IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1999

John C. YOUNG,

ANDREW D. SMITH,
GEORGE SHERMAN,
DOUGLAS JACKSON
&
DAVIS MILITARY INSTITUTE, Petitioners

v.

Susan E. HARLAN, Respondent

No. 99-01749

August 16, 1999

ORDER

Case below, *Harlan v. Young*, 333 F.3d 749 (16th Cir. 1999).

The petition for writ of certiorari to the United States Court of Appeals for the Sixteenth Circuit is hereby granted limited to the following two questions:

1) Whether the Violence Against Women Act, 42 U.S.C. § 13981, constitutes a valid legislative enactment under the Commerce Clause of the United States Constitution; and

2) Whether the Violence Against Women Act, 42 U.S.C.§ 13981, constitutes a valid exercise of congressional powers under Section 5 of the Fourteenth Amendment to the United States Constitution.

Probable jurisdiction noted, and a total of one half hour allotted for oral argument. The briefs of the parties are to be filed with the Clerk of the Court on or before 6:00 p.m., Friday, September 24, 1999. Cases are set for oral argument in the October 1999 term of this Court.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF DAVIS
AT LEXINGTON
CIVIL ACTION NO. 3:98 CV-421-P

SUSAN E. HARLAN **PLAINTIFF**

v.

JOHN C. YOUNG,

ANDREW D. SMITH,

GEORGE SHERMAN
as an individual and in his official capacity as Vice Commandant of Davis Military Institute,

DOUGLAS JACKSON
as an individual and in his official capacity as Commandant of Davis Military Institute,

and

DAVIS MILITARY INSTITUTE

DEFENDANTS

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ORDER AND OPINION

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Susan E. Harlan is a twenty-one year old female student who grew up in a "military" family outside an army base in southern Davis. She matriculated at the Davis Military Institute ("DMI") in the fall of 1996. She was the recipient of a full academic scholarship to attend DMI and following her first year at DMI, she was ranked first in her class. Defendant John C. Young is a 1998 male graduate of DMI, while Defendant Andrew D. Smith is a currently-enrolled male student at Davis Military. Both played varsity soccer at DMI and were considered exceptional athletes. They also led the male platoon of the senior and junior classes, respectively, at DMI for the 1997-98 school year.

On the night of November 17, 1997, at the end of so-called "hell-week" at DMI, Plaintiff Harlan was violently assaulted in a room in the basement of Nevin Hall, the female dormitory at DMI. She and a friend, Mary Cooper, recognized her attackers only as male students at DMI wearing DMI athletic clothing.

Harlan alleges that the two men tied her up inside the basement room, removed her clothing, and violently and repeatedly struck her naked body. At various intervals both men threatened to rape her. Harlan alleges that the two men's acts "were motivated wholly by discriminatory animus toward her gender and were not random acts of violence." Harlan also alleges she did not learn of Young or Smith's names until some four months after the alleged incident.

On November 17, Harlan, Cooper, Young and Smith were all at a party outside the female dormitory sponsored by the Student Activities Council at DMI. Cooper departed after a few minutes of conversation, when Young and Smith asked Harlan to admit them to a male restroom located in the basement of the female-only Nevin Hall. When Harlan attempted to leave the basement, Smith, brandishing a knife, blocked her path. Smith then looked on as Young bound Harlan's hands and feet and then removed her clothing. Young subsequently violently struck Harlan repeatedly while Smith looked on. Although Harlan attempted to escape,

Smith blocked her path. After inflicting his last blow, Young stated to Harlan that he was "going to show all women at DMI who was in charge" and that "it's time DMI women learned their place." Young and Smith then left Harlan bound and bleeding in the basement floor. Harlan sought medical treatment from the DMI infirmary, but was told by the DMI staff there that she did not need to go to Davis General Hospital for further treatment and that she should talk with the Commandant's office rather than report the incident to the police.

In March of 1998, Harlan recognized Young and Smith as the two men who had assaulted her in the basement of Nevin Hall. During January of 1998, Young, while highly intoxicated at a public function, had announced he "had finally gotten even with the women at DMI." He also allegedly stated that "women don't belong here and we'll show those bitches their place."

Following this encounter, Harlan started counseling sessions with a local therapist in Davis. With her encouragement, Harlan initiated a complaint under DMI's Sexual Assault Policy in April 1998. Harlan learned after initiating her complaint that a fellow student overheard Young state he should "have gutted that stupid woman when I had the chance."

During the first hearing, held under the direction of an all-student honor council, Young denied assaulting Harlan. He stated that she was just making it up to have an excuse for losing her top spot in her class. Smith said that he had not participated in the assault, but admitted talking to Harlan and Cooper on the evening of the assault. After several students testified to having heard Young brag about the attack, the honor council determined sanctions should be imposed on Young, and ordered his dismissal from DMI. Smith was absolved of all responsibility. Young appealed to the Vice Commandant, who upheld the decision of the honor council without comment. As a result of his dismissal, Young was unable to graduate from DMI.

However, during the summer, Harlan received notice from the office of the DMI Commandant, who is a general in the Davis National Guard, that a second inquiry would be held. This time the hearing took place before the Vice Commandant himself, who is a colonel in the Davis National Guard, and Harlan's attorney was barred from participating in the hearing process. The Vice Commandant refused to consider evidence from the previous hearing and also refused to allow Harlan to cross-examine Young or his witnesses.

The Vice Commandant reversed his previous decision, which led to the Commandant reinstating Young and granting his diploma. Harlan subsequently withdrew from DMI, fearing reprisals from Smith, and transferred to Davis University, a state-supported non-military school.[1] As a result of her withdrawal from DMI, Harlan was forced to forfeit her academic scholarship.

Harlan initiated this action against Young, Smith, the Commandant, the Vice Commandant and DMI itself in October of 1998, alleging Intentional Infliction of

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[1] DMI is also a state-supported school, and is considered a subdivision of the Commonwealth of Davis.

Emotional Distress, a civil claim for assault and battery,[2] and violations of the Violence Against Women Act ("VAWA"), 42 U.S.C. § 13981. The claims against the DMI Commandant and Smith were dismissed by previous order of this Court, and all remaining state law claims against the Vice Commandant and Young were dismissed by agreed order of the parties. Young and the Vice Commandant now seek a Fed. R. Civ. P. 12(b)(6) dismissal of the VAWA claims against them on the grounds that Harlan fails to state a claim upon which relief may be granted and that the VAWA exceeds congressional powers for the enactment of statutes.

