantly, although the phrases are similar and sometimes mistaken for one another, anticipatory relief under the SCRA is distinct from the often-hypothesized and often-criticized concept of "anticipatory adjudication," where courts are permitted to opine on the record how a likely future dispute might resolve if the controversy were to reach the court in a formal lawsuit. *See, e.g.*, William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 685 (1994) ("[Anticipatory adjudication] would consume potentially enormous resources by requiring courts to decide hypothetical, contingent, inchoate, premature, abstract, not fully developed disputes that, left alone by the courts for a time, might not require judicial resolution at all."). Under the system that Landes and Posner (and many others) reference critically, courts essentially replace the roles of attorneys, advising would-be litigants about the prospects of their success in a potential case. *Id.* at 694, 714-15. Adopting such a role would likely consume an inordinate amount of the court's already-constrained funding and time without reaching legally enforceable outcomes. *See id.* On the contrary, anticipatory relief under the SCRA permits the court to: (1) review an actual controversy that the servicemember or recently discharged veteran recognizes as inevitable; and (2) take immediate and concrete action that avoids an inequitable outcome. *See generally* 50 U.S.C.S. § 4021. By granting justifiable relief to a servicemember or recently discharged veteran, the court conserves its own resources and the resources of the involved parties, thus structuring an arrangement that temporarily reduces the financial pressures upon the servicemembers while ensuring that the debtor remains legally obligated to repay the creditor within a reasonable time. *See* 50 U.S.C.S. § 4021(b). If this system functions correctly, it will guard against the debtor needing to wait and then later engage the legal system's time and money in a far longer and considerably more involved personal bankruptcy proceeding. *See Guide to Understanding Relevant Federal and State Laws Affecting Members of the Military, Reservists and Veterans Living in New York*, NASSAU CNTY. BAR ASS'N, 2010, at 19.

75. 50 U.S.C.S. § 4021(b).

76. *See* U.S.C.S. § 4021(c); *see also* 50 U.S.C.S. § 3919 (LexisNexis 2016).

77. 50 U.S.C.S. § 4021(b).

ability to obtain or maintain a security clearance, and other key areas of concern.[78]

Individuals covered under the SCRA possess a private right of action against parties breaching these statutory requirements.[79] Additionally, the United States Attorney General may commence a civil action in federal court against SCRA violators whose wrongful acts are habitual or raise an issue of significant public concern.[80] Courts may grant successful plaintiffs declaratory relief, equitable relief (including monetary damages), reasonable costs and attorney's fees, and even consequential or punitive damages.[81]

Overall, the present-day SCRA succeeds in its mission of robustly protecting the unique financial situations frequently caused or exacerbated by the challenges of military service.[82] At the same time, the law reassures creditors that their rights still receive significant legal respect, generally forbidding protections to parties who cannot prove that military service materially affected their ability to meet particular obligations, and typically preventing individuals from voiding their obligations entirely.[83] Compared with previous eras' consumer protection statutes regarding military members, the SCRA represents substantial steps forward toward the goal of ensuring fair outcomes for the parties involved in these matters.[84]

However, certain important areas of the SCRA fail to provide results consistent with this law's equitable purposes. Other provisions suffer from inconsistency or vagueness within the SCRA itself. It is to these areas that we now turn in search of a more uniform solution.

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78. *See* JAG SCHOOL GUIDE, *supra* note 17, at 86-89. While bankruptcy provides a legitimate legal mechanism to resolve debts in a fair and reasonable manner for all parties involved, filing for bankruptcy nevertheless can impose barriers upon an individual's security clearance. *See, e.g.*, *How Big Debt is Threatening Security Clearances for Thousands of Troops*, NBC NEWS: U.S. NEWS (Aug. 13, 2012, 10:12 AM), http://usnews.nbcnews.com/_news/2012/08/13/13221657-how-big-debt-is-threatening-security-clearances-for-thousands-of-troops. In recent years, the United States Department of Defense began increasing their level of scrutiny toward individuals with problems that the agency categorized as "delinquent indebtedness." *Id.* Under the Department's analysis, an individual who could not manage his or her personal finances might not possess the level of responsibility necessary to receive clearance for handling sensitive and secret information. *Id.* Similarly, the Department determined that an individual in financial distress might become more willing to sell secret information to enemy operatives. *Id.*; *National Guard and Reservists Debt Relief Act of 2008: Hearing on H.R. 4044 Before the H. Comm. on the Judiciary*, 110th Cong. (Apr. 1, 2008) (statement of Prof. Jack F. Williams) (noting that between 16,000 and 20,000 active duty servicemembers file for personal bankruptcy each year).

79. 50 U.S.C.S. § 4042.

80. 50 U.S.C.S. § 4041 (LexisNexis 2016).

81. 50 U.S.C.S. § 4041(b).

82. *See supra* notes 15-24.

83. *Id.*

84. *See supra* notes 3, 9, 36-80 and accompanying text.

II. LACK OF UNIFORMITY IN MATERIAL EFFECT: SHIFTING BURDENS AND ELUSIVE DEFINITIONS

i. Definitional Inconsistency and Its Problems

Multiple SCRA protections do not apply unless the court or other tribunal decides that military service materially affected the servicemember's ability to meet the obligation in question.[85] However, questions abound regarding what this frequently used phrase actually means within the context of the SCRA. No precise definition, or even a set of guidelines, exists within this law.[86] In fact, according to the federal legislators themselves, "Congress chose not to define in the definitions section of the SCRA . . . what it means to be materially affected because it felt comfortable with the way the courts had interpreted this requirement under [the old Soldiers and Sailors Civil Relief Act]."[87]

This lack of a definition grants tremendous flexibility to individual tribunals, allowing each decider of fact to determine what criteria to impose and how much weight to afford to each piece of evidence presented.[88] To a certain extent, this elasticity is beneficial, permitting a review that takes into account each servicemember's unique set of circumstances.[89] An

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85. *See supra* Part I.

86. Mark E. Sullivan, *A Judge's Guide to the Servicemembers Civil Relief Act*, OREGON.GOV 5, https://www.oregon.gov/OMD/JAG/. . ./scra_encl_4_judges_guide.pdf ("There is no one definition of 'material effect.'").

87. FRANK KINSON & MICHAEL D. SCHAG, SERVICEMEMBERS CIVIL RELIEF ACT § 4.11 (2009) (citing H.R. REP. NO. 81, 108th Cong. (1st Sess. 2003)).

88. *Id.*; Sullivan, *supra* note 86, at 5. Several legislators advocated for a more precise definition of "material effect" when drafting the modern SCRA in 2003, but their proposals ultimately never gained enough traction to result in a change to this area of the law. Jensen, *supra* note 8, at 86.

89. *See, e.g.*, *Boone*, 319 U.S. at 565 ("The legislative history of [the original Soldiers' and Sailors' Civil Relief Act of 1918] shows . . . that judicial discretion thereby conferred upon the trial court instead of rigid and undiscriminating suspension of civil proceedings that was the very heart of the policy of the Act."). In writing the majority opinion in *Boone*, Justice Robert Jackson went on to explain:

> One case may turn on an issue of fact as to which the party is an important witness, where it only appears that he is in [military] service at a remote place or at a place unknown. The next may involve an accident caused by one of his family using his car with his permission, which he did not witness, and as to which he is fully covered by insurance. Such a nominal defendant's absence in military service in Washington might be urged by the insurance company, the real defendant, as ground for deferring trial until after the war. To say that the mere fact of a party's military service has the same significance . . . in the two contexts would be to put into the Act through a burden of proof theory the rigidity and lack of discriminating application which Congress sought to remove by making stays discretionary. We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment.

Id. at 569-70. While *Boone* focused on the Soldiers' and Sailors' Civil Relief Act, this case remains valid law regarding the modern-day SCRA. *See, e.g.*, Kirk D. Jensen, Sasha Leonhardt & Alex

unyielding definition of "material effect" would likely end up excluding worthy situations from SCRA protection and affording these safeguards to cases that the legislators never intended the statute to encompass.[90] Therefore, Congress wisely avoided the pitfalls of establishing an exact meaning of this term within the law.[91]

However, the absence of any statutory guidance whatsoever ultimately creates practical problems when rendering decisions on these issues. Judges are often unfamiliar with military jargon, requirements, experiences, and effects, making it difficult for them to evaluate evidence presented and determine whether a particular set of military conditions truly represent a "material effect" on the servicemember's ability to meet the obligation.[92]

Dempsey, *From Landlord to Locked-Up: The Long Arm of the SCRA*, LAW360 (Aug. 21, 2014, 10:32 AM), http://www.law360.com/articles/569448/from-landlord-to-locked-up-the-long-arm-of-the-scra (citing *Boone* to reinforce the assertion that courts should resolve ambiguities in the SCRA in favor of servicemembers who "'dropped their affairs to answer their country's call . . . .'"); Harris v. Paige, No. 08-2126, 2009 U.S. Dist LEXIS 62366, at *6-7 (E.D. Pa. July 17, 2009) (following *Boone* in determining that the decision of whether a party moving to receive a stay deserves SCRA protections rests with the court's discretion); Johnson v. City of Philadelphia, No. 07-2966, 2007 U.S. Dist. LEXIS 86057, at *5 (E.D. Pa. Nov. 19, 2007) (citing *Boone* in the court's determination that the SCRA maintains the same purposes and goals as the earlier Soldiers' and Sailors' Civil Relief Act).

90. *See* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 629, 637-40, 648 (2002) (providing examples of benefits when statutes contain a degree of ambiguity, permitting judges to exercise a valuable level of discretion when deciding difficult cases); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 338 (1988) (discussing the downfall of many static statutes and positive aspects of statutes that permit interpretation in a dynamic manner, including careful consideration of the size and power of interested groups); Andrew Rudalevige, *This Week in SCOTUS: Who Gets to Decide What a Statute Means?*, WASH. POST (July 3, 2015), https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/07/03/the-week-in-scotus-who-gets-to-decide-what-a-statute-means/ (noting that certain forms of ambiguous statutory language often proved beneficial, as it provided "wiggle room to deal with unexpected real-world circumstances . . . .").

91. To a certain degree, one might draw an analogy in bankruptcy law to the frequently debated definition of a "family farmer" in Chapter 12 bankruptcy proceedings. Through the years, some courts held that the Chapter 12 definition of this term (and associated definitions linked with it) is too rigid and took it upon themselves to provide a less-restrictive structure for the parties to a case. Other courts have strictly adhered to the more restrictive definition. *See* MARTIN A. FREY & SIDNEY K. SWINSON, AN INTRODUCTION TO BANKRUPTCY LAW 450-51 (6th ed. 2013). The SCRA sidesteps this type of controversy in this particular area by refraining from attaching a rigid meaning to "material effect" and instead leaving discretion in the hands of the courts from the outset. However, the SCRA's lack of *any* statutory definition attached to this term also causes notable problems, as discussed below. *See infra* notes 92-129.

92. *See, e.g.*, William B. Brown et al., *The Perfect Storm: Veterans, Culture, and the Criminal Justice System*, 10 JUST. POL'Y J. 1, 25-31 (2013) (discussing the overall lack of military cultural competency among most judges and describing one particular situation where the presiding judge stated that he understood war from watching movies); Porter v. McCollum, 558 U.S. 30, 42-44 (2009) (describing the outcomes of a case in which the trial court judge and several state appellate court judges ignored the potential impacts of the defendant's military service upon his decisions and actions after returning to civilian life); Robert Gavin, *A Look Inside Courtroom 2*, ALBANY TIMES UNION (Oct. 12, 2013, 8:37 PM), http://www.timesunion.com/local/article/A-look-inside-Courtroom-2-4891291.php (describing one court proceeding in which the presiding judge asked a veteran who had served in Iraq whether he had ever killed anybody while serving in combat).

The unfocused nature of this pivotal term weakens the total effect of this law, permitting each tribunal to be as strict or as lenient as it chooses without any baseline standards regarding how the legislature intended this law to be applied.[93] Similarly, the lack of any consistent guidelines can lead to unnecessary litigation, as affected parties (particularly creditors) have no dependable standards that they can use to determine when they need to grant SCRA protections to a servicemember.[94]

Perhaps most disturbingly, the absence of any definition creates unwanted confusion and irregularity regarding which party bears the burden of proving the material effect of military service.[95] In 1943, writing the United States Supreme Court's majority opinion in a landmark case involving the Soldiers and Sailors Civil Relief Act, Justice Robert Jackson addressed this fundamental issue by stating:

> The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sense to know from what direction their information should be expected to come.[96]

Unfortunately, a rather chaotic judicial landscape ultimately emerged from this indecisiveness. Some courts place the burden of proof upon the servicemember seeking to assert the SCRA's protections.[97] Others,

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93. This becomes particularly troubling when considering that some judges are wholly or partially unaware of the SCRA and its purposes. *See* Diana B. Henriques, *Some Creditors Make Illegal Demands on Active-Duty Soldiers*, N.Y. TIMES (Mar. 28, 2005), http://www.nytimes.com/2005/03/28/us/some-creditors-make-illegal-demands-on-activeduty-soldiers.html ("The problem, most military law specialists say, is that too many lenders, debt collectors, landlords, lawyers[,] and judges are unaware of the federal statute or do not fully understand it.").

94. *See* MARK E. SULLIVAN, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES 111 (2006). If the SCRA provided a clearer picture of what constituted "material effect," then one would reasonably expect creditors and other parties dealing with SCRA-covered individuals to adhere to these more compensable requirements, thus leading to fewer instances of civil litigation involving alleged SCRA violations.

95. Phillip J. Tucker, *SCRA: The Real 'Rules of Engagement' and its Impact in Family Law Practice*, 83 OKLA. B.J. 1687, 1688 (2012) ("[T]here is no clear formulation of who has the burden of proof to show material effect.").

96. *Boone*, 319 U.S.at 569.

97. *See, e.g.*, Wilson v. Butler, 584 So. 2d 414, 416 (Miss. 1991); Power v. Power, 720 S.W.2d 683, 684 (Tex. App. Ct. 1986); Plesniak v. Wiegand, 335 N.E.2d 131, 135 (Ill. App. Ct. 1975); Mayfair Sales v. Sams, 169 So. 2d 150, 152 (La. App. Ct. 1964); Pope v. United Fidelity & Guar., 20 S.E.2d 618, 621 (Ga. App. Ct. 1942).

however, require the opposing party to shoulder the burden of proving that the servicemember's military duties did not materially affect his or her ability to satisfy the obligations at issue.[98] Still other tribunals require both parties to provide evidence on this topic, assigning the burden of proof to no one.[99] Consequently, the level of protection that a servicemember receives under this law varies noticeably among the various courts, without any true agreement on the threshold questions of what "material effect" means and who bears the burden of proving its absence or existence.[100]

ii. Trends in Material Effect Findings

Typically, tribunals will employ a "totality of the circumstances" evaluation when deciding whether an individual's military service materially affected his or her ability to meet the obligation under review.[101] Some deciders will look closely at whether entering military service adversely affected the servicemember's net earnings.[102] Others consider how much leave the servicemember has accrued, commonly requesting a copy of the servicemember's Leave and Earning Statement to make this determination.[103] This inquiry may extend to an examination of what leave the servicemember already took and the purposes of taking such leave,

98. *See, e.g.*, Roark v. Roark, 201 S.W.2d 862, 863 (Tex. Civ. App. 1947); Meyers v. Schmidt, 46 N.Y.S.2d 420, 422 (Columbia Cnty. Ct. 1944); Reynolds v. Haulcroft, 170 S.W.2d 678, 680 (Ark. 1943); Bowsman v. Peterson, 45 F. Supp. 741, 743 (D. Neb. 1942); Johnson v. Burken, No. 89C1580, 1990 U.S. Dist. LEXIS 839, at *2 (N.D. Ill. Jan. 25, 1990) (refusing to issue a resolution between the conflicting streams of caselaw regarding which party shoulders the burden of proving material effect of military service).

