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Articles

TJAGLCS Practice Note

Faculty, The Judge Advocate General's Legal Center & School

Administrative & Civil Law Note

Article 119a: Does It Protect Pregnant Women or Target Them?

Major Kirsten M. Dowdy[*]

The "Unborn Victims of Violence Act" is a sham, designed . . . to promote an agenda by which women will in fact lose control of their bodies to the state.[1]

I. Introduction

On 1 April 2004, President George W. Bush signed into law the Unborn Victims of Violence Act of 2004 (UVVA).[2] The UVVA amended the Uniform Code of Military Justice (UCMJ) by adding Article 119a, the offense of death or injury of an unborn child.[3] Under this article, any person who, while engaging in certain predicate illegal behavior,[4] either intentionally or unintentionally harms or kills an unborn child is criminally responsible for the unborn child's death.[5] Article 119a exempts three specific types of people from prosecution: anyone involved in a consensual abortion, anyone involved in medical treatment of the pregnant woman or unborn child, and the mother of the unborn child.[6] The pronounced legislative intent behind this amendment is to protect pregnant women and their unborn children equally.[7]

However, opponents of the UVVA believe that its hidden agenda is to expand fetal rights so drastically that they begin to override the rights of a pregnant woman[8] recognized by the U.S. Supreme Court in *Roe v. Wade*.[9] In military criminal law, this amendment will cause the exact dramatic expansion of fetal rights feared by the UVVA's opponents. In fact, Article 119a will eventually compel commanders to criminally charge pregnant Soldiers for legal prenatal conduct, will inappropriately propel the military into the nation's abortion debate, and may inadvertently lead to increased harm and death of unborn children.

This article will begin by describing the evolution of fetal rights in military criminal law before the addition of Article 119a. Next, this article will detail the legislative history and intent behind the UVVA and its amendment to the UCMJ. This article will then demonstrate how the state of South Carolina, in order to be equitable and consistent, has used its feticide law[10] to expand fetal rights and allow for the prosecution of pregnant women for their prenatal conduct. This article will then layout the dilemma military commanders will face when attempting to charge their servicemembers equitably and consistently under Article 119a. Next, it will argue that this dilemma will compel commanders to follow South Carolina's

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[1] 150 CONG. REC. H650 (daily ed. Feb. 26, 2004) (letter from Carolyn Ratner, Senior Legislative Representative, Nat'l Council of Jewish Women).

[2] Unborn Victims of Violence Act of 2004, 18 U.S.C.S. § 1841 (LexisNexis 2008).

[3] *See id*; UCMJ art. 119a (2008).

[4] *See* UCMJ art. 119a. The predicate crimes under this article are murder, manslaughter, rape, sexual assault, robbery, maiming, arson, and assault and can be found at UCMJ articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128, as well as, 10 U.S.C.S. §§ 918, 919(a), 919(b)(2), 920(a), 922, 924, 926, and 928 (LexisNexis 2008).

[5] *See id.*

[6] *See id.*

[7] *See* 150 CONG. REC. S3132 (daily ed. Mar. 25, 2004) (statement of Sen. Dewine, Ohio, sponsor of H.R. 1997, Unborn Victims of Violence Act of 2004).

[8] *See, e.g.*, 150 CONG. REC. S3131 (2004) (statement of Sen. Dianne Feinstein, Cal., sponsor of the Motherhood Protection Act, an alternative to the Unborn Victims of Violence Act, which rather than recognizing a fetus as a victim, proposed increased punishments for individuals who engage in certain conduct causing the early termination of a pregnancy).

[9] 410 U.S. 113 (1973) (ruling that the right to privacy encompasses a woman's decision to terminate her pregnancy and that an unborn child is not a person under the Constitution).

[10] The terms "fetal homicide laws" and "feticide laws" are generic terms for state laws which essentially mirror the protections afforded unborn children in the UVVA. Nat'l Conf. of State Legislatures, *Fetal Homicide*, *available at* http://www.ncsl.org/programs/health/fethom.htm (last visited Mar. 12, 2008) [hereinafter Fetal Homicide Laws]; Thomas W. Strahan, *Legal Protection of the Unborn Child Outside the Context of Induced Abortion*, 11 A.I.R.V.S.C. 1 (Mar./Apr. 1997), *available at* http://www.lifeissues.net/writers/air/air_vol11no1_1997.html.

lead in expanding fetal rights and charging pregnant women for their prenatal conduct. Finally, this article will explore the problems that will stem from expanding fetal rights and prosecuting pregnant women for their prenatal conduct in the military.

A. Fetal Rights in Military Criminal Law: Before Article 119a

There were no codified protections for unborn children in the UCMJ prior to the UVVA. Only babies who were "born alive"[11] prior to an offense could be considered victims of a crime. Case law demonstrates, however, that even before the creation of Article 119a, military courts were amenable to acknowledging fetal rights. First, the courts showed a willingness to extend the born alive rule to include viable fetuses. Then, in 1999, a military court went a step further and assimilated a state feticide law to prosecute a servicemember for killing an unborn child.[12]

1. Born Alive Rule

The born alive rule is a common law rule that can be traced back to seventeenth century England. Sir Edward Coke, who was appointed Lord Chief Justice of the King's bench in 1613, stated,

> If a woman be quick with childe, and by a potion or otherwise *killeth it in her wombe*; or if a man beat her, whereby the *childe dieth in her body*, and she is delivered of a dead childe, this is a great misprision, and not murder; but if the childe be *born alive* and dieth of the potion, battery, or other cause, this is murder.[13]

Under this rule, a person could be prosecuted for harm done to an unborn child only if that child was born alive prior to dying or exhibiting injury.

For example, in *Williams v. State*, a defendant was convicted of manslaughter for unintentionally shooting an arrow through the stomach of a woman who was nine months pregnant.[14] This conviction was made possible under the born alive rule, only because the child lived for seventeen hours following an emergency cesarean section.[15] In *Jones v. Commonwealth*, the defendant drove while intoxicated and his vehicle collided with a pregnant woman's vehicle.[16] Jones was convicted of second degree manslaughter when the woman's child, delivered by Cesarean section, died fourteen hours later from injuries sustained during the collision.[17] Finally, in *State v. Ashley*, a woman who was twenty-six weeks pregnant shot herself in the abdomen through a pillow.[18] The bullet went through the fetus' wrist and the baby was born by Cesarean section.[19] The baby then died fifteen days later and the defendant was convicted of manslaughter and third-degree felony murder.[20] Like these state courts, military courts also applied the common law born alive rule.

2. Military Application of the Born Alive Rule

The born alive rule was first applied in a military courtroom in 1954. In *United States v. Gibson*,[21] the U.S. Air Force Board of Review (AFBR) thoroughly analyzed and defined the born alive rule as it should be applied in the Air Force.[22] In

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[11] *See* United States v. Gibson, 17 C.M.R. 911 (A.F.B.R. 1954); United States v. Nelson, 53 M.J. 319 (C.A.A.F. 2000).

[12] *See* United States v. Robbins, 52 M.J. 159 (C.A.A.F. 1999).

[13] Williams v. State, 561 A.2d 216, 218 (Md. 1989) (quoting 3 COKE, INSTITUTES 50 (1648)).

[14] *Id.* at 217.

[15] *See id.*

[16] 830 S.W.2d 877, 878 (Ky. 1992).

[17] *Id.*

[18] 670 So. 2d 1087, 1088–89 (Fla. Dist. Ct. App. 1996).

[19] *Id.* at 1089.

[20] *Id.*

[21] 17 C.M.R. 911 (A.F.B.R. 1954).

[22] *See id.*

this case, First Lieutenant (1LT) Gibson, an Air Force nurse, kept her pregnancy a secret and then strangled her daughter with a pajama top immediately following her birth.[23] The AFBR determined that 1LT Gibson's daughter was born alive prior to being murdered and was therefore a proper victim under Article 118 of the UCMJ.[24]

The AFBR examined two different state court interpretations of the born alive rule in search of the version to be applied in the Air Force.[25] First, they looked at the more liberal standard applied by a California appellate court in *People v. Chavez*.[26] The California appellate court's interpretation was that a baby begins its "independent existence after it has reached a state of development where it is capable of living and where it will, in the normal course of nature and with ordinary care, continue to live and grow as a separate being."[27] Then, the AFBR reviewed the interpretation of the New York Appeals Court in *People v. Hayner*.[28] The New York Appeals Court's view, more in line with early common law, was that a baby was born alive if it could carry "on its being without the help of the mother's circulation."[29] The AFBR in *Gibson* acknowledged that the more liberal approach could become applicable in military law.[30] However, they chose to adopt the New York court's conservative interpretation. Using this standard, the AFBR determined that 1LT Gibson's daughter was born alive before she was strangled.[31]

In making its determination, the AFBR considered two pieces of evidence that supported a conclusion that the baby took breaths on her own prior to dying. First, the doctor who performed the autopsy put the baby's lungs in water and discovered that they floated, signifying that they were filled with oxygen.[32] Second, a witness testified that she heard a baby crying in 1LT Gibson's room.[33] Though the AFBR specifically recognized that there was no evidence showing that the umbilical cord was severed prior to the baby's death, it determined that the modern common law doctrine of born alive does not require that the umbilical cord be severed.[34]

The born alive rule did not find its way back into a military courtroom again for another four decades. In *United States v. Nelson*,[35] Navy Hull Maintenance Technician Third Class (HT3) Nelson concealed her pregnancy while serving on a ship.[36] One evening, while her shipmates were ashore, she delivered a baby girl.[37] Without tending to her daughter, HT3 Nelson immediately wrapped her in the sheets used during labor and put her in a plastic bag with holes punched in it.[38] She then left the ship with her baby and twelve hours later carried her to a hospital.[39] Upon removing the baby from the plastic

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[23] *Id.* at 917.

[24] *Id*. at 927. Article 118 of the UCMJ provides that murder is the unlawful killing of a "human being." UCMJ art. 118 (2008). The Air Force board in *Gibson* determined that because the child was born alive the baby was a "human being" under Article 118. *Gibson*, 17 C.M.R. at 927.

[25] *Gibson*, 17 C.M.R. at 924–27.

[26] 176 P.2d 92 (Cal. 1947).

[27] *Gibson*, 17 C.M.R. at 925 (quoting *Chavez*, 176 P.2d at 94).

[28] 90 N.E.2d 23 (N.Y. 1949).

[29] *Id.* at 24 (quoting 1 RUSSELL ON CRIME 349 (9th ed. n.d.)).

[30] The board stated that it did "not reject as unsound, or as inapplicable in military law, the more liberal and 'enlightened' version expressed in . . . People v. Chavez . . . ." *Gibson*, 17 C.M.R. at 926.

[31] *Id*. at 927.

[32] *Id.*

[33] *Id.* at 917.

[34] The board cited Halsbury's Laws of England as the modern common law view:

> A child is not considered in law to be completely born, so as to be the subject of a charge of murder or manslaughter until the whole body of the child is brought alive into the world having an **independent** circulation, and breathing or capable of breathing, from its own lungs, so that it possesses, or is capable of, an existence **independent** of connection with its mother. But the child may be completely born although the umbilical cord be not severed.

Id. at 924 (quoting 9 HALSBURY'S LAWS OF ENGLAND 427 (2d ed. 1937)).

[35] 53 M.J. 319 (C.A.A.F. 2000).

[36] *Id.* at 322.

[37] *Id.*

[38] *Id.*

[39] *Id.*

bag, the hospital personnel discovered that the baby was dead.[40] Nelson was convicted of involuntary manslaughter due to negligently delivering her baby without medical assistance and not providing assistance to the child following the delivery.[41]

Unlike in *Gibson*, there was no evidence that HT3 Nelson's baby cried prior to her death.[42] Further, a doctor placed the baby's lungs in water and discovered that they did not float, therefore, they were not filled with oxygen.[43] However, HT3 Nelson testified that while her child did not cry, she did let out a small whimper following delivery.[44] Further, HT3 Nelson admitted that her newborn daughter was alive immediately before she arrived at the hospital.[45]

To convict HT3 Nelson, the panel had to find that her newborn daughter fit the definition of a "human being" under Article 119(a) of the UCMJ, involuntary manslaughter.[46] While the defense did not argue that this child was not born alive, the judge gave an instruction to the panel which specifically cited *Gibson*'s legal definition of born alive.[47]

The Air Force Court of Criminal Appeals (AFCCA) affirmed the trial court, but replaced the *Gibson*'s born alive test with a new "viability outside the womb" standard.[48] This new standard stated that when an infant is fully expelled from the mother and no longer needs her circulatory system to live, that infant will be considered born alive.[49] The AFCCA further explained that under this standard, "an infant need not be breathing at the time it is fully expelled from its mother so long as it 'shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles'"[50] Finally, the AFCCA found that "[i]n making this determination, as recognized by the *Gibson* court, it is also appropriate to consider current medical technology."[51]

When this case found its way to the Court of Appeals for the Armed Forces (CAAF), the court reverted back to the *Gibson* born alive standard. The CAAF reasoned that, "*Gibson* has been the sole authoritative voice in military jurisprudence on this issue for nearly a half century."[52] The CAAF went on to state, "We agree, and note that *Gibson*'s application of *Hayner* continues to offer flexibility to accommodate advancements in medicine and science that inevitably affect the reality of what it means to be 'born alive.'"[53]

In 2003, the CAAF faced similar facts to those presented in both *Gibson* and *Nelson*. In *United States v. Riley* (*Riley II*),[54] Airman (Amn) Riley ignored her pregnancy until she was full term and was experiencing cramps.[55] She went to a hospital and falsely complained that her back hurt from racquetball.[56] A doctor provided Amn Riley some pain medicine.[57] As she waited to be discharged, she doubled over in pain.[58] A doctor then drew blood to test for pregnancy.[59] While she

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[40] *Id.*

[41] *Id.* at 322–23, 325.

[42] *Id.* at 322.

[43] *Id.* at 322–23.

[44] *Id.* at 322.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 324.

[48] *Id.*

[49] *Id.* at 323.

[50] *Id.* (quoting BLACK'S LAW DICTIONARY 184 (7th ed. 1999)).

[51] *Id.* (quoting United States v. Nelson, 52 M.J. 516, 521 (N-M. Ct. Crim. App. 1999)).

[52] *Id.* at 323.

[53] *Id.* at 324.

[54] 58 M.J. 305 (C.A.A.F. 2003).

[55] *Id.* at 306.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

waited for the results, Amn Riley went into the bathroom alone.[60] Hearing moaning from behind the bathroom door, emergency room technicians knocked on the door twice.[61] Both times, Amn Riley dismissed the technicians stating that she would be out shortly.[62] While in the bathroom, Amn Riley delivered the baby in a squat position so explosively that the baby hit the hard floor and fractured her skull.[63] The baby died instantly.[64] The baby's status in *Riley* seemed to present the greatest challenge under the born alive rule. However, the courts in this case chose to ignore the born alive rule stating that it was an undisputed fact that the baby was born alive.[65]

The born alive line of cases demonstrates that even prior to the existence of Article 119a, military courts began eroding this rule, treating it as antiquated. In *Gibson*, while the AFBR cited witness testimony and medical evidence to prove that the baby took breaths prior to dying as support for their determination that the child was born alive, they held that the born alive doctrine does not require that the umbilical cord be severed.[66] Then, even without this witness testimony and medical evidence, the trial court in *Nelson* decided that the baby was born alive and the AFCCA attempted to redefine the born alive doctrine to include viable fetuses.[67] Finally, despite the lack of evidence supporting a determination that the baby was born alive prior to her death in *Riley*, the CAAF chose to accept this as an undisputed fact and conduct no analysis.[68] Prior to Article 119a, the born alive rule was never discarded. Over time, however, military courts applied the rule with more flexibility.

3. Assimilation of a State Feticide Law

In 1999, a military court went a step further and for the first time recognized an unborn child as an individual by assimilating a state feticide law.[69] Prior to the signing of the UVVA, approximately thirty-five states enacted their own feticide laws to protect unborn children.[70] This provided certain commanders[71] the ability to use clause three of Article 134[72] and the Assimilative Crimes Act (ACA)[73] to charge military offenders with a state feticide law. The case of *United States v. Robbins*[74] represents the first and only case to assimilate a state feticide law.

Air Force Amn Robbins assaulted his wife, who was thirty-four weeks pregnant.[75] Not only did Amn Robbins break his wife's nose and blacken her eye, but he hit her body so hard that her uterus ruptured and the placenta tore away from the uterine wall.[76] This caused the unborn child to die before birth.[77] The command, unable to charge Robbins with murder

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[60] *Id.* at 307.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *See* United States v. Riley (*Riley I*), 47 M.J. 603, 607 (A.F. Ct. Crim. App. 1997).

[66] *See supra* notes 32–34 and accompanying text.

[67] *See supra* notes 42–51 and accompanying text.

[68] *See supra* note 65 and accompanying text.

[69] United States v. Robbins, 52 M.J. 159 (C.A.A.F. 1999) (convicting an Air Force Airman of violating Ohio's feticide law).

[70] The states that currently have feticide laws include: Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *See* Fetal Homicide Laws, *supra* note 10; Nat'l Right to Life Comm., *State Homicide Laws that Recognize Unborn Victims*, June 25, 2008, *available at* http://www.nrlc.org/Unborn_victims/Statehomicidelaws092302.html.

[71] Only "certain commanders" could charge their Soldiers with these laws because only some states had these laws. Therefore, if no local state feticide law had been enacted or if the conduct did not occur within an area of exclusive federal or concurrent jurisdiction, the ACA would not permit such a charge. *See* 18 U.S.C. 13 (2000).

[72] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 60 (2008) [hereinafter MCM].

[73] 18 U.S.C. 13.

[74] 52 M.J. 159.

[75] *Id.* at 160.

[76] *Id.*

[77] *Id.*

since the child was not born alive, assimilated the Ohio feticide law.[78] Airman Robbins pled guilty and was convicted of this offense.[79]

On appeal, Amn Robbins argued that the preemption doctrine[80] prohibited this prosecution.[81] Airman Robbins pointed to the fact that the Ohio feticide law was a part of Ohio's involuntary manslaughter statute.[82] He then argued that Articles 118 and 119 of the UCMJ, murder and manslaughter, comprehensively covered this class of offenses and served to preempt the assimilated Ohio involuntary manslaughter statute.[83] The CAAF affirmed the conviction, stating, "The Ohio statute does not conflict with congressional intent to preempt the field. To the contrary, legislation regarding termination of pregnancy is an area traditionally left to the states."[84] The CAAF further stated that this assimilated offense was distinct from homicide because a homicide victim must be born alive.[85] Therefore, the CAAF reasoned that the Ohio feticide law filled a gap in criminal law and was properly assimilated.[86]

Robbins represents the first time, prior to the addition of Article 119a, that a military court recognized an unborn child as an individual victim. While the military courts in *Nelson* and *Riley* indicated a willingness to accept a liberal definition of born alive, they never went as far as to acknowledge fetal rights. Through *Robbins*, military courts announced, for the first time, their readiness to grant fetal rights.

B. Fetal Rights in Military Criminal Law: After Article 119a

The UVVA and Article 119a define an unborn child as "a child in utero."[87] They further define a child in utero as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."[88] This marks the first time that the federal government has recognized the rights of an unborn child in criminal law.[89] Although Article 119a has been in existence for almost three years, a military court has yet to convict an individual of violating Article 119a.[90]

II. The Unborn Victims of Violence Act and Its Amendment to the UCMJ

A. Legislative History

Congress enacted the UVVA, also called the Laci and Connor's Law,[91] five years after its origination. Congressman Lindsey Graham from South Carolina, currently a Senator and a colonel in the Air Force Reserve Judge Advocate General's

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[78] *Id.*

[79] *Id.* at 159.

[80] The preemption doctrine precludes the use of Article 134 to charge an offense already specifically covered in Articles 80 to 132, UCMJ. MCM, *supra* note 72, pt. IV, ¶ 60c(5)(a).

[81] *Robbins*, 52 M.J. at 160.

[82] *Id.*

[83] *Id.* at 162–63.

[84] *Id.* at 163.

[85] *Id.*

[86] *Id.*

[87] Unborn Victims of Violence Act of 2004, 18 U.S.C.S. § 1841 (LexisNexis 2008); UCMJ art. 119a (2008).

[88] 18 U.S.C.S. § 1841; UCMJ art. 119a.

[89] 145 CONG. REC. 23,362 (1999) (statement from Congresswoman Jackson-Lee, Tex.).

[90] At least one commander has charged a Soldier with a violation of Article 119a. In 2006, at Fort Hood, Texas, a commander charged an officer named Major (MAJ) Marcel Thompson with a violation of Article 119a. E-mail from Major Deirdre Brou, Trial Counsel, Judge Advocate General's Corps, to Major Kirsten M. Dowdy (13 Mar. 2008, 22:32 EST) (on file with author). The commander accused MAJ Thompson of killing an unborn child by placing aspirin powder, Cytotec or some other unknown substance in the vagina of his pregnant girlfriend, causing her to miscarry. *Id.* In addition to the Article 119a charge, the commander charged MAJ Thompson with violating Article 128, Assault and Article 134, Adultery and Obstruction of Justice. *Id.* The trial judge sitting on this case was COL Theodore Dixon. *Id.* A military panel convicted MAJ Thompson of violating Article 134, Adultery and Obstruction of Justice. *Id.* However, the panel found MAJ Thompson not guilty of violating Article 119a and Article 128, Assault. *Id.*

[91] This federal act was named after Laci and Connor Peterson. Laci and her unborn child, Connor were both killed by their husband and father, Scott Peterson. Press Release, President Bush Signs Unborn Victims of Violence Act of 2004 (Apr. 1, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/04/20040401-3.html. When signing the Act, President Bush stated,

Corps,[92] first introduced[93] this controversial bill in the House of Representatives as the Unborn Victims of Violence Act of 1999 (1999 UVVA).[94] The House of Representatives then referred the bill to the Judiciary Committee's Subcommittee on the Constitution.[95] As one of several opponents of the bill, Congresswoman Jackson-Lee from Texas stated,

> [T]his particular legislation, Mr. Speaker, finds many of us at odds with the intent of the proponents. And it is not because we are not empathetic and sympathetic to the crisis and the tragedy that occurs when a pregnant woman is attacked, and not because we do not want to find relief, but because this bill, unfortunately, wants to be a side bar or a back-door response to some of our colleagues' opposition to Roe versus Wade.
>
> This bill undermines a woman's right to choose by recognizing for the first time under Federal law that an embryo or fetus is a person, with rights separate and equal to that of a woman and worthy of legal protection. And the bill does not establish the time frame. The Supreme Court has held that fetuses are not persons within the meaning of the 14th Amendment. If enacted, H.R. 2436 will improperly inject debates about abortion into Federal and military criminal prosecutions across the country.[96]

Despite the opposition, the House of Representatives passed the UVVA 1999.[97] The Senate then failed to act on the 1999 UVVA.[98]

In 2001, Congressman F. James Sensenbrenner, Jr. from Wisconsin, reintroduced the bill[99] as the Unborn Victims of Violence Act of 2001.[100] Once again, the House of Representatives passed the bill.[101] However, as in 1999, the Senate failed to act on the bill.[102] The reasons behind the opposition to this Act were the same as they were in 1999. A Congresswoman opposed to the Act stated,

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> [Connor's] little soul never saw light, but he was loved, and he is remembered. And his name is forever joined with that of his mom in this statute, which is also known as Laci and Connor's Law. All who knew Laci Peterson have mourned two deaths, and the law cannot look away and pretend there was just one.

Id.

[92] *See* United States Senator Lindsey Graham, South Carolina, *Biography*, http://lgraham.senate.gov/public/index.cfm?FuseAction=AboutSenatorGraham.Biography (last visited Sept. 14, 2008).

[93] *See generally* 145 CONG. REC. 23,361 (1999) (naming Congressman Graham as the bill's sponsor).

[94] H.R. 2436, 106th Cong. (1999).

[95] The referral of this Act to the Subcommittee on the Constitution of the Committee on the Judiciary instead of the Subcommittee on Crime was extremely controversial. In 1999, Congresswoman Slaughter from New York, argued,

> The supporters of the bill insist that H.R. 2436 has nothing to do with the abortion debate and was crafted to protect women against violence. Why then, one is left to wonder, was this bill referred not to the Subcommittee on Crime but, instead, to the Subcommittee on the Constitution of the Committee on the Judiciary.

145 CONG. REC. 23,361 (statement Congresswoman Slaughter, N.Y.). Similarly, in 2001, Congressman Conyers asked, "if this bill does not deal with abortion, . . . why is it coming out of the Subcommittee on the Constitution instead of the Subcommittee on Crime?" 147 CONG. REC. 6305–06 (2001). Congressman Conyers then answers his own question by stating, "You think we thought that it was tossed there by accident. But it was tossed there because it is changing the fundamental constitutional law in the most controlling case on abortion in current Federal judicial practice, Roe v. Wade. That is why it went there." *Id.* at 6306.