I. Motions to Dismiss

Rule 12(b)(6) dismissals are generally disfavored under the liberalized notice pleading doctrine embodied in the Federal Rules of Civil Procedure. All facts must be considered in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

The dispute in determining if Harlan sufficiently stated a VAWA claim is whether she sufficiently alleged that the assault was "motivated by gender." A crime "motivated by gender" is defined as a crime "committed because of gender or on the basis of gender, and due, at lest in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1).

The legislative history of the VAWA indicates the intent of Congress on the issue of proving a claim under 42 U.S.C. § 13981. "Proof of 'gender motivation' under [T]itle III should proceed in the same ways poof of race or sex discrimination proceeds under other civil rights laws." S. Rep. No. 102-197, at 50 (1991). The statute "requires subjective proof on a case-by-case basis that the criminal was motivated by a bias against the victim's gender." S. Rep. No. 103-138, at 49-50 (1993).

In support of her VAWA claim, Harlan makes the conclusory statement that Young's actions "were motivated wholly by discriminatory animus toward his gender and were not random acts of violence." Such a sweeping statement is likely insufficient to state a claim under state law. Cf. *Simpson v. Welch*, 900 F.2d 33 (4th Cir. 1990). However, Harlan has alleged other facts to support her claims under the VAWA.

Harlan alleges that she met Young & Smith less than one (1) hour before the alleged assault, that Smith stood by and watched the brutal assault, that Young stated afterwards that he was "going to show all women who was in charge at DMI" and that "it's time DMI women learned their place." She also alleges he publically stated he "had finally gotten even with the women at DMI" and "women don't belong here and we'll show those bitches their place."

In this situation, it is unnecessary for the Court to decide whether Young sufficiently states a claim for assault under state law. Also, clearly not all assaults would qualify as crimes based on "gender animus"

[2] Davis St. Ann § 446.070 provides that a "person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation." Harlan alleges Young's conduct amounted to assault and battery under Davis Penal Code § 508.090.

under the VAWA.

Nevertheless, in the case at bar, several factors point to "gender animus" as a basis for the assault. There is no indication of any prior relationship among Young, Smith, Harlan and Cooper. Such a prior relationship might provide underlying disagreements that would provoke such an assault. Young's alleged statements to Harlan further indicate a lack of respect for Harlan and other women at DMI. Finally, Young's public statements concerning women add more support to an inference the assault was motivated by gender animus.

Congress obviously intended this statute to apply to assaults motivated by gender bias. Young's actions indicate, on the face of the complaint, more evidence of such bias that would be present in most situations of assault. The central purpose of the statute, providing a civil remedy to gender motivated crimes, would be ill-served by requiring a plaintiff to allege, for example, the defendant stated "I hate women" at the time of the assault.

Defendants contend, however, that Plaintiff much show a pattern of discriminatory conduct to prove gender animus. I find such a contention unsupported by the statute or its legislative history. I question whether a series of assaults would indicate any more gender animus than a single assault accompanied by the statements in this case.

Therefore, as far as Young is concerned, Harlan has successfully stated a VAWA claim. However, I believe the claim against the Vice Commandant must be dismissed. Harlan has not shown that any "crime of violence" was committed by the Vice Commandant. While the Vice-Commandant may have denied Harlan equal protection of the laws, under color of state law,[3] that is not an issue that I am asked to reach here, nor do I express any opinion as to the validity of such a claim.

II. Constitutionality of the VAWA, 42 U.S.C. § 13981.

Ours is a government of limited powers. Congress may only act pursuant to the enumerated powers set out in the Constitution. The far-reaching VAWA, due to its unusual position within our federal system, may only be said to fall within two provisions of the Constitution, if any at all. As set forth in its preamble, these are the Commerce Clause; Article I, Section 8, Clause 3; and Section 5 of the Fourteenth Amendment.

A. The Commerce Clause

Plaintiff argues that the VAWA passes constitutional muster because it addresses conduct that "substantially affects" interstate commerce. The Supreme Court recently elaborated at length on the requirements to meet the substantial affects test in *United States v. Lopez*, 514 U.S. 549 (1995). There, the Court cautioned that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.* at

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[3] *See* 42 U.S.C. § 1983.

557 (quoting *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). All courts in evaluating congressional enactments must undertake "to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* (citing *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 276-280 (1981); *Perez v. United States*, 402 U.S. 146, 155-156 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964)). If the VAWA is a permissible exercise of power under the Commerce Clause, it can only qualify under the "substantial effects" test, the third of the *Lopez* factors.

Lopez requires a reviewing court to conduct an independent inquiry into the propriety of Commerce Clause legislation. "'Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question.'" *Lopez*, 514 U.S. at 557 n. 2 (quoting *Heart of Atlanta Motel* at 366 (Black, J., concurring)). A court must look at the nature of the regulated activity, whether there exists a jurisdictional element to limit the statute to activities truly occurring interstate, legislative history and findings and finally evaluate the effects of upholding a broad-reaching Commerce Clause statute. *Lopez*, 514 U.S. at 559-568.[4]

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[4] The *Lopez* Court also found that Congress may regulate the channels of interstate commerce and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may only come from intrastate activities. *Lopez* at 558-559. While an argument may exists that the VAWA attempts to protect these persons in interstate commerce, the facts of this case obviously indicate that Ms. Harlan nor her attackers recently traveled in interstate commerce.

1. Nature of the Regulated Activity

Wickard v. Filburn, 317 U.S. 111 (1942) represents the most expansive sweep of congressional regulation of commerce ever approved by the Supreme Court. Roscoe Wickard was fined under the Agriculture Adjustment Act of 1938 for growing, harvesting, and consuming wheat grown on his own land. Nevertheless, the Court upheld the AAA on the ground that Mr. Wickard's home grown wheat "competes with wheat in commerce" and as such, posed a threat, no matter how insignificant, to the overall wheat pricing regulatory system. *Id.* at 128.

However, the VAWA does not pertain to an overall system of regulating commerce. The VAWA reaches activities entirely disassociated with commerce in the ordinary sense. "It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561.

The VAWA reaches far beyond the regulation of economic activity into areas of criminal and civil law historically relegated to the states. *Lopez* teaches that a determination of whether a statute regulates commerce, rather than crime or domestic relations, is a

very relevant inquiry in evaluating a statute's constitutionality. The VAWA heavily relies on state criminal statutes for defining the scope of its remedies. It simply bears little or no relation to commerce.[5]

2. Jurisdictional limitations

Similar to the Gun Free School Zones Act at issue in *Lopez*, the VAWA contains no jurisdictional element. Congress often places such limitations in criminal statutes to ensure their constitutionality under the Commerce Clause. *See Cleveland v. United States*, 329 U.S. 14 (1946)(discussing the Mann Act and its requirements of interstate transport for convictions of federal prostitution crimes).