99. SULLIVAN, *supra* note 94, at 111 ("Although it is logical to require that the burden of proof be on the movant (that is, the [servicemember] requesting the stay), some courts have stated that *both parties* may be required to produce evidence on the issues."); *see In re* Lewis, 257 B.R. 431, 436 (Bankr. D. Md. 2001) ("[O]n a case by case basis, courts should impose the burden of proof upon whichever party is in the best position to show either that the applicant for the stay will be prejudiced by proceeding with the action or whether the applicant has improperly used the Act to prolong the controversy.").

100. *See infra* notes 101-14 and accompanying text; *see supra* notes 94-99 and accompanying text.

101. For an example of one of the first cases demonstrating this multi-faceted approach, *see* Dietz v. Treupel, 170 N.Y.S. 108, 109 (App. Div. 1918). This wide-ranging (and, at times, disappointingly inconsistent) approach to evaluating these cases remains standard procedure today. *See, e.g.*, *infra* notes 104-14.

102. *See, e.g.*, Hempstead Bank v. Collier, 289 N.Y.S.2d 797 (Sup. Ct. 1967); Sullivan, *supra* note 86, at 5 ("An adverse material effect might also be found when military service impairs substantially the member's ability to pay financial obligations."); *see also* Jensen, *supra* note 8, at 76-77 n.112 ("[The SCRA] arises from the differences in pay which a [servicemember] receives and what the same [servicemember] normally earns in civilian life."); Gregory M. Huckabee, *Operations Desert Shield and Desert Storm: Resurrection of the Soldiers' and Sailors' Civil Relief Act*, 132 MIL. L. REV. 141, 146-47 (1991) (stating that Congress carefully considered differences in pay between military and civilian careers before enacting new protections for servicemembers who incurred debt prior to entering active duty military service).

103. Sullivan, *supra* note 86, at 4, 17.

ensuring that the military member did not use leave for pleasure trips while ignoring his or her legal obligations.[104]

The geographic location of the servicemember's current duty station, and the proximity of this location to the tribunal hearing the proceeding, tends to be an influential factor.[105] The nature and time demands of the servicemember's assigned military duties frequently plays a considerable role, too, with courts studying how much time the individual seeking to assert SCRA protections is actually "on duty."[106] In matters where the servicemember requests a long stay of a court appearance, the court will generally evaluate whether that individual is a necessary party to the proceeding and whether the individual's in-person appearance is necessary to mount an effective defense.[107] At times, courts will even analyze whether the individual entered the military as a means of avoiding obligations to repay substantial debts.[108]

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104. *See id.*; *see also* Radich v. Bloomberg, 54 A.2d 247, 249 (N.J. 1947) (finding that the servicemember never demonstrated any interest in the proceedings despite receiving notice of the impending foreclosure and thus did not deserve SCRA protections due to his failure to assert his rights).

105. *See, e.g.*, Lawry v. Lawry, 951 N.Y.S.2d 855, 930 (N.Y. Sup. Ct. 2012) ("There is no allegation in either letter that the husband, between now and November 14, 2012, would be stationed for duty outside the United States or, for that matter, outside Fort Drum (in northern New York) and therefore unable to deliver these goods to his wife."); Pokrzywnicki v. Kozak, 44 A.2d 247, 249 (Pa. 1945) (favoring a filing extension for a servicemember stationed outside the continental United States). However, geographic location is not by itself dispositive. *In re* Diaz, 82 B.R. 162, 165 (Bankr. M.D. Ga. 1988) (holding that although the servicemember debtor was stationed at a military base in Germany, advanced communications technologies precluded any reason for the court to grant the servicemember's request for an indefinite stay of the proceedings); *Power*, 720 S.W.2d at 684 (determining that despite evidence proving that the servicemember was stationed in Germany for three years, the servicemember was represented by counsel in the United States at all times and failed to provide the court with further proof demonstrating how his military duties outside the continental United States justified the court granting an additional stay).

106. One of the more peculiar outcomes in this area came in the case of *Keefe v. Spangenberg*, where the Western District of Oklahoma provided a surprising degree of attention to the fact that the servicemember's military obligations occurred during peacetime rather than during a period of war, and thus refused to grant a stay. *Keefe v. Spangenberg*, 533 F. Supp. 49, 50 (W.D. Okla. 1981). At least one court has held that the SCRA does not entitle a servicemember to any "further benefits" as soon as the servicemember gains notice of the civil proceeding in question. Roslyn B. v. Alfred G., 222 A.D.2d 581, 582 (App. Div. N.Y. 1995).

107. *See, e.g.*, Bubac v. Boston, 600 So. 2d 951 (Miss. 1992) (holding that a servicemember seeking SCRA-based stay of child custody case was not a necessary party to the proceedings and permitting the child support case to proceed without his presence in the courtroom); Hackman v. Postel, 675 F. Supp. 1132 (N.D. Ill. 1988) (deciding that the case could proceed without prejudice to the absent servicemember because his insurance company's counsel could appear at trial and represent the servicemember's interests); Cadieux v. Cadieux, 75 So. 2d 700 (Fla. 1954) (holding that the defendant's personal presence in the proceeding was not indispensible to his own defense); Gilbride v. Algona, 20 N.W.2d 905 (Iowa 1945) (determining that co-defendants who were the servicemembers' close relatives could adequately represent the servicemember's interest in the case, even if the affected servicemembers themselves were not present).

108. *See, e.g.*, Pacific Greyhound Lines v. Superior Court of San Francisco, 168 P.2d 665, 669 (1946) (determining that defendant did not join the military to avoid litigation, even though he enlisted in the Army after the lawsuit began, and deciding that the defendant's in-person appearance was necessary to a just resolution in the case).

One factor, however, is common to virtually every case in which the court engages in a material effect analysis of any depth: the question of whether the servicemember made a meaningful effort to obtain leave from military duties.[109] A servicemember-debtor's failure to demonstrate both a reasonable attempt to seek leave and a commanding officer's clear refusal of this request is far less likely to prevail on the question of military service's material effect.[110] Even in matters where the nature of the servicemember's duties would make obtaining leave unlikely, military members risk a court's rejection of a SCRA request if the servicemember does not affirmatively state that he or she was denied a request for military leave.[111]

Additionally, courts tend to become suspicious when servicemembers request SCRA protections with no sign that the military member intends to meet his or her legal obligations in the future.[112] A military member seeking to assert SCRA protections is thus well-advised to provide a declaration of an estimated timeframe when he or she might likely be available to partake fully in the matter.[113] Even if the servicemember's

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109. *Compare* Cromer v. Cromer, 271 S.E.2d 541, 544 (N.C. App. Ct. 1980) (denied Navy officer's request for additional stay, because the officer had thirty days of available leave and appeared to have military transportation available to him at no cost), *with* Cromer v. Cromer, 278 S.E.2d 518, 520 (N.C. 1981) (overturning the initial denial "in the interest of justice" after Navy officer produced documents from his commanding officer verifying the officer's inability to obtain leave).

110. This factor frequently proves to be fatal to servicemembers' attempts to receive protections under the SCRA. *See, e.g.*, *Harris*, 2009 U.S. Dist. LEXIS 62366, at *7-8; *Hackman*, 675 F. Supp. at 1133-34; Tabor v. Miller, 389 F.2d 645, 646-47 (3d Cir. 1968); Underhill v. Barnes, 288 S.E.2d 905, 907 (Ga. App. Ct. 1982); Palo v. Palo, 299 N.W.2d 577, 579 (S.D. 1980); *Plesniak*, 335 N.E.2d at 137; Graves v. Bednar, 95 N.W.2d 123, 128 (Neb. 1959).

111. *See, e.g.*, Judkins v. Judkins, 441 S.E.2d 139, 142 (N.C. 1994) (deciding that despite a letter from the Department of the Army affirming that the servicemember was scheduled to depart for Southeast Asia, the court denied SCRA protections because the letter neglected to specifically state "whether defendant at any time requested leave to defend this action or whether leave was likely to be granted upon request."); *see also* M&T Mortg. Corp. v. Foy, 15 841 N.Y.S.2d 826 (N.Y. Sup. Ct. 2007) (holding that although defendant was stationed in Japan when foreclosure proceedings against her property began, defendant failed to submit any evidence to the court demonstrating military service's material effect upon her ability to defend herself and thus could not assert protections under the SCRA).

112. *See Palo*, 299 N.W.2d at 579; *Judkins*, 441 S.E.2d at 142 ("For a serviceman to be entitled to a stay under [the SCRA], 'the man in service must himself exhibit some degree of good faith and his counsel some degree of diligence.'") (internal citations omitted); *Keefe*, 533 F. Supp. at 50 ("Spangenberg seeks to have all proceedings in the case suspended until his current, expected discharge date in 1984 . . . Where the proceedings can proceed without prejudicing the civil rights of the serviceman, and where the conduct of his defense is not materially affected by reason of his military service, the Act need not be used for delay."); Norris v. Superior Court, 481 P.2d 553, 555 (Ariz. App. Ct. 1971) ("It is interesting to note that although plaintiffs knew in July 1969 they were going overseas, they delayed seeking the now requested relief.").

113. However, parties opposing an individual's assertion of SCRA rights should recognize that courts consistently reject arguments that the SCRA should not apply simply because another party's interests might face some sort of adverse impact. *See, e.g.*, *In re Watson*, 292 B.R. 441, 445 (Bankr. S.D. Ga. 2003) ("[T]he SCRA applies in the context of a bankruptcy case even though the interests of the creditors may be affected.").

military tasks ultimately prevent the military member from appearing during this speculated window of time, courts tend to look favorably upon servicemembers who demonstrate at least a good faith effort to make themselves accessible to the court.[114]

iii. Recommendations for Greater Uniformity

As shown in the brief summaries above, courts and other tribunals possess tremendous power when rendering a determination regarding the presence or absence of military service's material effect upon a servicemember's ability to meet his or her obligations. In large measure, this is appropriate, given that such fact-specific analyses necessitate a substantial degree of flexibility. However, the incongruous outcomes that can result when a civilian tribunal must render judgments about military-specific facts with no statutory direction whatsoever leads to three brief but important recommendations for amending the SCRA to produce greater clarity and a heightened uniformity of outcomes.

First, Congress should specifically require that a servicemember requesting a SCRA-based stay declare when he or she will likely be available to participate in court proceedings. As discussed above, courts commonly will object when a servicemember seeks a stay and provides no guidance to the tribunal regarding his or her potential future availability.[115] In some cases, such skepticism is justified, while in others, it seems unduly harsh. However, nothing in the existing law expressly requires a servicemember to tell the court when he or she will likely become available.[116] Still, at times, courts will decide on their own accord that the servicemember is trying to unduly delay the administration of justice and will simply assign a new appearance date of the court's own choosing without fully giving the servicemember an opportunity to explain whether this new date would be burdensome.[117]

Establishing a legal requirement for servicemembers to give the court at least a good faith estimate of when potential availability may arise—and, for military members who genuinely cannot predict when they may become available, requiring the servicemember to provide a statement stating why future accessibility to the court is unknown—will alert servicemembers that the court expects such documentation. By extension, it eliminates the unnecessary role of courts attempting to second-guess a servicemember's military orders and obligations without the proper evidence to do so. While

114. *See, e.g.*, *Pacific Greyhound Lines*, 168 P.2d at 669; *Cromer*, 278 S.E.2d at 520.
115. *See supra* notes 110-14 and accompanying text.
116. *See, e.g.*, 50 U.S.C.S. § 3931; 50 U.S.C.S. § 3932.
117. *See* SULLIVAN, *supra* note 94, at 112-13; *see also supra* notes 110-14.

courts certainly should question petitions for stays that seem disingenuous, assigning future court dates without giving the servicemember a chance to fully explain the present situation is a practice that could undermine the SCRA's central objectives.[118] Requiring servicemembers to present such an explanation at the outset should avoid problems of uninformed second-guessing.

Next, the SCRA should establish a presumption of military-induced material effect for any servicemember receiving hazardous duty pay or imminent danger pay at the time of petitioning for SCRA protections or within thirty days of filing such a petition. The United States military issues this additional compensation as a financial recognition for servicemembers performing particularly difficult or dangerous tasks, such as parachute jumping, exposure to toxic pesticides, handling chemical munitions, demolition of explosives, missions in combat areas where servicemembers are "subject to physical harm or imminent danger due to wartime conditions, terrorism, civil insurrection, or civil war," and other particularly perilous military tasks.[119] Given the extraordinarily high level of concentration and awareness that these tasks demand, it is especially important for servicemembers performing these duties to be free from outside worries wherever possible.[120] Therefore, it is sensible to presume that military service warranting hazardous duty pay or imminent danger pay materially affects a servicemember's ability to meet other non-military obligations, affording the servicemember SCRA protections unless opposing counsel can prove otherwise.[121]

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118. Given that the SCRA's drafters intended this law to protect men and women whose military service adversely affected their ability to meet certain civilian obligations, leaving open the chance for courts to guess when a servicemember might be available to appear in a civil proceeding defeats the statute's protective purposes. *See generally supra* Part I; *see also* James P. Pottorff, *Contemporary Applications of the Soldiers' and Sailors' Civil Relief Act*, 132 MIL. L. REV. 115, 116 (1991) ("The premise underlying [the SCRA] is that service members should not be disadvantaged either legally or financially when called to active service."). In fact, the United States Supreme Court has held that tribunals should interpret the SCRA's provisions liberally in favor of SCRA-covered parties. LeMaistre v. Leffers, 333 U.S. 1, 6 (1948) ("The Act must be read with an eye friendly to those who dropped their affairs to answer their country's call."). Requiring the servicemember to inform the court when he or she might likely be available will assist military members. As a court, following this tradition of liberal interpretation in the servicemember's favor should look favorably upon the availability of information that the servicemember submits unless the court discovers clear reason to believe that the servicemember is not acting in good faith.

119. *See generally* 37 U.S.C.S. § 310 (LexisNexis 2016) ("Special Pay: Duty Subject to Hostile Fire or Imminent Danger"); *2016 Pay Book: Special Pays*, MILITARY TIMES (Jan. 19, 2016), http://www.militarytimes.com/story/military/benefits/pay/2016/01/18/2016-pay-book-special-pays/78807876/.