[96] 145 CONG. REC. 23,362 (1999).

[97] *See* 145 CONG. REC. 23,395. It passed by a vote of 254 to 172 in the House of Representatives. *See id.*

[98] *See* Joseph L. Falvey, Jr., *Kill an Unborn Child—Go to Jail: The Unborn Victims of Violence Act of 2004 and Military Justice*, 53 NAVAL L. REV. 1, 11 n.1 (2006) (citing *'Unborn Victims' Bill Passed By House*, ASSOC. PRESS, Feb. 26, 2004, *available at* http://www.msnbc.msn.com/id/4387085). Lieutenant Colonel Michael J. Davidson, U.S. Army Judge Advocate General's Corps submitted written comments to the Senate Judiciary Committee concerning S.1673. He supported the bill stating that he "believe[s] this legislation would have a positive impact on military law by providing a uniform feticide law and by eliminating reliance on the out-dated born alive rule." Written Testimony of Michael J. Davidson, Lieutenant Colonel, Concerning S.1673, The Unborn Victims of Violence Act of 1999, *available at* http://www.senate.gov/comm/judiciary/general/oldsite/223200md.htm. Lieutenant Colonel Davidson went on to opine that "the Act does not interfere with a woman's right to choose, but instead reinforces both that right and the government's interest in protecting the potentiality of life." *Id.*

[99] *See generally* 147 CONG. REC. 6339 (2001) (naming Congressman Sensenbrenner as the bill's sponsor).

[100] H.R. 503, 107th Cong. (2001).

[101] *See* 147 CONG. REC. 6339–40. It passed by a vote of 252 to 172 in the House of Representatives. *See id.*

[102] *See* Falvey, *supra* note 98, at 11 n.1.

> The Unborn Victims of Violence Act is the first volley this term by the anti-choice legislators to restrict a woman's right to choose. This bill would add to the Federal criminal code a separate new offense to punish individuals who injure or cause the death of a child which is in utero, regardless of the stage of development. It sounds innocuous enough, but in essence it is a sham.[103]

In the third attempt to enact this legislation, the House of Representatives and the Senate both passed the Unborn Victims of Violence Act of 2004.[104] President George W. Bush subsequently signed the Act into law.[105] Prior to its enactment, opponents in 2004 expressed the same concerns as the opposition in 1999 and 2001. For example, Congressman Nadler argued,

> If a fetus is recognized as a legal person, then this bill would open the door to barring abortions, to prosecuting women or to restraining them physically for the sake of the fetus. Some courts and State governments have already experimented with this approach. . . . Once we recognize even a zygote, two cells, as having the same legal status as the pregnant woman, it would logically flow that her liberty could be restricted to protect its interests. The whole purpose of Roe is to say that her liberty interests trump the interests of the fetus. This bill says exactly the opposite.[106]

Members of Congress countered the UVVA all three times by introducing substitute amendments.[107] The substitute amendments recommended the addition of an almost identical punitive article to the UCMJ. These substitutes, instead of pronouncing the unborn child in utero as the victim, allowed for the prosecution of a person who, while engaged in a predicate offense, "cause[d] the termination of a pregnancy or the interruption of the normal course of pregnancy."[108] As pointed out by Senator Feinstein in 2004, the substitute amendments "include[d] the same structure, the same crimes, and the exact same penalties as the [UVVA]. The only real difference between [the] amendment[s] and the [UVVA was] that [they did] not attempt to place into law language defining life as beginning at conception beginning with an embryo."[109] The substitute amendments failed to pass in either house each time they were considered.[110]

B. Legislative Intent

The UVVA's sponsors and proponents consistently promoted the bill stating that unlike the substitute amendments, the UVVA recognizes two victims instead of just one when a mother and her unborn child are killed or harmed by a third party.[111] Proponents specifically cited *United States v. Robbins*[112] as a primary example of the need for a federal UVVA. For instance, in 1999, Congressman Buyer, the chairman of the Subcommittee on Military Personnel supported amending the UCMJ stating,

> Once this bill was reported, it is fitting that the Uniform Code of Justice be compatible with the Federal statute, and that is why we procedurally waived jurisdiction.

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[103] 147 CONG. REC. 6337 (statement of Congresswoman Slaughter).

[104] The House Bill, H.R. 1997 was sponsored by Congresswoman Melissa Hart, Pa. The House Bill was passed by a vote of 254 to 163. 150 CONG. REC. H667–68 (daily ed. Feb. 26, 2004). The companion Senate Bill, S.R. 1019 was sponsored by Senator Mike DeWine, Ohio. The Senate Bill was passed by a vote of 61 to 38. 150 CONG. REC. S3167 (daily ed. Mar. 25, 2004).

[105] *See* NAT'L RIGHT TO LIFE COMM., KEY FACTS ON THE UNBORN VICTIMS OF VIOLENCE ACT (2004), *available at* http://www.nrlc.org/unborn_victims/keypointsuvva.html.

[106] 150 CONG. REC. H640 (daily ed. Feb. 26, 2004) (statement of Congressman Nadler), *available at* http://thomas.loc.gov/cgi-bin/query/F?r108:2:./temp/~r108JCCBHC:e24014:.

[107] In the House of Representatives, the substitute amendment, the Lofgren Amendment, introduced in 1999, 2001 and 2004 was named after its primary sponsor, Congresswoman Lofgren, Cal. 145 CONG. REC. 23,361 (1999); 147 CONG. REC. 6337–38 (2001); 150 CONG. REC. H646 (daily ed. Feb. 26, 2004). In the Senate, the substitute amendment, entitled the Feinstein Amendment or the Motherhood Protection Act, was introduced by among others, Sen. Feinstein, Cal. *See* 150 CONG. REC. S3125 (daily ed. Mar. 25, 2004).

[108] 150 CONG. REC. H637–39 (daily ed. Feb. 26, 2004).

[109] 150 CONG. REC. S3126 (daily ed. Mar. 25, 2004).

[110] *See* 145 CONG. REC. 23,394–95 (1999); 147 CONG. REC. 6339 (2001); 150 CONG. REC. H667 (daily ed. Feb. 26, 2004); 150 CONG. REC. S3151 (daily ed. Mar. 25, 2004).

[111] *See* 145 CONG. REC. 23,364 (1999); 147 CONG. REC. 6307 (2001); 150 CONG. REC. S3125 (daily ed. Mar. 25, 2004).

[112] 52 M.J. 159 (C.A.A.F. 1999).

> The need for the manager's amendment and the request for support by this body is illustrated by the case of United States versus Robbins.[113]

In 2001, Congressman Sensenbrenner pointed out that,

> Military prosecutors were able to charge Robbins for death of the unborn child by assimilating Ohio's fetal homicide law through the Uniform Code of Military Justice. Had Mr. Robbins beaten his wife just across the river in Kentucky, a State which has no fetal homicide law, he would have received no additional punishment for killing the unborn child.[114]

Finally, in 2004, Senator Dewine, the Senate bill's sponsor, introduced the bill by asking his colleagues to "[i]magine a pregnant woman in a national park or a pregnant woman on an Air Force base and she is violently assaulted. As a result . . . she loses her child."[115] Senator Dewine then announced that "[t]oday, unless that Federal park or Air Force base is located in a State that has a similar law, a Federal prosecutor would search the Federal statute books in vain to find anything to charge that assailant [with]."[116]

The UVVA's sponsors never directly addressed the intent behind exempting the mother from prosecution for any harm she may do to her unborn child. In 1999, Senator Dewine simply explained that the drafters,

> purposely drafted this legislation very narrowly. For example, it would not permit the prosecution for any abortion to which a woman consented. It would not permit the prosecution of a woman for any action—legal or illegal—in regard to her unborn child. That is not what the intent of this legislation is all about. This legislation, further, would not permit the prosecution for harm caused to the mother or unborn child in the case of medical treatment.[117]

Likewise, Senator Graham, the original drafter of the 1999 bill, did not specifically explain the intent behind exempting mothers in the UVVA. However, he implied that the UVVA was only intended to cover a third party's criminal activity toward an unborn child.[118] Despite this implied intent, in 2004, Senator Graham from South Carolina,[119] admitted that in his own state, feticide law was being used to convict mothers for their prenatal behavior.[120]

III. South Carolina's Feticide Law Used to Convict Mothers: An Example of What UVVA Opponents' Feared

A. History of South Carolina's Feticide Law

Initially, the South Carolina Supreme Court established the existence of its state's feticide law through interpretation. More specifically, in 1984, the South Carolina Supreme Court in *State v. Horne*[121] held that South Carolina's murder statute[122] must be interpreted to include viable fetuses as individual victims.[123] The defendant in this case stabbed his wife, who was nine months pregnant.[124] After arriving at the hospital, doctors attempted to deliver the child through caesarean

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[113] 145 CONG. REC. 23,385 (1999).

[114] 147 CONG. REC. 6303 (2001) (statement of Congresswoman Sensenbrenner).

[115] 150 CONG. REC. S3125 (daily ed. Mar. 25, 2004).

[116] *Id.*

[117] 145 CONG. REC. 23,555 (1999).

[118] *Id.* As the original drafter of the 1999 bill, Senator Graham clarified that, "[w]hat [he] wanted to do was to focus on what [he] thought [they] all could agree on, to a large extent. The law in abortion and the politics of abortion really do not play well here because we are talking about criminal activity of a third party." *Id.*

[119] *See supra* note 92 and accompanying text.

[120] *See* 150 CONG. REC. S3134 (daily ed. Mar. 25, 2004). More specifically, Senator Graham admitted, "There are cases out there where mothers are being prosecuted who abuse drugs or alcohol and do damage to their children." *Id.*

[121] 319 S.E.2d 703 (S.C. 1984).

[122] S.C. CODE ANN. § 16-3-10 (2006).

[123] *Horne*, 319 S.E.2d at 704.

[124] *Id.*

section; however, the child died in the womb.[125] The mother survived.[126] The defendant was convicted of assault and battery with intent to kill and voluntary manslaughter for killing the unborn child.[127] Mr. Horne appealed to the South Carolina Supreme Court on the ground that the crime of feticide had not yet been recognized in South Carolina.[128] The South Carolina Supreme Court granted the appeal and reversed the voluntary manslaughter conviction.[129] However, the court also unanimously declared feticide to be a crime in South Carolina from that day forward.[130] The court's rationale was that it would be "grossly inconsistent . . . to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context."[131]

Then, in *State v. Ard*, the South Carolina Supreme Court held that a defendant was eligible to receive the death penalty for murdering a viable fetus. [132] The court stated that the term "person" in the South Carolina Code's statutory aggravating circumstances for murder was intended to include viable fetuses.[133] As support for its holding, this court noted that the legislature amended portions of the murder statutes after the holding in *Horne*[134] and chose not to specifically exclude viable fetuses as potential victims.[135] The South Carolina Supreme Court concluded that by not amending the statutes to exclude viable fetuses as potential victims, the legislature demonstrated their intent to include viable fetuses in the murder statutes.[136]

South Carolina actually codified its feticide law in 2006. The South Carolina UVVA[137] provides that a person who commits a violent crime that causes the death of, or injury to, a child in utero is guilty of a separate offense and that the person must be punished as if the death or injury occurred to the unborn child's mother.[138] Additionally, the South Carolina Act states that if a person intentionally kills or attempts to kill an unborn child, they must be punished for murder or attempted murder.[139] Finally, the South Carolina Act, like the federal UVVA, specifically exempts from prosecution the mother of the unborn child. [140]

B. Despite Exemption, Court Turns Feticide Law Against Mothers

Despite the specific exemption of mothers from prosecution, the South Carolina Supreme Court in *Whitner v. State* used the fetal rights acknowledged in the feticide law to convict a mother for harming her unborn child under a separate South Carolina child neglect statute.[141] More specifically, the court in *Whitner* used its recognition of feticide in *Horne*,[142] to expand the definition of a "child" under the South Carolina criminal child abuse and endangerment statute, to include viable fetuses.[143]

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[125] *Id.*

[126] *Id.*

[127] *Id.* at 703.

[128] *Id.* at 704.

[129] *Id.*

[130] *Id.*

[131] *Id.* (citing the decision in *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964), where the South Carolina Supreme Court held that a wrongful death action could be maintained for a viable, unborn fetus).

[132] 505 S.E.2d 328, 375 (S.C. 1998).

[133] S.C. CODE ANN. § 16-3-20 (C)(a) (2006).

[134] 319 S.E.2d 703.

[135] *See Ard*, 505 S.E.2d at 375.

[136] *Id.*

[137] S.C. CODE ANN. § 16-3-1083.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] 492 S.E.2d 777 (S.C. 1997). Cornelia Whitner was convicted of child neglect in violation of S.C. CODE ANN. § 20-7-50 (1985). *Id.*

[142] 319 S.E.2d 703 (S.C. 1984).

[143] *Whitner*, 492 S.E.2d at 780.

Cornelia Whitner pled guilty to criminal child neglect for ingesting cocaine during her third trimester of pregnancy.[144] The South Carolina criminal child neglect statute provided that,

> any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.[145]

The court held that the word "child" in the child neglect law included a viable fetus. The court, relying on its rulings in *Horne*[146] and *Fowler v. Woodward*[147] determined that it "would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse."[148]

The South Carolina Supreme Court then used its holding in *Whitner* to uphold the conviction of Regina McKnight of homicide by child abuse, for killing her unborn child through cocaine use.[149] McKnight gave birth to a nearly full-term stillborn child in 1999.[150] An autopsy showed that the child had cocaine in her body.[151] Subsequently, McKnight was convicted of homicide by child abuse.[152] Under this statute a person is guilty of homicide by child abuse if he or she "causes the death of a child under the age of eleven while committing child abuse or neglect."[153] The court, as they did in *Whitner*, held that the term "child" included a viable fetus.[154] The court relied on the fact that the legislature amending this statute in 2000 "was well aware of this court's opinion in *Whitner*, yet failed to omit 'viable fetus' from the statute's applicability."[155] The court saw this as "persuasive evidence that the legislature did not intend to exempt fetuses from the statute's operation."[156]

These court rulings demonstrate at a state level how a feticide law's novel grant of fetal rights can quickly spread to other statutes.[157] The expansion of fetal rights in South Carolina is the exact infestation that was feared by opponents of the

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[144] *Id.* at 778.

[145] S.C. CODE ANN. § 20-7-50 (1985).

[146] 319 S.E.2d 703.

[147] 138 S.E.2d 42 (S.C. 1964) (holding that a wrongful death action could be maintained for a viable, unborn fetus).

[148] *Whitner*, 492 S.E.2d at 780.

[149] State v. McKnight, 576 S.E.2d 168 (S.C. 2003).

[150] *Id.* at 171.

[151] *Id.*

[152] *Id.* Regina McKnight was convicted of homicide by child abuse in violation of S.C. CODE ANN. § 16-3-85(A) (2001). *Id.*

[153] S.C. CODE ANN. § 16-3-85(A) (2006).

[154] *McKnight*, 576 S.E.2d at 174.

[155] *Id.* at 175.

[156] *Id.*

[157] Not all states have allowed such a spread to occur. The South Carolina Supreme Court in their holding in *Whitner* recognized that many states have not allowed for mothers to be prosecuted for drug use during their pregnancy. As examples, the court listed *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (1977); *State v. Carter*, 602 So. 2d 995 (Fla. Ct. App. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. Ct. App. 1991); *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992, *cert. denied* (Ga. 1992); *Commonwealth v. Pellegrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App.), *app. denied*, 437 Mich. 1046 (Mich. 1991) and *Commonwealth v. Kemp*, 643 A.2d 705 (Pa. Super. Ct. 1994). *See* Whitner v. State, 492 S.E.2d 777, 782 (S.C. 1997). The South Carolina Supreme Court distinguished their decision from these. First, the court pointed out that most of the decisions are inapplicable because they were decided under drug delivery or distribution statutes instead of child neglect or child endangerment statutes. *Id.* The court conceded that the California case and Kentucky case involved homicide, murder and manslaughter statutes instead of drug statutes, but set itself apart from these decisions stating that California and Kentucky "have entirely different bodies of case law from South Carolina." *Id.* The South Carolina Supreme Court then specifically rejected the decision made by the Massachusetts Superior Court in *Pellegrini* even after noting that Massachusetts, unlike California and Kentucky, has a "body of case law similar to South Carolina's." *Id.* The South Carolina Supreme Court examined the Massachusetts decision in *Pellegrini* and determined that the ruling was based on a theory that a viable fetus should be given the rights of a person only as a vindication of a parent's interest and that "the viable fetus lacks rights of its own that deserve vindication." *Id.* at 783. The South Carolina Supreme Court then concluded that, "[b]ecause the rationale underlying our body of law—protection of the viable fetus—is radically different from that underlying the law of Massachusetts, we decline to follow the decision of the Massachusetts Superior Court in *Pellegrini*." *Id.*

federal UVVA.[158] Proponents of the UVVA seemed mystified over the fears of their opponents, arguing that the exemptions are so clear there is no conceivable way the Act could be used to undermine a mother's reproductive rights.[159] South Carolina demonstrates that these fears can easily come to fruition. The South Carolina Supreme Court ruled that it would be "absurd" to recognize fetal rights in feticide, but not in child abuse or neglect laws.[160] In other words, the South Carolina Supreme Court allowed fetal rights to creep over to other statutes, based on a desire to be consistent and equitable. Military commanders, based on the same desire, will likewise be compelled to apply the fetal rights recognized in Article 119a to other UCMJ Articles.

IV. Military Commanders and Military Courts Will Also Expand Fetal Rights to Be Consistent and Equitable

A. Military Commanders' Disposition Decisions under Article 119a

Imagine that an Army commander faces two separate situations where Soldiers under his command allegedly kill an unborn child. In the first instance, an investigation reveals that a male Soldier had a minor altercation with a female Soldier in the unit. The female Soldier happened to be five weeks pregnant. The pregnant Soldier lost her baby because the quarrel became physical. The male Soldier, who committed a simple assault on the expectant mother, is further charged with violating Article 119a, despite the fact that he was completely unaware that she was pregnant.

In the second instance, this same commander discovers that a different female Soldier is accused of killing her own unborn child in a separate incident. This Soldier was eight months pregnant. An investigation reveals that she ingested a large amount of cocaine intending to kill or harm her unborn child. Despite the commander's desire to be consistent and equitable, the commander cannot charge the second Soldier with a violation of Article 119a because she is exempt from prosecution as the mother of the unborn child.

Under Article 119a, this second Soldier who killed her own unborn child intentionally will not face any consequences for her actions. However, the unknowing, less culpable male Soldier, who had a minor altercation with a Soldier who was five weeks pregnant, may face full prosecution. These circumstances present a unique dilemma for the commander as he makes his disposition decisions.

A commander's decision regarding how to dispose of criminal offenses is "one of the most important and difficult decisions facing a commander."[161] Rule for Courts-Martial (RCM) 306 states that in making a disposition decision, a commander must consider and balance many factors.[162] Among these factors are the "interest of justice" and the "effect of the decision on the accused and the command."[163] Additionally, RCM 306 projects that the goal of the commander "should be a disposition that is warranted, appropriate, and fair."[164] Aspiring to be fair certainly does not mean that commanders should try to dispose of all like offenses in the same way. In fact, commanders are encouraged to treat each case

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[158] The Executive Director of the National Network to End Domestic Violence, Lynn Rosenthal, specifically summarized this fear in her letter to Congress opposing the UVVA in 2004.

> [W]hile the UVVA on its face seems to protect women from prosecution of the violence causes her to lose the pregnancy, it may lead to a slippery slope that erodes women's rights and holds them responsible for this loss. This slippery slope has already formed in South Carolina . . . . For example, in Whitner v. State, the court found that South Carolina's child endangerment statute could be used to punish a pregnant woman who engaged in any behavior that might endanger her fetus. Legislation regarding violence against women must be carefully considered in order to prevent unintended effects from hurting the very women it is supposed to help.

150 CONG. REC. S3141 (daily ed. Mar. 25, 2004).

[159] For example, in 2004, Senator Hatch stated:

> I cannot imagine why anyone would oppose this bill . . . . I do not believe this bill in any way undermines abortion rights . . . . The bill explicitly says that the Federal Government cannot prosecute a pregnant woman for having an abortion. In fact, the bill goes even further. The bill does not permit prosecution against any woman with respect to her unborn child regardless of whether the mother acted legally or illegally.

150 CONG. REC. S3136.

[160] *Whitner*, 492 S.E.2d at 780.

[161] MCM, *supra* note 72, R.C.M. 306.

[162] *Id.*

[163] *Id.*

[164] *Id.*

individually.[165] However, a commander must carefully balance this concept with the inherent disruption he may cause within the command with drastically disparate dispositions for like offenses. The *Manual for Courts Martial* (*MCM*) specifically explains that,

> The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.[166]

If a commander is grossly inconsistent in his disposition decisions for like offenses, he may negatively influence the good order and discipline of his unit and its effectiveness. This would directly defeat the codified purposes of military law. Therefore, there is a "fundamental tension . . . between the UCMJ dictate that we treat each case individually, and the need for some form of consistency."[167]

In order to be consistent, a commander who faces the dilemma described above, may search for a way to ensure that the more culpable Soldier faces consequences for her intentional killing. Even if the less culpable male Soldier was eliminated from the above scenario, a commander may still feel that the malicious intentional act of his Soldier warrants prosecution. Despite Article 119a's specific exemption of the mother from prosecution, its recognition of the fetus as an individual victim may provide this commander with the ability to charge the pregnant Soldier with the death of her unborn child, as seen in South Carolina.

South Carolina demonstrates how fetal rights created through feticide laws can easily be adopted into other crimes out of a desire to be consistent and equitable.[168] These identical goals may lead to the same unintended expansion of fetal rights in the military. As seen in South Carolina, the grant of fetal rights in Article 119a may eventually be used to allow the prosecution of mothers for their prenatal conduct. A commander may charge a Soldier with a violation of the UCMJ by simply applying Article 119a's definition of the word "child" to Article 134, Child Endangerment.[169] If a military court is amenable to this application, a federal conviction will follow.

B. Will Military Courts Convict Mothers for Prenatal Conduct?

Even prior to the fetal rights granted by the addition of Article 119a, an Air Force Airman was charged and convicted of child neglect under Article 134's general article for cocaine use during her pregnancy in *United States v. Foreman*.[170] The Air Force Court of Military Review overturned this conviction. The court found:

> As to prenatal drug use, there is no legal basis, absent specific statutory authority, to suggest that an unborn fetus is intended as a potential victim of criminal neglect under Article 134, nor do we choose to create such a basis at this time, particularly where the fetus, once born, shows no discernible injury from the alleged neglect.[171]

Through this holding, the court in *Foreman* implied that given the statutory authority, it would allow for an Article 134 child neglect charge to extend to unborn children as victims.[172] In other words, the court in *Foreman* seemed amenable to a

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[165] *See id.* R.C.M. 306.

[166] *Id.* pt. I, ¶ 3.

[167] E-mail from Lieutenant Colonel Mark L. Johnson, Chair, Criminal Law Dep't, TJAGLCS, U.S. Army, Charlottesville, Va., to Major Kirsten M. Dowdy (18 Dec. 2007, 17:12 EST) (on file with author).

[168] *See supra* sec. III, subsec. B.

[169] Commanders will have a few different charging options for this conduct under Article 134, UCMJ. Commanders could charge this as child endangerment, reckless endangerment or they could craft a different child neglect charge using the general article as seen in *United States v. Foreman*, No. 28008, 1990 C.M.R. LEXIS 622 (A.F.C.M.R. May 25, 1990). Child endangerment is a new offense under Article 134. President George W. Bush amended the UCMJ to include this new offense through Executive Order 13,447, which took effect on 1 October 2007. *See* Exec. Order No. 13,447, 72 Fed. Reg. 56,233–37 (Oct. 2, 2007). This amendment presents the perfect opportunity for commanders to begin to charge mothers for their prenatal conduct as it fails to specifically define the word "child" in the offense.

[170] No. 28008, 1990 C.M.R. LEXIS 622.

[171] *Id.* at 3.

[172] *Id.*

future extension of a child neglect charge to include unborn children as victims. The court leaves the door open by stating that it did not want to "create such a [legal] basis *at [that] time*."[173]

If the facts presented in *Foreman* were before a military court today, the outcome may have been different. Article 119a provides the statutory authority that the *Foreman* court determined was absent, by allowing unborn children to be the victims of a crime. A military court faced with these facts today may walk through the door left open in *Foreman* and allow the fetal rights created in Article 119a to leak over to a child endangerment charge under Article 134.