Nothing found in the body of the civil remedy section of the VAWA limits its jurisdiction. Its avowed purpose is to reach intrastate gender-motivated crimes since state law offers too little protection. Few, if any, congressional statutes reach so completely to activity inherently intrastate. Similar to the situation in *Lopez*, I would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564.[6]

3. Congressional Findings

Unlike the *Lopez* Court, I am presented with an enormous volume of congressional findings contained in the original legislative history of the VAWA. Certainly, the conclusory language contained in some of the congressional reports supports the notion that violence against women "substantially affects" interstate commerce. The House Conference found:

> [C]rimes of violence motivated by gender have a substantially adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment interstate business, and from transacting with businesses and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantially adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products. H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

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[5] Other courts have disagreed, concluding that the VAWA regulation of violence is no more tenuous that the AAA regulation of home-grown wheat. *See, e.g., Doe v. Doe*, 929 F. Supp. 608, 614 (D. Conn. 1996). With all due respect to my brethren on the bench, these analyses misconstrue the *Lopez* holding. *Wickard* and its progeny can all be tied to a larger system of national economic regulation, while the VAWA simply cannot.

[6] Other sections of the VAWA do contain jurisdictional limitations requiring the activity to occur across state lines. *See, e.g.*, 18 U.S.C. § 2261. Congress' vain attempt to limit the insertion of the VAWA into quintessential state law issues of domestic relations does not in any meaningful way limit the reach of the statue. *See* 42 U.S.C. § 13981(e)(4).

As the *Lopez* court points out, however, such findings are not necessary. *Lopez*, 514 U.S. at 562-63("Congress need not make particularized findings in order to legislate.") (citations omitted). Having said that, the Court noted that the amended § 922(q) [Gun Free School Zones Act] included congressional findings regarding the effects upon interstate and foreign commerce of firearm possession in and around schools. *See Lopez*, 514 U.S. at 563 n. 4. If the Court felt that such findings were extremely important, it could have referred to and relied upon these amended findings.

While principles of respect for the co-equal legislative branch as well as long-held concepts of statutory construction mandate that this Court give considerable weight to congressional findings, the determination of whether a particular statute falls within the commerce power of the Congress is "ultimately a judicial rather than a legislative question." *Lopez*, 514 U.S. at 557 n. 2 (quoting *Heart of Atlanta Motel*, 339 U.S. at 273 (Black, J., concurring)). The Supreme Court in *Lopez* had before it, through amicus briefs and other materials, many of the same type of findings before this Court today. The *Lopez* treatment of these congressional findings indicates that while they will often prove helpful, they are not dispositive of whether a rational relation to interstate commerce exists to support a particular statute.

4. Practical Effects

The bottom line is that both *Lopez* and the case at hand involve regulated activity that is too remote from interstate commerce to justify congressional regulation thereof. Congress, in the civil remedy section of the VAWA, has inserted itself into activities heretofore solely regulated by the states. Our constitutional system does not contemplate a central legislature turning its powers to regulate commerce with distant nations on internal domestic relations. Upholding the VAWA would leave only Congress' own "underdeveloped capacity for self restraint" standing between the people and national regulation of all domestic relations. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588 (1985)(O'Connor, J., dissenting). A reasonable adherence to the recent holding in *Lopez* reveals that the VAWA is not a proper use of Congress' commerce clause powers.

B. Section Five

The Fourteenth Amendment states in part that no "State shall . . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. It also provides that the "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV § 5. Plaintiff maintains that Congress properly invoked Section 5 in enacting the VAWA because Congress concluded that bias and discrimination against women in the state criminal justice systems "often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled" and that the VAWA was "necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. The remaining issue is to determine whether Section 13981 is appropriate legislation to enforce the substantive guarantees of the Fourteenth Amendment. In light of Supreme Court

precedent, especially the recent case of *City of Boerne v. Flores*, 521 U.S. 507 (1997), I find that it is not.

The Supreme Court has explicitly stated that the Fourteenth Amendment regulates only state action and that some state involvement is necessary to invoke Section 5. *See, e.g., Civil Rights Cases*, 109 U.S. 3, 11 (1883)(stating that an "[i]ndividual invasion of individual rights is not the subject matter of the [Fourteenth] Amendment"); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)(stating that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful"); *United States v. Guest*, 383 U.S. 745, 755 (1966)(opinion of Stewart, J.)("It is a common place that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority."). Unsurprisingly, in accord with its uniform understanding of Section 1 as conferring rights only against the States, the Court has consistently held that Congress' Section 5 power to enforce Section 1 is correspondingly limited to remedial action against states and state actors.

> Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be. As a general matter, the protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights. Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law. *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191 (1988)(internal quotation marks and citations omitted).

Some authority does indicate that Congress may address purely private conduct via Section 5 of the Fourteenth Amendment in spite of the fact that Section 1 claims require state action. In *Guest*, while Justice Stewart's opinion of the Court mandated some public involvement for congressional use of the power granted by Section 5, six justices agreed that no state action was necessary for Congress to employ its Section 5 power. *Guest*, 383 U.S. at 762 (opinion of Clark, J.); *Id.* at 774-786 (opinion of Brennan, J.).

Plaintiff also points to *Katzenbach v. Morgan*, 384 U.S. 641 (1966), in support of her position that the Fourteenth Amendment reaches private conduct. The *Morgan* Court noted that "a construction of Section 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment as a condition of sustaining the congressional enactment, would deprecate both congressional resourcefulness and congressional responsibility for implementing the Amendment." *Morgan*, 384 U.S. at 648. The *Morgan* Court quoted *McCollough v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), wherein Chief Justice Marshall granted wide deference to congressional enactments, when defining the scope of congressional power under Section 5.

However, in *Morgan*, the Court had before it clear evidence that a specific state law, the New York English literacy requirement for voting, necessitated

congressional redress pursuant to Section 5. Reasonably, *Morgan* is limited to situations where Congress acted against *state* action which caused a denial of equal protection, and *Morgan* does not permit Congress to act against purely *private* action which causes a denial of equal protection.