120. *See id.*; *see also* Joel S. Brown & Burt P. Kotler, *Hazardous Duty Pay and the Foraging Cost of Predation*, 7 ECOLOGY LETTERS 999, 999 (2004) ("The incentive behind 'hazardous duty' or 'combat' pay is straightforward: the person risks injury or perhaps death in exchange for additional benefits.").

121. *See Hazardous Duty Incentive Pay*, MILITARY AUTHORITY, http://www.militaryauthority.

Lastly, Congress should provide direction to the courts regarding the ever-nebulous question of who bears the burden of proving the material effect of military service. While it is sensible for lawmakers to allow courts ample freedom regarding the fact-based determinations of what constitutes material effect, Congress should specifically allocate the legal burden of proving the question of material effect to one party or the other.[122]

Any clarity with assigning the burden of proof will represent an improvement over the currently ambiguous status of this area. Already, this article has discussed how to best address cases in which the servicemember is fulfilling duties with a heightened degree of danger, as evidenced by receiving hazardous duty pay or imminent danger pay.[123] For the fairest results in all other cases, Congress could adopt a shifting burden of proof framework somewhat similar to the structure that presently exists in workplace discrimination cases.[124] Initially, as the moving party, the servicemember would bear the burden of establishing a "*prima facie* case" demonstrating that military service materially affected his or her ability to meet the obligations at issue.[125] Certain SCRA provisions already require the servicemember to submit a letter from his or her commanding officer stating that the servicemember could not receive leave or could not attend to other non-military duties.[126] Such a letter should, by itself, satisfy the servicemember's initial burden.[127] Once the servicemember meets this

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com/benefits/military-pay/special-pay/hazardous-duty-incentive-pay.html (last visited July 21, 2016) ("[Hazardous duty pay and imminent danger pay] help to ensure that military members are compensated for taking additional risks while in the line of duty."). Put another way, it seems considerably more likely than not that a servicemember's military service would materially affect his or her ability to meet certain civilian obligations if those military duties included life-or-death obligations such as parachute jumping, exposure to toxic pesticides, handling chemical munitions, demolition of explosives, or missions in combat areas where servicemembers are "subject to physical harm or imminent danger due to wartime conditions, terrorism, civil insurrection, or civil war." *See supra* note 110 and accompanying text. These are high-stakes duties from which a servicemember should face the most minimal number of distractions possible.

122. *See supra* notes 92-100 (discussing various drawbacks related to the present-day absence of specific statutory guidance in this area).

123. *See supra* notes 119-21.

124. This concept in workplace discrimination cases dates back to the United States Supreme Court's landmark 1973 decision in *McDonnell Douglas Corp. v. Green*. The Court later explained this rule as follows: "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

125. Establishing a *prima facie* case means that the party bearing this burden provides enough evidence that he or she will prevail in the case unless the opposing party subsequently submits enough evidence to prove otherwise. *See, e.g.*, State v. Haremza, 515 P.2d 1217, 1222 (Kan. 1973); State ex. rel. Herbert v. Whims, 38 N.E.2d 596, 599 (Ohio App. Ct. 1941).

126. *See, e.g.*, 50 U.S.C.S. § 3932(b)(2)(B); 50 U.S.C.S. § 3955(i)(1).

127. To be clear, this refers not only to situations where the applicable SCRA section specifically demands a letter from the commanding officer, but also should extend to any case where the servicemember obtains a letter from his or her commanding officer declaring that the servicemember

initial threshold, the burden would then shift to the opposing counsel to prove, by a preponderance of the evidence, that military service did not materially affect the military member's ability to satisfy his or her outside obligations.[128]

A few commentators have already called for a shifting burden framework, and a number of courts have already informally adopted this framework, or a procedure similar to it, when handling SCRA matters.[129] However, the absence of any solid legal foundation assigning burden of proof for this pivotal SCRA issue remains troubling, leading to a rather haphazard and uncertain jurisprudential legacy on this topic. To attain necessary uniformity among the nation's jurisdictions, Congress should codify an answer to resolve this burden of proof question that has lingered for far too long.

III. LACK OF UNIFORMITY IN GUARANTEEING PROTECTIONS: THE BACK DOOR OF ARBITRATION

In November 2006, Captain Matthew Wolf, a member of the Judge Advocate General's Corps of the United States Army Reserves, signed an agreement to lease a Nissan automobile for thirty-nine months.[130] Upon entering the lease agreement, Wolf provided Nissan with a substantial advance payment toward the lease's total obligation.[131] Approximately one year after signing the vehicle lease, however, the Army shifted Wolf from

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cannot meet the civil obligation at issue. For a sampling of the currently varying and inconsistent ways that courts treat statements in a commanding officer's statement, *see, e.g.*, *supra* notes 105-14 and accompanying text.

128. Again, this follows the shifting burden concept used in workplace discrimination cases since the mid-1970s. *See* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 401 n.5 (1983). Here, the party opposing the use of SCRA protections would bear the same burdens as the employer in a Title VII trial. *See McDonnell*, 411 U.S. at 802.

129. *See, e.g.*, Mary Kathleen Day, *Material Effect: Shifting the Burden of Proof for Greater Procedural Relief Under the Soldiers' and Sailors' Civil Relief Act*, 27 TULSA L. REV. 45, 60 n.130, 68 (1991) ("It is thus recommended that courts place an initial burden on servicemembers to allege that they are materially affected by their military service . . . Opposing parties may then counter this assertion if they establish that the servicemembers' ability to defend actions is not materially affected by military service. Such use of evidentiary burdens is consistent with the purposes of the Act.") (citing Kathleen H. Switzer, *Mortgage Defaults and the Soldiers' and Sailors Civil Relief Act: Assigning the Burden of Proof When Applying the Material Effect Test*, 18 REAL EST. J. 171, 174 (1989) (stating that a burden-shifting framework would prove considerably fairer and clearer than the existing piecemeal and often-changing approach in this area)). Notably, though, other proposals have not called for the rebuttable presumption that this article recommends in favor of servicemembers receiving hazardous duty pay or imminent danger pay. However, given the level of heightened attention that such difficult and dangerous military service demands, such a presumption is consistent with all of the SCRA's underlying purposes, as described above.

130. Wolf v Nissan Motor Acceptance Corp., No. 10-cv-3338, 2011 U.S. Dist. LEXIS 66649, at *1 (D. N.J. June 22, 2011).

131. *Id.*

the Reserves to active duty.[132] As soon as he received his active duty orders, Wolf attempted to invoke his SCRA protections regarding vehicle leases, returning the automobile to Nissan and requesting that Nissan refund the advance payments that he had already made.[133]

Nissan refused to return Wolf's advance payments.[134] After the company rejected his request, Wolf learned that Nissan had declined to return advance payments to other servicemembers as well.[135] Bringing together many of these wronged military members, Wolf filed a class-action lawsuit against Nissan for conversion and SCRA violations.[136]

Yet Nissan held a powerful trump card: the powerful automobile company never responded to the merits of Wolf's complaints.[137] Instead, Nissan based its reply on a single provision within the lease agreement: a clause requiring that all claims against the corporation go before an arbitrator rather than a court of law.[138] Armed with this one statement, Nissan moved to compel Wolf to argue his case to an arbitrator—who could, at the arbitrator's discretion, decide to ignore the SCRA's protections—rather than permitting Wolf to bring his case to a court bound by the SCRA's safeguards.[139] Furthermore, Nissan sought to dissolve the class-action lawsuit by virtue of a class action waiver provision in the lease agreement.[140] In response, Wolf argued that these provisions were unconscionable under the laws of New Jersey, the state that Nissan had selected in the lease agreement as its forum for hearing disputes, specifically claiming that these waivers undermined the "purposes and policies underscoring the SCRA."[141]

As luck would have it, the United States Supreme Court decided a seminal case regarding the enforceability of mandatory arbitration agreements shortly after the parties filed their briefs regarding Nissan's motion to compel arbitration.[142] In *AT&T Mobility v. Conception*,[143] the

132. *Id.*
133. *Id.* at **2-3.
134. *Id.* ("Despite Wolf's invocation of the SCRA and his provision of proper notices, Nissan refused to refund to Wolf any prorated [capitalized cost reduction] payments.").
135. *Wolf*, 2011 U.S. Dist. LEXIS 66649, at **3, 6.
136. *Id.* at *3.
137. *See id.* at *6.
138. *Id.* at **5-6.
139. *See id.* at **8-9.
140. *Wolf*, 2011 U.S. Dist. LEXIS 66649, at **5-6, 8-9.
141. *Id.* at *6.
142. Wolf initiated his class action lawsuit in 2010. The opposing parties were deeply into preparing their briefs regarding Nissan's motion to compel arbitration when the United States Supreme Court announced its decision in *AT&T Mobility v. Conception* in 2011. *See* David Segal, *A Rising Tide Against Class-Action Suits*, N.Y. TIMES (May 5, 2012), http://www.nytimes.com/2012/05/06/your-money/class-actions-face-hurdle-in-2011-supreme-court-ruling.html?_r=0.

Court issued a sweeping affirmation—and, some would argue, a dramatic expansion—of the Federal Arbitration Act's power. In language particularly relevant to Wolf's case, the Court declared that the Federal Arbitration Act supersedes "state-law rules that stand as an obstacle to the accomplishment of the [Federal Arbitration Act's] objectives."[144] To the Court's majority, the Federal Arbitration Act preempted any state laws and regulations that "interfered" with an apparent Congressional preference toward resolving disputes in arbitration rather than in the judicial system.[145]

Shortly after the Court released its decision in *AT&T Mobility*, Nissan's lawyers filed a letter brief arguing that the Court's findings regarding the Federal Arbitration Act reinforced the necessity of granting Nissan's motion to compel arbitration.[146] Ultimately, this argument successfully stifled any chances that Wolf possessed to keep his case in the courtroom.[147] In a decision frequently bearing shades of the Supreme Court's language in *AT&T Mobility*, the trial court determined that while the arbitration provision in the lease agreement was "indeed expansive,"[148] the SCRA could not "modif[y] or nullif[y] a contractual agreement mutually adopted by private parties" absent "direct authority" within the SCRA to engage in

143. 563 U.S. 333, 351-52 (2011). Originally, Congress enacted the Federal Arbitration Act to counteract a perceived "longstanding judicial hostility to arbitration" and remove barriers for parties to pursue dispute resolution through channels beyond the court system. *See, e.g.*, Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 475 (2006). Subsequent jurisprudence from the United States Supreme Court regarding the Federal Arbitration Act, however, extended far beyond the original legislative goal of placing arbitration agreements on equal footing with other legally enforceable agreements. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 269-70, 273-74 (1995) (applying the Federal Arbitration Act to practically every transaction that involved or affected commerce in some manner); Southland Corp. v. Keating, 465 U.S. 1, 15-17 (1984) (stating that state statutes conflicting with the Federal Arbitration Act were invalid under the Supremacy Clause of the United States Constitution); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 27 (1983) (stating that Congress favored arbitration over litigation as a dispute resolution tool). In *AT&T Mobility*, the Supreme Court specifically focused on the issue of class action lawsuits, overturning a California statute that invalidated class action waivers in arbitration agreements under certain circumstances. According to the Court, such a law directly contradicted the purposes of the Federal Arbitration Agreement and thus could not remain in existence. *AT&T Mobility*, 563 U.S. at 550-52.

144. *AT&T Mobility*, 563 U.S. at 343.

145. *See id.* at 352. This decision, and the lineage of Federal Arbitration Act-based cases that preceded it, sparked a firestorm of controversy, with many commentators arguing that the Court has stretched the impact of the Federal Arbitration Act far beyond Congress' original intent in enacting this statute. *See, e.g.*, Benjamin Pomerance, *Arbitration Over Accountability? The State of Mandatory Arbitration Clauses in Nursing Home Admission Contracts*, 16 FLA. COASTAL L. REV. 153, 158-64 (2015); Arpan A. Sura & Robert A. DeRise, *Conceptualizing* Concepcion*: The Continuing Viability of Arbitration Regulations*, 62 KAN. L. REV. 403, 486 (2013); L. Ali Kahn, *Arbitral Autonomy*, 74 LA. L. REV. 1, 56 (2013); Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. U. L. REV. 131, 185 (2012).

146. Wolf v. Nissan Motor Acceptance Corp., No. 10-3338, 2012 U.S. Dist. LEXIS 44854, at **1-2 n.1 (D. N.J. Mar. 29, 2012).

147. *Id.* at **22-24.

148. *Id.* at **17-18.

such a measure.[149] Additionally, the trial court ruled that the Supreme Court's holding in *AT&T Mobility* prevented any inferences, no matter how potentially justifiable by the SCRA's underlying purposes and traditions of liberal interpretation, of "the SCRA's tacit suppression of or dominance over" the Federal Arbitration Act.[150]

As a result, Wolf and his fellow servicemembers were denied their class-action lawsuit, and Wolf was denied his day in court.[151] Instead, Wolf was required to appear before an arbitrator who could decide to ignore the SCRA's protections, who was not required to abide by rules of evidence and other standards that are commonplace in courts of law, who was not required to issue a publicly disseminated decision of his or her findings in this matter, and whose ultimate decision is typically not appealable to a higher authority.[152] Following the *AT&T Mobility* line of reasoning, the fact that compelling arbitration under the facts of *Wolf* could easily undercut the SCRA's central policy goals took a distant backseat to the apparently essential objectives of the Federal Arbitration Act.[153]

Wolf's case raised a red flag regarding a troublingly vacant area of the SCRA's authority. Today, many commentators state that mandatory arbitration clauses are more prevalent than ever in consumer contracts.[154]

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149. *Id.* at *8.

150. *Id.* at **8-9.

151. *Wolf*, 2012 U.S. Dist. LEXIS 44854, at **22-24.

152. These issues are among the most frequently articulated concerns about bringing a case before an arbitrator rather than a court of law. *See* WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 74 (4th ed. 2007) (stating that arbitration hearings are typically unpublished, thus removing the level of public accountability that judges must face in a court of law); Bryon Allyn Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 HOUS. L. REV. 215, 222 (2008) ("Unlike trials, arbitrations are generally not bound by discovery rules or evidentiary standards. Nor are the results, for the most part, appealable . . . These characteristics of arbitration can have dire consequences for consumers, particularly when such procedures are imposed upon consumers through mandatory arbitration clauses."); Leslie A. Gordon, *Clause for Alarm*, A.B.A. J. (Nov. 2006), http://www.abajournal.com/magazine/article/clause_for_alarm (describing components of arbitration that can place consumers at an unknowing disadvantage); Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 293 (2004) (stating that arbitration can become considerably more costly than litigation for plaintiffs); Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1, 11(2003) (arguing that mandatory arbitration can harm everyday consumers unaware that the contract they signed contains a mandatory arbitration clause somewhere within the agreement); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0 ("[In arbitration], rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients, The Times found.").