Military courts, in the past, have allowed for such a leak. The courts have found it appropriate to apply an expanded definition designed for one punitive article to another punitive article. For example, in *United State v. Adams*,[174] the CAAF based its decision to broaden the actual knowledge element in Article 86, failure to go to one's appointed place of duty, primarily on the fact that this expansion had already been made with respect to Article 112a, wrongful use of a controlled substance. More specifically, the CAAF expanded the element of actual knowledge within Article 86 to encompass the concept of "deliberate ignorance."[175]

This concept was originally applied by the CAAF to Article 112a in *United States v. Newman*[176] and then again in *United States v. Brown*.[177] In *Newman*, the CAAF held that "in cases where knowledge is an essential element, specific knowledge is not always necessary; rather, purposeful ignorance may suffice."[178] The CAAF later clarified in *Brown* that, "[s]ome evidence must [be] admitted which permits an inference of deliberate avoidance, *i.e.*, that 'the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and . . . the defendant purposely contrived to avoid learning of the illegal conduct.'"[179]

In *Adams*, the CAAF considered the case of Private (Pvt) Adams who deliberately avoided his responsibility to determine where his place of duty was.[180] While he was not at his appointed place of duty, in order to be in violation of Article 86, UCMJ, Pvt Adams had to have actual knowledge of where that place was at the moment he was avoiding it.[181] The CAAF determined that the Pvt Adams's deliberate avoidance of the requisite knowledge under Article 86, UCMJ, should not excuse his failure to go to his appointed place of duty.[182]

In *Adams*, the CAAF recognized that the "deliberate avoidance" theory as applied to Article 112a was specifically supported in the *MCM*, whereas the expansion of this principle for use under Article 86 was unsupported.[183] The CAAF acknowledged its unprecedented decision stating,

> unlike the explanation contained in the *MCM* for Article 86(1), UCMJ, the *MCM* provision for Article 112a, UCMJ, at issue in *Brown* expressly allowed for such an inference where the accused "avoids knowledge of the presence of a controlled substance." To date, this Court has not considered the deliberate avoidance theory outside the context of drug offenses. Thus, we have not considered whether the deliberate avoidance theory permits an inference of knowledge where the punitive article at issue expressly requires that the accused have actual knowledge of his illegal conduct.[184]

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[173] *Id.* (emphasis added).

[174] 63 M.J. 223 (C.A.A.F. 2006).

[175] *Id.* (holding that deliberately ignoring one's duty to know where his or her appointed place of duty will not serve as an excuse or defense to a violation of Article 86, failure to be at one's appointed place of duty).

[176] 14 M.J. 474, 478 (C.M.A. 1983).

[177] 50 M.J. 262 (C.A.A.F. 1999).

[178] *Newman*, 14 M.J. at 478.

[179] *Brown*, 50 M.J. at 266 (quoting United States v. Lara-Velasquez, 919 F.2d 946, 952 (5th Cir. 1990)).

[180] *See Adams*, 63 M.J. at 223.

[181] UCMJ art. 86 (2008).

[182] *See Adams*, 63 M.J. at 226–27.

[183] *See id.* at 226.

[184] *Id.* at 225 (citation omitted).

The CAAF then concluded that "a literal application of actual knowledge to Article 86, UCMJ, offenses would result in absurd results in a military context."[185] The CAAF recognized that this would allow servicemembers to avoid committing this offense by simply shirking their duty to learn where they are required to be.[186] The CAAF went on to conclude that "in the absence of evidence that the President sought to limit the application of the deliberate avoidance theory to Article 112a, UCMJ, . . . we hold that deliberate avoidance can create the same criminal liability as actual knowledge for all Article 86, UCMJ, offenses."[187]

The CAAF used this same reasoning in *United States v. Zachary*, when it held that mistake of fact should not only be a defense to carnal knowledge under Article 120, UCMJ, but also to the offense of indecent acts with a child under Article 134, UCMJ.[188] The CAAF acknowledged that in 1996 Congress amended Article 120(b), Carnal Knowledge of the UCMJ to specifically recognize mistake of fact as a defense to each crime.[189] The CAAF then stated "that it is illogical and unjust to recognize mistake of fact as to the alleged victim's age as a complete defense to a carnal knowledge offense under Article 120(d), UCMJ, but not to recognize the same defense to the lesser included offense of indecent acts with a child."[190]

These cases demonstrate that military courts, with no legislative support, will apply theories designed for one punitive article to another punitive article. The similarities between the holding in *Adams*, *Zachary*, and the South Carolina Supreme Court holding in *Whitner*, are remarkable. The courts rationalize the extensions of the "deliberate avoidance" theory, the "mistake of fact defense" and "unborn child as a victim" principle to other crimes opining that it would be "absurd" or "illogical" not to make such an extension.[191] From the CAAF's holdings in *Adams* and *Zachary*, it is easy to see how military courts will expand the "unborn child as a victim" principle for use in Article 134 to prosecute mothers for prenatal neglect or abuse. Military courts, like the South Carolina Supreme Court, will find it absurd or illogical for this principle to apply to Article 119a and not Article 134. As seen in *Adams* and *Zachary*, military courts will apply the principle to Article 134, because there is no direct evidence that the President sought to limit this principle's application when he signed the UVVA. Further, the existence of Article 119a will not prevent this Article 134 charge under the preemption doctrine.

C. Preemption Doctrine Will Not Be an Obstacle to Article 134 Charge

Assuming a military court does apply the "unborn child as a victim" principle and a mother is convicted under Article 134 for her prenatal conduct towards her unborn child, she may argue that the preemption doctrine will not allow her conviction to be upheld. However, her argument will most likely be unsuccessful. The preemption doctrine states that Article 134 may not be used to charge an offense that is already specifically covered by Articles 80 through 132.[192] In other words, if Congress intended to cover a certain class of offenses completely through a specific punitive article and an individual's conduct does not amount to a violation of that article, a separate offense may not be created under Article 134.[193]

In order for the preemption doctrine to prohibit charging mothers for their prenatal conduct, Congress must have intended to cover this conduct completely through Article 119a. Military courts use a two-pronged test to determine whether the preemption doctrine applies.[194] The first prong of this test asks "whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific areas of the Code."[195] The second prong

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[185] *Id.* at 226.

[186] *See id.*

[187] *Id.*

[188] 63 M.J. 438, 442–43 (C.A.A.F. 2006).

[189] *Id.* at 442.

[190] *Id.* at 443.

[191] *Compare Adams*, 63 M.J. at 226 (holding "a literal application of actual knowledge to Article 86, UCMJ, offenses would result in *absurd* results in a military context.") (emphasis added), *and Zachary*, 63 M.J. at 443 (holding "that it is *illogical* and unjust to recognize mistake of fact as to the alleged victim's age as a complete defense to a carnal knowledge offense under Article 120(d), UCMJ, but not to recognize the same defense to the lesser included offense of indecent acts with a child") (emphasis added), *with* Whitner v. State, 492 S.E.2d 777, 780 (S.C. 1997) (holding it "would be *absurd* to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statute proscribing child abuse.") (emphasis added).

[192] MCM, *supra* note 72, pt. IV, ¶ 60c(5)(a).

[193] United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979).

[194] United States v. Wright, 5 M.J. 106 (C.M.A. 1978).

[195] *Id.* at 110–11.

asks "whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of . . . [one of] the general articles."[196] In this case, charging mothers for prenatal abuse or neglect does not pass this two-pronged test and therefore is not prohibited by the preemption doctrine.

The first prong of this test requires an examination of Congress' intent in drafting Article 119a. Senator Graham, one of the original UVVA's drafters, made it clear during the 2004 congressional debates that the focus of the UVVA was not on the prenatal conduct of mothers, but instead on the conduct of third parties.[197] Therefore, Senator Graham inferred that Article 119a, UCMJ was intended only to cover misconduct of third persons toward unborn children. Further, regarding the second prong, a charge of child endangerment under Article 134 of the UCMJ would not be composed of "a residuum of elements" of Article 119a. An Article 119a charge requires that certain predicate offenses be committed causing the harm or death of an unborn child. A child endangerment charge under Article 134 would not have an element requiring such a predicate offense.[198] Therefore, these charges are separate and distinct. Based on this two-prong test, Article 119a would not serve to preempt an Article 134 charge against a mother for her prenatal conduct.

V. Why Not Prosecute Mothers for Prenatal Conduct?

Prosecuting mothers for prenatal conduct is problematic for at least three reasons. First, these prosecutions may lead the military down a slippery slope of charging and convicting mothers for legal prenatal conduct. Second, the military may be inappropriately propelled into the nation's abortion debate. Finally, the ultimate result of these prosecutions may be that mothers harm or abort their unborn children to avoid criminal charges.

A. Slippery Slope

Prosecuting mothers for certain prenatal conduct is not necessarily inappropriate. For example, Cornelia Whitner and Regina McKnight, from South Carolina, used cocaine while they were pregnant and harmed their unborn children.[199] This offense may be worthy of a criminal conviction and criminal punishment. If U.S. Air Force Staff Sergeant Gussie Foreman had harmed her unborn child through her prenatal cocaine use,[200] she too may have deserved criminal prosecution. However, a significant problem with prosecuting mothers for their use of controlled substances while pregnant is that these prosecutions will not be limited to illegal conduct. In the military, these prosecutions may lead commanders and military courts down a slippery slope. These commanders and military courts may begin to charge and convict mothers for legal conduct which negatively affects their unborn child.

The South Carolina Supreme Court in *State v. McKnight* references author Nova D. Janssen, from Drake University, as a supporter of the prosecution of mothers for drug abuse that harms their unborn child.[201] Janssen argues that "[o]ne of the consequences of having children is that it creates certain duties and obligations to that child. If a woman does not fulfill those obligations, then the state must step in to prevent harm to the child."[202] In support of this position, the author points out that,

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[196] *Id.* at 111.

[197] 150 CONG. REC. S3134 (daily ed. Mar. 25, 2004).

[198] The elements of child endangerment are,

> (1) That the accused had a duty for the care of a certain child;
> (2) That the child was under the age of 16 years;
> (3) That the accused endangered the child's mental or physical health, safety or welfare through design or culpable negligence; and
> (4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Exec. Order No. 13,447, 72 Fed. Reg. 56,179, 56,233–34 (Oct. 2, 2007).

[199] *See supra* notes 141, 149 and accompanying text.

[200] *See supra* note 170 and accompanying text.

[201] State v. McKnight, 576 S.E.2d 168, 175 n.5 (S.C. 2003).

[202] Nova D. Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741, 762 (2000).

> Studies show that cocaine, as well as other illegal drugs, has been linked to strokes while still in the womb or shortly after birth, difficulties in bonding and habituation, attention deficit disorder, impaired growth, and a variety of physical deformities that may result when constriction of blood vessels decreases the transmission of nutrients from mother to unborn child. Heroin, a drug that has made a significant resurgence in recent years, has been linked to congenital abnormalities, jaundice, respiratory distress syndrome, low birth weight, low Apgar scores, impaired cognitive and behavioral development, and a high likelihood of complications resulting from withdrawal. Studies have even shown that ingestion of marijuana—a drug long thought to be harmless to unborn children—during pregnancy may result in "increased behavioral problems and decreased performance on visual perceptual tasks, language comprehension[,] sustained attention[,] and memory."[203]

To strengthen the article, Janssen specifically mentions and rejects the slippery slope argument against criminalizing drug use by pregnant women.[204] Janssen acknowledges that "[t]his is a valid question, particularly considering that alcohol—a legal substance—can be even more detrimental to an unborn child than many illegal substances."[205] Janssen then rejects this concern by stating that "there is no slippery slope because there is no constitutional right to take illegal drugs."[206] Janssen further acknowledges that mothers who harm their children by drinking alcohol during their pregnancy deserve punishment equal to those pregnant women who abuse drugs.[207] However, Janssen argues that "[t]he mere fact that some bad behaviors are beyond the reach of the legal system, . . . does not mean that society should leave unpunished bad behaviors which are within the reach of the legal system."[208] Janssen then simply concludes, "[a]s with any legal issue, a line must be drawn somewhere, and here it can easily be drawn between legal and illegal behaviors."[209]

Janssen's rejection of the slippery slope argument is inherently flawed. Janssen argues that a line between illegal behaviors and legal behaviors is easily drawn since legal behaviors are "beyond the reach of the legal system."[210] Janssen's statement would be accurate if pregnant women were only facing prosecution for their underlying illegal behavior of drug use. However, the South Carolina Supreme Court, for example, convicted Cornelia Whitner and Regina McKnight of child neglect, and did nothing to limit their ruling to cases in which the underlying conduct itself is illegal.[211] In other words, based on the South Carolina Supreme Court's reasoning in these cases, it could have just as easily convicted these women of child neglect due to alcohol use, a legal behavior. Therefore, legal behaviors are certainly not "beyond the reach of the legal system."[212]

Similarly, military commanders may charge Soldier mothers for prenatal drug use under Article 134 instead of Article 112a, Use of a Controlled Substance. Article 134 declares certain acts illegal that, in a civilian context, would be legal. For instance, Article 134 prohibits conduct such as indecent language, straggling, and adultery.[213] This demonstrates that the military legal system is not limited to punishing only prenatal behaviors that involve otherwise illegal conduct. Article 134 could certainly be used to punish prenatal behaviors that would otherwise be legal, such as, alcohol use or failing to follow recommendations from medical personnel. Therefore, Janssen's bright line that guards against a slippery slope problem does not exist.

In some states, mothers have already faced prosecution for prenatal conduct that would otherwise be legal. For example, in Wisconsin, Deborah Zimmerman was charged with attempted murder for consuming alcohol while pregnant.[214] Zimmerman was nine months pregnant and drank so much alcohol that her baby was born with a blood alcohol level of

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[203] *Id.* at 746–47 (citations omitted).

[204] *See id.* at 763–64.

[205] *Id.* at 763.

[206] *Id.*

[207] *See id.*

[208] *Id.* at 763–64.

[209] *Id.* at 764.

[210] *See id.*

[211] *See supra* notes 141, 149 and accompanying text.

[212] Janssen, *supra* note 202, at 763.

[213] UCMJ art. 134 (2008).

[214] State v. Deborah, 596 N.W.2d 490 (Wis. 1999).

.199% and suffered from symptoms associated with fetal alcohol syndrome.[215] She was charged with attempted murder based on the fact that she admitted to her nurse that she was going to "keep drinking and drink [herself] to death and [she was] going to kill this thing because [she didn't] want it anyways."[216]

Unlike Whitner and McKnight, who were charged with child neglect,[217] Zimmerman was charged with attempted first-degree homicide and first-degree reckless injury.[218] Zimmerman filed a motion to dismiss and the circuit court denied it.[219] Zimmerman appealed the order denying her motion to the Wisconsin Court of Appeals.[220] The Wisconsin Court of Appeals reversed the circuit court decision that there was probable cause to charge Zimmerman with these crimes based on the fact that the legislature specifically limited the definition of a "human being" in these statutes to include only "one who has been born alive."[221] The Court of Appeals ruled that "it would be absurd to conclude that a 'human being' can be an unborn child if the perpetrator is the mother, where the definition of 'human being' includes only persons who have been born alive."[222]

The court found further support that the legislature did not intend for unborn children to be victims of those crimes, by looking at several other statutes where the legislature had specifically included protections for unborn children. The court therefore reasoned that,

> When the legislature in one subsection of a statute specifically criminalizes death or injury to unborn child victims, but in another subsection uses the general designation of "human being" victims, we conclude that the legislative intent is manifest—an unborn child is not to be included in the definition of "human being."[223]

While the outcome was favorable to her, Deborah Zimmerman was nevertheless the first in this country to face prosecution for prenatal alcohol abuse, an otherwise legal activity. The Wisconsin Court of Appeals acknowledged its fear of the slippery slope stating,

> Even though Deborah's actions were egregious, we decline the State's overture to give the statute such a broad construction. Under such a construction, a woman could risk criminal charges for any perceived self-destructive behavior during her pregnancy that may result in injuries to her unborn child. Any reckless or dangerous conduct, such as smoking heavily or abusing legal medications, could become criminal behavior because the actions were taken while the woman was pregnant. "Taken to its extreme, prohibitions during pregnancy could also include the failure to act, such as the failure to secure adequate prenatal medical care, and overzealous behavior, such as excessive exercising or dieting."[224]

Wisconsin is not the only state to charge pregnant women for legal prenatal conduct. In Wyoming, a prosecutor charged a pregnant woman for her use of alcohol during her pregnancy.[225] However, the charges in this case were dismissed due to a lack of evidence that the fetus was harmed by alcohol.[226] In Missouri, Lisa Pindar was similarly charged with second-degree assault and child endangerment when her newborn son exhibited signs of Fetal Alcohol Syndrome.[227] Finally, in California,

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[215] *Id.* at 492.

[216] *Id.* at 491.

[217] *See supra* notes 141, 149 and accompanying text.

[218] *Deborah*, 596 N.W.2d at 491.

[219] *Id.*

[220] *Id.*

[221] *Id.* at 492–93 (quoting WIS. STAT. § 939.22(16) (2006)).

[222] *Id.* at 494.

[223] *Id.*

[224] *Id.* at 494–95 (quoting Hillman v. Georgia, 503 S.E.2d 610, 613 (Ga. Ct. App. 1998)).

[225] *See* LYNN M. PALTROW ET AL., CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN 2 (Apr. 1992), *available at* http://www.advocatesforpregnantwomen.org/articles/1992stat.htm (citing State v. Pfannestiel, No. 1-90-8CR (Co. Ct. of Laramie, Wyo., Feb. 1, 1990) as dismissed for lack of probable cause); CTR. FOR REPRODUCTIVE RIGHTS, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN'S HEALTH AND CHILDREN'S INTERESTS 1, 17 n.10 (Sept. 2000) (BRIEFING PAPER), *available at* http://www.reproductiverights.org/pdf/pub_bp_punishingwomen.pdf [hereinafter PUNISHING WOMEN].

[226] *See* PALTROW, *supra* note 225, at 2.

[227] *See id.*

police and prosecutors arrested and criminally charged Pamela Rae Stewart because she ignored her doctor's advice to stay in bed, stop having sexual intercourse and take labor suppressing medication.[228] While none of the charges in these cases resulted in convictions, they demonstrate that the fear of a slippery slope in the prosecution of mothers is real.

Like the prosecutors in *Zimmerman*, *Pfannestiel*, *Pindar*, and *Stewart*, military commanders may decide to prosecute pregnant Soldiers for their alcohol consumption or other legal conduct under Article 134. Pregnant Soldiers in the military are provided with written limitations from their doctors as soon as their pregnancy is detected. These limitations advise that pregnant Soldiers not deploy, not conduct airborne operations and not submit to the standard physical fitness requirements of their service.[229] If a pregnant Soldier were to ignore these limitations and jump out of an airplane, for instance, harm to her unborn child is probable. It is easy to imagine a commander unreasonably charging this Soldier with child endangerment under Article 134.

The list of possible prosecutions is endless. Author Carolyn Coffey demonstrates this limitless slope, when she raises questions such as,

> If a woman can be prosecuted for drinking while pregnant—which, by the way, is not illegal—could another be prosecuted for smoking cigarettes and birthing an underweight baby? For endangering her unborn child by failing to heed a doctor's bed rest orders? For becoming pregnant while obese, thus doubling, or in the case of the extremely obese even quadrupling, the chance of neural tube defects?[230]

In summary, the largest negative consequence of prosecuting mothers for their harmful prenatal conduct is the slippery slope that will inevitably develop. As predicted by the dissent in *Whitner*, "the impact of today's decision is to render a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize. To ignore this 'down-the-road' consequence in a case of this import is unrealistic."[231]

B. The Military Will Be Propelled into the Nation's Abortion Debate

In 1999, Congresswoman Jackson-Lee from Texas warned that the UVVA would "improperly inject debates about abortion into Federal and military criminal prosecutions across the country."[232] Conversely, proponents of the UVVA argued that the UVVA had nothing to do with abortion.[233] A fact that is indisputable is that the UVVA recognizes the unborn child as an individual victim and therefore recognizes that a fetus has rights. This article has shown how this recognition of fetal rights has been expanded and used in other criminal statutes against mothers in South Carolina.[234] Further, this article has demonstrated how this recognition of fetal rights will most likely lead to a similar expansion in military prosecutions and convictions.[235]

This expansion of fetal rights may be perceived as the military's declaration that the rights of an unborn child surpass the rights of the pregnant Soldier carrying the child. This declaration may create the appearance that the military or a specific commander, is taking a political stance in the nation's abortion debate. The Department of Defense has made it clear that military personnel should remain non-partisan.[236] The grant of fetal rights in Article 119a may, however, inappropriately push the military and its commanders into a political debate.

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[228] *See id.* (citing People v. Pamela Rae Stewart, Declaration in Support of Arrest Warrant Case No. M508 197 (Aug. 28, 1986); PUNISHING WOMEN, *supra* note 229, at 17 n.11 (citing No. M508197, Reporter's Transcript, at 4 (Cal. Mun. Ct. San Diego Cty. Feb. 26, 1987)).

[229] *See id.*

[230] Carolyn Coffey, Whitner v. State*: Aberrational Judicial Response or Wave of the Future for Maternal Substance Abuse Cases?*, 14 J. CONTEMP. HEALTH L. & POL'Y 211, 211 (Fall 1997) (citing Robin Abcarian, *A New Strategy for Pregnancy Police?*, L.A. TIMES, Sept. 18, 1996, at E2).

[231] Whitner v. State, 492 S.E.2d 777, 788 (S.C. 1997) (quoting Moore, A.J., dissenting).

[232] 145 CONG. REC. 23,362 (statement of Congresswoman Jackson-Lee).

[233] *See, e.g.*, 150 CONG. REC. S3134 (daily ed. Mar. 25, 2004) (statement of Sen. Graham).

[234] *See supra* sec. III, subsec. B.

[235] *See supra* sec. IV.

[236] *See* U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION 6-300 (Aug. 1993) (C6, 29 Nov. 2007); U.S. DEP'T OF DEFENSE, DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES reference (e) (19 Feb. 2008).

In addition to improperly propelling military commanders into the abortion debates through their disposition decisions, the military court decisions that may result from the addition of Article 119a may later be used as ammunition to overturn *Roe v. Wade*.[237] In *Roe*, the Supreme Court clearly ruled that an unborn child is not a person under the Constitution.[238] Conversely, the UVVA and Article 119a specifically designate an unborn child as a person. In 2004, the National Organization for Women spoke out against the UVVA stating that its new definition of a person to include "even zygotes, blastocysts or embryos . . . would give rights to fertilized eggs, embryos and fetuses—ultimately, setting the stage to legally reverse *Roe*."[239] Similarly, following President Bush's signing of the UVVA, author Kate Randall comments that the Act, "[b]y covering crimes in which an embryo is protected from the 'time of conception,' anti-abortion advocates are seeking to establish a precedent in federal law that could be used to push through new anti-abortion legislation."[240]

As noted above, Senator Graham stated that "[n]othing in the language of this bill is intended in any way to undermine the legal basis for abortion rights, as expressed by the Supreme Court in Roe v. Wade, and subsequent decisions."[241] While the *intent* of the UVVA's language may not be to erode abortion rights, that will be the *result*. Each time a military court allows fetal rights to expand within the punitive articles, a federal court opinion that inadvertently contradicts the Supreme Court's ruling will be created. Over time, these military opinions may be used as support to institute a new precedent that establishes individual rights for the unborn and eliminates abortion rights. In 2004, Senator Feinstein, quoting Professor Charo from the University of Wisconsin stated,

> [i]f you can . . . draw enough examples from different parts of life and law where embryos are treated as babies, then how can the Supreme Court say they are not? This is, without question, a conscious strategy. . . . the erosion against Roe is being waged, piece by piece, bit by bit, law by law, action by action . . . .[242]

Military courts' rulings will become one of the "piece[s]" or "bit[s]" of this strategy to overturn *Roe v. Wade*. This interjection of the political debate over abortion into the military arena is highly problematic.[243]

C. The Ultimate Result Could Be More Harm and Deaths of Unborn Children

The pronounced intent of the UVVA was to protect pregnant women and their unborn children from violence and death.[244] However, the ultimate result may be the direct opposite. In order to avoid prosecution for their prenatal conduct, pregnant Soldiers may abort their unborn children. For instance, a servicemember like SSG Gussie Foreman, who despite her prenatal drug use carried a healthy child to term, might have aborted her baby simply to avoid the possibility of prosecution. Therefore, the number of abortions may increase in the military because of Article 119a and the expansion of fetal rights. A Massachusetts Superior Court noted this quandary stating that the, "[p]rosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."[245]

Article 119a specifically excludes the act of abortion from prosecution.[246] If a pregnant Soldier believes that her commander may charge her with a violation of Article 134 for her prenatal conduct, she may simply choose to consent to an abortion. If the abortion is legal, she could not be prosecuted for eliminating her unborn child. Any attempt to prosecute this

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[237] 410 U.S. 113 (1973).