Recently, in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), the Court reaffirmed the remedial, state-law oriented scope of Section 5. "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." *Id.*, 521 U.S. at ___, 117 S. Ct. at 2167. Congress cannot alter the scope of its Section 5 power merely by legislative fiat. "If Congress could define its own power by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangable by ordinary means.'" *Id.*, 521 U.S. at ___, 117 S. Ct. at 2168 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

While Plaintiff points to several passages within the legislative history to suggest Congress was acting to remedy equal protection violations, such conclusory statements simply do not support the VAWA as valid Section 5 legislation in the post-*Boerne* environment.

Plaintiff argues these citations and others demonstrate that Congress had legitimate ends that it was seeking to remedy by passage of the VAWA. However, as demonstrated previously, the goal of remedying *private* discriminatory violence, "however discriminatory or wrongful," is simply not embraced by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. at 13 (1948). However, a colorable argument does exist, under the congressional findings, that the VAWA remedies deficiencies of state laws and deficiencies within state judicial systems.

Certainly, the legislative record offers support for the notion that state laws and judicial systems do not adequately remedy violence against women. "Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men." State and federal criminal laws do not "adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

Those conclusory statements, however, do not offer any specifics to validate their conclusions. Indeed, the state law provision relied on by plaintiff in the instant case demonstrates the adequacy of state law provisions in Davis. *See note 1, supra.* Moreover, the VAWA does not address the states, which are the perpetrators of the Fourteenth Amendment violations through their actors; it is wholly silent about the conduct of the various states in their handling of rape and other violent crimes against women. If the Congress truly meant to remedy these violations, it would have provided a cause of action against the state, not private individuals.

Consequently, the VAWA does nothing to discourage the Fourteenth

Amendment violations which occur in the state criminal and civil justice systems. Unlike in *Guest*, where the statute provided a remedy against the violator, the private acts which the VAWA targets are incidental to the Fourteenth Amendment violation. It therefore does not constitute a reasonable remedy of any legitimate Fourteenth Amendment concern.

III. Conclusion

Undoubtedly, violence against women is a pervasive and troublesome aspect of American life which needs thorough attention. Indeed, as the facts in the case at bar demonstrate, gender-motivated violence should receive consideration by appropriate legislative bodies. However, Congress does not possess the power to address all aspects of life in the United States. Its authority to act is limited by the express terms of the Constitution, and the constitutional limits must be respected if our federal system is to survive. Congress' reliance on the Commerce Clause and Section 5 of the Fourteenth Amendment to support its enactment of the VAWA is misplaced. It certainly has at its disposal broad powers to address equal protection and discrimination concerns in the United States, but the VAWA exceeds these powers.

While Plaintiff adequately states a claim under the VAWA, I find the statute exceeds congressional authority for the enactment of legislation under both the Commerce Clause and Section 5 of the Fourteenth Amendment. Consequently, Defendants' Motion to Dismiss the VAWA claims with prejudice is granted.

This is a final and appealable order, there being no just cause for delay.

/s/ Judge Pierce, United States District Court for the Western District of Davis

UNITED STATES COURT OF APPEALS
FOR THE SIXTEENTH CIRCUIT
No. 99-1819M

SUSAN E. HARLAN — **APPELLANT/ PLAINTIFF**

v.

JOHN C. YOUNG,

ANDREW D. SMITH,

GEORGE SHERMAN
as an individual and in his official capacity as Vice Commandant of Davis Military Institute,

DOUGLAS JACKSON
as an individual and in his official capacity as Commandant of Davis Military Institute,

and

DAVIS MILITARY INSTITUTE — **APPELLEES/ DEFENDANTS**

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ORDER AND OPINION

*** *** ***

This case stems from the violent assault of a female student at the Davis Military Institute ("DMI") by two male students and the subsequent decision of DMI, by way of its Vice Commandant, to impose no punishment on the perpetrators of the assault. The Plaintiff alleges she suffered a violent, gender-motivated battery at the hands of the two men, and brings suit against the men under the Violence Against Women Act of 1994 ("VAWA"). She asserts that DMI knew of the attacks she suffered, but failed to punish the violent offenders and allowed a hostile environment to flourish at DMI. Plaintiff sued not only her attackers, but also the DMI officials, along with the school itself, responsible for allowing her attackers to escape unpunished.

The District Court dismissed the case in its entirety. It found that while Harlan had adequately stated a VAWA claim against Defendant Young,[1] the VAWA exceeded congressional powers for the enactment of statutes. Because we believe both the Commerce Clause and Section 5 of the Fourteenth Amendment support the enactment of the VAWA, we reverse and remand for further proceedings.

I. Background

The Davis Military Institute, as a result of rulings issued by this Court, has recently

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[1] The District Court dismissed the VAWA claims against all other Defendants. As to the Vice Commandant in particular, the Court found that the Plaintiff had "not shown any 'crime of violence' committed by the Vice Commandant." *Slip. Op.* at 4. This ignores the fact that the Davis Attorney General, pursuant to Davis St. Ann. § 510.311 and Section 2 of the Davis Constitution, may prosecute anyone in Davis for abridgment of equal protection of the laws. Section 510.311(c) imposes a punishment of up to five (5) years in the Davis penitentiary, making the statute a felony under both Davis law and federal caselaw. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968).

opened its doors to cadets of both genders. As with the integration of the races during the early 1960s at DMI, the introduction of female cadets at the venerable male-dominated institution has led to friction within the student body, faculty, and alumni. DMI officials have made a concerted effort to combat gender-related conflicts within the student body through, *inter alia*, the establishment of the student-administered Sexual Assault Policy. However, as the facts of this case demonstrate, the efforts of DMI have ignored some critical problems at the institution.

Susan Harlan began her sophomore year at DMI in the fall of 1997.[2] On the evening of November 17, 1997, Harlan and another female student met two men who Harlan knew only by their first names and their status as male soccer players. Within an hour of first meeting Harlan, these two men, later identified as John C. Young and Andrew D. Smith, assaulted Harlan.

The two men, both members of the DMI soccer team and student leaders, participated in a violent assault on Harlan. Shortly after meeting the two men at a school-sponsored event outside her dormitory, Harlan was asked to admit them to a male restroom located in the basement of the female-only dorm. Once inside, Smith, wielding a knife, blocked Harlan's exit from the basement. Young then bound Harlan's hands and feet, and removed her clothing. Smith stood by, still brandishing the knife, while Young repeatedly and violently struck the helpless Harlan. Smith blocked Harlan's path when she attempted to escape the torture. Both Smith and Young threatened to rape Harlan if she did not learn her "place" at DMI.