153. *See Wolf*, 2012 U.S. Dist. LEXIS 44854, at *8 ("The Court specifically recognized that the SCRA was 'a clearly worded statute[,]' and that it could not 'modif[y] or nullif[y] a contractual agreement mutually adopted by private parties' in the absence of 'direct authority' within the SCRA 'that precludes waivers of class-wide proceedings.'").

154. *See Section 2: How Prevalent Are Pre-Dispute Arbitration Clauses and What are their Main Feature?*, *in* ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET

By extension, one could reasonably infer that more servicemembers than ever before are signing agreements containing provisions that force any legal disputes into private, binding arbitration hearings rather than courtrooms.[155] When entering into these contracts, servicemembers place their own SCRA rights in jeopardy.[156] Given the length and density of many consumer contracts today, and taking into account the fact that mandatory arbitration clauses often are immersed in an ocean of other verbiage within these agreements, servicemembers all too frequently sign away their SCRA rights without comprehending the significant impact of what they are doing.[157]

The SCRA's drafters did not intend these protections to be bargained away lightly.[158] Notably, the SCRA sets strict requirements regarding a servicemember's waiver of his or her SCRA rights.[159] For instance, the waiver must be in writing and contained in a document separate from the applicable legal instrument.[160] The written waiver must specify the legal instrument to which it applies.[161] Individuals cannot agree to waive their SCRA rights before entering active duty military service.[162] Some jurisdictions even possess the authority to impose criminal penalties on parties trying to coerce a servicemember or veteran into waiving his or her SCRA safeguards.[163]

REFORM AND CONSUMER PROTECTION ACT § 1028(a) (Consumer Fin. Protection Bureau 2015); *see generally* Silver-Greenberg & Corkery, *supra* note 152.

155. *See* CHRISTINE HINES, PUBLIC CITIZEN, ARMED FORCES AND FORCED ARBITRATION: DESPITE EFFORTS, THE FINE PRINT STILL CASTS A SHADOW ON FINANCIAL PROTECTIONS FOR MILITARY MEMBERS 4-5 (2012), *available at* http://www.citizen.org/documents/armed-forces-and-forced-arbitration-report.pdf.

156. *See, e.g.*, *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing Before the Comm. on the Judiciary*, 113th Cong. 18-19 (2013) (statement of Vildan A. Teske).

157. *See id.* ("Unfortunately, consumers realize their right to seek redress in our public justice system before a judge or jury is destroyed only after a dispute arises and it is too late to do anything about it."); *Access to Justice for Those Who Serve: Hearing Before the Subcomm. On Oversight, Federal Rights and Agency Rights Comm. on the Judiciary*, 113th Cong. 6 (2014) (statement of John S. Odom) [hereinafter Odom] ("The prevalence of forced arbitration agreements embedded in virtually every mortgage instrument and credit card agreement has caused many of our servicemembers who have disputes with creditors to be denied access to a federal or state court for resolution of their complaint.").

158. Dwain Alexander, *Unenforceability of Certain Pre-Dispute Waivers of Rights Under the Servicemembers Civil Relief Act*, MIL. L. NEWSLETTER (Virginia State Bar, Richmond, Va.), Spring 2014, *available at* http://www.vsb.org/site/sections/military/mlnewsspring2014d/ ("[A] waiver of one, any, or all of a servicemember's rights under the SCRA must be given great consideration and review.").

159. 50 U.S.C.S. § 3918.

160. 50 U.S.C.S. § 3918(a).

161. *Id.*

162. *Id.* ("[T]he waiver is effective only if made pursuant to a written agreement of the parties that is executed during or after the servicemember's period of military service.").

163. *See* N.Y. MIL. LAW § 318(2)(b) (Consol. 2016).

However, all of these worthy protections vanish in the face of a mandatory arbitration clause.[164] A contract containing such a clause effectively constitutes a waiver of a party's SCRA rights, as signing an agreement mandating arbitration exposes the servicemember to the potential of facing an arbitrator who does not abide by the SCRA's protections.[165] One sentence of text can erase all of the important safeguards that the SCRA provides by completely forcing matters out of the judicial system's hands.[166] Indeed, leaders within banks and other powerful industries recognize the power that these clauses can wield over servicemembers, recently discharged veterans, and their families.[167] One industry newsletter for debt collectors even called arbitration a "silver bullet" that could "successfully remove the matter from court and likely end the case in its entirety."[168]

The drafters of the SCRA crafted these necessary protections with far too much detail and care, and with far too many safeguards against waiving these protections without the servicemember's understanding of the impact of waiving these rights, for mandatory arbitration clauses to become an all too convenient way to circumvent this entire law.[169] Unfortunately, bipartisan attempts to pass legislation preventing this damaging practice quickly sputtered.[170] In part, the most recent legislation failed because somewhat broadly painted language opened the door to banning mandatory arbitration in every agreement and transaction involving a servicemember,

164. *See supra* notes 154-58 and accompanying text.

165. Odom, *supra* note 157, at 6 ("[I]f a dispute arises creditors point to a mandatory arbitration clause that may have been signed long before the individual became protected by the SCRA. The creditor then requires the American Arbitration Association rules to be followed—sometimes over a dispute involving only a few hundred dollars in overcharged interest.").

166. Jessica Silver-Greenberg & Michael Corkery, *Failed by Law and Courts, Troops Come Home to Repossessions*, N.Y. TIMES (Mar. 16, 2015), http://www.nytimes.com/2015/03/17/business/wronged-troops-are-denied-recourse-by-arbitration-clauses.html.

167. Many lenders and other businesses specifically target military bases, hoping to persuade servicemembers into high-interest transactions with extensive refinancing plans. Many military members succumb to these practices, pushing them deeply into debt and leaving them with repayment programs where the majority of money goes toward interest and fees rather than toward the principal. *See* Charlene Crowell, *Financial Predators Target Active Duty Military Members*, PHILA. TRIBUNE (May 12, 2015, 5:30 AM), http://www.phillytrib.com/commentary/financial-predators-target-active-duty-military-members/article_cb57914b-f6b0-5c94-a478-f9739ca50601.html; HINES, *supra* note 155, at 5-6. The issue of servicemembers accumulating extensive debt in this manner is hardly new. *See, e.g.*, RAMINDER K. LUTHER ET AL., MIL. FAMILY INST., SCOPE AND IMPACT OF PERSONAL FINANCIAL MANAGEMENT DIFFICULTIES OF SERVICE MEMBERS ON THE DEPARTMENT OF THE NAVY iv (1997).

168. Silver-Greenberg & Corkery, *supra* note 166.

169. *See supra* Part I; *see also supra* notes 154-59 and accompanying text.

170. Silver-Greenberg & Corkery, *supra* note 166. For last year's unsuccessful legislation on this topic, *see* SCRA Rights Protection Act of 2014, S.1999, 113th Cong. (2014); SCRA Rights Protection Act of 2014, H.R. 4068, 113th Cong. (2014).

rather than limiting the bill's scope to transactions covered under the SCRA.[171]

More prominently, however, each bill introduced on this topic received tremendous opposition from extremely powerful and well-organized entities in the American financial sector, including the Securities Industry and Financial Markets Association and the United States Chamber of Commerce.[172] These groups argued that the bills would invite too much frivolous litigation from servicemember consumers, unnecessarily deluging already-crowded court dockets and costing companies considerably more money than the price of arbitration.[173] The higher costs of courtroom litigation, according to opponents of this bill, would inherently force affected companies to charge higher prices for their goods and services, adversely impacting all consumers nationwide.[174] According to one report, lobbyists even met with the most recent bill's bipartisan sponsors and argued that the various industries were willing to police themselves regarding their use of mandatory arbitration clauses, as long as Congress did not "upset the apple cart with a new law" forbidding this practice toward anyone covered by the SCRA.[175]

However, piecemeal self-regulation that individual creditors can freely ignore is not the best answer to this dilemma, particularly given the frequency with which financial institutions violate the SCRA.[176] Instead, the federal government should enact legislation that explicitly and

171. Kevin Carroll, *SIFMA on the Servicemembers Civil Relief Act*, SIFMA (Mar. 19, 2015), http://www.sifma.org/blog/civil-relief-act/ ("The bill, however, as originally drafted, could be read to ban arbitration clauses in *any and all* contracts entered into by a servicemember, and not just those enumerated in the SCRA. While we do not believe that was the intent, our concern was that it painted arbitration clauses with too broad a brush."); *see* SCRA Rights Protection Act of 2014, S.1999, 113th Cong. (2014); SCRA Rights Protection Act of 2014, H.R. 4068, 113th Cong. (2014) (lacking any language stating that the bill extended to only transactions within the purview of the SCRA).

172. Carroll, *supra* note 171; Silver-Greenberg & Corkery, *supra* note 166.

173. Silver-Greenberg & Corkery, *supra* note 166.

174. *Id.*

175. *Id.*

176. *See, e.g.*, *supra* notes 170-73 and accompanying text. For just a few of many recent examples of egregious violations, *see* Michael Corkery, *Bank of America Fined for Violations of Military Relief Law*, N.Y. TIMES (May 29, 2015), http://www.nytimes.com/2015/05/30/business/dealbook/bank-of-america-fined-for-violations-of-military-relief-law.html; *Nearly 78,000 Service Members to Begin Receiving $60 Million Under Department of Justice Settlement with Navient for Overcharging on Student Loans*, U.S. DEP'T OF JUSTICE (May 28, 2015), http://www.justice.gov/opa/pr/nearly-78000-service-members-begin-receiving-60-million-under-department-justice-settlement; Alan Zibel, *Santander Consumer USA to Pay $9.4 Million Settlement*, WALL ST. J. (Feb. 25, 2015, 6:18 PM), http://www.wsj.com/articles/santander-consumer-usa-to-pay-9-4-million-settlement-1424906284; *Service Members to Receive Over $123 Million for Unlawful Foreclosures Under the Servicemembers Civil Relief Act*, U.S. DEP'T OF JUSTICE (Feb. 9, 2015), http://www.justice.gov/opa/pr/service-members-receive-over-123-million-unlawful-foreclosures-under-servicemembers-civil; Allie Bidwell, *Justice Department Takes Action Against Sallie Mae*, U.S. NEWS & WORLD REPORT (May 13, 2014, 4:21 PM), http://www.usnews.com/news/articles/2014/05/13/sallie-mae-must-pay-service-members-60-million-for-student-loan-violations.

uniformly prevents any party from using arbitration as a way to avert the SCRA's requirements. The most direct route, of course, is to ban this practice outright, straightforwardly permitting any individual subject to the SCRA's safeguards to reject arbitration in any transaction covered by the SCRA. In November 2015, Democrat Jack Reed and Republican Lindsey Graham introduced a bill in the United States Senate that would accomplish this worthwhile goal.[177]

Yet if outside pressures from financial sector groups stall this bill once again, another potential avenue of change exists. Signing a contract containing a mandatory arbitration clause is essentially akin to waiving one's SCRA rights.[178] Therefore, the federal government could justifiably enact a law requiring that any agreement with a mandatory arbitration clause satisfy all of the various tests necessary for a SCRA waiver.[179] If established, this statute would demand that all mandatory arbitration clauses in a SCRA-covered agreement appear in a separate written instrument clearly specifying the legal instrument to which the clause applies. Creditors could not enforce the arbitration clause in the SCRA-protected agreement unless the parties executed the agreement during or after the covered individual's term of military service. In addition, this law should require any party inserting a mandatory arbitration clause into any agreement protected by the SCRA to include a statement plainly disclosing the fact that an arbitrator is not bound to follow the SCRA's safeguards.[180]

Preferably, the federal government will enact the legislation that Senator Graham and Senator Reed introduced this year. Doing so would provide the most uniform solution to this prevalent problem. However, if Congress again fails to pass this bill, the federal legislators should, at the very least, draft new legislation that treats mandatory arbitration clauses in the same manner as any other provisions that waive SCRA protections. Either of these measures will represent a significant improvement over the

177. Jessica Silver-Greenberg & Michael Corkery, *Bipartisan Bill Would Protect Service Members' Right to Avoid Arbitration*, N.Y. TIMES (Nov. 20, 2015), http://www.nytimes.com/2015/11/21/business/dealbook/bipartisan-bill-would-protect-service-members-right-to-go-to-court.html.

178. *See generally supra* notes 171-77.

179. Such a law would follow the provisions already described in 50 U.S.C. § 3918. *See supra* notes 155-58 and accompanying text.

180. This is not a requirement designed to burden commercial enterprises. Rather, it merely provides necessary information to the SCRA-covered customer, alerting him or her to the rights that might be waived by agreeing to the proposed bargain. In fact, such notice may prove to help businesses rather than hinder them, reducing the chance of the SCRA-covered customer to successfully prove the contract unconscionable on the grounds that the more "sophisticated" party (the business) tricked the "less sophisticated" party (the customer) into agreeing to these terms. *See, e.g.*, Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 515 (2010) ("[T]o the extent that the validity of arbitration clauses is policed largely by the unconscionability doctrine, courts often mention the sophistication of the parties in determining whether to compel them to arbitrate their dispute.").

current conditions that allow businesses to rid themselves of SCRA obligations far too quickly and surreptitiously.

IV. LACK OF UNIFORMITY IN REPRESENTATION: ESTABLISHING ASSIGNED COUNSEL SAFEGUARDS

For years, USA Discounters sold furniture, electronics, jewelry, and other popular products from several retail outlets located near military bases.[181] Not surprisingly, many of the retailer's customers were servicemembers and their dependents.[182] Frequently, the company financed purchases of these items for consumers using its own credit program.[183] This practice was particularly commonplace among USA Discounters' military member customers, many of whom had mediocre, poor, or non-existent credit histories.[184] Generally, USA Discounters offered purchasers an installment payment plan, with fixed monthly payments carrying high interest rates and fees.[185] Additionally, USA Discounters retained a security interest in the purchased product, allowing the retailer to repossess the property if the customer failed to meet his or her payment obligations.[186]

USA Discounters instigated tens of thousands of lawsuits against servicemembers who were unable to repay their debts under these installment plans.[187] Commonly, these servicemembers and their dependents could not afford an attorney to represent them in actions that

181. Jacqueline Palank, *USA Discounters Seeks Bankruptcy Protection*, WALL ST. J. (Aug. 25, 2015, 7:40 PM), http://www.wsj.com/articles/usa-discounters-seeks-bankruptcy-protection-1440546023.

182. Truman Lewis, *Feds Say USA Discounters Scammed Military Customers; Refunds Pending*, CONSUMER AFFAIRS (Aug. 15, 2014), http://www.consumeraffairs.com/news/feds-say-usa-discounters-scammed-military-consumers-refunds-pending-081514.html.

183. Paul Kiel, *Thank You For Your Service: How One Company Sues Soldiers Worldwide*, PROPUBLICA (July 25, 2014, 11:00 AM), http://www.propublica.org/article/thank-you-for-your-service-how-one-company-sues-soldiers-worldwide.