[238] *Id.*

[239] Press Release, Nat'l Org. for Women, NOW Urges Immediate Action to Prevent Devastating "Unborn Victims of Violence Act" from Passing in Senate (Feb. 26, 2004), *available at* http://www.now.org/press/02-04/02-26.html.

[240] Kate Randall, *Bush Signs "Unborn Victims of Violence Act": Legislation Targets Abortion Rights*, WORLD SOCIALIST WEB SITE, Apr. 9, 2004, http://www.wsws.org/articles/ 2004/apr2004/vict-a09.shtml.

[241] 150 CONG. REC. S3164 (daily ed. Mar. 25, 2004) (statement of Sen. Graham).

[242] 150 CONG. REC. S3150 (daily ed. Mar. 25, 2004) (statement of Sen. Feinstein).

[243] *See supra* note 236 and accompanying text.

[244] *See* 150 CONG. REC. S3132 (daily ed. Mar. 25, 2004) (statement of Sen. Dewine, Ohio, sponsor of H.R. 1997, Unborn Victims of Violence Act of 2004).

[245] Johnson v. State, 602 So. 2d 1288, 1296 (Fla. 1992) (citations omitted); *see also* Commonwealth v. Pellegrini, No.87–970, slip op. (Mass. Super. Ct., Oct. 15, 1990) (holding that a pregnant woman is not criminally liable for the transmission of cocaine to her unborn child).

[246] UCMJ art. 119a (2008).

as a crime under Article 134 would most likely be blocked by the preemption doctrine since consensual abortion is specifically addressed and exempted in Article 119a.[247]

Just as concerning is the idea that pregnant Soldiers, fearing prosecution, may also avoid proper prenatal care and harm their unborn children. In *State v. Zimmerman*, the Wisconsin Court of Appeals acknowledged that "the imposition of criminal sanctions on pregnant women for prenatal conduct may hinder many women from seeking prenatal care and needed medical treatment because any act or omission on their part may render them criminally liable to the subsequently born child."[248] A Florida court similarly recognized that, "[r]ather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected."[249]

One could argue that in a military society, due to its paternalistic nature, pregnant servicemembers will not be inclined to forego prenatal care simply to avoid prosecution for their prenatal conduct. Military leaders closely supervise their subordinates, to include those who are pregnant. For this reason, it might be difficult to be pregnant, avoid prenatal care, and go unnoticed. This argument is further supported by the idea that all servicemembers, to include pregnant Soldiers, are subject to random urinalysis tests and therefore, drug use would most likely not be first detected through prenatal care.

However, despite this paternalistic society, pregnant servicemembers may still forgo prenatal care to avoid prosecution. As demonstrated by the pregnant Soldiers in the "born alive" line of cases, *Gibson*, *Nelson*, and *Riley*, concealing a pregnancy and avoiding prenatal care can be done.[250] In fact, the women in these cases managed to conceal their pregnancies while surrounded by other servicemembers in a barracks and on a ship.[251] This possible result of increased death and harm of unborn children is the exact opposite of what the UVVA's drafters intended.[252] However, in the military, just as in the states, this result is more than just conceivable.

VI. Conclusion

The UVVA's addition of Article 119a to the UCMJ is purported to protect pregnant women and their unborn children equally.[253] The UVVA and Article 119a recognize an unborn child as an individual victim.[254] Therefore, the UVVA grants a fetus rights for the first time in federal law.[255] Based on this novel grant of fetal rights, opponents of the UVVA are adamant that its hidden agenda is to erode women's reproductive rights[256] and eventually overturn the Supreme Court's decision in *Roe v. Wade*.[257]

The UVVA's sponsors firmly deny that it has anything to do with mothers' rights, abortion or *Roe v. Wade*.[258] In support of this denial, they point to the fact that the UVVA and Article 119a expressly exempt from prosecution anyone involved in a consensual abortion, medical treatment or the mother of the unborn child.[259] Drafters stated that the intent was merely to cause third party criminals to not only face criminal consequences for harm they may do to a pregnant women, but also for harm done to a second victim, the unborn child.[260]

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[247] *See supra* notes 192–196 and accompanying text.

[248] State v. Deborah, 596 N.W.2d 490, 495 (1999).

[249] *Johnson*, 602 So. 2d, at 1295–96.

[250] *See supra* pp. 2–5.

[251] *See id.*

[252] *See* 150 CONG. REC. S3132 (daily ed. Mar. 25, 2004) (statement of Sen. Dewine, Ohio, sponsor of H.R. 1997, Unborn Victims of Violence Act of 2004).

[253] *See id.*

[254] *See id*.

[255] *See supra* note 89 and accompanying text.

[256] *See supra* note 8 and accompanying text.

[257] *See supra* note 9 and accompanying text.

[258] *See supra* note 233 and accompanying text.

[259] *See supra* note 117 and accompanying text.

[260] *See supra* note 111 and accompanying text.

Regardless of its intent, however, in the military, the UVVA represents a dramatic expansion of fetal rights in criminal law. This expansion will allow commanders to charge pregnant Soldiers for their illegal and legal prenatal conduct under Article 134, the exact prosecution intentionally exempted from Article 119a and the UVVA. Military courts, like the South Carolina Supreme Court, will convict these Soldiers holding that it would be "absurd" and inconsistent to acknowledge fetal rights in Article 119a and not apply those fetal rights to a child endangerment charge under Article 134. These convictions will improperly place military commanders in the nation's abortion debate and may also cause more pregnant women to abort or harm their unborn children because of their desperate desires to avoid prosecution.

The UVVA and Article 119a, in practice, will not protect unborn children and mothers equally. In the military, as demonstrated by South Carolina, this novel grant of fetal rights will eventually cause an unborn child's interests to outweigh a mother's rights. As opponents of the UVVA alleged, this elimination of a woman's right to control her body may be part of the hidden agenda its proponents wished to accomplish.

"If at First You Don't Succeed . . .": An Argument Giving Federal Agencies the Ability to Challenge Adverse Equal Employment Opportunity Commission Decisions in Federal Court

Major Steven M. Ranieri[*]

I. Introduction

Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination in hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin.[1] The Equal Employment Opportunity Commission (EEOC) enforces these prohibitions against federal agencies through a comprehensive regulatory scheme[2] that expressly includes the power to award remedies, such as reinstatement, hiring (with or without back pay), and other equitable relief.[3]

Neither the originally enacted nor the amended versions of Title VII provide a mechanism for federal agencies to challenge the EEOC's award of remedies in federal court. The Title VII and the EEOC implementing regulations act in concert to make EEOC decisions regarding both liability and remedies binding upon federal agencies. Thus, the EEOC's determination is final, unless a complainant is dissatisfied with the decision and seeks a trial de novo in federal court.[4]

Congress amended Title VII with the Civil Rights Act of 1991 (1991 CRA).[5] The 1991 CRA permits, among other things, victims of intentional discrimination to recover compensatory damages and permits any party to demand a jury trial when the alleged victim seeks compensatory damages.[6] Unfortunately, the 1991 CRA does not explicitly state whether the EEOC could award compensatory damages in administrative proceedings or whether compensatory damages were a remedy available only to employees suing in federal court. Notwithstanding this uncertainty, the EEOC began to grant compensatory damages in federal-sector employment discrimination cases shortly after the passage of the 1991 CRA.[7]

In *West v. Gibson*, the Supreme Court held that the EEOC possessed the legal authority to require federal agencies to pay compensatory damages.[8] In doing so, the court determined that the 1991 CRA constituted a waiver of the federal government's sovereign immunity and that this waiver applied not only to litigation in federal court but also to administrative proceedings.[9] Thus, *Gibson* permits the EEOC to award compensatory damages to federal complainants as an administrative remedy.

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[1] 42 U.S.C. § 2000e (2000).

[2] *Id.* § 2000e-16(b).

> [T]he Equal Employment Opportunity Commission [EEOC] shall have authority to enforce the provisions of subsection (a) of [42 U.S.C. § 2000e] through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

Id.

[3] *Id.* § 2000e-5(g).

[4] As explained in more detail in Section II, *infra*, a complainant can also seek to enforce an EEOC's determination of liability and remedy against an alleged non-compliant federal agency.

[5] 42 U.S.C. § 1981a.

[6] *See id.*

[7] *See, e.g.*, Jackson v. U.S. Postal Serv., E.E.O.C. No. 01923399, 93 F.E.O.R. 3062 (1992).

[8] West. v. Gibson, 527 U.S. 212, 223 (1999).

[9] *Id.* at 222.

This article extends the reasoning of the Supreme Court's decision in *Gibson* and makes the argument that adverse EEOC decisions are not binding against federal agencies when complainants seek compensatory damages. Since the 1991 CRA permits any party to demand a jury trial in compensatory damages cases, it should also permit federal agencies to challenge adverse EEOC rulings in federal court. In other words, if the waiver of sovereign immunity applies to awards of compensatory damages in administrative hearings, and if an award of compensatory damages is conditioned upon a request for trial by jury, such administrative awards must be subject to judicial review if the federal agency decides to challenge the adverse decision.

Amending Title VII to allow federal agencies to challenge adverse EEOC rulings furthers the purpose of Title VII. The purpose of Title VII is to remedy discrimination in federal employment, which it does in part by creating a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action. This system encourages quicker, less formal and less expensive resolutions of disputes within the federal government and outside of court. The current dispute resolution system, however, provides no incentive to complainants to settle their complaints because they can obtain a trial de novo in federal court if they lose in the administrative process. Complainants would be encouraged to enter into binding administrative settlements if federal agencies could challenge adverse administrative findings in federal court.

To discuss this issue the article is divided into four parts. Part I provides a detailed explanation of the federal equal employment opportunity (EEO) complaint process. Part II provides a statutory and regulatory interpretation of the 1991 CRA and the Supreme Court's decision in *Gibson*. Part III presents the argument that existing law provides authority for federal agencies to challenge adverse EEOC decisions in federal court. Lastly, Part IV states the case for changing Title VII to create a procedure for judicial review of adverse EEOC decisions.

II. The Federal Equal Employment Opportunity Complaint Process

Through statutes and regulations, Congress created an elaborate remedial system that is the exclusive and preemptive means for handling federal sector discrimination complaints.[10] Specifically, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, as amended, prohibits discrimination based on race, color, religion, sex, or national origin.[11] Acting under the authorization of Title VII, the EEOC promulgates regulations to provide a mechanism to enforce the statute's anti-discrimination prohibitions.

A. Title VII of the Civil Rights Act of 1964

1. Applying Title VII to Federal Sector Employment

When enacted, Title VII specifically excluded the federal government from the definition of "employer" and, consequently, its provisions did not protect federal sector employees and applicants.[12] Congress extended Title VII's anti-discrimination prohibitions to executive agencies of the federal government in 1972, with the addition of § 2000e-16 to Title 42.[13]

Section 2000e-16 states "[a]ll personnel actions affecting employees or applicants for employment [in executive agencies][14] shall be made free from any discrimination based on race, color, religion, sex, or national origin."[15] While §

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[10] *See* Brown v. Gen. Servs. Admin., 425 U.S. 820, 832 (1976).

[11] *See supra* note 1.

[12] 42 U.S.C. § 2000e-(b)(1).

[13] Federal employees were relegated to the protections of executive orders until the enactment of the Equal Employment Opportunity Act of 1972, which amended Title VII by, among other things, extending antidiscrimination prohibitions to the federal sector. *See id*. § 2000e-16 (corresponds to the Equal Employment Opportunity Act of 1972, § 11).

[14] The term "federal agencies" is used throughout this article for simplification and, unless otherwise noted, refers generally to all departments, agencies, and units of the federal government covered by Title VII and the EEOC's antidiscrimination regulations. 29 C.F.R. § 1614.103(b) (2007).

> This part applies to: (1) Military departments as defined in 5 U.S.C. 102; (2) Executive agencies as defined in 5 U.S.C. 105; (3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority; (4) All units of the judicial branch of the Federal government having positions in the competitive service, except for complaints under the Rehabilitation Act; (5) The National Oceanic and Atmospheric Administration Commissioned Corps; (6) The Government Printing Office; and (7) The Smithsonian Institution.

2000e-16 applies Title VII to federal sector employees, there is not a complete statutory overlap in applying Title VII in the private and state government sectors with the federal sector. Specifically, § 2000e-16, which applies to federal government employees, incorporates by reference only the remedies sections of 2000e-5, which applies to employees in the private sector.[16]

Thus, it would appear that § 2000e-16 prohibits discrimination in the federal sector solely to "personnel actions" effecting federal employees. However, courts have historically interpreted § 2000e-16 to incorporate by inference the provisions applicable to the private sector.[17] Thus, Courts have routinely interpreted Title VII to prohibit retaliation against federal sector employees who engage in protected activity even though § 2000e-16 does not explicitly prohibit it.[18]

2. Civil Actions under Title VII

Section 2000e-16 provides the statutory framework for aggrieved persons to file civil actions in federal district court alleging Title VII violations. The statute provides that "an employee or applicant for employment, if aggrieved by the final disposition of his [administrative] complaint, or by the failure to take final action on his [administrative] complaint, may file a civil action as provided in § 2000e–5."[19] Notably absent, however, is a reciprocal provision authorizing federal agencies to initiate a civil action against the federal sector employee or applicant for employment. This "one sided" access to federal district court is reinforced by the EEOC's implementing regulations. As a result, federal agencies are bound by the factual and legal determinations of the EEOC.

B. The Regulatory Framework Created by the EEOC

The federal-sector employment discrimination complaint process[20] is delineated in Part 1614, of Title 29 of the Code of Federal Regulations (CFR).[21] It is a segmented process beginning with informal counseling and extending, in some circumstances, to a formal complaint, an agency investigation, a hearing before an EEOC administrative judge, and an appeal to the EEOC.

The process begins with informal counseling. Aggrieved persons who believe they have been discriminated against must contact an agency EEO counselor within forty-five days of the alleged discriminatory matter or, in the case of personnel action, within forty-five days of the action's effective date, prior to filing a complaint in order to try to resolve the matter informally.[22] The EEO counselors explain the federal sector EEO process to the aggrieved individual and attempt to resolve the complaint informally.[23] At the initial counseling session, counselors must advise individuals in writing of their rights and

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Id.; *see also* 42 U.S.C. § 2000e-16(a).

[15] 42 U.S.C. § 2000e-16(a).

[16] *Id.* § 2000e-16(d) ("The provisions of section 2000e–5 (f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.").

[17] *See, e.g.*, Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008). The Age Discrimination in Employment Act, unlike Title VII, does not specifically incorporate anti-retaliation protections provided to private sector employees; nonetheless, the Supreme Court held that the ADEA provides a federal sector employee a cause of action for retaliation in the same manner in which it provides this cause of action to a private sector employee. *See also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

[18] *Compare* 42 U.S.C. § 2000e-16 (requiring all personnel actions affecting employees or applicants for employment to be free from discrimination), *with* 42 U.S.C. § 2000(e)-2(a)(1) (forbidding discrimination based on "race, color, religion, sex, or national origin"), *and* 42 U. S. C. §2000e-3(a) (forbidding discrimination against an employee or job applicant who has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation).

[19] *Id.* § 2000e-16(c).

[20] This article examines individual federal sector complaints and does not cover class complaints.

[21] 29 C.F.R. § 1614 (2007).

[22] *Id.* § 1614.105(a). This time limit must be extended by the agency if the complainant

> shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits . . . .

Id. § 1614.105(a)(2).

[23] *Id.*

responsibilities in the EEO process, including the right to request a hearing before an EEOC administrative judge or the right to an immediate final decision from the agency following its investigation of the complaint.[24] Furthermore, counselors must inform aggrieved persons of their right to elect between pursuing the matter in the EEO process under Part 1614 or the Merit Systems Protection Board (MSPB) appeal process, if applicable.[25] The counselor must also inform aggrieved persons of their duty to mitigate damages and that only claims raised in pre-complaint counseling may be alleged in a subsequent formal complaint filed with the agency.[26]

The agency must complete the counseling within thirty days of the initial date the aggrieved person contacted the agency's EEO office to file her informal complaint.[27] If the aggrieved person's informal complaint is not resolved within that time, the counselor must inform the individual in writing of the right to file a formal complaint of discrimination.[28] The notice must inform the individual that a formal complaint must be filed within fifteen days of receiving the notice, identify the agency official with whom the complaint must be filed, and explain the individual's duty to inform the agency if he is represented by legal counsel.[29]

A formal complaint is a signed statement from the aggrieved person or his attorney and must be sufficiently precise to identify the complainant and the agency, and to generally describe the action or practice which forms the basis of the complaint.[30] The complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims similar to those raised in the complaint.[31] When an aggrieved person subsequently files a formal complaint, the EEO counselor must submit a written report to the agency's EEO office concerning the issues discussed and the actions taken during counseling.[32]

The responding agency[33] is required to conduct an impartial and appropriate investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the deadline.[34] The agency is then required to develop an impartial and appropriate factual record upon which to make findings on the claims raised by the complaint.[35] At the conclusion of the investigation, the agency must provide a copy of the investigative file to the aggrieved person and notify him that, within thirty days of receipt of the file, he has the right to request a hearing and a decision from an EEOC administrative judge[36] or he may request an immediate final decision from the agency.[37] The complainant may also request a hearing before an EEOC administrative judge at any time after 180 days have elapsed from the filing of the formal complaint

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[24] *Id.*

[25] "A mixed case complaint is a complaint of employment discrimination filed with a Federal agency . . . related to or stemming from an action that can be appealed to the [MSPB]. The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address." *Id.* § 1614.302(a)(1). "A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of [illegal] discrimination . . . ." *Id.* § 1614.302(a)(2). Mixed case complaints and appeals are a distinct concept from the mixed motive theory of intentional discrimination. *See* note 90 *infra*.

[26] 29 C.F.R. § 1614.105(b)(1).

[27] *Id.* § 1614.105(d). The aggrieved person may agree to extend the thirty-day counseling period, however, for an additional sixty days. *See id.* § 1614.105(e).

[28] *Id.*

[29] *Id.*

[30] *Id.* § 1614.106(c).

[31] *Id.* § 1614.106(d).

[32] *Id.* § 1614.105(c).

[33] *Id.* § 1614.108(a).

[34] *Id.* § 1614.106(e)(2).

> When a complaint has been amended, the agency shall complete its investigation within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, except that the complainant may request a hearing from an administrative judge on the consolidated complaints any time after 180 days from the date of the first filed complaint.

Id.

[35] *Id.* § 1614.108(b) ("An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.").

[36] *Id.* § 1614.108(f).

[37] *Id.* § 1614.110 ("When an agency . . . receives a request for an immediate final decision . . . under § 1614.108(f), the agency shall take final action by issuing a final decision.").

if the agency has not concluded their investigation and met their obligation.[38] Upon the complainant's request, the EEOC will then appoint an administrative judge to conduct a hearing.[39]

The parties may conduct discovery prior to the hearing.[40] The administrative judge conducts the hearing and receives relevant information and documents as evidence.[41] The rules of evidence are not strictly applied; however, the administrative judge must exclude irrelevant or repetitious evidence.[42] The administrative judge is required to issue a decision on the complaint within 180 days of receipt of the complaint file from the agency and, where discrimination is determined, order appropriate remedies and relief.[43] When an administrative judge has issued a decision, the agency must take final action on the complaint by issuing a final order within forty days of receipt of the hearing file and the administrative judge's decision.[44] The agency's final order must notify the complainant whether or not the agency will fully implement the decision of the administrative judge and must contain, among other things, notice of the complainant's right to appeal the decision to the EEOC Office of Federal Operations (EEOC OFO) and the right to file a civil action in federal district court.[45] If the complainant chooses to appeal the final order, he must do so within thirty days of receipt of the final order.[46] If the complainant chooses to file a civil action, he must do so within ninety days of receipt of the final order.[47]

Alternatively, there are circumstances in which the administrative judge will not have issued a decision. For example, the administrative judge will not issue a decision when an agency dismisses the entire complaint, receives a request for an immediate final decision, or does not receive a reply to the notice it provided to the complainant regarding the right to either request a hearing or an immediate final decision.[48] In these circumstances, the agency will issue a final decision.[49] The final agency decision must include findings by the agency on the merits of each issue in the complaint, the rationale for dismissing any claims in the complaint, and appropriate remedies and relief, if the agency finds discrimination.[50] Similar to the final agency order, the final agency decision must contain notice of the complainant's right to appeal to the EEOC OFO or to file a civil action in federal district court and the same timelines apply.[51]

If a federal agency disagrees with the administrative judge's decision, the agency may avoid fully implementing the decision pending an agency appeal. The agency must appeal the administrative judge's decision to the EEOC OFO simultaneously with the issuance of the final agency action to the complainant.[52] The EEOC OFO's decision on appeal from an agency's final action is based on a de novo review. However, the EEOC OFO reviews factual findings in a decision by an administrative judge based on a substantial evidence standard of review.[53]

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[38] *Id.* § 1614.108(g).

[39] *Id.* §§ 1614.108(g), 1614.109(a).

[40] *See id.* § 1614.109(d).

> The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. . . . Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery.

Id.

[41] *Id.* § 1614.109(e).

[42] *Id.*

[43] *Id.* § 1614.109(i).

[44] *Id.* § 1614.110(a). The administrative judge's decision that triggers the agency's final order can be a dismissal of the complaint, a summary judgment decision, or a decision following a hearing. *See id.* § 1614.109(b), (g) and (i), respectively.

[45] *Id.*

[46] *Id.* §§ 1614.401(a), 1614.402(a).

[47] *See infra* note 55.

[48] E.g., dismissal is proper if a complainant refuses to accept an offer of "full relief' from the agency. *See* 29 C.F.R. §§ 1614.107, 1614.108(f).

[49] *Id.* § 1614.110(b).

[50] *Id.*

[51] *Id.* §§ 1614.110(b), 1614.401(a), 1614.402(a).

[52] *Id.* §§ 1614.401(a), 1614.402(a); *see also id.* § 1614.403.

[53] *Id.* § 1614.405(a).

The EEOC OFO's decision on an appeal requested by either party is final unless the EEOC OFO reconsiders the case.[54] Either the complainant or the agency may request the EEOC OFO to reconsider its decision within thirty days of receipt of the decision.[55] Reconsideration is discretionary and granted only when the previous EEOC decision involved a clearly erroneous interpretation of material fact or law, or when the decision will have a substantial impact on the policies, practices or operations of the agency.[56]

A dissatisfied complainant may only proceed to federal district court if the civil action is properly filed within one of the following deadlines:

> (1) within ninety days of receipt of the final action where no administrative appeal has been filed;
> (2) after 180 days from the date of filing a complaint if an administrative appeal has not been filed and final action has not been taken;
> (3) within ninety days of receipt of EEOC's final decision on an appeal; or
> (4) after 180 days from the filing of an appeal with EEOC if there has been no final decision by the EEOC.[57]

"Mixed" cases involve a personnel action that is otherwise appealable to the MSPB under the Civil Service Reform Act (CSRA) and an allegation that the basis for the action was discrimination prohibited by Title VII, the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), or the Rehabilitation Act (RA).[58] Specifically, a mixed case complaint is a complaint of employment discrimination filed with a federal agency related to or stemming from an action that can be appealed to the MSPB.[59] The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.[60]

Mixed case complaints are processed similarly to other complaints of discrimination; however, there are three exceptions. First, the agency has only 120 days from the date of filing the mixed case complaint to issue a final decision and the complainant may appeal the matter to the MSPB or file a civil action any time thereafter.[61] Second, the complainant must appeal the agency's decision to the MSPB, not the EEOC, within 30 days of receipt of the agency's decision.[62] Third, at the completion of the investigation, the complainant does not have the right to request a hearing before an EEOC administrative judge, and the agency must issue a decision within 45 days.[63]

On the other hand, a mixed case appeal is an appeal filed with the MSPB alleging that an appealable agency action was effected, in whole or in part, because of discrimination.[64] Mixed case appeals brought before the MSPB must stem from one of the conditions enumerated in § 1201.3, Title 5 of the CFR.[65] For example, a federal employee may appeal a reduction in grade or removal for unacceptable performance or a removal, reduction in grade or pay, suspension for more than fourteen days, or furlough for thirty days or less for cause that will promote the efficiency of the service.[66]

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[54] *Id.* § 1614.405(b).

[55] *Id.*

[56] *Id.*

[57] *Id.* § 1614.407.

[58] 5 U.S.C. § 7702 (2000); *see* Meehan v. U.S. Postal Serv., 718 F.2d 1069 (Fed. Cir. 1983).

[59] 29 C.F.R. § 1614.302(a)(1).

[60] *Id.*

[61] *Id.* § 1614.302(d).

[62] *Id.*

[63] *Id.*

[64] *Id.* § 1614.302(a)(2); *see also* 5 U.S.C. § 7702 (2000).