After striking his final, bloody blow, Young stated to Harlan that he was "going to show all women at DMI who was in charge" and that "its time DMI women learned their place." Young and Smith left Harlan bound and bleeding in the basement floor. She sought medical treatment from the DMI infirmary, but was told by the DMI staff not to seek further medical treatment at the local hospital or to report the incident to the police.

Upon ascertaining the identity of her attackers, and undergoing extensive counseling, Harlan initiated a complaint against Young and Smith under the DMI Sexual Assault Policy. Harlan learned after initiating her complaint that Young stated he should "have gutted that stupid women when I had the chance." Harlan also learned that in January of 1998, Young had publically stated that he "had finally gotten even with the women at DMI" and that "women don't belong here and we'll show those bitches their place."

At the first hearing, before the all-student DMI honor council, Young denied assaulting Harlan. He stated she was faking the assault because she had lost her previous high class rank. Smith stated he had not participated in the assault, but admitted talking to Harlan and her friend Mary Cooper on the evening of the assault. Several students testified that Young had bragged about the assault and his ability to "get even" with

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[2] "On appeal from an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6), we accept as true the facts alleged in the complaint." *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 327 (4th Cir. 1996).

women at DMI. The honor council determined sanctions should be imposed on Young and he was ordered dismissed from DMI. Smith was absolved of all responsibility. Young appealed his verdict to the Vice Commandant, who upheld the decision without comment. As a result of the findings of the honor council, Young was unable to graduate from DMI.

Despite the arduous process of the first hearing, Harlan received notice during the following summer that the matter had been reopened. Upon order of the DMI Commandant, the Vice Commandant himself conducted a new hearing. Harlan's attorney was barred from participating in the new inquiry, and Harlan could not cross-examine Young or his witnesses. The Vice Commandant denied Harlan's request to consider evidence from the previous hearing.

The Vice Commandant summarily reversed his previous decision and reinstated Young's diploma. He also gave no reason for the decision to conduct the new hearing nor any indication of his basis for reversing the decision of the honor council. Harlan subsequently withdrew from DMI, in the process losing her academic scholarship, and transferred to the non-military Davis University.

Harlan brought this action in federal district court, alleging various state law claims as well as violations of the VAWA. The court below dismissed all of the state law claims on various grounds, including stipulations of the parties, prior to addressing the federal VAWA claim.

The court found that the VAWA exceeded congressional powers under both the Commerce Clause and the Fourteenth Amendment. While ostensibly conducting a rational basis inquiry into the enactment of the statue, the district court rejected volumes of congressional findings as insufficient to support the enactment of the VAWA under either constitutional provision. We find otherwise

II. The VAWA

We turn to the issue of whether the District Court erred in dismissing Harlan's claim that Young and Smith violated Title III of the Violence Against Women Act of 1994, 42 U.S.C. § 13981. The District Court concluded that while Harlan had alleged a valid VAWA claim as defined by the statute, Congress had exceeded its powers to enact legislation under the Constitution. *See Slip Op.* at 4. While we agree that Harlan has stated a valid claim under the VAWA, we conclude that Congress acted within its authority under the Commerce Clause and Section 5 of the Fourteenth Amendment in passing the VAWA. We therefore hold that the District Court erred in ruling the statute unconstitutional.

A. History of the VAWA

Congress enacted the VAWA in 1994 after four years of exhaustive hearings on the enormous problems associated with violence against women in the United States today. As a result of being faced with overwhelming evidence of "the escalating problem of violent crime against women," Congress passed the comprehensive VAWA. S. Rep. No. 103-138, at 37 (1993). Title III, the portion of the statute at issue in this case, establishes the right upon which a civil claim may be brought: "[a]ll persons within the United

States shall have the right to be free from crimes of violence motivated by gender . . .." 42 U.S.C. § 13981(b).

The statute sets forth a civil remedy designed to protect persons from gender motivated crimes of violence:

> (c) Cause of action
> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

The statute also provides definitions for "crime of violence motivated by gender":

> (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender;

as well as "crime of violence":

> (2) the term "crime of violence" means --
> (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
> (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. § 13981(d)(2)(A-B).

Young does not now argue that the assault alleged by Harlan fails to satisfy the definition of "crime of violence motivated by gender." However, the Vice Commandant continues to maintain that no activity attributable to himself falls within this definition. As demonstrated in Note 1, *supra*, we find this contention unsupported by the statutes of Davis. The history of Davis St. Ann. § 510.311[3] indicates it was passed by the Davis legislature during Reconstruction as a

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[3] Davis St. Ann. § 510.311(a) provides that "[n]o person may deny any other person equal protection of the laws. A person shall be guilty of such denial if he through violent means, or permits another through violent means, to deny another the benefits of the equal protection of the laws." Subsection (b) states that "[t]he Attorney General, at his discretion, may seek a criminal indictment against any person who violates this statute." Subsection (c) allows a court to sentence violators to "up to five(5) years in the State Reformatory." The statute has not been amended since its enactment in 1866, nor have there been any reported cases in the last one hundred years.

method of abating violence committed by members of the Ku Klux Klan. A chief concern of the statute is preventing the denial of equal protection resulting "violent means." While the Vice Commandant may not have inflicted any blows upon Harlan, his actions in denying her equal protection, at least under Davis law, constitute felonious conduct against the person. Therefore, we find Harlan has adequately alleged a "crime of violence" against both Young and the Vice Commandant.

The VAWA does not provide a cause of action for "[r]andom acts of violence unrelated to gender." 42 U.S.C. § 13981(e)(1). It requires some showing that the "crime of violence" was "gender motivated." Bias "can be proved by circumstantial as well as indirect evidence." S. Rep. No. 103-138, at 52. "Generally accepted guidelines for identifying hate crimes may also be useful" such as: "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any other apparent motive (battery without robbery, for example); common sense." *Id.* at 52 n. 61.

Against these standards, as the District Court concluded, Harlan has certainly alleged a crime of violence motivated by gender. She had only known Young and Smith for less than an hour, yet they brutally attacked her in the basement of the female dorm at DMI. Young made statements to Harlan highly indicative of gender bias at the time of the attack. Young also made similar statements much later, in situations where Harlan was not present (thus discounting any hatred toward Harlan in particular).

We agree with the District Court that Harlan has sufficiently demonstrated gender bias on the part of Young.

However, despite our sincere belief that the conduct of the Vice Commandant constitutes a crime of violence within the meaning of the VAWA, Harlan has not shown any evidence suggesting that his conduct is attributable to "gender bias." Therefore, we must reluctantly sustain the District Court's dismissal of the claim against the Vice Commandant.