184. *Id.*

185. Chris Morran, *USA Discounters: Where a $650 Laptop Ends Up Costing Army Private $8,626*, CONSUMERIST (July 28, 2014), http://consumerist.com/2014/07/28/usa-discounters-where-a-650-laptop-ends-up-costing-army-private-8626/. Even before adding the interest and fees, the prices for USA Discounters' items tended to be higher than the average cost of these goods. *See id.*

186. Declaration of Timothy W. Dorsey in Support of First Day Motions at 5-6, *In re* USA Discounters, No. 15-11755 (Bankr. D. Del. Aug. 24, 2015) [hereinafter Declaration of Timothy W. Dorsey], *available at* http://www.mnat.com/files/BankruptcyAlerts/FirstDayDeclaration_08-24-15_USADiscountersLtd.pdf.

187. Rebecca J. Rosen, *35,000 Lawsuits Against Soldiers Struggling to Pay Their Bills*, THE ATLANTIC (July 28, 2014), http://www.theatlantic.com/business/archive/2014/07/35000-lawsuits-against-soldiers-struggling-to-pay-their-bills/375090/; Declaration of Timothy W. Dorsey, *supra* note 186, at 6 ("As of August 15, 2015, the Receivables consisted of approximately 31,394 open Customer Contracts, with an aggregate unpaid gross balance of approximately $114 million and a remaining average term of approximately 19 months.").

USA Discounters brought against them.[188] In these cases, courts consistently fulfilled their SCRA obligations by assigning counsel to represent these defendants.[189]

Yet there was a noticeable fly in the legal ointment. In most of these cases brought in Virginia's courts, judges permitted USA Discounters to select the attorney appointed to represent the defendants' interests.[190] Most of the time, USA Discounters selected the same lawyer to represent their opponents.[191] For a thirty-five dollar fee, Virginia attorney Tariq Louka would send a form letter to his new client, advising the servicemember of his or her basic rights under the SCRA.[192] If the client never contacted Louka, the attorney generally informed the court that the client was unresponsive and recommended that the case move forward.[193] Rarely did Louka ever attempt to proactively contact his assigned SCRA clients beyond sending the form letter.[194] Generally, the court would indeed proceed with hearing the lawsuit, and most of the time, USA Discounters would prevail, commonly with the servicemember not even present in the courtroom due to military obligations.[195] Louka would then require the servicemember defendant, as the losing party in the case, to pay his thirty-five dollar fee, and the company would begin garnishing the servicemember's pay to start settling the debt, including the added interest and fees.[196]

Ultimately, the federal Consumer Financial Protection Bureau ended USA Discounters' financing program, issuing a consent order requiring USA Discounters to pay more than $350,000 in restitution to

188. Paul Kiel, *For Lenders, Gaps in Federal Law Make Suing Soldiers Easy*, PROPUBLICA (July 25, 2014, 11:00 AM), https://www.propublica.org/article/for-lenders-gaps-in-federal-law-make-suing-soldiers-easy.

189. *Id.*

190. Kiel, *supra* note 188. To begin with, the suits ended up in Virginia by USA Discounters' choice, as the SCRA contains no limitations on where plaintiffs can bring a civil suit. *See* Rosen, *supra* note 187. A combination of state laws favorable to businesses and a local attorney whom USA Discounters successfully recommended repeatedly as the assigned counsel for the defendants led USA Discounters to select Virginia as the forum for these suits. *See id.*

191. Kiel, *supra* note 188.

192. *Id.* Each assigned client received the same letter from Louka, declaring in capital letters: "I have not been appointed by the court to defend you on the merits of this case in any way. Mu [sic] only obligation is to review your response and request an additional stay or continuance if I feel it is appropriate given your answers." Morran, *supra* note 185.

193. Kiel, *supra* note 188 ("If the service member didn't respond to Louka's letter, as occurred in 10 [of the 11 cases that ProPublica reviewed], he informed the court that his work was done and the case should proceed.").

194. *Id.* ("He doesn't typically try to call clients, Louka wrote in an email in response to questions from ProPublica.").

195. Morran, *supra* note 185 ("USA Discounters has filed more than 13,470 lawsuits since 2006 and . . . the company almost always wins in court.").

196. Kiel, *supra* note 188.

servicemembers.[197] Importantly, however, the Consumer Financial Protection Bureau's investigation and order focused on certain terms of the company's credit agreement that violated the SCRA.[198] Largely lost amid this outcome was the fact that Louka's actions as the assigned counsel in so many of these cases did not violate any of the SCRA's provisions.[199] Furthermore, USA Discounters was far from the only business to exploit the unfortunate vagueness of the SCRA's assigned counsel requirements to its distinct advantage in the courtroom.[200]

Overall, the SCRA's current assigned counsel framework permits businesses to "obtain default judgments against [servicemember] consumers without giving them any real opportunity to defend themselves."[201] Given that the SCRA exists specifically to avoid such injustices, manipulative scenarios like the ongoing abuses that USA Discounters perpetrated should inspire Congress to augment the SCRA's assigned counsel mandates with specific requirements regarding the duties that the designated lawyer must fulfill.[202]

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197. Consent Order, *In re USA Discounters*, No. 2014-CFPB-0011, 2014 CFPB Admin. Proc. LEXIS 406, **11-23 (Aug. 14, 2014) [hereinafter CFPB Consent Order].

198. USA Discounters charged servicemembers an additional $5 fee as a condition of credit, claiming that this fee would cover services from an allegedly independent entity called "SCRA Specialists LLC." *See* CFPB Consent Order, *supra* note 197, at **10-11. According to the agreements that USA Discounters provided, SCRA Specialists LLC would represent the servicemember's SCRA-related interests, including verifying the servicemember's military service, informing USA Discounters of any change in the servicemember's address, and receiving notices any of lawsuits that USA Discounters filed against the servicemember. *Id.* In actuality, however, SCRA Specialists LLC was far from an independent entity. *Id.* Payments from USA Discounters' customers were SCRA Specialists LLC's sole source of revenue. *Id.* Ultimately, the services that SCRA Specialists provided helped USA Discounters sue servicemembers far more than it helped the servicemembers assert their SCRA rights. *Id.* The Consumer Financial Protection Bureau held that this fee for SCRA Specialists' services violated the Consumer Financial Protection Act of 2010 because it was misleading and deceptive, as USA Discounters charged this fee "in exchange for services that were never provided or had no representational value." *Id.*

199. *See* Kiel, *supra* note 188; Morran, *supra* note 185.

200. Karen Jowers, *Government: Companies Owe $2.5 Million to Consumers for Illegal Debt Collection*, MILITARY TIMES (Dec. 19, 2014, 1:20 PM), http://www.militarytimes.com/story/military/benefits/2014/12/19/companies-owe-consumers-for-illegal-debt-collection-practices/20639907/ (discussing actions from the Consumer Financial Protection Bureau and the attorneys general of North Carolina and Virginia against Freedom Furniture and Electronics, and two affiliated finance companies, for targeting servicemembers with agreements similar to what USA Discounters used); Kiel, *supra* note 188 (discussing Freedom Furniture's tactics of bringing suit in Virginia and suggesting the appointment of the same attorney, William Parkhurst, in every case); Rosen, *supra* note 187 (pointing out that ProPublica's reporting identified at least two other companies, Military Credit Services and Freedom Furniture and Electronics, that engaged in similar practices against servicemembers). In the Freedom Furniture lawsuits, Parkhurst wrote letters to his assigned clients with only cursory descriptions of their SCRA rights, using vague language similar to Louka's unclear statements. Kiel, *supra* note 188.

201. Rosen, *supra* note 187.

202. From the outset, the drafters of the SCRA and its predecessor statutes intended to avoid individuals facing legal or financial disadvantages because of their military service. *See* Pottorff, *supra* note 118, at 116; *see generally supra* Part I (describing the multiple methods through which the SCRA accomplishes this central purpose). In 1918, when the first iteration of the Soldiers' and Sailors' Civil

Currently, if the servicemember has not appeared in the case, the assigned attorney must at least make an effort to locate the servicemember.[203] If the lawyer cannot find the servicemember, then the attorney's actions in the case "shall not waive any defense of the servicemember or otherwise bind the servicemember."[204] Additionally, in a situation where a court denies a servicemember's request for an additional stay of the proceedings, the court must appoint counsel to represent the servicemember's interests.[205]

An assigned attorney has many weapons at his or her disposal under the SCRA.[206] However, concrete obligations governing the lawyer's services are essentially non-existent beyond the minimal terms described above.[207] Such a paucity of expectations enables attorneys like Tariq Louka to engage in the barest possible level of representation of their assigned clients.[208] This exposes the servicemember to virtually the same level of vulnerability to unfavorable default judgments as if the SCRA did not exist at all.[209] Certainly, one could reasonably argue that this high degree of inaction violates ethical canons of the legal profession.[210] However, the federal

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Relief Act was up for debate, the House Committee on the Judiciary declared such protections vital for the national defense, specifically reporting that "freedom from harassing debts will make [military members] better and more effective, more eager [servicemembers], than if their loyalty and zeal is tempered with the knowledge that their country, which demands the supreme sacrifice, grudges a small measure of protection to their families and their homes." Jensen, *supra* note 8, at 72-73 (citing H.R. REP. NO. 181, *reprinted in* 55 CONG. REC. 7789 (1917)). When an SCRA-protected individual cannot even receive effective representation from the lawyer assigned to represent his or her interests, this "small measure of protection" for members of the Armed Forces and their dependents is not achieved.

203. 50 U.S.C.S. § 3931(b)(2).

204. *Id.*; *see also* 50 U.S.C.S. § 3931(d)(2) (requiring appointed counsel to exercise "due diligence" in searching for the servicemember's whereabouts before the court will grant a stay based on counsel's inability to contact the defendant or determine whether the client may possess a viable defense on the merits of the case).

205. 50 U.S.C.S. § 3932(d)(2).

206. *See generally supra* Part I (discussing the multiple safeguards that the SCRA offers).

207. *See* Kiel, *supra* note 188; Morran, *supra* note 185.

208. *See* Kiel, *supra* note 188.

209. One noteworthy example occurred in the case of Army Staff Sergeant David Ray, who, according to ProPublica, was stationed in Germany when USA Discounters sued him in 2013. *Id.* Following its customary procedure, USA Discounters recommended Louka's appointment as Ray's counsel, and the Virginia court followed the business's recommendation. *Id.* When Ray received Louka's form letter, he wrote to Louka and said that he had followed all of USA Discounters' requirements "to the letter." *Id.* He also told Louka that he could not attend court proceedings in Virginia due to his military obligations overseas. *Id.* Instead of requesting evidence of Ray's military obligations, thus building a case that these obligations materially affected Ray's ability to participate in the civil case, and requesting a stay under the SCRA, Louka recommended that the case proceed because Ray had "stated that he is not disputing this debt." Kiel, *supra* note 188. In this case, Ray received no benefits from the SCRA's provisions, even though key protections may have allowed him to receive, at a minimum, a stay of the legal proceedings against him in Virginia while he was serving in Germany. *Id.*

210. For instance, the scenarios described in this section involving the representation of servicemembers by Louka and Parkhurst implicate the ethical duties of diligent and prompt representation, open communication with a client and responsiveness to a client's questions and

government should not merely assume that the existence of these ethical standards will guarantee the level of representation that the SCRA's drafters intended.[211] To truly protect the interests of servicemembers whose military service materially affects their ability to participate in their own defense, Congress needs to establish further conditions to ensure that individuals covered under the SCRA's assigned counsel requirements actually receive meaningful representation.

For instance, the SCRA should expressly demand that any assigned attorney make a meaningful effort to contact his or her client and enter a meaningful defense for the client under the circumstances of the case. To instill these protections, Congress could utilize language already contained within the American Bar Association's Model Rules of Professional Conduct. For example, Rule 1.3 declares that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[212] Rule 1.4 states that an attorney shall:

> 'reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests for information,' and 'explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'[213]

All of these ethical professional thresholds are also worthy requirements by which attorneys assigned under the SCRA need to abide to meet the law's central purposes.[214]

Congress should also establish some basic provisions regarding conflicts of interest within the SCRA's assigned counsel program. In particular, the federal government should enact legislation to expressly prohibit a creditor from recommending an attorney to represent a SCRA-

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requests, and avoiding relationships that conflict or may conflict with a current client's best interests without informing the client of such relationship. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3, 1.4, 1.8 (2016) [hereinafter MODEL RULES OF PROF'L CONDUCT].

211. *See generally* Pottorff, *supra* note 118 (discussing the original purposes for which Congress enacted the SCRA). While the Model Rules of Professional Conduct serve as the model for the ethical rules in most states, and violations of such rules may lead to attorney discipline, the SCRA should contain its own specific safeguards against unethical or ineffective representation from attorneys assigned to represent individuals under this law.

212. MODEL RULES OF PROF'L CONDUCT R. 1.3.

213. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2)-(4), (b).

214. These requirements would guard against attorneys who fail to do more than send a cursory letter to the servicemember outlining certain SCRA rights and who also fail to respond to reasonable requests for information and assistance from the servicemember—a cursory level of representation which falls short of these professional standards. *See supra* notes 190-200 and accompanying text.

protected debtor to the court.[215] Returning again to the Model Rules, Rule 1.8 states that a lawyer "shall not . . . knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" unless the lawyer informs the client of the conflict in writing and the client gives informed consent to continue the representation.[216] In particular, the client must receive "a reasonable opportunity to seek the advice of independent legal counsel" before giving informed consent.[217] Exercising independent professional judgment in representation seems difficult to accomplish when the opposing party in the case provides the tribunal with suggestions of whom to appoint. Considering that an attorney typically has a financial incentive to seek a greater number of appointments to cases, Congress would help preserve the independence of counsel assigned to represent a SCRA-protected individual if the opposing party had no part in making or even offering ideas to the court for these appointments.[218]

The SCRA should also offer a precise structure for any SCRA-covered party to petition the court for new counsel if the originally assigned attorney's representation is ineffective. Importantly, the law should not allow defendants to discharge their assigned lawyer and receive new appointed counsel merely because of petty disagreements between client and attorney.[219] However, if the servicemember can demonstrate to the court that the assigned counsel is utterly unwilling or unable to represent the SCRA-protected party's interests in the instant proceeding, the SCRA should require the court to appoint new counsel so this individual's interests are meaningfully represented, just as the drafters of the SCRA originally intended.[220]

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215. This would expressly guard against the problematic situation that arose in the USA Discounters and Freedom Furniture series of lawsuits. *See supra* notes 190-200 and accompanying text. If the SCRA is to truly protect the rights of men and women whose ability to meet certain civilian obligations is materially affected by military service, then the opposing party in a civil proceeding should play no role in determining whom the court should appoint as counsel to safeguard those interests. Anything less than this level of full independence from the opposing party is a conflict that could lead to less than adequate representation of the SCRA-protected individual's legal rights.