[65] *See* 5 C.F.R. § 1201.3 (2008).

[66] *Id.*

Where either avenue of redress is available, the aggrieved person must either elect to proceed with a complaint as a mixed case complaint through the procedures outlined above, or pursue a mixed case appeal before the MSPB.[67] Upon filing of a new appeal, the administrative judge will issue an acknowledgment order to both the appellant and the agency.[68] This order transmits a copy of the appeal to the agency and directs the agency to submit a statement as to its reason for taking the personnel action or decision being challenged, together with all documents contained in the agency record of the action.[69] The parties will submit pleadings and the administrative judge will issue an initial order following a hearing on the merits of the appeal.[70] When appellants or agencies are dissatisfied with an initial decision, they may file a petition for review with the MSPB, which issues a final decision.[71]

Aggrieved individuals who have filed either a mixed case complaint or a mixed case appeal, and who have received a final decision from the MSPB, may petition the EEOC to review the MSPB final decision.[72] Complainants may file a civil action from a mixed case complaint or mixed case appeal within thirty days of receipt of: (1) the agency's final decision, (2) the MSPB's final decision, or (3) the EEOC's decision on a petition to review.[73] Alternatively, a civil action may be filed after 120 days from the date of filing the mixed case complaint with the agency or the mixed case appeal with the MSPB if there has been no final decision on the complaint or appeal, or 180 days after filing a petition to review with EEOC if there has been no decision by EEOC on the petition.[74]

III. Compensatory Damages in Federal Sector Employment Discrimination

A. The Civil Rights Act of 1991

1. History

Congress enacted Title VII in order to promote a discrimination-free workplace in both the public and private sectors. The federal courts initially interpreted Title VII liberally; however, as discussed in this section, this view became more restrictive with the issuance of several Title VII decisions by the Supreme Court in the late 1980's. Congress interpreted the Supreme Court's progression toward limiting employee rights under Title VII as a threat to Title VII's goal of eliminating workplace discrimination.

Exacerbating this tension between Congress and the Court, the Supreme Court issued a decision significantly limiting the anti-discrimination protections provided to racial minorities by Civil Rights Act of 1886, commonly referred to as "Section 1981."[75] Section 1981 is a Reconstruction Era statute passed by Congress to counteract the attempts by state and local government, primarily in the South, from infringing on the civil liberties granted to African Americans following passage of the Thirteenth Amendment.

These Supreme Court decisions were not the only impetus for the 1991 CRA. Commentators have identified at least three other factors prompting the congressional debate surrounding amending Title VII: (1) the difference in remedies between § 1981 and Title VII,[76] (2) society's heightened sensitivity to sexual harassment in the workplace,[77] and (3) the trend

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[67] Federal employees may file a mixed case complaint as a complaint of discrimination with the agency's EEO department or as a mixed case appeal to the MSPB, but not both. *Id.* § 1614.302(b); *see also* 5 U.S.C. § 7702; 5 C.F.R. § 1201.154; McAdams v. Reno, 64 F.3d 1137, 1142 (8th Cir. 1995); Tolbert v. United States, 916 F.2d 245, 248 (5th Cir. 1990).

[68] 5 C.F.R. § 1201.

[69] *Id.*

[70] *Id.*

[71] *Id.* Appellants who are dissatisfied with an initial decision have the alternative of filing a petition with the United States Court of Appeals for the Federal Circuit. *Id.*

[72] 29 C.F.R. § 1614.310.

[73] *Id.*

[74] *Id.*

[75] 42 U.S.C. § 1981 (2000).

[76] *See* Douglas M. Staudmeister, *Grasping The Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 AM. U.L. REV. 189, 197 (1996) (citing Govan, *infra* note 79, at 57) (supporters of 1991 Act argued that "it was a matter of simple equity to eliminate the preferential status of race discrimination cases and provide to victims of gender, religious, national origin, and disability discrimination the remedies long available to victims of race discrimination").

in state statutes toward fashioning legal and equitable relief for employment discrimination.[78] The issue of Title VII remedies, however, dominated the debate that culminated in the passage of the 1991 CRA.

a. Supreme Court Decisions Set the Stage for Legislation

The major impetus for the 1991 CRA was a series of decisions handed down by the Supreme Court in 1989.[79] Three of those decisions had a major impact on the debate in Congress: *Wards Cove Packing Co. v. Antonio*,[80] *Price Waterhouse v. Hopkins*,[81] and *Patterson v. McLean Credit Union*.[82]

The first significant Title VII case rejected by the 1991 CRA, *Wards Cove Packing Co.*, made it harder for plaintiffs to prove disparate impact discrimination under Title VII.[83] *Wards Cove Packing Co.* partially overturned *Griggs v. Duke Power Co.*,[84] a 1971 Supreme Court decision that firmly established disparate impact as a viable theory upon which to litigate discrimination cases. In *Griggs*, the Court ruled that if an employment practice has a disparate impact on members of minority groups and there is no proven "business necessity" for the practice, Title VII was violated even without a showing of discriminatory intent.[85] The *Griggs* decision was controversial since it raised the danger of requiring employers to hire by quotas, because of the fear that employees could easily show a statistical imbalance in their hiring practices.[86]

In *Wards Cove Packing Co.*, plaintiffs alleged employment discrimination in Alaskan salmon canneries by attempting to show a high percentage of nonwhite workers in low paying jobs and a low percentage of nonwhite workers in high paying jobs.[87] The nonwhite workers relied on this statistical evidence to establish a disparate impact.[88] The Supreme Court held that the comparison between the racial compositions of the high and low paying jobs was flawed because the data failed to take into account the pool of qualified job applicants.[89]

The Court's decision reduced the perceived quota pressure on employers by redefining the evidentiary burdens amongst the litigants. The Court held that, in Title VII disparate impact cases, plaintiffs must show which specific employment practice led to the statistical disparity.[90] Further, the Court held that when the employer supplies a business justification for the practice, the ultimate burden of persuading the decision maker that discrimination occurred rests with the plaintiffs, even if plaintiffs present statistical evidence of a disparity.[91] Lastly, the Court lessened the standard employers must meet when

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[77] *See* Staudmeister (citing Michael W. Roskiewicz, Note, *Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 397 (1993)) (growing hostility toward minorities, women, and disabled persons in workplace influenced Congress to expand scope of remedies available to victims of employment discrimination).

[78] *See id.* at 400.

[79] Roger Clegg, *The Civil Rights Act of 1991: A Symposium: Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994). Clegg argues that that the following cases moved congress to enact the 1991 CRA: Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989); Lorance v. AT&T Techs., Inc. 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755(1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); and Independent Fed'n of Flight Attendants v. Zipes. 491 U.S. 754 (1989). Clegg, *supra*; *see also* Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict between the Rhetoric and the Content of the 1991 CRA*, 46 RUTGERS L. REV. 1 (1994) (providing a background for the enactment of the 1991 CRA). Clegg and Govan also credit the Senate confirmation hearings of Clarence Thomas prior to his appointment to the Supreme Court as placing a spotlight on sexual harassment and softening the Republican opposition to a Democratic push for a civil rights bill. Clegg, *supra* at 1469; Govan, *supra* at 214.

[80] 490 U.S. 642 (1989).

[81] 490 U.S. 228 (1989).

[82] 491 U.S. 164 (1989).

[83] *See* Clegg, *supra* note 79.

[84] 401 U.S. 424 (1971).

[85] Clegg, *supra* note 79, at 1460.

[86] *Id.*

[87] Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 646–47 (1989).

[88] *Id.* at 650.

[89] *Id.* at 650–51.

[90] *See id.* at 654.

[91] *Id.* at 659.

arguing a challenged business practice was "necessary."[92] The Court held that the employer need not show that the practice was essential to the business but only that it served a legitimate employment goal.[93]

Congress perceived the *Wards Cove Packing Co.* decision as placing an onerous and unjustified burden on plaintiffs.[94] It rejected *Wards Cove Packing Co.* with the passage of the 1991 CRA, by enacting language that shifted the burden of proof back to the employers and returning the concept of business necessity to the state of the law prior to *Wards Cove Packing Co*.[95]

Price Waterhouse v. Hopkins, in which the Supreme Court laid out the standards for deciding "mixed motive" cases,[96] was the second significant Title VII case rejected by the 1991 CRA. Ann Hopkins was an accountant who sued her employer, Price Waterhouse, for sexual discrimination because they refused to make her a partner in the firm.[97] Price Waterhouse admitted that Hopkins was qualified for the promotion; however, they claimed they did not select her because she lacked interpersonal skills, e.g., they felt she was too masculine and needed to walk and talk more femininely.[98] Hopkins made a prima facie case on a disparate treatment theory before the trial court.[99] The question before the court was whether Price Waterhouse's disqualification of Hopkins based on her perceived lack of interpersonal skills constituted a legitimate nondiscriminatory basis on which to deny her partnership, or merely a pretext to disguise illegal discrimination.[100]

The trial court required Price Waterhouse to show that the denial of partnership would have occurred *but for* the discrimination.[101] Price Waterhouse failed to meet this burden and on appeal challenged the trial court's burden-shifting framework on appeal.[102] Specifically, Price Waterhouse claimed that Hopkins should have been required to show that impermissible discrimination was the *predominant motivating* factor in the adverse partnership decision.[103] The appellate court affirmed and Price Waterhouse petitioned the Supreme Court for certiorari.

The Supreme Court concluded, in a plurality opinion, that if a plaintiff satisfied the evidentiary threshold necessary to obtain mixed-motive treatment, she became entitled to a shift in the burden of persuasion.[104] The employer could then avoid

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[92] *Id.* at 660.

[93] *Id.*

[94] 136 CONG. REC. H6756 (daily ed. Aug 3, 1990) (statement of Rep. Hawkins).

> Wards Cove changed the Griggs standard which was put on the statute books by a unanimous Supreme Court decision back in 1971. Wards Cove, by a 5-to-4 split, would change it. Griggs provided that qualified women and minorities cannot be excluded unless for job-related performance on the basis of qualifications. Wards Cove placed on the victims, in contrast, the burden of proving business necessity, a sophisticated process that the average victim of discrimination cannot even define, knows nothing about, has not even the information to prove their case.

Id.; *see also* 1991 CRA, Pub. L. No. 102-166, § 2, 105 Stat. 1071 ("The Congress finds that . . . the decision of the Supreme Court in Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections.").

[95] The 1991 CRA amended section 703 of Title VII by adding subsection "(k) Burden of proof in disparate impact cases." *See* 42 U.S.C. 2000e-2(k) (2000). The congressional record reflects significant debate and disagreement regarding how to define "business necessity." *See* 137 CONG. REC. S15276 (daily ed. Oct. 25, 1991). Ultimately, Congress simply decided not to define it. Thus, section k does not define business necessity, but the congressional record reflects congress' intention to return to the status quo ante. *See id.* ("The terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).").

[96] Plaintiff's attempting to prove intentional discrimination may proceed under two distinct theories: the pretext theory or the mixed-motive theory. Under the pretext theory, a plaintiff seeks to prove that the defendant's proffered non-discriminatory reason for an adverse employment action was, in reality, a pretext for illegal discrimination. Under the mixed-motive theory, a plaintiff does not have to disprove the employer's non-discriminatory reason. Instead, a plaintiff must show that both legitimate and illegitimate reasons motivated the employment decision. The mixed motive theory of intentional discrimination is a separate concept from mixed case complaints or mixed case appeals. *See supra* note 24.

[97] 490 U.S. 228 (1989).

[98] *Id.* at 235.

[99] *Id.* at 246.

[100] *Id.*

[101] *Id.* at 236–37.

[102] *Id.* at 237.

[103] *Id.* at 237–38.

[104] *Id.* at 261.

liability only by demonstrating that it would have reached the same decision absent any discrimination.[105] Justice O'Connor, expressing the opinion of the Court, reasoned that the burden would shift only where the plaintiff could show by "direct evidence" that an illegitimate criterion was a substantial factor in the employment decision.[106] Consequently, even though Hopkins showed that gender was a consideration in the denial of her promotion, the Supreme Court ruled in defendant's favor.[107]

Congress was dissatisfied that employers could use illegal factors in employment decisions and avoid liability by showing they would have made the same decision without considering the unlawful factor.[108] Thus, it amended Title VII to modify the *Price Waterhouse* scheme, making mixed-motive treatment more favorable to plaintiffs.[109] As amended, an employer could no longer avoid liability by proving it would have made the same decision for nondiscriminatory reasons.[110] Instead, liability would attach whenever an unlawful motive was a motivating factor for any employment practice, even though other factors also motivated the practice.[111] Additionally, Congress limited the remedies available to the plaintiff in cases in which the employer would have reached the same determination without any discriminatory animus.[112] Notably, plaintiffs are not entitled to compensatory damages in these cases.[113]

The third and final significant Title VII case rejected by the 1991 CRA was *Patterson v. McLean Credit Union*, a racial discrimination suit decided under § 1981.[114] Section 1981 grants to all persons, inter alia, the right to make and enforce contracts.[115] Prior to *Patterson*, courts interpreted § 1981 to cover victims of on-the-job racial or ethnic discrimination.[116] In those instances, § 1981 provided equitable as well as compensatory relief and, in particularly egregious cases, punitive damages.[117] This protection extended to both public and private contractual relations and applied to all employers regardless of the number of their employees.[118]

In *Patterson*, the plaintiff sued her employer alleging harassment, failure to promote, and wrongful discharge because of her race.[119] The Court strictly interpreted the so-called "make and enforce contracts" clause of § 1981, declaring that the statute applied only to racial discrimination in the "formation of a contract, . . . not to problems that may arise later from the conditions of continuing employment."[120] Consequently, the Court held that racial harassment engendering a hostile work environment was not actionable under § 1981.[121]

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[105] *Id.* at 278–79.

[106] *Id.*

[107] *Id.* at 279.

[108] 136 CONG. REC. S9328 (daily ed. July 10, 1990) (statement of Sen. Kennedy).

> In a fourth objectionable decision, *Price Waterhouse v. Hopkins*, the Supreme Court opened a hole in the fabric of our civil rights laws by saying that an employment decision motivated in part by prejudice does not violate title VII, as long as the employer would have made the same decision for nondiscriminatory reasons. As one of our legal experts testified, the decision sent a message to employers that 'a little discrimination is OK.'

Id.

[109] The 1991 CRA amended section 703 of Title VII by adding subsection "(m)." *See* 42 U.S.C. 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[110] *Id.*

[111] *Id.*

[112] The 1991 CRA amended section 706(g) of Title VII by adding new subsection "(B)." *See* 42 U.S.C. 2000e-2(m) (limiting plaintiffs to declaratory relief, injunctive relief, attorney's fees, and costs, but not compensatory damages).

[113] *Id.*

[114] 491 U.S. 164 (1989).

[115] *See* 42 U.S.C. § 1981 (2000).

[116] *See* Staudmeister, *supra* note 76, at 196.

[117] *Id.*

[118] *Id.*

[119] *Patterson*, 491 U.S. at 169.

[120] *Id.* at 166.

[121] *Id.* at 189.

b. Political Battles Shape the Compensatory Damages Provisions

In 1990, Representative Hawkins and Senator Kennedy introduced the legislative initiative that laid the foundation for the 1991 CRA. The Kennedy-Hawkins bill was the subject of intense controversy for several reasons, including a belief that it would lead to hiring quotas and a "bonanza" for plaintiff's attorneys.[122] The most troubling component for the business community, however, was the bills compensatory and punitive damages provisions, because of the increased litigation costs.[123]

During the debate over the bill, Congress articulated its concern that there was a disparity between the remedies available in race discrimination suits brought under § 1981 and suits brought under Title VII alleging other forms of discrimination, such as religion or sex.[124] Prior to the 1991 CRA, Title VII only provided for remedies such as reinstatement, hiring with or without back pay, and other equitable relief.[125] Conversely, § 1981, which prohibits racial discrimination, permitted for the recovery of damages.[126] The Congressional debate exposed this disparity and the CRA reflects Congress' attempt to make the remedies available under Title VII and § 1981 equivalent. By doing so, Congress concluded that discrimination based upon other characteristics, such as religion, sex, or disability, were as wrong as racial discrimination, and victims of such discrimination should have similar remedies.[127]

Second, Congress expressed its concern that anti-discrimination laws that provided only equitable relief and not damages fell short of properly compensating plaintiffs. Specifically, they concluded that reinstatement and back pay do nothing for a victim of harassment or other such on-the-job mistreatment that stops short of loss of job or pay.[128] Congress believed that Title VII was inadequate to remedy the full range of workplace discrimination.[129] Therefore, the Kennedy-Hawkins bill sought not only to reject the Supreme Court civil rights cases of 1989, it also sought to amend the damages provisions of Title VII by adding damages as a form of relief available to plaintiffs.

Congress passed the Civil Rights Act of 1990, which authorized unlimited compensatory damages while limiting punitive damages to the greater of either $150,000 or the amount awarded as compensatory damages.[130] Worried that businesses would react to increased liability by implementing hiring practices based on quotas, President George H. W. Bush vetoed the bill.[131] After failing to muster the votes necessary to sustain an override, Congress set out to pass a modified version of the bill early the next session.[132] Ultimately, Congress and the White House forged a compromise: a bill that responded to the Supreme Court's civil rights decisions and expanded legal relief for victims of workplace discrimination within statutory limits on compensatory damages designed to placate employers' fear of costly litigation.[133] On 21 November 1991, President Bush signed the Civil Rights Act of 1991.[134]

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[122] *See* Govan, *supra* note 79.

[123] *Id.* at 71.

[124] *See* 136 CONG. REC. H6769 (daily ed. Aug. 3, 1990) (statement of Rep. Geren).

[125] 42 U.S.C. § 2000e (1988).

[126] *Id.* § 1981.

[127] *Id.*

[128] 42 U.S.C. § 1981 (1994).

[129] Moreover, as stated in the preceding section, Congress believed that the Supreme Court had made it harder for aggrieved persons to bring successful discrimination lawsuits. This belief applied equally to Section 1981 suits as it did to Title VII. *See* 136 CONG. REC. H6769 (daily ed. Aug. 3, 1990) (statement of Rep. Geren, reading an excerpt from the *Washington Post*, 25 June 1990).

> Under old law, the most that the typical winning plaintiff could get was to be made whole in the limited sense of being awarded the job or promotion and back pay found to have been wrongly denied. That was all that a judge was empowered to order, and the law did not provide for jury trials. Only in one class of cases could plaintiffs seek more. Under a post-Civil War statute plaintiffs charging intentional racial discrimination were entitled to ask for jury trials and seek not just lost rank and pay but compensatory and punitive damages. The Supreme Court last year narrowed the application of this Reconstruction Era statute, called Section 1981.

Id.

[130] *See* Staudmeister, *supra* note 76, at 202.

[131] *Id*.

[132] *Id.*

[133] *Id.*

[134] *Id.*

2. 1991 CRA's Compensatory Damages Provisions

The 1991 CRA[135] authorizes compensatory and punitive damages in cases brought under Title VII, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. Damages are available only to victims of unlawful intentional discrimination, not disparate impact discrimination.[136] Punitive damages are not recoverable against the federal government.[137] The 1991 CRA caps compensatory and, in actions brought by private sector employees, punitive damages.[138] The limits are indexed in relation to the size of the employer.[139] Notably, the 1991 CRA recognizes the right to a jury trial: "If a complaining party seeks compensatory or punitive damages under this section . . . (1) any party may demand a trial by jury . . . ."[140]

3. The EEOC's Implementation of the 1991 CRA's Compensatory Damages Provision in Federal Sector Cases

The legislative history and language of the 1991 CRA are silent as to the availability of legal remedies in the administrative process. Thus, the EEOC decided whether a complainant was able to recover compensatory damages from a federal employer during the administrative process based on its own interpretation of the 1991 CRA.

The EEOC first addressed this issue in *Jackson v. United States Postal Service*.[141] Jackson alleged a hostile work environment based on sex, race, age, and disability.[142] He further alleged that the U.S. Postal Service's harassment aggravated his existing medical condition.[143] Consequently, Jackson sought damages from the U.S. Postal Service for his medical expenses.[144] The U.S. Postal Service offered Jackson equitable relief, but denied his demand for compensatory damages.[145] When Jackson refused what he considered to be only partial compensation, the EEOC administrative judge dismissed his claim for refusing the relief that the U.S. Postal Service offered.[146]

Jackson appealed to the EEOC and asserted the Postal Service's offer was inadequate because it failed to compensate him for the aforementioned compensatory damages.[147] The EEOC relied on its interpretation of Title VII as a remedial statute, the purpose of which was to make aggrieved persons whole by providing relief necessary to restore them to the same status they would have been in had the discrimination not taken place.[148] The EEOC determined that the U.S. Postal Service could not make Jackson whole absent an award of compensatory damages.[149] Therefore, they had to resolve whether the 1991 CRA empowered them to award compensatory damages during the administrative process or whether Jackson would have to take his case to federal court.

The EEOC determined that the 1991 CRA made compensatory damages available not only in federal district court, but also in administrative hearings.[150] Specifically, the EEOC analyzed §102 of the 1991 CRA, which states that "[i]n an action brought by a complaining party under [Title VII] against a respondent who engaged in unlawful intentional discrimination . . .

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[135] 42 U.S.C. § 1981a (2000).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.* § 1981a(c).

[141] E.E.O.C. No. 01923399, 93 F.E.O.R. 3062 (1992).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* The EEOC OFO adjudicated Jackson's appeal. *See* Section I.B, *supra* (providing a discussion on appeals to the EEOC OFO).

[148] *See Jackson*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062.

[149] *See id.*

[150] *See id.*

the complaining party may recover compensatory . . . damages."[151] The EEOC determined that Congress's use of the term "an action" implied an intention to include administrative as well as judicial proceedings.[152]

Additionally, the EEOC determined that the definition of "complaining party," found later in § 102, also supported this inference.[153] A "complaining party" is defined by the 1991 CRA as "a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under Title VII of the Civil Rights Act of 1964 . . . ."[154] In the judgment of the EEOC, Congress recognized the difference between an administrative action and a judicial action (i.e., a "proceeding") when they listed them separately. Thus, the EEOC determined that Congress intended compensatory damages to be available during the administrative process and granted Jackson's appeal.[155]

B. *West v. Gibson*

1. The Federal Courts of Appeal Interpret the 1991 CRA Differently, Creating a Split Regarding the EEOC's Authority to Award Compensatory Damages

It should be no surprise that the 1991 CRA ambiguous treatment of the EEOC authority to award compensatory damages during federal sector administrative process caused differing results in various jurisdictions. Two prominent cases are illustrative of the courts' differing analysis: *Fitzgerald v. Secretary, U.S. Dep't of Veterans Affairs*[156] and *Crawford v. Babbit*.[157]

Fitzgerald, a black male, was employed as a pharmacy technician at a Department of Veterans Affairs medical center in Shreveport, Louisiana.[158] In the spring of 1992, Fitzgerald was allegedly harassed at work by a white female pharmacist.[159] Fitzgerald claimed that the pharmacist uttered racial slurs about him; ordered him to perform job-related tasks that had already been completed; and falsely accused him of putting his hands around her throat, threatening to kill her, and shooting another co-worker's house with a firearm.[160] Similar to *Jackson*,[161] the agency offered what it considered "full relief." The offer, however, did not include compensatory damages.[162] The agency dismissed the complaint when Fitzgerald declined the offer.[163] On appeal, Fitzgerald asserted that the agency's dismissal was unwarranted because the putative offer of full relief did not include compensatory damages for emotional injuries that allegedly led to his hospitalization.[164]

The Fifth Circuit undertook a similar textual analysis of the 1991 CRA as the EEOC had in *Jackson*, and concluded that compensatory damages were authorized in the administrative process.[165]

> [The 1991 CRA] provides that a party may recover compensatory damages against an employer in an "action" brought pursuant to 42 U.S.C. §§ 2000e-5 or 2000e-16. Nowhere does Title VII define whether the term "action" refers to a district court suit, an administrative proceeding, or both. Regardless, the text

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[151] 42 U.S.C. § 1981a(a)(1) (2000).

[152] *See Jackson*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062.

[153] *See id.*

[154] 42 U.S.C. § 1981a(d)(1).

[155] *See Jackson*, E.E.O.C. No. 01923399, 93 F.E.O.R. 3062.

[156] 121 F.3d 203 (5th Cir. 1997).

[157] 148 F.3d 1318 (11th Cir. 1998).

[158] *Fitzgerald*, 121 F.3d at 205.

[159] *Id.*

[160] *Id.*

[161] *See* Section III.A.3, *supra*.

[162] *Fitzgerald*, 121 F.3d at 205.

[163] *Id.*

[164] *Id.* at 206.