B. The VAWA and the Commerce Clause

The District Court concluded after reviewing the VAWA and relevant Supreme Court precedent that Congress had exceeded its constitutional authority in enacting the VAWA. Congress directly addressed the source of its authority in the body of the VAWA. After accumulating an overwhelming body of evidence that action needed to be taken, and after being presented with a letter signed by 42 state attorney's general requesting that action be taken,[4] Congress stated that it was invoking its authority "under section 5 of the Fourteenth Amendment to the Constitution,[5] as well as under section 8 of Article I of the Constitution" to pass Title III of the VAWA. 42 U.S.C. § 13981(a). It did so "to protect the

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[4] Letter from States' Attorneys General, *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. On Civil and Const. Rights of the House Comm. On the Judiciary,* 103d Cong. 35-37 (Nov. 16, 1993).

[5] *See* Section II(C), *infra*.

civil rights of victims of gender motivated violence and to promote public safety, health, and *activities affecting interstate commerce* . . .." *Id.*(emphasis added). Article I, Section 8, Clause 3 of the Constitution empowers Congress to "regulate Commerce . . . among the several states." U.S. Const. art. I, §8, cl. 3.

In assessing whether Congress exceeded its authority under the Commerce Clause, we note that every act of Congress is entitled to a "strong presumption of validity and constitutionality," *Barwick v. Celotex Corp.*, 736 F.2d 946, 955 (4th Cir. 1984) and will be invalidated only "for the most compelling constitutional reasons." *Mistretta v. United States*, 488 U.S. 361, 384 (1989). "Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. This power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution.'" *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 176 (1981)(citations omitted)(quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)). The Supreme Court has directed that "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,' a court is not lightly [to] second-guess such legislative judgments." *Westside Community Board of Education v. Mergens*, 496 U.S. 226, 251 (1990)(quoting *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 319 (1985)).

Moreover, the "task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." *Hodel*, 452 U.S. at 276. *See also United States v. Lopez*, 514 U.S. 549, 568 (1995)(Kennedy, J., concurring)("The history of the judicial struggle to interpret the Commerce Clause . . . counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power.") Thus, a reviewing court need only determine "whether a *rational basis* existed for concluding that a regulated activity" substantially affects interstate commerce. *Lopez*, 514 U.S. at 557 (emphasis added).

The Supreme Court, in *Lopez*, recently laid out in unmistakable terms a three-part judicial inquiry for examining Commerce Clause legislation:

> First, Congress may regulate the use of the channels of interstate commerce . . .. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . .. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce.

Id. at 558-59 (citations omitted).

As with the statute under scrutiny in *Lopez*, the Gun Free School Zones Act, the VAWA clearly does not meet either of the first two tests. "Thus, if [the VAWA] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce." *Id.* at 559.

The *Lopez* Court applied the substantial affects to the Gun Free School Zones Act, which made it a federal crime to knowingly possess a firearm in a school zone. 18 U.S.C. § 922(q). The Court "characterized [the statute] as a 'sharp break with the long-standing pattern of federal . . . legislation,'" *Crisonino v. New York City Housing Authority*, 985 F. Supp. 385, 397 (S.D.N.Y. 1997)(quoting *Lopez*, 514 U.S. at 563), as it amounted to an attempt to supplant state criminal laws with a federal statute that criminalized an activity that on its face had "nothing to do with" commerce, without making any findings demonstrating the activity affected interstate commerce or including a jurisdictional element to ensure a case by case connection with interstate commerce. *Lopez*, 514 U.S. at 561.

A "court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel*, 452 U.S. at 276 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-304, (1964)). However, it is important that we recognize that discerning a rational basis "is ultimately a judicial rather than a legislative question." *Lopez*, 514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel*, 379 U.S. at 273(Black, J., concurring). "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (quoting *Hodel*, 452 U.S. at 311)(Rehnquist, J., concurring).

1. Congressional Findings

Unlike the Court in *Lopez*, we are presented with voluminous congressional findings relating to the enactment of the VAWA. Thus, again unlike the *Lopez* Court, we can begin by "evaluat[ing] the legislative judgment that the activity in question substantially affected interstate commerce." *Lopez*, 514 U.S. at 563. The congressional findings and testimony that support the passage of the VAWA pursuant to the Commerce Clause are detailed and extensive.

In September 1994, "Congress passed the VAWA, drafted in response to what its chief legislative sponsor, Senator Joseph R. Biden, called a 'national tragedy.' The 'national tragedy' perceived by Senator Biden and Congress was 'the escalating problem of violent crimes against women.'" *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997)(quoting S. Rep. 103-138, at 38 (1993)). When passing the VAWA, many committees and sub-committees of both the House and Senate made detailed findings on the relationship between violence against women and interstate commerce. These included:

> "Violence is the leading cause of injury to women ages 15-44, more common than automobile accidents, muggings, and cancer deaths combined." S. Rep. No. 103-138, at 38.
>
> "[G]ender-based violence bars its most likely targets--women--from full [participation] in the national economy." S. Rep. No. 103-138, at 54.
>
> "Domestic violence alone costs employers an estimated $3 to $5 billion annually due to absenteeism from the workplace." *Women and Violence, Hearings before the Senate Comm. On the Judiciary*, 101st Cong. 58 (1990) (statement of Helen Neuborne, N.O.W.)

Estimates suggest "that we spend $5 to $10 billion a year on health care, criminal justice and other social costs of domestic violence." S. Rep. No. 103-138, at 41.

"[A]lmost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime." S. Rep. No. 103-138, at 54.

Fear of gender-based violence "deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence." *Id.*

"*Women often refuse higher paying night jobs in service and retail industries because they fear attack.*" *See Id.* at 54 n. 70 (emphasis added);

Fear of gender-motivated violence deters women from using public transportation and thus "acts as a barrier to mobility, particularly for those women who have no alternative to public transportation because of economic constraints." *Women and Violence*, *Hearings before the Senate Comm. On the Judiciary*, 101st Cong. 69 (1990) (testimony of Helen Neuborne, N.O.W.); see also *Violence Against Women: Victims of the System: Hearing before the Senate Comm. On the Judiciary*. 102d Cong. 2 (statement of Sen. Biden citing survey finding that approximately one-half of the women responding said they never use public transportation after dark).