216. MODEL RULES OF PROF'L CONDUCT R. 1.8(a).

217. MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(2).

218. The analogy between Rule 1.8 and the SCRA situations described in this section is not exact. However, a lawyer whom a frequent plaintiff commonly recommends as assigned counsel inherently has a financial stake in receiving as many appointments as possible. A lawyer with this interest is not likely to represent his or her assigned client as zealously as a lawyer appointed by an independent tribunal without any influence from opposing counsel.

219. One would reasonably anticipate that each court will have its own assigned counsel procedures. However, the federal government should establish a baseline set of standards that all tribunals must comply with, ensuring that SCRA-covered individuals have some avenue for receiving new assigned counsel if the original counsel proves to be legitimately ineffective. At the same time, however, these basic standards should prove rigorous enough that a SCRA-covered individual cannot successfully jettison his or her assigned counsel on a whim.

220. *See supra* notes 11-23, 118, 202.

Finally, the federal government should specify a payment system for lawyers appointed under the SCRA. Existing law does not create a uniform compensation structure for these assigned attorneys, leaving each individual jurisdiction to resolve this question.[221] Somewhat similar to compensation for attorneys assigned in cases covered under the modern federal Criminal Justice Act,[222] the SCRA should expressly authorize reimbursement of reasonable expenses to the assigned attorney, including, but not limited to, essential travel, hiring experts, paying for investigative services, and other out-of-pocket costs necessary to represent the client effectively.[223] Additionally, the federal government should—after conducting the proper research—establish a presumptive hourly rate of compensation for SCRA-appointed lawyers.[224] Individual jurisdictions should retain the right to provide data justifying their use of an hourly rate above or below the presumptive federal rate, but Congress should enact a uniform nationwide hourly compensation rate that jurisdictions must use in absence of localized data demonstrating otherwise.[225] Establishing a fair rate of remuneration ensures that these assigned attorneys receive just compensation for their services. Just as importantly, developing this program helps incentivize lawyers assigned to these cases to provide more skilled representation than they might provide if proper compensation were not provided.[226]

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221. JOHN COSTELLO, SERVICEMEMBERS CIVIL RELIEF ACT (SCRA): LEGAL PROFESSIONALS GUIDE TO BENEFITS AND PROTECTIONS FOR MILITARY MEMBERS 21 (2014), *available at* http://www.lockelord.com/~/media/Files/NewsandEvents/Publications/2014/07/2014_07_SCRABooklet_Costello.pdf ("The SCRA is silent with regard to how the appointed attorney is to be compensated.").

222. *See* Robert P. Wolf, *The Criminal Justice Act of 1964: A Critique*, 7 WM. & MARY L. REV. 331, 331-32 (1966) (explaining several reasons why federal lawmakers determined that a basic structure for compensating attorneys appointed in criminal cases was a keystone to protecting the constitutional rights of criminal defendants).

223. *See id.* ("The net result is that the attorney . . . is no longer required to finance the expenses of the defense from his pocket nor forego the employment of investigators or experts who may be essential to the defense because he is unable to personally finance such services."). Financial assistance funding these components of an effective defense is as important to SCRA-related civil cases as it is in criminal cases.

224. This idea was another cornerstone of the Criminal Justice Act of 1964. *See* Dudley B. Bonsal, *The Criminal Justice Act—1964 to 1976*, 52 IND. L.J. 135, 142-46 (1976). Applying this concept to attorneys appointed as assigned counsel under the SCRA holds equal importance in the context of protecting the rights of servicemembers and their dependents in civil proceedings.

225. This permits states to provide greater compensation to attorneys assigned under the SCRA, but prevents states from offering grossly low levels of compensation to these assigned attorneys.

226. *See, e.g.*, CHRISTOPHER P. BANKS & DAVID M. O'BRIEN, THE JUDICIAL PROCESS: LAW, COURTS, AND JUDICIAL POLITICS 160 (2016) (listing "attorney incompetence or indifference" as an unfortunately all too common result of assigned counsel programs with low compensation plans); John A. Birdsall, *Low Assigned-Counsel Compensation Shortchanges Justice*, WISC. LAWYER (Sept. 2015), http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=88&Issue=8&ArticleID=24309 (arguing that low assigned counsel compensation rates can lead to ineffective representation and even threaten the attorney's ethical duty to remain independent from outside influences and give undivided loyalty to every defendant).

Today, the nonexistence of specific requirements within the SCRA's assigned counsel provisions threaten to undermine the fundamental objectives behind this law. Enacting the measures described within this section will provide significant safeguards for defendants eligible for assigned counsel under the SCRA, providing an additional layer of necessary protections for individuals covered under these assigned counsel statutes.

V. LACK OF UNIFORMITY IN STATUTES OF LIMITATIONS: THE ODD ABSENCE OF MATERIAL EFFECT

Twenty-three years ago, the United States Supreme Court released its decision in *Conroy v. Aniskoff*,[227] a matter that seemingly resolved a longstanding debate regarding the Soldiers and Sailors Civil Relief Act. The case centered on Thomas Conroy, a Colonel in the United States Army, who failed to pay taxes on his real estate in Danforth, Maine for three years while serving on active duty.[228] In leveraging Maine laws that allow a locality to acquire tax-delinquent real property, the Town of Danforth seized and sold Conroy's land.[229] In particular, the town relied upon a Maine statute that gives a taxpayer an eighteen-month "redemption period" during which he or she could recover seized property by paying all of the overdue taxes along with all applicable interest and fees.[230]

Conroy brought suit in federal district court against the town.[231] In his petition, he argued that the SSCRA preserved the redemption period for the full duration of his military service, thus preventing the town from obtaining good title over the land until eighteen months after Conroy's discharge from military service.[232] The trial court, however, adamantly rejected Conroy's position, stating that Conroy could not prove that his military service materially affected his ability to pay his property taxes.[233] To the court, suspending any limitations period "for career service personnel who had not been 'handicapped by their military service'" would produce an "absurd and illogical" result.[234] Conroy appealed, but a divided Supreme Judicial Court of Maine affirmed the lower court's decision.[235]

By the time the United States Supreme Court granted *certiorari* to hear this case, the issue of whether the SSCRA tolled the statute of limitations in

227. 507 U.S. 511 (1993).
228. *Conroy*, 507 U.S. at 513.
229. *Id.*
230. *Id.*
231. *Id.* at 513-14.
232. *Id.* at 514.
233. *Conroy*, 507 U.S. at 513-14.
234. *Id.* at 514.
235. *Id.*

a civil action during a servicemember's time on active duty had divided along two opposing jurisprudential tracks.[236] Some courts had determined that the SSCRA stopped a statute of limitations from running only if military service materially affected the servicemember's ability to participate in the legal action.[237] Others, however, decided that the SSCRA automatically and unconditionally suspended the statute of limitations without demanding any showing of material effect.[238]

To the majority of the United States Supreme Court's justices, however, the answer was straightforward.[239] Without any language in the SSCRA specifically requiring a showing of material effect before permitting tolling of the statute of limitations, the Court's majority determined that no tribunal could presume the existence of such a significant condition.[240] According to the justices, the section of the SSCRA concerning statutes of limitation "is unambiguous, unequivocal, and unlimited"—not only in what it said, but also in what it did not say.[241] To the justices, the drafters of the law would have created provisions specifically mandating a showing of material effect before suspending the statute of limitations if they had truly intended to adopt such a requirement.[242] Additionally, beyond the "plain meaning" of the statute, the Court's majority stated that "[t]he long and consistent history and the structure of this legislation therefore lead[s] us to conclude that" the lawmakers in Congress "made a deliberate policy judgment placing a higher value on firmly protecting the service member's redemption rights than on occasionally burdening the tax collection process."[243]

In a separate concurring opinion, however, Justice Antonin Scalia asserted that the legislative history behind the SSCRA was inconclusive at best and contradictory at worst.[244] Delving back to the congressional debates of 1917, and pointing out that even this analysis did not represent a

236. *See id.* at 513 ("In an unreported opinion, [the trial court] noted that some courts had construed [the section of the Soldiers' and Sailors' Civil Relief Act concerning statutes of limitations] literally, but it elected to follow a line of decisions that refused to toll the redemption period unless the taxpayer could show that 'military service resulted in hardship excusing timely legal action.'").

237. *See, e.g.*, Crouch v. United Techs. Corp., 553 So. 2d 220, 223 (Ala. 1988); Pannell v. Continental Can Co., 554 F.2d 216, 225 (5th Cir. 1977); Bailey v. Barranca, 488 P.2d 725, 727-30 (N.M. 1971); King v. Zagorski, 207 So. 2d 61, 63-67 (Fla. 1968).

238. *See, e.g.*, Donohue v. Ward, 378 S.E.2d 261, 264-65 (S.C. App. Ct. 1989); Barstow v. State, 742 S.W.2d 495, 499-501 (Tex. App. Ct. 1987); McCance v. Lindau, 492 A.2d 1352, 1355-57 (Md. Ct. Spec. App. 1985); Ricard v. Birch, 529 F.2d 214, 217 (4th Cir. 1975).

239. *Conroy*, 507 U.S. at 517-18.

240. *Id.* at 518.

241. *Id.* at 514.

242. *Id.* at 514, 516.

243. *Id.* at 516-17.

244. *Conroy*, 507 U.S. at 518-27 (Scalia, J., concurring) (examining the debates, statements, and circumstances surrounding the Soldiers' and Sailors' Civil Relief Act of 1918, the Soldiers' and Sailors' Civil Relief Act of 1940, the Soldiers' and Sailors' Civil Relief Act Amendments of 1942, and the Selective Service Act of 1948).

complete picture of the history underlying this statute, Justice Scalia pointed to numerous written and spoken statements from lawmakers indicating that the entire law hinged on proof that military service somehow prejudiced the covered individual's ability to meet a particular obligation.[245] In fact, Justice Scalia even pointed to prior instances when the United States government successfully argued that Congress intended the law tolling statutes of limitations to apply only if the individual in question could demonstrate the material effect of military service upon that individual's ability to take part in the case.[246] Nevertheless, Justice Scalia ultimately sided with the majority, holding that while he rejected the majority's legislative history argument, he agreed that "[t]he language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."[247]

Reasonable arguments appear to exist on both sides of the dispute regarding the lawmakers' intent when drafting the statute of limitations tolling provisions of the SSCRA and, more recently, the SCRA.[248] The issue more relevant to this article, however, is whether Congress indeed needs to correct an erroneous omission within this particular portion of the SCRA. Today, the outcome in *Conroy* remains the controlling Supreme Court precedent in this area.[249] Unfortunately, this decision continues to open the door to a statute that sticks out like a proverbial sore thumb amid the other SCRA provisions, with no obvious reason for receiving such contrary treatment.[250] Considering this peculiar outlier within the SCRA and the ability of this provision to destabilize the core of the SCRA's mission, Congress should follow the advice contained in Justice Scalia's concurring opinion and correct this mistake within the existing law.

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245. *See id.*

246. *Id.* at 527 ("[E]ven the Government itself, which successfully urged in this case the position we have adopted, until recently believed, on the basis of legislative history, the contrary.") (citations omitted).

247. *Id.* at 528.

248. *See id.* at 516-18, 520-26 (Scalia, J., dissenting). An even broader issue raised within this case is the overall role that legislative history should play in deciding cases. This question, however, while worthy of significant and detailed deliberation, is beyond the scope of this article.

249. *See, e.g.*, Ludwig, *supra* note 23, at 819 n.128 ("This view of career servicemember eligibility, firmly established by the Supreme Court in *Conroy v. Aniskoff* . . . is seemingly entirely dominant in recent caselaw. The opposing view, that a demonstration of prejudice is required before career servicemembers can invoke the tolling provisions of the SCRA, has not been upheld since *Conroy*.").

250. *Compare* 50 U.S.C.S. § 3936(a) (tolling the statute of limitations for a SCRA individual without requiring any showing of the material effect of military service), *with* 50 U.S.C.S. § 3937(c); 50 U.S.C.S. § 3932(b); 50 U.S.C.S. § 3932(d); 50 U.S.C.S. § 3933(b); 50 U.S.C.S. § 3934(a); 50 U.S.C.S. § 3931(g); 50 U.S.C.S. § 3957(c) (requiring a demonstration that military service materially affected the individual's ability to meet the obligation in question before any of these SCRA protections will apply).

The pivotal moment in the history of this law occurred when lawmakers moved away from the absolute moratorium on civil actions against servicemembers and developed a more balanced model in its place, taking into account both servicemembers' protections and creditors' rights.[251] As already discussed, this increased emphasis on equitable solutions benefited parties on all sides of this issue.[252] One of the essential hallmarks of achieving this more balanced approach arises from ensuring that the SCRA applies to only those servicemembers whose military service materially affects their ability to meet certain obligations.[253] However, by not attaching the requirement of demonstrating material effect of military service to the provisions tolling statutes of limitation, Congress created the distinct possibility of allowing servicemembers to unnecessarily shirk their legal duties for substantial periods of time.[254]

Commentators put forth multiple reasons why statutes of limitations are a necessary feature of the American legal system, including promoting the efficient resolution of disputes, reducing the overall volume of pending litigation, vindicating meritorious claims, decreasing overall costs of litigation, increasing the level of equality between the plaintiff and defendant, minimizing the destruction of evidence, providing the involved parties with peace of mind, and preserving the integrity of the legal system.[255] All of these reasons are worthy objectives to pursue, not only for reaching a fair outcome in each individual legal dispute, but also for safeguarding the long-term health of the judicial system as a whole.[256]

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251. *See supra* notes 8-23 and accompanying text.
252. *See supra* notes 7-10 and accompanying text.
253. *See supra* notes 19-23, 72 and accompanying text.
254. The Court of Special Appeals of Maryland stated:

> In holding that [the SCRA provisions tolling the statute of limitations in a civil proceeding] is to be applied unconditionally to those on active military duty, we are cognizant of the possibility that absurd results may ensue. Conceivably, a career military serviceman could for any reason or no reason at all wait 30 years or more before filing a law suit. The Damoclean sword, suspended by a single section of the SSCRA over the head of the civilian populace, was placed there by Congress. It is for Congress to sheath or remove that sword, if it so desires.

See McCance, 492 A.2d at 1357.

255. *See* Roger J. Perlstadt, *Interlocutory Review of Litigation-Avoidance Claims: Insights from Appeals Under the Federal Arbitration Act*, 44 AKRON L. REV. 375, 398-99 (2011); Ryan Walters, Comment, *Worth the Toll? The Dormant Commerce Clause's Effect on Statutory Tolling Based on a Defendant's Absence from the State in Texas and Other States*, 62 BAYLOR L. REV. 628, 631-32 (2010); Adam Bain & Ugo Colella, *The United States Supreme Court and Federal Law: Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 571-72 (2004); Patrick J. Kelley, *The Discovery Rule for Personal Injury Statutes of Limitations: Reflections on the British Experience*, 24 WAYNE L. REV. 1641, 1644-45 (1978).