[165] *See id.* at 207–08.

of Title VII's remedial provisions demonstrates that compensatory damages are available in administrative proceedings.[166]

The court continued their analysis by explaining that Title VII was a broad anti-discrimination statute meant to eliminate illegal discrimination from the workplace.[167] Further, the court reasoned that Congress granted the EEOC a broad mandate to enforce the remedial nature of Title VII in the federal sector in order to accomplish this broad goal.[168] Additionally, the court took a pragmatic approach to analyzing the compensatory damages provisions in the context of the already existing federal sector complaint process promulgated by the EEOC.[169] Specifically, the court suggested that one of the goals of the administrative process—to resolve disputes without the need for litigation—would be frustrated if a plaintiff could recover compensatory damages only by filing a lawsuit.[170] The court concluded that aggrieved persons would be reluctant to settle during the administrative process if they were denied damages that they could otherwise recover in court.[171]

The second seminal case interpreting the EEOC's ability to award compensatory damages under the 1991 CRA was *Crawford v. Babbit*.[172] Crawford worked for the Fish and Wildlife Service, a Division of the Department of the Interior, during the latter part of 1993.[173] She filed an administrative complaint alleging that her supervisors had sexually harassed her and then retaliated against her when she complained.[174] She also informed her employer that she had developed physical and emotional problems from the stress of the sexual harassment.[175] Following the agency's investigation, Crawford requested an administrative hearing before the EEOC.[176] Ultimately, the agency admitted that it had subjected Crawford to sexual harassment and retaliation in violation of Title VII and awarded her injunctive relief, costs, and attorney's fees.[177] The agency did not award her compensatory damages.[178] Crawford sued to obtain the equitable relief the agency had admitted she was due, as well as to obtain the compensatory damages the agency had denied her.[179] The district court granted her motion for summary judgment and ordered the agency to issue Crawford her equitable relief.[180] However, the court dismissed her claim for compensatory damages and Crawford appealed the dismissal.[181]

The concept of sovereign immunity is notably absent from the Fifth Circuit's analysis in *Fitzgerald*; however, this is not so in the Eleventh Circuit's analysis of *Crawford*. The court began its analysis by acknowledging that Congress waived the federal government's sovereign immunity for violations of Title VII when it passed the Equal Employment Opportunity Act of 1972.[182] The court then recognized that Congress widened the scope of the waiver with the passage of the 1991 CRA, entitling plaintiffs who sue their federal-sector employers the right to compensatory damages.[183] Additionally, the court cited

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[166] *Id.* at 207.

[167] *Id.* at 207–08.

[168] *Id.*

[169] *See id.*

[170] *Id.*

[171] *Id.*

[172] 148 F.3d 1318 (11th Cir. 1998).

[173] *Id.* at 1319–20.

[174] *Id*.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.* at 1320–21.

[180] *Id.*

[181] *Id.* The district court relied on two grounds in dismissing Crawford's claim for compensatory damages. First, the court determined that she failed to exhaust her administrative remedies, because she failed to raise the claim for compensatory damages during the administrative process. *Id*. Second, court determined that her use of the agency's final decision in her motion for summary judgment precluded her from litigating de novo the issue of compensatory damages. *Id.* ("The magistrate judge observed that, in essence, Crawford was seeking to enforce the favorable parts of the Agency's final decision (the finding of discrimination and the award of equitable relief) while at the same time litigating de novo the unfavorable parts (the failure to award her compensatory damages.")); *see also* Laber v. Harvey, 438 F.3d 404 (4th Cir. 2006) (en banc). Title VII does not authorize a federal-sector employee to bring a civil action alleging only that the remedy was insufficient. Rather, the employee must place the employing agency's discrimination at issue.

[182] *See Crawford*, 148 F.3d at 1323–24; *see also infra* note 11.

[183] *Id.* at 1324.

the 1991 CRA for the proposition that the waiver of sovereign immunity was conditioned on the government's ability to seek a jury trial:

> Congress expressly conditioned the expanded waiver by providing that the government has a right to a jury trial on the issue of its liability for compensatory damages. *See* 42 U.S.C. § 1981a(c) ("If a complaining party seeks compensatory . . . damages under this section[,] any party may demand a trial by jury."). The effect of that condition is a government agency may not be held liable for compensatory damages unless it has the opportunity to have a jury trial on the issue of its liability for those compensatory damages.[184]

Importantly, the court met the rationale used by the EEOC in *Jackson* and the Fifth Circuit in *Fitzgerald*, and dismissed it. Specifically, it concluded that *Jackson* and *Fitzgerald* were wrongly decided because the EEOC's concept of awarding "full relief" in the administrative process negates the government's right to a jury trial if the complainant seeks compensatory damages.[185]

An underpinning of the *Crawford* court's analysis was its reliance on the language of the 1991 CRA that granted *any party* the right to a jury trial.[186] The court made two significant conclusions regarding this language. First, it determined that Congress intended the *any party* provision to apply to both the aggrieved plaintiff and the defendant agency.[187] Unfortunately, the congressional record is silent regarding what Congress intended. Nevertheless, it seems reasonable that a pure textual analysis supports the conclusion that *any party* meant both the plaintiff-employee as well as the defendant-agency.

Second, the Court acknowledged that Title VII provides only the aggrieved employee, not the federal agency, the right to challenge the outcome of the administrative process.[188] As the Court stated:

> [U]nless the employee challenges the disposition of his complaint in the administrative process by filing a claim in federal court, the agency is bound by the terms and relief ordered in the agency's or the EEOC's final decision. . . . The Agency argues that Congress' awareness of the one-way appealability rule when it made compensatory damages available in the Civil Rights Act of 1991 means Congress, in conditioning the waiver of sovereign immunity on an agency having a right to a jury trial, must have recognized that an agency would be unable to exercise its right to a jury trial if compensatory damages were awarded in the administrative process.[189]

The Court found it easy to dismiss this argument, because it determined that the basis of the argument rested on the presumption that Congress intended for compensatory damages to be awarded in the administrative process.[190] Absent this presumption (and any evidence in the congressional record of their intent) there is no rationale for concluding that Congress contemplated this "one-way appealability" when it waived sovereign immunity. As discussed below, the Supreme Court also found it easy to dismiss this argument, but with the opposite outcome.

2. The Supreme Court Allows the EEOC to Award Compensatory Damages

a. Procedural History

In 1992, Michael Gibson, an accountant employed by the Department of Veterans Affairs (VA), was denied a promotion.[191] The position instead went to a woman and Gibson filed a complaint with the agency, alleging sex

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[184] *Id.* (citing the 1991 CRA, 42 U.S.C. § 1981a(c) (2000)).

[185] *See id.*

[186] *Id.* at 1324.

[187] *Id.* at 1324–25.

[188] *Id.* at 1325.

[189] *Id.*

[190] *See id.*

[191] *See* Gibson v. Brown, 1996 U.S. Dist. LEXIS 14583, at *1 (N.D. Il. 1996).

discrimination in violation of Title VII.[192] In his administrative complaint, Gibson sought back pay and a transfer to another VA hospital, but did not seek compensatory damages.[193] The VA issued a decision finding no discrimination.[194] Gibson appealed the decision to the EEOC, which found that the VA had discriminated against him.[195] The EEOC ordered the VA to promote Gibson with back pay.[196] When the VA failed to timely comply with the EEOC's order, Gibson filed a compliance suit in federal district court.[197] He also sought compensatory damages, which he had not sought in the administrative process.[198] The court rejected Gibson's claim for compensatory damages on the ground that he had failed to exhaust his administrative remedies by not presenting that claim to the VA and the EEOC.[199]

The court of appeals reversed the dismissal of Gibson's claim for compensatory damages, reasoning that federal employees need not exhaust administrative remedies on such claims.[200] The court asserted that "exhaustion is not required if [an agency] 'lack[s] authority to grant the type of relief requested.'"[201] The court then concluded that the EEOC did not have the authority under Title VII to award compensatory damages against federal agencies.[202] The court principally relied on 42 U.S.C. 1981a(c)(1), which provides that "[i]f a complaining party seeks compensatory . . . damages under this section," then "any party may demand a trial by jury."[203] The court then recognized that a "trial by jury" cannot occur in an administrative proceeding.[204]

Notably, the court also recognized that § 1981a(c)(1) might be construed to mean that "the EEOC has the right to issue compensatory damages in the first instance, and the losing party may seek de novo review of the damages by demanding a jury trial" in district court.[205] However, the court rejected this alternate construction, reasoning that a federal agency, in accordance with the language of Title VII and the EEOC's interpreting regulations, is bound by the EEOC's disposition of a Title VII complaint, although an employee is not and that employee may seek relief de novo in district court.[206] Thus, a federal agency could not demand a jury trial to review an EEOC award of compensatory damages to an employee. The court consequently declined to construe Title VII in a manner that would deprive federal agencies of what the court characterized as the "significant procedural right" to a jury trial on compensatory damages claims.[207]

The court of appeals found further support for its position in the language of 42 U.S.C. 1981a(a)(1), which provides for compensatory damages awards in "an action brought by a complaining party" under, among other things, the statutory provision allowing Title VII claims against the federal government.[208] The court declined to defer to the EEOC's own construction of § 1981a(a)(1) as encompassing administrative as well as judicial proceedings.[209] The court concluded that Congress generally used the term "actions" throughout Title VII to refer to "civil actions filed in federal court, not complaints of discrimination lodged with the EEOC."[210] Finally, the court of appeals invoked the principle that any waiver of the federal

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[192] *Id.* at *1–2.

[193] *Id.* at *3.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.* at *7–12.

[200] Gibson v. Brown, 137 F.3d 992 (7th Cir. Ill. 1998).

[201] *Id*. at 995 (quoting McCarthy v. Madigan, 503 U.S. 140, 148 (1992)).

[202] *Id.* at 995–98.

[203] *Id.* at 996.

[204] *Id.*

[205] *Id.*

[206] *See id*. (citing 29 C.F.R. 1614.504(a) (1991)).

[207] *Id.* at 996.

[208] *Id.*

[209] *Id.* at 997.

[210] *Id.*

government's sovereign immunity should be strictly construed.[211] The court recognized that Congress has expressly waived the government's sovereign immunity with respect to civil actions for compensatory damages under Title VII.[212] Nevertheless, the court declined in the absence of a clearer expression of congressional intent "to extend the waiver of sovereign immunity so that the government may be liable for compensatory damages without the benefit of a jury trial."[213] The court of appeals remanded Gibson's compensatory damages claim to the district court so a jury would consider it.[214]

b. The Majority Opinion

The VA petitioned the Supreme Court for certiorari, which the Court granted and then ultimately held that the EEOC possesses the legal authority to require federal agencies to pay compensatory damages when they discriminate in employment in violation of Title VII.[215] The Court's four part analysis started with a literal reading of Title VII, the Equal Employment Opportunity Act of 1972 (making Title VII applicable to federal agencies), and the 1991 CRA.[216] First, the Court turned to the 1972 Act, which stated that the EEOC shall enforce Title VII "through appropriate remedies, including reinstatement or hiring of employees with or without back pay."[217] The Court determined that the 1991 CRA added compensatory damages to the list of appropriate remedies available to the EEOC.[218] The fact that the list of remedies included only equitable relief and compensatory damages were not part of the available remedies until 1991 did not trouble the court. Instead, they determined that Congress provided a non-exhaustive list, which was later modified by the 1991 CRA.[219] The Court decided that the 1991 CRA added a category of damages—compensatory damages—that are "appropriate" and that were not so previously.[220]

Second, the Court found that the purpose of Title VII supported their interpretation of the statute. Here, the Court stated:

> [Title VII's] general purpose is to remedy discrimination in federal employment. It does so in part by creating a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action, thereby encouraging quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court.[221]

The Court believed that the remedial purpose of Title VII would be thwarted if the EEOC was without the power to award compensatory damages in the administrative process, because it would force aggrieved persons to go to court in order to pursue compensatory damages.[222]

Third, the Court found solace in the congressional record. Although Congress was silent regarding this specific issue, the record reflected the supporters of the 1991 CRA intended for the act to make victims of discrimination whole.[223] The Court reasoned that the "make whole" provisions of Title VII would have to include all available remedies, including compensatory damages, or the provisions would be ineffective.[224]

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[211] *Id.* (citing Lehman v. Nakshian, 453 U.S. 156, 161 (1981)).

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] West v. Gibson, 527 U.S. 212 (1999).

[216] *Id.* at 217.

[217] *Id.* (citing 42 U.S.C. § 2000e-16(b) (1994)).

[218] *Id.*

[219] *Id.* at 217–18.

[220] *Id.*

[221] *Id.* at 218–19.

[222] *Id.*

[223] *Id.* at 219–20.

[224] *Id.*

Of note for the purposes of this article, the Court addressed Gibson's argument that the 1991 CRA's jury trial provisions would be frustrated if the EEOC could award compensatory damages without the government getting a jury trial.[225] The Court disposed of this argument easily:

> This argument, however, draws too much from too little. One easily can read the jury trial provision in § 1981a(c) as simply guaranteeing either party a jury trial in respect to compensatory damages *if* a complaining party proceeds to court under § 717(c). The words "under this section" in § 1981a(c) support that interpretation, for "this section," § 1981a, refers primarily to court proceedings. And there is no reason to believe Congress intended more.[226]

Lastly, the Court rejected the argument that the sovereign immunity barred the EEOC from awarding compensatory damages. The Court acknowledged that it was undisputed that the 1991 CRA waived sovereign immunity for compensatory damages.[227] The Court then determined that the issue of the EEOC authority was nothing more than a matter of how the waiver was administered.[228]

c. Sovereign Immunity

The doctrine of sovereign immunity bars suits against the federal and state governments in most circumstances.[229] There must be an explicit waiver of sovereign immunity for claims brought against and judgments paid by the United States.[230] Even when the basic grant of legislative permission is sufficiently unambiguous, the Supreme Court has directed the contours of a statutory waiver of sovereign immunity be construed strictly and narrowly.[231] Only Congress grants waivers of sovereign immunity. Courts, therefore, interpret the statutory terms of such waivers to define the jurisdiction of the courts to entertain an action against the government.[232] Thus, the Supreme Court has refused to extend the scope of a sovereign immunity waiver when the language of the statute leaves any ambiguity and declined to look beyond the text to legislative history or statutory purpose.[233] In other words, doubts about the extent of a putative statutory waiver, or even the existence of said waiver, result in decisions preserving the federal government's immunity from suit.

d. The Supreme Court's Dissenting Opinion

Justices Kennedy, Scalia, and Thomas dissented in *Gibson*. The crux of their dissent was their belief that Congress did not waive sovereign immunity for the EEOC to award compensatory damages when it waived the same for federal courts.[234] Not surprisingly, the dissenting and more judicially conservative justices cited to the established Supreme Court sovereign immunity jurisprudence to support their conclusions. For example, the dissent acknowledged "relief may not be awarded

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[225] *Id.* at 221–22.

[226] *Id.* at 221.

[227] *Id*. at 222.

[228] *Id.*

[229] The Constitution does not refer to sovereign immunity. Rather, it is a doctrine from English law that the Court has assumed was silently imported into American law. *See* United States v. Lee, 106 U.S. 196 (1882). For a historical analysis of the sovereign immunity doctrine, see also GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT ch. 2 (4th ed., ALI-ABA 2006). Sisk argues that three landmark Supreme Court decisions lay the framework for sovereign immunity jurisprudence. *Id.* The first decision is *United States v. Lee*, 106 U.S. 196, which arose from seizure of the Arlington estate of Confederate General Robert E. Lee by federal forces during the Civil War and the establishment of a military cemetery on the site. *Id*. at 80. The second case is *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), which arose after World War II, when the War Assets Administration allegedly reneged on a contract to sell coal to the Domestic & Foreign Commerce Corp. *Id.* at 84. The third case is *Malone v. Bowdoin*, 369 U.S. 643 (1962), in which plaintiffs claimed proper title to land occupied by the government brought an ejectment action against a Forest Service officer to recover the property. *Id.* at 87.

[230] *See Gibson*, 527 U.S. at 224; United States v. Testan, 424 U.S. 392, 399 (1976).

[231] *See* Library of Cong. v. Shaw, 478 U.S. 310, 318 (1986).

[232] *See* United States v. Testan, 424 U.S. 392, 399 (1976).

[233] *See, e.g.*, Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999); Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992).

[234] *Gibson*, 527 U.S. at 224–28.

against the United States unless it has waived its sovereign immunity,"[235] and the waiver "must be expressed in unequivocal statutory text and cannot be implied."[236] Moreover, the dissent recognized that a waiver must be "strictly construed, in terms of its scope, in favor of the sovereign,"[237] and the "waiver of sovereign immunity in one forum does not effect a waiver in other forums."[238] The dissent then succinctly rejected the majority opinions approach to deciding the case:

> In all events, [the majority opinion's] speculation [that awarding compensatory damages in the administrative process is more efficient] does not suffice to overcome the rule that waivers of sovereign immunity must be clear and express. An unequivocal waiver of the United States' sovereign immunity to administrative awards of compensatory damages cannot be found in the relevant statutory provisions. To the extent the majority relies on textual analysis, it establishes at most (if at all) that the statutes might be read to authorize such awards, not that that the statutes must be so read. To the extent the majority relies on legislative history and other extratextual sources, it contradicts our precedents and sets us on a new course, for before today it was well settled that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text."[239]

Based on this established jurisprudence, it is easy to see why the dissenting Justices in *Gibson* easily determined that the 1991 CRA did not waive the federal government's immunity from administrative awards of compensatory damages.

e. Criticism of the Supreme Court's Decision

The Supreme Court's decision in *Gibson* received mixed reviews. The decision provided a mandate for the EEOC to award compensatory damages, with the explicit language that Congress neglected to write into the 1991 CRA. The EEOC's influence in enforcing federal anti-discrimination laws increased. Many saw the decision as "a triumph for federal sector employment discriminatees because it arms the EEOC with a complete arsenal of remedies with which to combat employment discrimination in the federal sector."[240] Others, however, saw the Court's decision as endorsing a flawed system whose damage caps fail to make aggrieved persons whole and deter employers from discriminating, and whose cumbersome administrative process deters aggrieved persons from pursuing their claims.[241]

Notably absent from the discussion, however, are complaints about the majority opinion's apparent departure from established sovereign immunity principles. This is not surprising, since this is a scholarly issue and not one invoking the passion of civil rights violations. Moreover, it is understandable if there is little sympathy for the federal government, as most would agree the government is capable of taking care of itself. For example, Congress is more than capable of reestablishing whatever degree of sovereign immunity it desires in this context by amending the 1991 CRA. Nonetheless, *Gibson* is a sharp departure from previously established sovereign immunity jurisprudence.

It is plausible that the dissent's reasoning in *Gibson* regarding sovereign immunity is more compelling than the majority's argument, because it seems to adhere more closely to Supreme Court precedent.[242] According to precedent, the majority never should have considered anything beyond the statute.[243] There is no *explicit waiver* of sovereign immunity in the 1991 CRA allowing the EEOC to award compensatory damages. However, in *Gibson* the majority looked at the statute

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[235] *Id.* at 224 (citing *Blue Fox*, 525 U.S. 255).

[236] *Id.* (citing *Blue Fox*, 525 U.S. at 687; *Lane*, 518 U.S. at 192).

[237] *See id.*

[238] *Id.* at 226 (citing McElrath v. United States, 102 U.S. 426 (1880) ("[The Government] can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits."); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54 n.6 (1944) ("The Federal Government's consent to suit against itself, without more, in a field of federal power does not authorize a suit in a state court."); Case v. Terrell, 78 U.S. 199 (1871) (The United States' consent to suit in the Court of Claims does not extend to other federal courts.).

[239] *Id.* at 228 (citing *Lane*, 518 U.S. at 192).

[240] Christina M. Royer, West v. Gibson*: Federal Employees Win the Battle, But Ultimately Lose the War for Compensatory Damages under Title VII*, 33 AKRON L. REV. 22 (2000).

[241] *See id.*

[242] *See supra* note 233.

[243] *See id.*

as a whole and determined that the waiver of sovereign immunity pertaining to federal court was also applicable in the administrative process.[244]

The most troubling aspect of the majority's reasoning is the provision of the 1991 CRA that conditioned the award of compensatory damages on either party's ability to seek a jury trial.[245] Gibson argued what appeared obvious: parties cannot receive a jury trial before the EEOC and may only receive one in court.[246] To Gibson this meant the EEOC could not award compensatory damages, because the EEOC could not meet a required condition of the damages provision, i.e., provide the government with a jury trial if it demanded one.[247]

The government conceded that the EEOC was without the power to grant jury trials. However, it interpreted the jury trial provision differently. Namely, it asserted that if a federal-sector employee was dissatisfied with either the administrative agency's or the EEOC's award and subsequently sought a trial ne novo in district court, either party could *then* request a jury trial.[248] In other words, the jury trial provision only became operative if the aggrieved person utilized the other provisions of Title VII enabling her to file a civil action. The administrative process occurs prior to the aggrieved making that decision. Thus, there is no right to a jury trial. This is the same argument the Government made unsuccessfully in *Crawford*.

IV. The Basis for Federal Agencies to Assert Claims to Challenge an EEOC's Compensatory Damage Award

A. An Alternative Interpretation of the 1991 CRA's Jury Trial Provision

While the positions taken by the Petitioner and Respondent before the Supreme Court in *Gibson* are plausible, the difficulty with both is that the congressional record is silent regarding the 1991 CRA's jury trial provision. As the government conceded to the Court:

> It's important to recognize that the jury trial provision is a general provision. It was not directed specifically at the Federal Government. It's part of a provision that applies to all Title VII cases whether against the Government or against private employees. This provision is already in the legislation that became section 1981a before Senator Warner offered his amendment to extend compensatory damages to Federal employees as well.[249]

Moreover, the Government's approach is arguably contrary to established sovereign immunity jurisprudence,[250] and Gibson's approach leaves federal employees with only partial remedies in the administrative process. Alternatively, there is a third approach that is without these shortcomings; the one suggested in dicta by the Seventh Circuit in *Gibson.* Namely, the 1991 CRA's jury trial provision modified Title VII to allow federal employers to initiate civil actions against aggrieved employees.[251]

Title VII states when an aggrieved employee may file a civil action in federal district court. Specifically, "an employee or applicant for employment, if aggrieved by the final disposition of his [administrative] complaint, or by the failure to take final action on his [administrative] complaint, may file a civil action."[252] Title VII is silent, however, regarding the right of federal agencies to initiate a civil action against the federal sector employee or applicant for employment. This "one sided" appealability rule regarding access to federal district court is reiterated in the EEOC's implementing regulations.

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[244] *Gibson*, 527 U.S. 212.

[245] *Id.* at 221.

[246] *Id.*

[247] *See* Oral Argument of Timothy M. Kelly, Esq., on Behalf of the Respondent, West v. Gibson, 1999 WL 270048, at *14–17 (Apr. 25, 1999).

[248] *See* Oral Argument of Barbara B. McDowell, Esq., on Behalf of the Petitioner, West v. Gibson, 1999 WL 270048, at *10 (Apr. 25, 1999).

[249] *Id.* at *11.

[250] *See Gibson*, 527 U.S. at 228.

[251] Gibson v. Brown, 137 F.3d 992, 997–98 (7th Cir. Ill. 1998).

[252] *See* Section II.A.2, *supra* (citing 42 U.S.C. § 2000e-16(c) (2000)).

Consequently, the factual and legal determinations of the EEOC are binding on federal agencies because they cannot initiate a civil action, unless the aggrieved employee is also dissatisfied and initiates the civil action.[253]

Nevertheless, the 1991 CRA guarantees both parties a right to trial by jury if an aggrieved employee seeks compensatory damages. What if demanding a jury trial was read to be synonymous with initiating a civil action (albeit one with a jury)? In this way, the 1991 CRA jury trial provisions would grant authority to federal agencies to initiate civil actions.

This is precisely the argument the Seventh Circuit proposed in their appellate decision in *Gibson.* Specifically, the court speculated that § 1981a(c)(1) of the 1991 CRA could be read as giving "the EEOC . . . the right to issue compensatory damages in the first instance, and the losing party [the right to] seek de novo review of the damages by demanding a jury trial" in district court.[254] In other words, the 1991 CRA's jury trial provision modifies the one-sided appealability rules recognized by the Supreme Court in *Gibson*.

The Seventh Circuit ultimately rejected this alternate construction, reasoning that a federal agency, in accordance with the language of Title VII and the EEOC's interpreting regulations, is bound by the EEOC's disposition of a Title VII complaint, although an employee is not and that employee may seek relief de novo in district court.[255] The problem with this reasoning is that it assumes away the issue it purports to resolve. The argument assumes that only aggrieved persons may initiate civil actions. It further presumes that Congress must have recognized this one-sided rule when they enacted the jury trial provisions in the 1991 CRA and, therefore, Congress must have conditioned the right to a jury trial on the aggrieved person initiating the civil action (i.e., the Government's argument in *Gibson*).