"Gender-based crimes and fear of gender-based crimes restrict movement, reduce employment opportunities, increase health expenditures, and reduce consumer expending, all of which affect interstate commerce and the national economy." S. Rep. No. 103-138, at 54.[6]

Congress summarized these findings, and determined that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting business . . . in interstate commerce . . .." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. Accordingly, Congress concluded that its authority to enact the VAWA's civil rights provision "is firmly based on the Commerce Clause . . .." S. Rep. No. 103-138, at 54.

Our task is simply to discern whether Congress had "a rational basis" for concluding that the regulated activity — here violence against women — substantially "affected interstate commerce." *Lopez*, 514 U.S. at 558-59. Congress held hearings over four years, across at least two separate sessions (no small feat for such partisan times), and considered voluminous testimonial, statistical, and documentary evidence. Congress made an unequivocal finding that violence against women substantially affects interstate

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[6] For similar recitations of congressional findings, see *Anisimov*, 982 F. Supp. at 537-38; *Crisonio*, 985 F. Supp. at 365-96; *Seaton v. Seaton*, 971 F. Supp. 1188, 1192 (E.D. Tenn. 1997); *Doe v. Hartz*, 970 F. Supp. 1375, 1421 (N.D. Iowa, 1997), *reversed in part, vacated in part*, 134 F.3d 1339 (8th Cir. 1998).

commerce.[7] Whatever one's doubts about whether Title III of the VAWA represents a good policy decision, *Seaton*, 971 F. Supp. at 1193, we can only conclude that Congress' findings are grounded in a rational basis. We note that every court to consider the question except the court below has so held. *See Crisonino*, *supra*, *Anisimov*, *supra*, *Seaton*, *supra*, *Doe v. Hartz*,[8] *supra* and *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996).

In fact, the Fourth Circuit has recently upheld Section 401(a)(1) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a)(1), on much less extensive congressional findings. *United States v. Leshuk*, 65 F.3d 1105 (4th Cir. 1995). The court based its conclusion wholly on Congress's "detailed findings that interstate manufacture, distribution, and possession of controlled substances, as a class of activities, have a substantial and direct effect upon interstate drug trafficking and that effective control of the interstate problems requires the regulation of both interstate and intrastate activities." *Id.* at 1112.[9]

The congressional findings setting forth the VAWA's substantial effect on interstate commerce are fare more detailed an complete than those found in such cases as *Leshuk* or even *Wickard v. Filburn*, 317 U.S. 111 (1942). When a court finds "that the

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[7] Defendants argue that Congress simply inserted the "substantially affects" conclusion to satisfy the Supreme Court after *Lopez*. They argue that Congress need only conduct enough hearings, and it can enact whatever legislation it chooses. The *Seaton* case is instructive on this point:

> [T]his is an unlikely scenario, so long as the courts exercise reasonableness in their analysis of legislative findings. Here, it is unlikely Congress would spend four years determining the effects of gender-based violence on interstate commerce for the sole purpose of overcoming the rationality test and the Supreme Court's decision in *Lopez*, especially since *Lopez* was decided *after the congressional hearings and findings began being made.* *Seaton*, 971 F. Supp. at 1194 (emphasis added.)

[8] On appeal, the Eighth Circuit reversed *Hartz* on grounds relating to the "crime of violence" element of the statute, and, by its reversal, vacated the District Court's opinion on constitutionality.

[9] Indeed, numerous courts have reiterated since *Lopez* that such deference to congressional findings is required: "court[s] must defer to a congressional finding that regulated activity affects interstate commere, if there is any rational basis for such a finding." *Terry v. Reno*, 101 F.3d 1412, 1416 (D.C. Cir. 1996); *United States v. McKinney*, 98 F.3d 974, 979 (7th Cir. 1996), *cert. denied*, 520 U.S. 1110 (1997)(same); *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996), *cert. denied*, ---U.S.---, 117 S. Ct. 753 (1997)(same); *United States v. Kim*, 94 F.3d 1247, 1250 (9th Cir. 1996)(same); *United States v. Bishop*, 66 F.3d 569, 577 (3d Cir. 1995), *cert. denied*, 516 U.S. 1066 (1996)(same); *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995)(same).

legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, [its] investigation is at an end." *United States v. Beuckelacre*, 91 F.3d 781, 785 (6th Cir. 1996)(quoting *Katzenbach v. McClung*, 379 U.S. at 303).

2. A Reasonable Means to an End.

Having found that Congress had a rational basis for determining that gender-based violence substantially affects interstate commerce, the question now turns to whether the VAWA is a reasonably adapted means to the intended goal of Congress. *See Hodel*, 452 U.S. at 276; *Heart of Atlanta Motel*, 379 U.S. at 258. Congress adopted the VAWA in part because of its assessment that state police, prosecutors and judges in the several states were not adequately protecting victims of gender-motivated violence. Congress "reviewed U.S. Justice Department statistics and studies of gender bias in state courts commissioned by seventeen state supreme courts" to reach this conclusion. *Doe v. Doe*, 929 F. Supp. at 611. This led Congress to conclude that "bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of . . . the redress to which they are entitled." H. R. Conf. Rep. No. 103-711 at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

Certainly, the congressional decision to provide a private right of action in federal courts is within the congressional prerogative; *i.e.*, it is a reasonable means to a legitimate end. *Anisimov*, 982 F. Supp. at 539-40; *Seaton*, 971 F. Supp. at 1194-95; *Hartz*, 970 F. Supp. at 1423.[10] Moreover, unlike the law at issue in *Lopez*, which the Court characterized as a "sharp break with the long-standing pattern of federal . . . legislation," *Lopez*, 514 U.S. at 563 (quoting *United States v. Lopez*, 2 F.3d 1342, 1366 (5th Cir. 1993)), the VAWA fits squarely within the tradition of federal civil rights legislation. The Supreme Court upheld the landmark civil rights legislation of the 1960s (and thereafter) under the congressional Commerce Clause power. *See Heart of Atlanta Motel*, *supra*; *Katzenbach v. McClung*, *supra*; *EEOC v. Wyoming*, 460 U.S. 226 (1983). There is no reason to depart from that tradition now.

We therefore conclude that the VAWA constitutes a valid congressional enactment under the Commerce Clause. Although we need not reach the issue for the disposition of this case, we also conclude that the VAWA falls within the scope of Congress' Section 5 powers under the Fourteenth Amendment.