256. These provisions held an important place in the American judicial system since the nation's earliest days. Fewer than two decades after the inception of the United States, Chief Justice John

Indeed, all of these goals are important enough that only a particularly compelling competing interest should overcome the fundamental interests that they preserve.[257]

For nearly a century, the federal government has determined that military members and their dependents involved in civil legal proceedings should not face a disadvantage due to obstacles that the realities and challenges of military service impose.[258] This is a specific and highly compelling reason for tolling statutes of limitation for a reasonable period of time when an individual's military service actually prevents his or her meaningful participation in the case.[259] Yet there is no equivalently compelling reason for automatically tolling statutes of limitation in every civil matter involving a military member. At times, situations will emerge where an individual engaged in active duty military service will not face any true hardships in attending court proceedings or otherwise taking part in the civil action.[260] In these situations, blindly stopping the clock on the statute of limitations for the duration of the individual's military service does not outweigh the important objectives that enforcing a statute of limitations promotes.[261] Instead, some examination into whether military duties materially affected the servicemember's ability to take part in the civil matter is warranted to determine whether a compelling reason for tolling the statute of limitations truly exists.[262]

Marshall declared that a legal action without a statute of limitations "would be utterly repugnant to the genius of our laws." Adams v. Woods, 6 U.S. 336, 342 (1805).

257. *See* Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 82 (2005); Bain & Colella, *supra* note 255, at 517-21.

258. *See generally supra* Part I; *supra* notes 11-23, 118, 202.

259. For examples of this situation, *see supra* note 228.

260. For examples of this situation, *see supra* note 229.

261. For example, the Supreme Court of New Mexico stated:

> Mr. Bailey's contention, distilled to its essence, is that regardless of all other factual and legal considerations, by virtue of the quoted statute, he must automatically prevail. If his position be meritorious, it would mean that a career service person could buy real estate, ignore and disregard his tax responsibilities for perhaps 30 years and then at his leisure during the redemption period following discharge, reclaim the property.

Barranca, 488 P.2d at 728. *See also Zagorski*, 207 So. 2d at 65 ("[C]ertainly [the SCRA] was not reasonably intended to provide a cloak of immunity to a property owner who, even though in military service, was in no way disadvantaged from the ordinary civilian in payment of his normal ad valorem taxes for the upkeep of government.").

262. Without this level of scrutiny, servicemembers could use their military duties as a proverbial "crutch" to avoid their legal obligations. This could result in unpaid taxes, debts left unresolved, and lengthy delays in all forms of civil legal proceedings that deny closure to the other parties involved. Statutes of limitations exist within the American legal system for many beneficial purposes. *See supra* notes 255-57 and accompanying text. Allowing a military member to automatically circumvent all of these objectives without demonstrating that military service prejudiced his or her ability to meet the

Such a review is consistent with most of the SCRA's major provisions, including sections regarding stays of proceedings, foreclosure prevention, the six percent interest rate cap, income tax debt, installment contracts, and many more key sections of this law.[263] Nothing in substance or in broader policy goals distinguishes statutes of limitations from these other areas to a level that justifies requiring a demonstration of material effect for all of these areas except for statutes of limitations. Today, however, this strange dichotomy does exist in the SCRA.

Whether this peculiar omission is an error in drafting or an error in judgment does not particularly matter today. Far more important is the necessity of clarifying this language for the future. Using the outcome in *Conroy* as both a warning signal and a call to action, Congress should proceed with amending this particular portion of the SCRA.[264] By adding into the statutes of limitations provision the same requirements and standards for proving the material effect of military service, Congress will improve the SCRA's effectiveness in meeting the balanced objectives that are a hallmark of this law's success.

VI. LACK OF UNIFORMITY IN SCOPE: PREVENTING HARM FROM EXPIRED LICENSES

Overall, the SCRA addresses direct financial protections for servicemembers, recently discharged veterans, and their family members, along with the ability of these individuals to participate effectively in civil legal proceedings.[265] This last section, however, recommends an amendment focusing on a less-direct—but just as important—realm of safeguarding these rights for men and women who serve in the United States Armed Forces. Military service commonly requires an individual to leave his or her home of record, often for a substantial period of time.[266] When this occurs, the SCRA permits the servicemember to retain his or her original state of legal residence even though military orders have sent him or her elsewhere.[267] However, the SCRA does not provide protections to

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obligations in question hearkens back to the absolute moratory legislation that the drafters of the modern SCRA strove to avoid. *See supra* notes 7-23 and accompanying text.

263. *See* 50 U.S.C.S. § 3937(c); 50 U.S.C.S. § 3932(b); 50 U.S.C.S. § 3932(d); 50 U.S.C.S. § 3933(b); 50 U.S.C.S. § 3934(a); 50 U.S.C.S. § 3931(g); 50 U.S.C.S. § 3957(c).

264. *See* C*onroy*, 507 U.S. at 517-18.

265. *See supra* Part I.

266. *See* Molly Clever & David R. Segal, *The Demographics of Military Children and Families*, 25 J. FUTURE OF CHILDREN 13, 13, 26 (2013), *available at* https://www.princeton.edu/futureofchildren/publications/docs/Chapter%201.pdf; Jessica Dickler, *Military Families Face Financial Hurdles*, CNNMONEY (Mar. 27, 2012, 5:51 AM), http://money.cnn.com/2012/03/27/pf/military-families/.

267. 50 U.S.C.S. § 4025(a) (2016). Additionally, the SCRA affords these same protections to military spouses. 50 U.S.C.S. § 4025(b).

these individuals in another imperative area: federal and state-issued licenses that may expire while the servicemember is away from home.[268]

This lack of protection becomes particularly problematic when it comes to a military member's state-issued driver's license and related items.[269] Frequently, a servicemember's driver's license, registration, or mandatory automobile insurance coverage will expire while the military member is stationed on active duty outside his or her home state.[270] Due to the priority role that military obligations play in a servicemember's daily life, military members often forget to contact their home state's Department of Motor Vehicles to renew their license, registration, or insurance.[271]

Under normal circumstances, such a situation can trigger a fine, a license suspension, or both.[272] Thankfully, most states have recognized the unique situations that military members face while serving beyond their home state's borders by enacting laws that extend a veteran's period of time to renew his or her license.[273] Unfortunately, too many of these statutes do not go far enough, offering only a short window of time after discharge for the veteran to renew his or her license and failing to properly consider the challenges that many recently discharged veterans face when transitioning back to civilian life.[274] As a result, veterans in these states can too easily

268. Congress recently heard substantial testimony on this issue from John S. Odom, Jr., a United States Air Force veteran who is considered to be one of the nation's leading SCRA-focused practitioners today. Odom, *supra* note 157, at 12 (supporting the addition of an amendment to the SCRA preventing expiration of licenses and continuing education requirements for any period when a servicemember is entitled to hostile fire pay and also within180 days after the period of entitlement to hostile fire pay ends).

269. *See Drivers in the Military*, DMV.ORG, http://www.dmv.org/military-drivers/ (last visited July 23, 2016) [hereinafter *Drivers in the Military*] ("Obtaining or renewing your driver's license or vehicle registration if you are military personnel can sometimes be a challenge due to your location or specific job.").

270. *Id.*; *see Insurance Issues for Military Members and their Families*, NAT'L ASS'N. OF INSURANCE COMM'RS, http://www.naic.org/consumer_military_insurance.htm (last visited July 23, 2016).

271. This is the type of scenario that the drafters intended the SCRA to cover, recognizing that military duties require substantial attention and often occur at the expense of remembering certain other obligations at home. *See supra* notes 7-19 and accompanying text.

272. *See, e.g.*, Rick Davis, *On the Road: Penalty for Expired Tags is Up to Each Law Enforcement Agency*, THE PRESS-ENT. (June 29, 2014, 6:01 PM), http://www.pe.com/articles/tags-696919-expired-vehicle.html; Casey McNerthney, *What Happens If You Forget Your Driver's License Renewal?*, SEATTLE POST-INTELLIGENCER (Apr. 29, 2009, 12:06 AM), http://blog.seattlepi.com/seattle911/2009/04/29/what-happens-if-you-forget-your-drivers-license-renewal/.

273. *Driver's License Renewal*, AMERICAN AUTO. ASS'N DIGEST OF MOTOR LAWS, http://drivinglaws.aaa.com/tag/drivers-license-renewal/ (last visited July 23, 2016) [hereinafter *Driver's License Renewal*]; *Drivers in the Military*, *supra* note 269.

274. *See, e.g.*, ARK. CODE ANN. § 27-16-902(b)(1) (LexisNexis 2016) (allowing an extension of the expiration date for a maximum period of thirty days following the servicemember's date of discharge); CAL. VEH. CODE § 12817(a) (LexisNexis 2016) (allowing renewal of a driver's license without penalty within thirty days following a servicemember's date of discharge); MD. CODE ANN. TRANSP. § 16-102(8) (LexisNexis 2016) (permitting a thirty-day extension of a driver's license expiration date after an individual separates from military service); MONT. CODE ANN. § 61-5-104(5)

lose their driver's licenses for a significant length of time, an event that substantially hampers a veteran's ability to obtain financial and emotional stability during this difficult immediate post-military period.[275]

Recently discharged veterans also confront problems regarding expired professional licenses.[276] Today, approximately thirty percent of all workers in the United States require some form of occupational license or certification to practice their professions.[277] In a scenario similar to the forgotten driver's license renewals, military obligations away from home can understandably cloud servicemembers' abilities to remember when their professional license expires. Returning home to find that a professional license is no longer valid can pose considerable financial hardships for a recently discharged veteran and his or her family, delaying the servicemember from returning to the career that he or she practiced prior to entering the military.[278] For a veteran confronting debts, an expired professional license becomes particularly problematic, preventing the

(LexisNexis 2015) (allowing a thirty-day grace period to renew a Montana driver's license after separation from military service); R.I. GEN LAWS § 31-10-8 (LexisNexis 2016) (providing a procedure for a recently discharged veteran to apply for a special driver's license within thirty days of discharge that will allow the veteran a longer time period to renew his or her license). As of this writing, certain states do not offer any automatic renewal extensions for servicemembers and recently discharged veterans, including Delaware, Georgia, Kentucky, Minnesota, and North Carolina. *See Driver's License Renewal*, *supra* note 273.

275. For a discussion of common negative financial and emotional consequences resulting from losing a driver's license, *see* CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., R41762, CHILD SUPPORT ENFORCEMENT AND DRIVER'S LICENSE SUSPENSION POLICIES 10-15 (2011).

276. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-790R, MILITARY PERSONNEL: DOD NEEDS DATA TO DETERMINE IF ACTIVE DUTY SERVICE HAS AN IMPACT ON THE ABILITY OF GUARD AND RESERVISTS TO MAINTAIN THEIR CIVILIAN PROFESSIONAL LICENSES OR CERTIFICATES 1 (2008) [hereinafter CIVILIAN PROFESSIONAL LICENSES] ("While on active duty, reservists may be unable to take the required professional development courses or periodic tests needed to retain their professional currency in fields such as accounting or software engineering."). This same problem can occur with any individual serving on active duty in any branch of the Armed Forces who leaves behind a career requiring a professional license or certification. In the National Defense Authorization Act for Fiscal Year 2008, Congress even mandated a study on the impact of military service upon servicemembers with such careers. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110181, § 516, 122 Stat. 3, 100 (2008). However, a lack of data from the Department of Defense on this topic led to an inconclusive result in this ultimate report.

277. Melissa S. Kearney et al., *Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It is Time to Examine Occupational Licensing Practices*, BROOKINGS (Jan. 27, 2015, 11:00 AM), http://www.brookings.edu/blogs/up-front/posts/2015/01/26-time-to-examine-occupational-licensing-practices-kearney-hershbein-boddy.

278. Notably, the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is the primary federal law governing the rights of employees called to military service, does not require the extension of professional licenses. *See, e.g.*, Samuel F. Wright, *Delaware Falls Short in Accommodating Deployed Service Members and Military Spouses*, SERVICE MEMBERS L. CTR. (2015) [hereinafter *Delaware Falls Short*], *available at* Law Review No. 15051; Samuel F. Wright, *My Professional License Has Expired—Help!*, SERVICE MEMBERS L. CTR. (2005), *available at* Law Review No. 171.

veteran from obtaining the source of income on which the veteran likely depended to fulfill his or her financial obligations.[279]

To help veterans avoid these problems, the federal government should suspend expiration of any professional license or transportation-related license for the servicemember's entire period of active duty plus at least ninety days after discharge from the military, if military service materially affected the servicemember's ability to renew the license in question.[280] Additionally, this amendment to the SCRA should include a mechanism for a veteran to request an extension beyond the mandatory ninety days after discharge from the military if the veteran demonstrates continued hardships that are linked to his or her military service, such as a veteran suffering from certain service-connected injuries that prevent him or her from completing the license renewal requirements within the immediate ninety-day window.[281]

This amendment would allow servicemembers to focus on their military obligations and duties without worrying about keeping track of the expiration date for their civilian licenses, and would also prevent servicemembers from facing significant penalties if an expiration date passes while they are on active duty. Furthermore, by mandating at least a ninety-day grace period after the servicemember returns home, this alteration to the law recognizes the multiple responsibilities that a recently discharged veteran must fulfill and the challenges that they may face upon re-entering the civilian world.[282] The SCRA already grants a ninety-day

279. *See Delaware Falls Short*, *supra* note 278 (describing the problems that an expired professional license can cause for a returning veteran); CIVILIAN PROFESSIONAL LICENSES, *supra* note 276, at 4-5.

280. Again, this is consistent with the purposes of the SCRA, allowing the servicemember to focus on his or her military duties without the distractions of worrying about a professional license or certification renewal date. *See, e.g.*, *Delaware Falls Short*, *supra* note 278, at n.3 ("While Joe was serving our country in Afghanistan, it was most important that he maintain his entire focus on his military duties, to keep himself and his colleagues safe. It would have been tragic if Joe had allowed himself to be distracted by the need to meet Delaware CPE requirements in order to facilitate his return to civilian employment.").

281. This could pose a logistical challenge, given that the United States Department of Veterans Affairs often takes considerable time issuing a service-connected disability rating to veterans filing claims with this agency. Leo Shane III, *VA: Claims Backlog is Better, But is Never Going Away*, MILITARY TIMES (Dec. 29, 2015, 11:42 AM), http://www.militarytimes.com/story/military/benefits/veterans/2015/12/29/2015-va-backlog-goal-missed/78010282/; Alan Zarembo, *VA is Buried in a Backlog of Never-Ending Veterans Disability Appeals*, L.A. TIMES (Nov. 23, 2015), http://www.latimes.com/nation/la-na-veterans-appeals-backlog-20151123-story.html. To overcome this potential problem, any entity responsible for professional licensure or certification should accept any information in a veteran's service medical records as acceptable proof of a service-connected disability. A servicemember or veteran can request this information, which states that this individual incurred or exacerbated the disability in question while in military service, relatively easily.