However, there is no incongruity if Title VII and the 1991 CRA are read in unison. The EEOC may award compensatory damages in the administrative process.[256] The 1991 CRA does not specifically limit the initiation of a civil action to the aggrieved employee. Thus, if the aggrieved employee or the federal agency is dissatisfied with the EEOC's decision, either should be able to initiate a civil action and a jury trial in federal district court.[257] Thus, 1991 CRA's jury trial provisions may be considered to modify Title VII by allowing the EEOC to award compensatory damages *and* allows the government to receive a jury trial if the aggrieved employee seeks those damages.

B. Compensatory Damages Against a Federal Employer without Damaging the Doctrine of Sovereign Immunity

The question of whether the 1991 CRA waives sovereign immunity for the award of compensatory damages in the administrative process is not a concern under the aforementioned alternative approach. Specifically, the dissent in *Gibson* was concerned that the waiver of sovereign immunity had to be expressed in unequivocal statutory text and strictly construed in favor of the sovereign.[258] This requirement is met by affording the sovereign, i.e., the federal agency, the ability to challenge the EEOC's compensatory damages award.

The Court was also concerned with the principle of sovereign immunity that states that a waiver in one forum does not affect a waiver in other forums.[259] Under the proposed alternative approach, there is no waiver of sovereign immunity in the administrative process unless the federal agency determines not to pursue their right to initiate a civil action and jury trial in federal district court. Thus, the federal agency would be in control of whether to pursue fully the rights guaranteed to it by Congress. This situation is analogous to a federal agency deciding to settle a claim included a demand for compensatory damages because there was the possibility that the aggrieved employee could be awarded these damages in court.

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[253] *See* Laber v. Harvey, 438 F.3d 404 (4th Cir. 2006) (en banc). The court held that Title VII does not authorize a federal-sector employee to bring a civil action alleging only that the EEOC OFO's remedy was insufficient. *Id.* Rather, in order properly to claim entitlement to a more favorable remedial award, the employee must place the employing agency's discrimination at issue. *Id.*; *see also* Morris v. Rumsfeld, 420 F.3d 287, (3d Cir. Pa., 2005), *cert. denied*,; Ellis v. England, 432 F.3d 1321, 1325 (11th Cir. 2005); Scott v. Johanns, 409 F.3d 466, 469 (D.C. Cir. 2005); Timmons v. White, 314 F.3d 1229, 1232 (10th Cir. 2003).

[254] *Gibson*, 137 F.3d at 996.

[255] *See id* at 997–98.

[256] 29 C.F.R. § 1614.501 (2008).

[257] 42 U.S.C. § 1981a.

[258] *See* West v. Gibson, 527 U.S. at 224 (citing Dep't of Army v. Blue Fox, Inc., 525 U.S. 255 (1999)).

[259] *Id.* at 226 (citing McElrath v. United States, 102 U.S. 426 (1880)).

V. Time for a Change to Title VII

Gibson was decided almost a decade ago and its precedent is now well established. Certainly, had Congress disagreed with the proposition that the EEOC could award compensatory damages or if it wished to remove the binding nature of compensatory damage awards on federal agencies, it could have done so.

Amending Title VII to allow federal agencies to challenge adverse EEOC rulings would further the purpose of Title VII, to remedy discrimination in federal employment, which it does in part by creating a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action. This proposed modified system encourages quicker, less formal, and less expensive resolution of disputes within the federal government and outside of court. The current dispute resolution system, however, provides an incentive to complainants to pursue their complaints through the entire administrative system without settling their complaints because they can always get a second bite at the apple in federal court (in the form of a trial de novo) if they lose in the administrative process. Complainants would be encouraged to enter into binding administrative settlements if federal agencies could challenge adverse administrative findings in federal court.

Additionally, there is a benefit from providing accurate determinations of whether or not an agency discriminated against its employee. The EEOC compiles statistics regarding discrimination complaints filed by federal sector employees.[260] The statistics indicate that the federal sector complaint processing system would be improved by allowing federal agencies to challenge the EEOC's findings of discrimination in federal court. For example, in fiscal year 2006, over 15,000 individuals filed nearly 17,000 complaints alleging employment discrimination against the federal government.[261] Government agencies appealed over 40% of these cases in which an EEOC Administrative Judge found the agency liable for discrimination.[262] Based on the same report, nearly one in every five of these agency appeals was successful.[263]

Hence, federal agencies believed that EEOC administrative judges were wrong 40% of the time. Moreover, the EEOC OFO agreed with the federal agencies and overturned their own administrative judges in 20% of the cases appealed.[264] In other words, the EEOC OFO found that nearly one in every ten cases decided by an EEOC administrative judge warranted overturning. This is a staggering rate of error, especially given the fact that the EEOC provides substantial deference to the factual findings of the administrative judge.[265] There is no way of guessing what percentage of the remaining cases were wrongly decided, but affirmed by the EEOC, other than to say it would be significant by any measure.

VII. Conclusion

The federal EEO complaint process is a complex system that is further complicated by the fact that Congress has twice amended it. With the last amendment, the 1991 CRA, Congress sought, among other things, to provide to aggrieved employees the ability to receive full compensated for the discriminatory acts of their employers through the award of compensatory damages. Unfortunately, the 1991 CRA was silent regarding its applicability to the administrative process.

Arguably, the Supreme Court discarded its well-established doctrine of sovereign immunity when it determined in *Gibson* that the EEOC could award compensatory damages. The article explained that the Court could have reached the same result without abandoning its sovereign immunity jurisprudence, by recognizing that the 1991 CRA allows federal-sector employers to initiate a civil action and receive a jury trial when an aggrieved employee seeks compensatory damages and these damages are awarded by the EEOC.

Regardless of how *Gibson* and the 1991 CRA are interpreted, there is still significant evidence supporting the need for changing Title VII to allow federal-sector employers to challenge EEOC's findings. Even recognizing that there is a benefit from the finality of administrative determinations of liability by the EEOC against federal agencies, it is difficult to accept that federal-sector employment would not benefit by the added accuracy that could be obtained by judicial proceedings.

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[260] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ANNUAL REPORT ON THE FEDERAL WORK FORCE FOR FISCAL YEAR 2006, *available at* http://www.eeoc.gov/federal/fsp2006/index.html (last visited June 16, 2008).

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *See* 29 C.F.R. § 1614.405(a) (2008).

Successful Criminal Prosecution of a Landlord Under the Servicemembers Civil Relief Act

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The Servicemembers Civil Relief Act (SCRA)[2] is something of a misnomer in that it also contains a number of criminal provisions in addition to its civil remedies.[3] Each provision provides that violations of the specific SCRA section constitute a misdemeanor, and that the offender is subject to fines and imprisonment pursuant to Title 18, United States Code.

Most Judge Advocates are familiar with provisions of the SCRA that allow a servicemember to reduce interest rates,[4] reopen default judgments,[5] or apply for a stay in a court of law.[6] However, when it comes to military tenants, ignoring the tenets of the SCRA can lead to serving time in federal prison.[7]

This article will examine the criminal penalties and prosecution procedures of the SCRA; wrongful eviction under the SCRA; the case of *Flessert v. McLeod*, a civil wrongful eviction lawsuit; and finally, *United States v. McLeod*, the subsequent SCRA criminal prosecution.

SCRA Criminal Penalties and Prosecution Procedures

Criminal penalties are available for violations of numerous SCRA provisions including eviction and distress,[8] installment contracts,[9] filing a false affidavit,[10] mortgages and trust deeds,[11] enforcement of storage liens,[12] assignment of life insurance policies,[13] and seizure of property or security deposit following termination of a lease.[14]

Before Judge Advocates consider seeking criminal prosecution of an SCRA case, they should ensure that they have exhausted all possible other avenues of advocacy, including attempting to informally resolve the dispute and assisting the servicemember in a civil action. The next step is to contact the Office of The Judge Advocate General (OTJAG) Legal Assistance Policy Division to approve the referral.[15] When OTJAG has recommended referral, the Judge Advocate should the contact the local U.S. Attorney's Office to move forward with prosecution.[16] In persuading the U.S. Attorney that the

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[2] Pub. L. No. 108-189, 117 Stat. 2835 (2003) (codified at 50 U.S.C.S. app. §§ 501–596) (LexisNexis 2008).

[3] *See infra* notes 7–13.

[4] 50 U.S.C. app. § 527.

[5] *Id.* app. § 521.

[6] *Id.* app. § 522.

[7] United States v. McLeod, No. 2:06-cr-27 (W.D. Mich. Sept. 21, 2007)

[8] 50 U.S.C. app. § 531(c)(1).

[9] *Id.* app. § 532(b)(1).

[10] *Id.* app. § 521(c).

[11] *Id.* app. § 533(d)(1).

[12] *Id.* app. § 537(c)(1).

[13] *Id.* app. § 536(e)(1).

[14] *Id.* app. § 535(h)(1).

[15] Policy e -Letter 47, Office of the Judge Advocate General, Legal Assistance (LA) Pol. Div., para. 4 (29 Feb. 2008).

[16] *Id.*

case warrants criminal prosecution, the Judge Advocate should be prepared to demonstrate why the actions of the offender are particularly offensive and how the case might be potentially precedential.

Wrongful Eviction Under the SCRA

The SCRA, 50 U.S.C.S. app. § 531, protects against the eviction of servicemembers and their dependents.[17] When a landlord does not abide by the SCRA, the servicemember should first pursue the matter in civil court to obtain damages or an injunction against the landlord. This may occur under either the SCRA or State eviction law.[18] In *Flessert v. McLeod*, the servicemember and his wife attempted to resolve the dispute through civil proceedings after the landlord evicted the servicemember's wife and retained the couples' belongings.[19] When *Flessert v. McLeod* did not result in an acceptable remedy, *United States v. McLeod* was pursued in criminal court.[20] Though infrequently enforced, the SCRA does allow for the criminal prosecution of a landlord for wrongful eviction. Judge Advocates should be mindful that a SCRA wrongful eviction prosecution can allow recovery for a victim who was unsuccessful recouping damages via a civil action or simply is located a thousand miles away from a likely court with jurisdiction.

Flessert v. McLeod

In September of 2004, Mrs. Flessert entered into a rental agreement for a mobile home trailer in Wilson, Michigan for $250 a month.[21] The landlord of the mobile home trailer was Randall McLeod.[22] At the time of signing the lease, Mrs. Flessert's husband, Specialist (SPC) Flessert, was attending his Advanced Individual Training at the Aberdeen Proving Ground, Maryland.[23] In a subsequent FBI investigation, McLeod confirmed that Mrs. Flessert "told him that her husband was away in training, for the United States Army."[24] Mrs. Flessert was pregnant with their third child and the baby was due in late December 2004.[25]

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[17] 50 U.S.C. app. § 531.

> (a) Court-ordered eviction.
>
> (1) In general. Except by court order, a landlord (or another person with paramount title) may not –
>
> (A) evict a servicemember, or the dependent of a servicemember, during a period of military service of the servicemember, from premises –
>
> (i) that are occupied or intended to be occupied primarily as a residence; and
>
> (ii) for which the monthly rent does not exceed $2,400, as adjusted under paragraph (2) for years after 2003; or
>
> (B) subject such premises to a distress during the period of military service.
>
> . . . .
>
> (c) Penalties. –
>
> (1) Misdemeanor. Except as provided in subsection (a), a person who knowingly takes part in an eviction or distress described in subsection (a), or who knowingly attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.
>
> (2) Preservation of other remedies and rights. The remedies and rights provided under this section are in addition to and do not preclude any remedy for wrongful conversion (or wrongful eviction) otherwise available under the law to the person claiming relief under this section, including any award for consequential and punitive damages.

Id.

[18] *See, e.g.*, MICH. COMP. LAWS § 600.2918 (LexisNexis 2008).

[19] Flessert v. McLeod, No. 2005 18621 GC (95A D. C. Mich. Oct. 18, 2005).

[20] United States v. McLeod, No. 2:06-cr-27 (W.D. Mich. Sept. 21, 2007).

[21] Plea Agreement, United States v. McLeod, No. 2:06-cr-27, para. 5 (W.D. Mich. May 8, 2007) [hereinafter Plea Agreement].

[22] *Id.* para. 5.

[23] Letter from Mrs. Flessert to Whom it May Concern (n.d.) [hereinafter Letter from Mrs. Flessert] (on file with author).

[24] FBI Special Agent Report of Interview of Randall McLeod (July 27, 2005) [hereinafter FBI Interview of McLeod].

[25] Plea Agreement, *supra* note 21, para. 5.

Mrs. Flessert paid the October and November rent in advance by post-dated check.[26] The initial rent was co-signed by the Red Cross, who also advised Mr. McLeod that the basis for the rental advance was the fact that it was for a servicemember's family.[27] In late November 2004, Mrs. Flessert and her two children traveled to Wisconsin to visit relatives and were joined by SPC Flessert when he took leave for the Thanksgiving holiday.[28] The day after Thanksgiving, Mrs. Flessert went into pre-term labor.[29] Her physician recommended that she not travel.[30] She left a voicemail with Mr. McLeod indicating that she was experiencing problems with her pregnancy, but would return to Michigan as soon as possible to pay the December rent.[31]

In early December, Mr. McLeod evicted the Flesserts without a court order.[32] The eviction consisted of Mr. McLeod changing the locks on the trailer and confiscating their personal belongings and furniture, including a three piece bedroom set.[33] When SPC Flessert learned of the eviction, he immediately contacted the Legal Assistance Office, Office of Command Judge Advocate (OCJA), Fort McCoy, Wisconsin. Major (MAJ) Jack Jakubiak was assigned to the case and contacted Mr. McLeod, advising him that his actions violated the SCRA.[34] McLeod was not receptive to this information and several follow up conversations were met with disdain.[35] At one point, McLeod offered to return some of the Flessert's belongings, but stated that he intended to keep the bedroom suite as recompense "for all of his inconvenience."[36] Major Jakubiak advised McLeod of the criminal nature of his conduct and urged him to seek advice from counsel.[37] When Mr. McLeod retained counsel, MAJ Jakubiak provided McLeod's attorney with the relevant case law and citation, and further identified in writing that the SCRA also included criminal penalties of up to one year in prison.[38]

Upon reviewing the provided materials, Mr. McLeod's counsel negotiated the return of all of the Flesserts' belongings.[39] However, before the materials could be recovered, Mr. McLeod fired his attorney and once again refused to return the Flesserts' personal property.[40]

After still further negotiations with Mr. McLeod proved unsuccessful, MAJ Jakubiak contacted the Menominee County Sheriff's Department to report the theft of the Flesserts' belongings by Mr. McLeod.[41] The Deputy Sheriff noted that Mr. McLeod:

> [I]s currently living in Arizona for the winter. He advised that he entered and removed [KF]'s belongings. He claimed she abandoned the trailer and left it a mess. When he arrived there was no fuel left and he had to put stuff in the drains so they would not freeze. She also owes him back rent. He is holding her property and will not return it unless she takes him to court. When asked if he went through the eviction process he said he did not and did not have to because she abandoned the place. When asked if there was any way [KF] could get her property back he said "no."[42]

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[26] *Id.*

[27] *See* United States v. McLeod, No. 2:06-cr-27 (W.D. Mich. Sept. 21, 2007).

[28] Plea Agreement, *supra* note 21, para. 5.

[29] *Id.*

[30] Letter from Mrs. Flessert, *supra* note 23.

[31] *Id.*

[32] Plea Agreement, *supra* note 21, para. 5.

[33] *Id.*

[34] *Id.* at 16–18, 20.

[35] *Id.* at 20.

[36] *Id.* at 17–18.

[37] *Id.* at 17.

[38] Fax to Ms. Deborah Curran, Attorney at Law, from Captain Jakubiak, Fort McCoy Legal Assistance Office, Wis., Feb. 11, 2005.

[39] Memorandum to File by Captain Jack Jakubiak, Legal Assistance Attorney, Fort McCoy, Wis. 2–3 (Feb. 22, 2005) [hereinafter Jakubiak Memo].

[40] Transcript of Sentencing Hearing at 17–18, United States v. McLeod, No. 2:06-cr-27 (W.D. Mich. Sept. 19, 2007) [hereinafter Transcript of Sentencing Hearing].

[41] Jakubiak Memo, *supra* note 39, at 2.

[42] Menominee County Sheriff Incident Report, No. 155-159-05 (Feb. 10, 2005).

Subsequently, MAJ Jakubiak once again contacted Mr. McLeod and advised him that he was at risk of being criminally prosecuted for his actions.[43] The Fort McCoy OCJA then contacted the United States Attorney's Office (USAO), Western District of Michigan, and the Legal Assistance Policy Division, Office of The Judge Advocate General, for assistance.[44]

The USAO's office requested that the FBI conduct an investigation. During the investigation, Mr. McLeod admitted that he was aware that SPC Flessert was in the U.S. Army when he rented the property to Mrs. Flessert.[45] He also admitted that on or about December 12, 2004, he "took all of the contents of the trailer and padlocked the door."[46] Finally, he stated that he knew "that [Mrs. Flessert]'s husband was away in the United States Army and that he failed to get a court order to evict. [McLeod] acknowledged that absent any Federal law, he realizes that the State of Michigan requires a landlord to go through an eviction process to make a tenant move out."[47] An FBI Special Agent later testified that "[McLeod] was going to hang onto the items that he had removed from the trailer, what he said was five pickup loads of stuff . . . until she took him to court."[48] He reiterated that he considered the trailer abandoned, despite the fact that the rent was only twelve days late.[49]

The Flesserts retained a legal assistance attorney from the Legal Services of Northern Michigan, Inc., to civilly prosecute the case against McLeod.[50] In October of 2005, a complaint was filed alleging violations of Michigan law and the civil provisions of the SCRA.[51] In the complaint, the Flesserts requested damages of over $15,000, including relocation expenses.[52] Mr. McLeod was served by mail and publication.[53] When he failed to respond to the complaint a default judgment was entered against him on 31 March 2006, awarding damages of $15,068 and costs of $232 to the Flesserts.[54]

The Flesserts' travails continued, however. They were unable to collect on the judgment because they could not locate any accounts or property to attach a judgment, garnishment, or lien. It was learned that McLeod had over forty creditors attempting to secure payment from him and in order to avoid these obligations, McLeod had transferred assets, to include his home and the title to his Ford F350 pickup truck, to his son.[55] In conjunction with the Office of Command Judge Advocate at Fort McCoy, the Legal Services of Northern Michigan requested that the U.S. Attorney pursue criminal prosecution to obtain restitution.

United States v. McLeod

In September of 2006, the United States brought a criminal action against Mr. McLeod, alleging that "without a court order, [he] knowingly evicted and attempted to evict the dependents of a servicemember, during a period of military service of the servicemember, from premises that were occupied or intended to be occupied primarily as a residence, and for which the monthly rent did not exceed $2,465."[56] In a pretrial pleading, the Government recited the admissions that Mr. McLeod had made to the FBI Special Agent in July of 2005.[57]

Following discovery, and with the realization that he had already admitted to all of the elements of the crime to the FBI Special Agent, Mr. McLeod agreed to plead guilty. In the plea agreement filed in May of 2007, Mr. McLeod admitted

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[43] Transcript of Sentencing Hearing, *supra* note 40, at 17–18.

[44] Jakubiak Memo, *supra* note 39.

[45] FBI Interview of McLeod, *supra* note 24.

[46] *Id.*

[47] *Id.*

[48] Transcript of Sentencing Hearing, *supra* note 40, at 9,

[49] *Id.*

[50] Summons and Complaint, Flessert v. McLeod, No. 2005 18621 GC (95A D. C. Mich. Oct. 18, 2005).

[51] *Id.*

[52] *Id.*

[53] Default Judgment, Flessert v. McLeod, No. 2005 18621 GC (95A D.C. Mich. Mar. 31, 2006).

[54] *Id.*

[55] Transcript of Sentencing Hearing, *supra* note 40, at 46.

[56] Class A Misdemeanor Information, United States v. McLeod, No. 2:06-cr-27.(W.D. Mich. Sept. 13, 2006).

[57] Government's Initial Pretrial Conference Summary Statement, United States v. McLeod, No. 2:06-cr-27 (W.D. Mich. Dec. 14, 2006).

violating 50 U.S.C. App. §§ 531(a)(1)(A), 531(a)(3), and 531(c)(1).[58] He agreed to a sentence of up to one year in prison and $100,000 fine including restitution.[59]

Mr. McLeod's sentencing occurred on August 28, 2007. Mr. McLeod was sentenced to six months of incarceration, followed by a period of supervision of one year, restitution to SPC Flessert and his spouse of $15,300, a $1000 fine, and an additional six month suspended sentence to be served should restitution not be paid during the one year period of supervision.[60]

Mr. McLeod was released from federal prison on 12 May 2008.[61] As indicated, pursuant to his sentence, during his one year of supervised release, he must make restitution to the family. In addressing this portion of the sentence, U.S. Magistrate Judge Greeley noted, "And Mr. McLeod, I'm telling you right now, and I'm making it very clear, if you don't pay that restitution during the supervised release you're going to do the other six months."[62]

Conclusion

Legal Assistance attorneys should be cognizant that egregious unlawful evictions in violation of the SCRA may support federal criminal prosecutions. When appropriate cases arise that may be candidates for criminal prosecution by the U.S. Department of Justice, legal assistance attorneys must work closely with their supervisors, Staff Judge Advocates, and the OTJAG Legal Assistance Policy Division. As evidenced by the sentence in *United States v. McLeod*, the consequences for landlords ignoring servicemembers' rights can be severe.

[58] Plea Agreement, *supra* note 21, para. 1.

[59] *Id.* para. 3.

[60] Judgment in a Criminal Case, United States v. McLeod, No. 2:06-cr-27 (W.D. Mich. Sept. 21, 2007).

[61] *See* Fed. Bureau of Prisons, Inmate Locator, http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=NameSearch&needingMoreList=false&FirstName=randall&Middle=&LastName=mcleod&Race=U&Sex=M&Age=&x=88&y=13 (last visited Sept. 17, 2008).

[62] Transcript of Sentencing Hearing, *supra* note 40, at 73; Judgment in a Criminal Case, *McLeod*, No. 2:06-cr-27.

TJAGLCS Practice Note

Faculty, The Judge Advocate General's Legal Center & School

Administrative and Civil Law Note

Noncitizen Servicemembers: Do They Really Have to Die to Become U.S. Citizens?

Lieutenant Colonel Jeffrey P. Sexton

Why did Jose have to die for America in order to truly belong?[1]

- Nora Mosquera

There is something terribly wrong with our immigration policies if it takes death on the battlefield in order to earn citizenship.[2]

- Cardinal Roger Mahoney

It's like, "You're not good enough to be a full member of this society until you die."[3]

- Nestor Rodriquez

"If I get killed, my family would get a green card."[4]

- Sergeant Rico Rodriquez

To be eligible to enlist in the U.S. Armed Forces, a person must either be a citizen of the United States, a lawful permanent resident of the United States, a national of the United States, or a citizen of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau.[5] Many Americans may be surprised to learn that roughly 35,000 noncitizen servicemembers serve in the military at any given time,[6] and hundreds of them have died on the battlefields of Afghanistan and Iraq.[7] Although no tribute can replace their loss, it is commendable that the Nation has granted posthumous citizenship to over 100 servicemembers killed during the Global War on Terror (GWOT).[8] Posthumous citizenship not only bestows inimitable honor upon the fallen servicemember, but also generates special immigration and naturalization opportunities for the deceased's direct family members, such as immediate eligibility for permanent resident and citizenship processing.[9]

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[1] *See* Helen O'Neill, Assoc. Press, *Kin Torn by Citizenship for Fallen*, MILITARY.COM, Mar 24, 2008, http://www.military.com/NewsContents/0,13319,164547,00.html (quoting Nora Mosquera, foster mother of Lance Corporal Jose Gutierrez, who was killed in action in Iraq).

[2] *See id.* (quoting Cardinal Roger Mahoney, Letter from Cardinal Roger Mahoney, Archbishop of Los Angeles, to President Bush (Apr. 2003)).

[3] Michael Riley, *Citizen Soldiers: Immigrants' Sacrifices Honored Posthumously; Some Families Are Pained by Calls for Border Crackdowns as Loved Ones Are Dying for Their Adopted Country*, DENVER POST, May 30, 2005 (quoting Nestor Rodriquez, Sociologist, Univ. of Houston).

[4] STOP LOSS (MTV Films 2008) (quoting the character Sergeant Rico Rodriquez).