C. Section Five

Section Five of the Fourteenth Amendment provides that Congress "shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV § 5. Plaintiff maintains that Congress properly invoked

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[10] The concern that traditional remedies are inadequate applies equally to local federal courts. *Cf. Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994)(affirming directed verdict for county in § 1943 action alleging equal protection violation based on county's policy regarding arrests in domestic violence cases), *cert. denied*, 516 U.S. 808 (1995).

Section 5 when enacting the VAWA as it had determined, after years of extensive hearings, the VAWA was "necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. Our task is simply to determine whether Section 13981 is "appropriate legislation," as concluded by Congress, to enforce the substantive guarantees of the Fourteenth Amendment.

The basic understanding of the Fourteenth Amendment, since the *Civil Rights Cases*, 109 U.S. 3 (1883), is that its substantive guarantees only reach conduct attributable to state actors. The Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). "As a general matter, the protections of the Fourteenth Amendment do not extend to private conduct abridging individual rights." *National Collegiate Athletic Association v. Tarkanian*, 488 US. 179, 191 (1988)(internal quotation marks and citations omitted).

The court below, in interpreting this long line of Supreme Court precedent, culminating in the recent *City of Boerne v. Flores* (521 U.S. 507, 117 S. Ct. 2157 (1997)) decision, found that the VAWA "does not constitute a reasonable remedy of any legitimate Fourteenth Amendment concern." *Slip Op.* at 9. It found that the VAWA does not address conduct attributable to state actors, and therefore cannot fall within Congress' remedial power under the Fourteenth Amendment. The court felt the VAWA was an attempt by Congress at "altering the Fourteenth Amendments meaning" by choosing what conduct violated the substantive guarantees of the Amendment. *City of Boerne*, 521 U.S. at ___, 117 S. Ct. at 2168.

We believe the district court misinterpreted the VAWA and relevant precedent as they pertain to the facts in this case. Congress was faced with testimony that indicated that state criminal justice systems "often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled." H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. Such testimony hardly differs from the evidence which supported the voting rights legislation of the 1960s. Cf. *United States v. Guest*, 383 U.S. 745 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Indeed, *Boerne* found that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . ." *Boerne*, 521 U.S. at ___, 117 S. Ct. at 2163.

The findings of Congress indicate that it was seeking to remedy problems created by state actors; *i.e.*, problems within state criminal justice systems. The fact that the remedy which Congress created provides for remedies against non state actors does not render the enactment unconstitutional. *See Guest*, 383 U.S. at 753 (opinion of Stewart, J.).[11] Nothing in the text of the Fourteenth

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[11] *See also Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971)(describing the ability of 42 U.S.C. § 1985(3) to reach purely private actors). Indeed, the legislative history of 42 U.S.C. § 1985(3) indicates it was aimed at the violent

Amendment suggests that Section Five legislation must be, *ipso facto*, directed at states.

We do not suggest that Congress may enact Section Five legislation that determines the substantive meaning of the Equal Protection Clause. *Boerne* directs us to remind Congress it cannot decide what constitutes a violation of Section One of the Fourteenth Amendment. *See Boerne*, 521 U.S. at ___, 117 S. Ct. at 2168 ("If Congress could define its own power by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means.")(quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). We therefore agree with Defendants' contention that evaluation of what constitutes "appropriate legislation" under Section Five "is ultimately a judicial rather than a legislative question." *Lopez*, 514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel*, 379 U.S. at 273(Black, J., concurring).

However, under the facts of this case, we conclude that the VAWA is "appropriate legislation." Clearly, one outcome of the crime of violence committed by Young was a denial of equal protection of the laws to Harlan, in the form of DMI's treatment of her complaint. The conduct of the Vice-Commandant in particular, as the court below seemed to indicate,[12] most certainly amounts to a denial of equal protection. Young received an extra-ordinary review of his case; a review process which deprived Harlan of any semblance due process or equal treatment. The Vice Commandant and DMI allowed Harlan to be faced with a hostile environment, one where equal protection was no where to be found for members of the female gender. Young's conduct, while not perpetrated by a state actor, was certainly facilitated by state actors. Just as the House Conference Report indicated, Harlan was denied "equal protection of the laws and the redress to which [she] was entitled." H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

The decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, —U.S.—, 119 S. Ct. 2199 (1999), decided after this case was presented for oral argument, does not alter our conclusions interpreting the VAWA under *Boerne*. Indeed, the *Florida Prepaid* Court noted that the key difficulty with the Religious Freedom Restoration Act, the legislation at issue in *Boerne*, was that "there was little support in the record for the concerns that supposedly animated the law." *Florida Prepaid*, 119 S. Ct. at 2207 (citing *Boerne*, 521 U.S. at ___, 117 S. Ct. at 2157. Here, the legislative record demonstrates ample evidence for Congress to rely on its Section 5 powers.

Thus, under the facts of this case, we conclude the VAWA does constitute a valid Section 5 enactment. However, we expressly disavow any opinion as to its Section 5 validity under any other factual scenarios. We

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depravation of the rights of equal protection by private individuals, the Ku Klux Klan.

[12] "While the Vice-Commandant may have denied Harlan equal protection of the laws, under color of state law . . ." *Slip Op.* at 4.

express reservations as to whether the statute would survive a facial challenge that it exceeds Section 5 powers.

III. Conclusion

Gender violence and gender discrimination in America is a national plague which needed attention. State attorney generals recognized it needed attention. State supreme courts recognized it as a problem in state judiciaries. Congress conducted four long years of careful inquiry regarding the problem. Numerous committees listened to voluminous oral testimony and reviewed hundreds of written submissions.

Only after examining all of the evidence, did Congress finally enact the Violence Against Women Act. In its preamble, it stated unequivocally that it was enacting the VAWA pursuant to "the affirmative power of Congress . . . under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution."

After review of the legislative history, as well as relevant case law and the facts of the case at bar, we agree that Congress certainly had a rational basis to conclude, based on the evidence before it, that violence against women "substantially affects" interstate commerce and that due to the equal protection violations in state judicial systems and by other state actors, the VAWA was "appropriate legislation" to remedy equal protection violations.

Our task is not to make a policy judgment concerning the "rightfulness" of the VAWA. The Congress, through its legislative powers, has made that judgment. We must simply ensure that the policy it has chosen to enact comports with the Constitution.

Wherefore, we REVERSE the decision of the lower court and find the VAWA CONSTITUTIONAL under both the Commerce Clause and Section 5 of the Fourteenth Amendment. We REMAND this case for proceedings not inconsistent with our opinion.

/s/ Judge E. Murphy (opinion of which Judges D. Bartock and S. Brown, join).