282. For just a sampling of the extensive literature about readjustment challenges that veterans may face in the immediate period after returning home, *see generally* Nina A. Sayer et al., *Reintegration Challenges in U.S. Service Members and Veterans Following Combat Deployment*, 8 SOC. ISSUES &

stay of a civil action when military service materially affects the servicemember's ability to participate in the proceeding, prevents creditors from evicting a servicemember and his or her family while the servicemember is on active duty, tolls the statute of limitations in a civil matter for the duration of the servicemember's active duty service, and provides many other protections against servicemembers facing ill effects from their inability to meet certain civilian sector requirements while fulfilling their attention-consuming military assignments.[283] Adding a provision to the SCRA protecting servicemembers' licenses continues this established and necessary tradition of removing financially related barriers when the consuming responsibilities of military service impose potential impediments for servicemembers, veterans, and their families.

Such a proposal may prove controversial. Typically, states maintain control over licensure for many professions.[284] Issuing or suspending a person's driver's license or other transportation-related license is likewise the traditional province of the individual states.[285] Given this conventional deference to state authority in the area of licensing, critics may argue that a SCRA provision suspending license expirations in this manner represents an example of improper federal overreaching.[286] Some detractors may also claim that this amendment prevents states from maintaining control over the health and welfare of their residents, establishing situations where a recently discharged veteran can instantly return to work in a job requiring a professional license without demonstrating that he or she still meets the quality control standards necessary for practicing that profession.

POL'Y REV. 33 (2014); Rich Morin, *The Difficult Transition from Military to Civilian Life*, PEW RESEARCH CTR. (Dec. 8, 2011), http://www.pewsocialtrends.org/2011/12/08/the-difficult-transition-from-military-to-civilian-life/; RAND CORP., INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY (Terri Tanielian & Lisa H. Jaycox eds., 2008), *available at* http://www.veterans.rand.org; *see also* Matthew J. Friedman, *Acknowledging the Psychiatric Cost of War*, 351 NEW ENG. J. MED. 75, 75 (2004). Certainly, some veterans will not experience any of the difficulties described in these reports upon coming home. Still, these veterans need to rebuild the lives they left behind when they joined the military—a process that inherently comes with a learning curve and can take considerable time.

283. *See supra* Part I.

284. *See, e.g.*, Edie Brous, *Common Misconceptions about Professional Licensure*, 112 AM. J. NURSING 55, 55-59 (2012).

285. *See* Jad Mouawad, *T.S.A. Moves Closer to Rejecting Some State Driver's Licenses for Travel*, N.Y. TIMES (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/business/tsa-moves-closer-to-rejecting-some-state-drivers-licenses-for-travel.html (describing the varying driver's license requirements implemented by various states).

286. Issues regarding the relationship between the federal government and the governments of the individual states in the licensing arena appear with relative frequency before the United States Supreme Court. For one recent example, *see* Chamber of Commerce v. Whiting, 563 U.S. 582, 587 (2011) ("Because we conclude that the State's licensing provisions fall squarely within the federal statute's saving clause and that the Arizona regulation does not otherwise conflict with federal law, we hold that the Arizona law is not preempted.").

However, such arguments should not prevent enactment of this amendment. The SCRA already enters several traditional state law domains, including contract disputes, property matters, and even the civil proceedings of state courts and other tribunals.[287] Nothing places licensing laws in a higher legal bracket that renders it untouchable. Well-established law requires the federal government to provide for the welfare of the United States military, a wide category that includes ensuring that servicemembers do not face undue hardships as civilians because of their decision to volunteer for military service.[288] Providing a reasonable mechanism to prevent servicemembers from losing their licenses while on military duty falls into this legal realm in which the federal government possesses considerable power.[289] Nothing in this amendment to the SCRA imposes an undue burden upon the states, as it establishes a sensible deadline for a recently returning veteran to renew his or her licenses, which prevents a veteran's license from being un-renewed indefinitely.[290] In fact, one could argue that states should actually benefit from this change in the law, as it will help veterans return to the workforce faster and, by extension, fulfill any financial obligations sooner.

Furthermore, this addition to the SCRA does not prevent entities from exercising quality control over veterans practicing certain professions. In many professions, license renewals do not require the applicant to pass a new test demonstrating their aptitude for the job.[291] Instead, many applications to renew an occupational license request that the individual fulfill certain administrative requirements within a set period of time, but never demand an assessment of professional abilities. For the vocations that do demand some form of skills-based test for license renewal, one would reasonably expect the veteran's workplace supervisors to diligently ensure that the returning veteran's work meets the profession's standards of safety and quality. Proper day-to-day supervision in this area will likely identify any substandard performance far better than a standardized licensing test.[292]

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287. *See supra* Part I.

288. Mason, *supra* note 22, at 1 (explaining that Congressional authority to enact the SCRA arises in large measure from U.S. CONST. art. I, § 8, cl. 12, which empowers Congress to raise and support the Armed Forces of the United States).

289. *See id.*; *see also* Jensen, *supra* note 8, at 72 n.79.

290. A number of states already offer a ninety-day grace period for veterans whose driver's licenses expire while on active military duty. *See Driver's License Renewal*, *supra* note 273.

291. In the practice of law, for instance, an attorney does not need to take a new bar examination to renew his or her law license. The same holds true for a number of other professions. Even a driver's license typically does not require a new test of driving skills to renew.

292. It seems difficult to imagine that the results of one standardized test could provide a picture of an individual's ability to perform his or her job successfully that is more accurate than day-to-day supervision and assessment of that individual's work. *See* LAWRENCE M. RUDNER & WILLIAM D. SCHAFER, WHAT TEACHERS NEED TO KNOW ABOUT ASSESSMENT 17 (Glen W. Cutlip ed., 2002) ("All tests contain error . . . High-stakes tests, such as licensure examinations, should have very little error.").

Furthermore, the ninety-day post-discharge deadline for license renewal ensures that the veteran undergo any skills assessment required for re-licensing within a reasonable window of time, ensuring that the veteran will face any required examinations soon after returning to civilian life.

Overall, the benefits that this amendment would provide to servicemembers, veterans, their family members, and creditors seeking repayment from an individual recently returning from military service outweigh any burdens that this change in the law may impose upon the individual states. In a sense, this provision would represent an unconventional move, as it deals with an area that traditionally falls under state jurisdiction.[293] However, this article has already demonstrated that the SCRA is filled with similar measures recognizing the unique circumstances of military service and preventing these conditions from causing unnecessary hardships for the men and women serving in the Armed Forces, while still ensuring that parties to whom these individuals owe financial obligations are not placed at an unreasonable disadvantage.[294] This addition to the law would continue this longstanding legacy.

VII. CONCLUSION

For more than two centuries, the American legal system has reacted to the exceptional requirements of military service and the need for servicemembers to fulfill these duties without facing additional stresses about legal matters in the civilian realm.[295] Special protections under both federal and state laws for the individuals who serve in the Armed Forces are now engrained in our nation's legal tradition.[296] Within the last century, however, federal and state laws began establishing a greater balance between the safeguards shielding members of the military and the civilian parties to whom these individuals owed an obligation.[297] Today, the SCRA offers an array of protections to servicemembers on active duty, recently discharged veterans, and servicemembers' and veterans' dependents.[298] Still, this set of statutes also recognizes creditors' needs in multiple areas, refusing to attach SCRA protections without a showing that military service materially affected the individual's ability to meet the civil obligations in

293. *See, e.g.*, Stephanie Hall Barclay, *Retained by the People: Federalism, the Ultimate Sovereign, and Natural Limits on Government Power*, 23 WM. & MARY BILL RTS. J. 257, 259 (2014).
294. *See supra* Part I.
295. *See* Kisor, *supra* note 5, at 162.
296. *See* Feller, *supra* note 2, at 1081-85; Wolson, *supra* note 2, at 162.
297. *See supra* notes 15-22.
298. *Id.*

question, and preventing anyone from using the SCRA as an instrument for avoiding debts and duties entirely.[299]

Unquestionably, the modern edition of the SCRA provides a more evenhanded and mutually beneficial approach than its predecessor statutes that imposed absolute moratoriums on civil actions against servicemembers.[300] Federal lawmakers between World War I and the present day increasingly tailored the SCRA to ensure that it provides relevant protections to military members and their loved ones while still respecting the interests of civilian parties seeking a just resolution to civil matters. At present, this set of statutes likely represents the finest approach to balancing these interests in our nation's history.

However, certain damaging flaws continue to plague the SCRA. This article focused on areas where the SCRA presently lacks uniformity, often due to ambiguous language that leads to inconsistent application of these provisions.[301] Unfortunately, this lack of uniformity, while seemingly subtle and minute at times, ultimately leads to confused and incompatible results that often contradict the purposes for which Congress passed these statutes and that undermine the level of balance that lawmakers sought to maintain in these provisions.[302] This article highlighted these troubling areas and proposed potential ways to provide clarity and uniformity that will avoid these currently problematic outcomes.[303]

This article focused first on the lack of uniformity regarding the burden of proving the material effect of military service, a threshold requirement for most protections contained within the SCRA.[304] After examining the ongoing inconsistency among courts grappling with this question and reviewing the various factors that courts typically weigh when deciding whether material effect exists, this article called for three new SCRA provisions to ensure fairness to all parties in these situations.[305]

First, Congress should specifically require an individual seeking a stay under the SCRA to make a good faith effort to inform the tribunal when he or she will likely become available to participate in proceedings, thus eliminating the unnecessary role of courts attempting to second guess a servicemember's military orders and assigned duties.[306] Secondly, the federal government should institute a presumption of military-induced material effect for all servicemembers receiving hazardous duty pay or

299. *See generally* 50 U.S.C.S. §§ 3901-4043.
300. *Compare supra* notes 15-22, *with* Jensen, *supra* note 8, at 72-73.
301. *See supra* Part II.
302. *See supra* Part II.
303. *See supra* Part II.
304. *See supra* Part II; *see also* Sullivan, *supra* note 86, at 5.
305. *See supra* Part II.
306. *See supra* Part II.

imminent danger pay at the time of petitioning for SCRA protections or within thirty days of filing such a petition.[307] Lastly, for all cases not involving a servicemember receiving hazardous duty pay or imminent danger pay, the federal government should establish a shifting burden of proof framework.[308] Initially, the government should require the servicemember to establish a "*prima facie* case" of material effect of military service.[309] If the servicemember successful does so, then the burden should shift to the opposing counsel to prove, by a preponderance of the evidence, that military service did not materially affect the servicemember's ability to satisfy his or her outside obligations.[310]

This article then moved to an all too frequently exploited area of this law: the use of mandatory arbitration clauses in contracts to completely circumvent the SCRA's otherwise-required consumer protections.[311] After reviewing the strict requirements that the SCRA's drafters established regarding any waiver of SCRA provisions, and noting the parallels between waiving the SCRA's protections and signing a lengthy consumer contract containing a mandatory arbitration clause buried within the agreement's language, this article recommended new legislation permitting any individual subject to the SCRA's safeguards to reject arbitration in any transaction covered by the SCRA.[312] Alternatively, the federal government could enact a new SCRA provision requiring any party seeking to add a mandatory arbitration clause in a contract involving a SCRA-eligible consumer to obey all of the SCRA's provisions regarding a waiver of SCRA rights.[313] Either change would follow the drafters' original objective of ensuring that individuals eligible for the SCRA do not unknowingly forfeit their legal safeguards.[314]

Thirdly, this article addressed the damaging lack of specificity within the SCRA's assigned counsel provisions.[315] The current absence of standards governing the lawyer's actual representation of the SCRA-protected party has caused problems in past cases, with certain attorneys providing only the most minimal assistance to their assigned clients and failing to even adequately inform their clients of the SCRA's safeguards.[316] To avoid this troubling scenario in future cases, this article recommended

307. *See supra* Part II.
308. *See supra* Part II.
309. *See supra* Part II.
310. *See supra* Part II.
311. *See supra* Part III.
312. *See supra* Part III.
313. *See supra* Part III.
314. *See Boone*, 319 U.S. at 575.
315. *See supra* Part IV.
316. *See, e.g.*, Kiel, *supra* note 188; Morran, *supra* note 185.

amendments to this section of the SCRA with language mirroring relevant provisions of the American Bar Association's Model Rules of Professional Conduct, establishing a baseline level of required representation duties.[317] Additionally, the federal government should establish a set procedure for SCRA-protected individuals to petition the court for new counsel if the original assigned counsel proves ineffective.[318] Finally, the federal government should create a uniform compensation system for SCRA-appointed attorneys, including reimbursement of reasonable expenses incurred in the course of representing the attorney's assigned client.[319]

Next, the article addressed the absence of key language within the SCRA's provisions tolling the statute of limitations in a civil action for the duration of an individual's military service.[320] In the case of *Conroy v. Aniskoff*, the United States Supreme Court determined that the SCRA did not require any showing that military service materially affected the servicemember's ability to meet his or her legal obligations within the statutorily assigned deadlines, because the relevant provisions in the SCRA lacked any language to this effect.[321] However, there is no reason to neglect this requirement regarding statutes of limitations while demanding it for virtually all other major provisions of the SCRA.[322] Furthermore, automatically tolling statutes of limitations in all cases involving a servicemember seems closer to the absolute moratoriums of the Civil War era than the more balanced approach that is characteristic of the modern SCRA.[323] Given this inconsistency, Congress should amend the SCRA to expressly demand a showing of material effect of military service prior to stopping the statute of limitations clock.[324]

Lastly, this article proposed that the SCRA enter a realm that is new in specific subject matter, but instrumental to the SCRA's basic purposes.[325] Servicemembers, recently discharged veterans, and their dependents would benefit substantially from a provision suspending expiration of any professional license or transportation-related license for the servicemember's entire period of active duty plus at least ninety days after discharge from the military, if military service materially affected the servicemember's ability to renew the license in question.[326] Such a

317. *See supra* Part IV.
318. *See supra* Part IV.
319. *See supra* Part IV.
320. *See supra* Part V.
321. *Conroy*, 507 U.S. at 517-18.
322. *See supra* Part V.
323. *See, e.g.*, Jensen, *supra* note 8, at 72-73.
324. *See supra* Part V.
325. *See supra* Part VI.
326. *See supra* Part VI.

requirement would remove the far too common scenario of a veteran returning home to learn that his or her driver's license or professional license expired while he or she was serving on active duty—a recurring situation that creates significant barriers for both the veteran attempting to readjust to civilian life and the veteran's family.[327] In particular, veterans facing these circumstances lose a projected source of income until these licenses are restored, prolonging the period when these veterans are unable to repay their debts and, as a result, causing creditors to wait for their payments for a longer period of time.[328] This change in the law would avoid these undesirable outcomes. [329]

Adopting these changes would make an already strong set of statutes even stronger. The SCRA currently provides greatly needed safeguards to military members and their dependents while simultaneously preventing parties from exploiting these protections. The alterations proposed in this article simply continue this worthy trend. By establishing greater uniformity within these statutes, the disputes involving the men and women who wear the uniforms of the American military and the individuals who enter into financial transactions with them will continue to reach increasingly equitable results.

327. *See supra* Part VI.
328. *See supra* Part VI.
329. *See supra* Part VI.