[5] 10 U.S.C. § 504(b) (2000). A lawful permanent resident is defined as a person who has been "lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws. 8 U.S.C. § 1101(a)(20). A "national of the United States" is defined as "a citizen of the United States, or . . . a person who, though not a citizen of the United States, owes permanent allegiance to the United States." *Id.* § 1101(a)(22). The term "national" is more specifically defined in 8 U.S.C § 1408 as, generally, "a person born an outlying possession of the United States . . ." *Id.* § 1408(1). The term "outlying possessions of the United States" means American Samoa and Swains Island. *Id.* § 1101(a)(29). Citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau are eligible for enlistment in the U.S. Armed Forces pursuant to Department of Defense Instruction 1304.26, *Qualification Standards for Enlistment, Appointment, and Induction*, which cites the Compact of Free Association between the Federated States of Micronesia and the United States, the Compact of Free Association between the Republic of the Marshall Islands and the United States, and the Compact of Free Association Between Palau and the United States. U.S. DEP'T OF DEFENSE, INSTR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION para. E2.2.2.1 (20 Sept. 2005) [hereinafter DODI 1304.26].

[6] ANITA HATTIANGADI ET AL., NON-CITIZENS IN TODAY'S MILITARY, CTR. FOR NAVAL ANALYSES (FINAL REPORT), Apr. 2005, *available at* http://www.cna.org/news/releases/researchbriefs.aspx?fromsearch=1.

[7] U.S. Citizenship & Immigration Servs., Fact Sheet: Naturalization through Military Service (May 16, 2008) [hereinafter Fact Sheet], http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=b821a9c210149110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

[8] *Id.*

[9] 8 U.S.C. § 1430(d) (stating that a surviving spouse, child or parent of a citizen servicemember (including a servicemember who was granted posthumous citizenship) may be naturalized without having to meet residency requirements, if the servicemember died during a period of honorable active duty service).

But what do we make of the quotes that opened this practice note? Do noncitizen servicemembers really have to die to become United States citizens? Must they die in combat in order to prove they are "good enough" and now "truly belong"? Is a servicemember's death on the battlefield the only avenue of citizenship for the grieving family members? This article will address the answer to these questions with an emphatic "No." Despite the belief of some,[10] statutory authority already exists for most noncitizen servicemembers to become United States citizens well before they are exposed to combat. The challenge for all the Armed Services is to ensure that all noncitizen servicemembers are aware of, and are afforded the opportunity to take advantage of, fast-track citizenship opportunities early on in military service.

Immediate Naturalization Authority

The starting point regarding servicemember citizenship issues is 8 U.S.C. § 1440, which authorizes the naturalization of noncitizen servicemembers who have served honorably in an active-duty status during a designated period of military hostilities.[11] The statute specifically waives the traditional residency and time-in-service requirements normally required of servicemembers and opens the door for *immediate* naturalization processing.[12] The key to eligibility is whether the servicemember has served during a "designated period of military hostilities." The statute expressly designates the conflicts of World War I, World War II, the Korean War, and the Vietnam War as qualifying periods of military hostilities, and further authorizes the President to designate other periods of hostilities for purposes of naturalization eligibility.[13] Regarding the GWOT, in July 2002, President Bush signed Executive Order 13,269, declaring the period beginning on 11 September 2001 as a qualifying period under the statute.[14] Until President Bush or a successor President rescinds the executive order, *any* current noncitizen servicemember,[15] whether a member of the active or reserve components, is immediately eligible to apply for naturalization as long as he or she has served honorably for just one day on active duty.[16] Accordingly, assertions that a noncitizen servicemember *must* die in order to gain citizenship are without merit and there is no reason why new servicemembers cannot begin the expedited naturalization process soon after entering the military. If a qualified noncitizen servicemember does not seek citizenship prior to being killed in combat, it is not because of a lack of authority or right to do so.

It is important to emphasize that the opportunity for immediate naturalization processing is not *automatic*, meaning that it does not just magically happen without any effort from the servicemember. The servicemember, with help from the chain of command, unit personnel sections, and Judge Advocate legal assistance personnel, must kick-start the process by submitting a naturalization application packet to the U.S. Citizenship and Immigration Service (USCIS). Although there are a number of steps required to submit a good packet, such as completing an application form,[17] obtaining certification from the unit that the servicemember has served honorably, and ensuring that a good set of fingerprints are available (enlistment fingerprints are sufficient),[18] the application process is more streamlined and less expensive than for nonmilitary persons.[19]

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[10] The opening quotes to this article reflect a view held by many Americans that posthumous citizenship is the only route to citizenship for noncitizen servicemembers.

[11] 8 U.S.C. § 1440.

[12] During peacetime where there is no "designated period of military hostilities," servicemembers must normally serve honorably for one year in the military before being eligible to apply for naturalization. *Id.* § 1439(a). Prior to 2004, the time in service requirement was three years. The National Defense Authorization Act for Fiscal Year 2004, tit. XVII, § 1701(a) reduced the time in service requirement from three years to one year. In comparison, persons not in the military must generally meet a five year residency requirement. 8 U.S.C. § 1427(a).

[13] 8 U.S.C. § 1440(a).

[14] Exec. Order No. 13,269, 67 C.F.R. § 45,287 (2002).

[15] As well as any former servicemember who served honorably on active duty since 11 September 2001. *See* 8 U.S.C. § 1440(a).

[16] The statute authorizes revocation of citizenship if the servicemember is separated from the service under other than honorable conditions before the servicemember has served honorably for a period or periods aggregating five years. *See id.* § 1440(c).

[17] U.S. Citizenship and Immigration Servs., N-400, Application for Naturalization (Oct. 15, 2007), *available at* http://www.uscis.gov/files/form/N-400.pdf.

[18] U.S. ARMY HUMAN RES. COMMAND, THE SOLDIER'S GUIDE TO CITIZENSHIP (July 2007), *available at* https://www.hrc.army.mil/site/Active/TAGD/A_soldiers_guide_to_citizenship.htm (providing the framework for citizenship packets and customer assistance). Since 1 October 2004, servicemembers have not been charged a fee for filing the application or for the issuance of a certificate of naturalization upon being granted citizenship. 8 U.S.C. § 1439(b).

In fact, servicemembers have the additional advantage of submitting their application packets to a specially designated military processing service center in Lincoln, Nebraska, commonly called the Nebraska Service Center.[20] As a result, servicemembers have a central point of contact for their application packets to address unique service-related issues.[21]

Overseas Naturalization Authority

What about servicemembers who are deployed or otherwise assigned overseas and unavailable to take advantage of this streamlined application process? Although overseas duty may make the process more challenging, it does not make it impossible. Due to a recent and welcome change, the current law does not require the servicemember to complete an in-person interview and take the oath of allegiance on American soil. Through the National Defense Authorization Act of 2004, Congress directed the Secretary of Homeland Security, the Secretary of State, and the Secretary of Defense to ensure that the final steps to naturalization (e.g. applications, interviews, filings, oaths, ceremonies) be made available overseas.[22] This is a remarkable benefit for noncitizen servicemembers serving overseas and has proved to be an enormous success. Since the initiation of overseas naturalization efforts in 2004, over 5000 servicemembers have taken the oath of citizenship overseas in locations such as Djibouti, Germany, Greece, Iceland, Italy, Japan, Kenya, Kosovo, Kuwait, South Korea, Spain, the United Kingdom, and even Iraq and Afghanistan.[23] If overseas duty was ever viewed as a detriment to the naturalization process, or used as an excuse to delay pursuing naturalization, it can no longer be said to be true.

Education and Assistance

As the opening quotes to this note attest, misperceptions still exist both inside and out of the military regarding citizenship opportunities for noncitizen servicemembers. This can be corrected in the military through persistent education and assistance efforts. The Judge Advocate community in particular can play a critical role in ensuring that all servicemembers are aware of naturalization opportunities.

Judge Advocates should incorporate immigration and naturalization information into routine legal assistance briefings at legal assistance offices, at the units, and at family readiness and other family support events. Judge Advocates should also encourage commanders to have their personnel sections make immigration and naturalization a regular point of emphasis.[24] Further, given the new opportunities for overseas naturalization processing, legal assistance Judge Advocates should include immigration and naturalization information in unit mobilization and deployment briefings, and be available during deployment to review application packets for legality and to conduct citizenship workshops when time and resources permit.[25] Servicemembers need to know that an imminent deployment does not preclude initiation of the naturalization application process and that expedited naturalization processing can continue even during mobilization and deployment.

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[19] Pursuant to 8 U.S.C. § 1439(b)(4), effective 1 October 2004, no fee shall be charged or collected from military applicants

> for filing the application, or for the issuance of a certificate of naturalization upon being granted citizenship, and no clerk of any State court shall charge or collect any fee for such services unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected.

Id.

[20] Brochure: Naturalization for Military Personnel, U.S. Citizenship and Immigration Servs. (June 2006), *available at* http://www.uscis.gov/files/article/MilitaryBrochurev7.pdf.

[21] Telephone Discussion with Leslie Lord, U.S. Army Human Res. Command Action Officer, in St. Louis, Mo. (Sept. 19, 2008).

[22] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, div. A, tit. XVII, § 1701, 117 Stat. 1539 (codified at 8 U.S.C.S. § 1443a (LexisNexis 2008)).

[23] Fact Sheet, *supra* note 7.

[24] In fact, the Department of Defense requires that each qualifying noncitizen servicemember be advised of the liberalized naturalization provisions of 8 U.S.C. § 1440 (naturalization during periods of military hostilities), and that basic training and orientation programs include naturalization advice and assistance to interested noncitizen servicemembers. U.S. DEP'T OF DEFENSE, INSTR. 5500.14, NATURALIZATION OF ALIENS SERVING IN THE ARMED FORCES OF THE UNITED STATES AND OF ALIEN SPOUSES AND/OR ALIEN ADOPTED CHILDREN OF MILITARY AND CIVILIAN PERSONNEL ORDERED OVERSEAS paras. E2.2.2, E2.2.2.1 (4 Jan. 2006).

[25] For a more detailed discussion of immigration and naturalization processing during deployments, see Major Marc Defreyn & First Lieutenant Darrell Baughn, *Immigration and Naturalization Issues in the Deployed Environment*, ARMY LAW., Oct. 2005, at 47.

Conclusion

Posthumous citizenship for Soldiers, Sailors, Airmen, Marines, and Coastguardsmen is a wonderful feature of American immigration and naturalization law. It reflects a conviction by the American people that noncitizen servicemembers who have shed their blood for the United States should receive the final, ultimate recognition of their selfless service, and that their families should be equally honored through greater immigration and naturalization opportunities. However, a Soldier need not die on the battlefield to become a U.S. citizen. Through statutes and executive orders, the opportunity for noncitizen servicemembers to naturalize during the GWOT exists *now*, regardless of combat status. Honorable *service* in an active duty status is the key, not an honorable *death*. Judge Advocate personnel must continually strive to educate and inform all servicemembers and their families concerning immediate naturalization opportunities. No servicemember should ever be under the mistaken impression that they are not "good enough" to be an American or will not "truly belong" unless they die on the battlefield.

CLE News

1. Resident Course Quotas

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

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

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

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

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

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

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	176th JAOBC/BOLC III (Ph 2)	18 Jul – 1 Oct 08
5-27-C20	177th JAOBC/BOLC III (Ph 2)	7 Nov 08 – 4 Feb 09
5-27-C20	178th JAOBC/BOLC III (Ph 2)	20 Feb – 6 May 09
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	204th Senior Officer Legal Orientation Course	20 – 24 Oct 08
5F-F1	205th Senior Officer Legal Orientation Course	26 – 30 Jan 09
5F-F1	206th Senior Officer Legal Orientation Course	23 – 27 Mar 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F3	15th RC General Officer Legal Orientation	11 – 13 Mar 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09
5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09

5F-F55	2009 JAOAC (Ph 2)	5 – 16 Jan 09
5F-JAG	2008 JAG Annual CLE Workshop	6 – 10 Oct 09
NCO ACADEMY COURSES		
5F-F58	27D Command Paralegal Course	2 – 6 Feb 09
600-BNCOC	1st BNCOC Common Core (Ph 1)	6 – 27 Oct 08
600-BNCOC	2d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	3d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	4th BNCOC Common Core (Ph 1)	9 – 27 Mar 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	1st Paralegal Specialist BNCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	1 Apr – 5 May 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	1st Paralegal Specialist ANCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr – 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
WARRANT OFFICER COURSES		
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
7A-270A3	9th Senior Warrant Officer Symposium	2 – 6 Feb 09
ENLISTED COURSES		
512-27D/20/30	20th Law for Paralegal Course	23 – 27 Mar 09
512-27D-BCT	27D BCT NCOIC/Chief Paralegal NCO Course	20 – 24 Apr 09
512-27D/DCSP	18th Senior Paralegal Course	15 – 19 Jun 09
512-27DC5	28th Court Reporter Course	26 Jan – 27 Mar 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	8th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC7	10th Redictation Course	5 – 16 Jan 09
512-27DC7	11th Redictation Course	30 Mar – 10 Apr 09

ADMINISTRATIVE AND CIVIL LAW		
5F-F202	7th Ethics Counselors Course	13 – 17 Apr 09
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F23	63d Legal Assistance Course	27 – 31 Oct 08
5F-F23	64th Legal Assistance Course	30 Mar – 3 Apr 09
5F-F23E	2008 USAREUR Legal Assistance CLE	3 – 7 Nov 08
5F-F24	33d Administrative Law for Installations Course	16 – 20 Mar 09
5F-F24E	2009 USAREUR Administrative Law CLE	14 – 18 Sep 09
5F-F26E	2008 USAREUR Claims Course	20 – 24 Oct 08
5F-F28	2008 Income Tax Law Course	8 – 12 Dec 08
5F-F28E	2008 USAREUR Tax CLE Course	1 – 5 Dec 08
5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F28P	2009 PACOM Tax CLE	6 – 9 Jan 09
CONTRACT AND FISCAL LAW		
5F-F10	161st Contract Attorneys Course	23 Feb – 3 Mar 09
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F103	9th Advanced Contract Law Course	16 – 20 Mar 09
5F-F11	2008 Government Contract Law Symposium	2 – 5 Dec 08
5F-F12	79th Fiscal Law Course	20 – 24 Oct 08
5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-F13	5th Operational Contracting Course	4 – 6 Mar 09
5F-F14	27th Comptrollers Accreditation Fiscal Law Course	13 – 16 Jan 09
5F-F15E	2009 USAREUR Contract/Fiscal Law Course	2 – 6 Feb 09
8F-DL12	1st Distance Learning Fiscal Law Course	19 – 22 May 09
CRIMINAL LAW		
5F-F301	13th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	14th Military Justice Managers Course	25 – 29 Aug 08
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09

5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	31st Criminal Law Advocacy Course	2 – 13 Feb 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F35	32d Criminal Law New Developments Course	3 – 6 Nov 08
5F-F35E	2009 USAREUR Criminal Law CLE	12 – 16 Jan 09
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F45	8th Domestic Operational Law Course	27 – 31 Oct 08
5F-F47	51st Operational Law Course	23 Feb – 6 Mar 09
5F-F47	52d Operational Law Course	27 Jul – 7 Aug 09
5F-F47E	2009 USAREUR Operational Law CLE	27 Apr – 1 May 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	14 Oct – 12 Dec 08 26 Jan – 27 Mar 09 26 May – 24 Jul 09 3 Aug – 2 Oct 09
0258	Senior Officer (010) (Newport) Senior Officer (020) (Newport) Senior Officer (030) (Newport) Senior Officer (040) (Newport) Senior Officer (050) (Newport) Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	20 – 24 Oct 08 (Newport) 26 – 30 Jan 09 (Newport) 9 – 13 Mar 09 (Newport) 4 – 8 May 09 (Newport) 15 – 19 Jun 09 (Newport) 27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)
2622	Senior Office (Fleet) (010) Senior Office (Fleet) (020) Senior Office (Fleet) (030) Senior Office (Fleet) (040) Senior Office (Fleet) (050) Senior Office (Fleet) (060) Senior Office (Fleet) (070) Senior Office (Fleet) (080)	3 – 7 Nov 08 (Pensacola) 12 – 16 Jan 09 (Pensacola) 2 – 6 Mar 09 (Pensacola) 23 – 27 Mar 09 (Pensacola) 27 Apr – 1 May 09 (Pensacola) 27 Apr – 1 May 09 (Naples, Italy) 8 – 12 Jun 09 (Pensacola) 15 – 19 Jun 09 (Quantico)

	Senior Office (Fleet) (090) Senior Office (Fleet) (100) Senior Office (Fleet) (110)	22 – 26 Jun 09 (Camp Lejeune) 27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)
BOLT	BOLT (010) BOLT (010) BOLT (020) BOLT (020) BOLT (030) BOLT (030) BOLT (040) BOLT (040)	6 – 9 Oct 08 (USN) 6 – 9 Oct 08 (USMC) 15 – 19 Dec 08 (USN) 15 – 19 Dec 08 (USMC) 30 Mar – 3 Apr 09 (USMC) 30 Mar – 3 Apr 09 (USN) 27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	14 – 15 Feb 09 (Yokosuka) 27 – 28 Apr 09 (Naples, Italy)
961F	Coast Guard Judge Advocate Course (010)	6 – 10 Oct 08
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	22 – 26 Jun 09 21 – 25 Sep 09
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	11 – 22 May 09 20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
4046	SJA Legalman (010) SJA Legalman (020)	23 Feb – 6 Mar 09 (San Diego) 11 – 22 May 09 (Norfolk)
4048	Estate Planning (010)	31 Aug – 4 Sep 09
627S	Senior Enlisted Leadership Course (Fleet) (010) Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090 Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	12 – 14 Nov 08 (Norfolk) 12 – 14 Nov 08 (San Diego) 12 – 14 Jan 09 (Mayport) 2 – 4 Feb 09 (Okinawa) 9 – 11 Feb 09 (Yokosuka) 17 – 19 Feb 09 (Norfolk) 17 – 19 Mar 09 (San Diego) 23 – 25 Mar 09 (Norfolk) 13 – 15 Apr 09 (Bremerton) 27 – 29 Apr 09 (Naples) 26 – 28 May 09 (Norfolk) 26 – 28 May 09 (San Diego) 30 Jun – 2 Jul 09 (San Diego) 10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (010)	14 – 18 Sep 09
748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09
748K	USMC Trial Advocacy Training (010) USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	20 – 24 Oct 08 (Camp Lejeune) 11 – 15 May (Okinawa, Japan) 18 – 22 May 09 (Pearl Harbor) 14 – 18 Sep 09 (San Diego)

786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	23 – 27 Mar 09 20 – 24 Apr 09
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
846M	Reserve Legalman Course (Ph III) (010)	4 – 15 May 09
850V	Law of Military Operations (010)	1 – 12 Jun 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
961J	Defending Complex Cases (010)	11 – 15 May 09
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	20 – 24 Oct 08 (Mayport) 6 – 10 Apr 09 (San Diego)
525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	29 Sep – 12 Dec 08 12 Jan – 27 Mar 09 11 May – 24 Jul 09
049N	Reserve Legalman Course (Ph I) (010)	6 – 17 Apr 09
056L	Reserve Legalman Course (Ph II) (010)	20 Apr – 1 May 09
2205	Defense Trial Enhancement (010)	TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)

5764	LN/Legal Specialist Mid-Career Course (010) LN/Legal Specialist Mid-Career Course (020)	14 – 24 Oct 08 4 – 15 May 09
7485	Classified Info Litigtion Course (010)	5 – 7 May 09 (Andrews AFB)
7487	Family Law/Consumer Law (010)	6 – 10 Apr 09
7878	Legal Assistance Paralegal Course (010)	6 – 11 Apr 09
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 09 6 – 9 Apr 09 6 – 9 Jul 09
NA	Legal Specialist Course (010) Legal Specialist Course (020) Legal Specialist Course (030) Legal Specialist Course (040)	12 Sep – 14 Nov 08 5 Jan – 5 Mar 09 30 Mar – 29 May 09 26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (010) Speech Recognition Court Reporter (020) Speech Recognition Court Reporter (030)	27 Aug – 6 Nov 08 5 Jan – 3 Apr 09 25 Aug – 31 Oct 09
NA	Leadership Training Symposium (010)	27 – 31 Oct 08 (Washington, DC)

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	20 Oct – 7 Nov 08 1 – 19 Dec 08 26 Jan –13 Feb 09 2 – 20 Mar 09 30 Mar – 17 Apr 09 27 Apr – 15 May 09 1 – 19 Jun 09 13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050 Legal Clerk Course (060) Legal Clerk Course (070))	20 – 31 Oct 08 1 – 12 Dec 08 26 Jan – 6 Feb 09 2 – 13 Mar 09 20 Apr – 1 May 09 13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	17 – 21 Nov 08 12 – 16 Jan 09 23 – 27 Feb 09 23 – 27 Mar 09 18 – 22 May 09 10 – 14 Aug 09 14 – 18 Sep 09
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	20 Oct – 7 Nov 08 1 – 19 Dec 08 5 – 23 Jan 09 23 Feb – 13 Mar 09 4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	14 – 24 Oct 08 1 – 12 Dec 08 5 – 16 Jan 09 30 Mar – 10 Apr 09 4 – 15 May 09 8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	6 – 10 Oct 08 (San Diego) 2 – 6 Feb 09 (Okinawa) 9 – 13 Feb 09 (Yokosuka) 30 Mar – 3 Apr 09 (San Diego) 13 – 17 Apr 09 (Bremerton) 27 Apr – 1 May 09 (San Diego) 1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

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

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Area Defense Counsel Orientation Course, Class 09-A	6 – 10 Oct 08
Defense Paralegal Orientation Course, Class 09-A	6 – 10 Oct 08
Judge Advocate Staff Officer Course, Class 09-A	6 – 12 Oct 08
Paralegal Apprentice Course, Class 09-01	7 Oct – 20 Nov 08
Paralegal Craftsman Course, Class 09-01	14 Oct – 20 Nov 08
Reserve Forces Judge Advocate Course, Class 09-A	25 – 26 Oct 08
Advanced Environmental Law Course, Class 09-A (Off-Site, Wash DC)	27 – 29 Oct 08
Federal Employee Labor Law Course, Class 09-A	8 – 12 Dec 08
Deployed Fiscal Law & Contingency Contracting Course, Class 09-A	15 – 18 Dec 08
Trial & Defense Advocacy Course, Class 09-A	5 – 16 Jan 09
Paralegal Apprentice Course, Class 09-02	6 Jan – 19 Feb 09
Air National Guard Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Air Force Reserve Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Advanced Trial Advocacy Course, Class 09-A	26 – 30 Jan 09
Interservice Military Judges Seminar, Class 09-A	27 – 30 Jan 09
Pacific Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	2 – 5 Feb 09
Homeland Defense/Homeland Security Course, Class 09-A	2 – 6 Feb 09
Legal & Administrative Investigations Course, Class 09-A	9 – 13 Feb 09
European Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	17 – 20 Feb 09
Judge Advocate Staff Officer Course, Class 09-B	17 Feb – 17 Apr 09
Paralegal Craftsman Course, Class 09-02	24 Feb – 1 Apr 09
Paralegal Apprentice Course, Class 09-03	3 Mar – 14 Apr 09
Area Defense Counsel Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Defense Paralegal Orientation Course, Class 09-B	30 Mar – 3 Apr 09

Environmental Law Course, Class 09-A	20 – 24 Apr 09
Military Justice Administration Course, Class 09-A	27 Apr – 1 May 09
Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Reserve Forces Judge Advocate Course, Class 09-B	2 – 3 May 09
Advanced Labor & Employment Law Course, Class 09-A	4 – 8 May 09
CONUS Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	11 – 15 May 09
Operations Law Course, Class 09-A	11 – 21 May 09
Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

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

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

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

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

ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
APRI:	American Prosecutors Research Institute 99 Canal Center Plaza, Suite 510 Alexandria, VA 22313 (703) 549-9222
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250

GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA:	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 ((703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003

PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at https://jag.learn.army.mil. The new course is expected to be open for registration on 1 April 2008.

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University. The new course is expected to be open for registration on 1 April 2008. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC resident phase. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

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

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

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

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

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB)

Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

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

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

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

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

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Desk book, vol. 2, JA-501-2-95.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333	Servicemembers Civil Relief Act Guide, JA-260 (2006).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Deskbook, JA 265 (2004).
AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

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

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

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

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

b. Access to the JAGCNet:

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

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

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

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

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

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

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

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

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

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

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

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Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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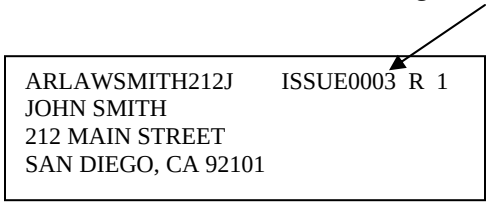

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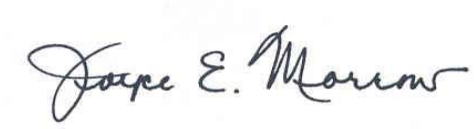

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