

ACCESS TO JUSTICE FOR THOSE WHO SERVE

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT,
FEDERAL RIGHTS AND AGENCY ACTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

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ACCESS TO JUSTICE FOR THOSE WHO SERVE

THURSDAY, MARCH 27, 2014

UNITED STATES SENATE,
SUBCOMMITTEE ON OVERSIGHT, FEDERAL RIGHTS AND
AGENCY ACTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 3:06 p.m., in Room SD-226, Dirksen Senate Office Building, Hon. Richard Blumenthal, Chairman of the Subcommittee, presiding.

Present: Senators Blumenthal, Franken, and Hatch.

OPENING STATEMENT OF HON. RICHARD BLUMENTHAL, A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Chairman BLUMENTHAL. The hearing will come to order, and I want to thank everyone for joining us today on this very, very important topic, very fittingly my last hearing as Chairman of this Subcommittee, and I want to thank our Ranking Member, Senator Hatch, for his many courtesies and all of his patience over the time that I have chaired this Subcommittee.

The critical subject before us is the rights of our servicemembers and making sure that they are adequately protected. I know everybody here and countless others outside of this building feel the same way as we do, that those rights have to be protected, that they are not only worthy of protection but essential. And over the course of this Congress, we have been able to explore a variety of issues related to the Federal Government's duty to protect its citizens. I have been proud of that work. None is more important than this one. And I want to thank Senator Leahy for giving me this opportunity on this Subcommittee.

Today's hearing is the product of a proud tradition and also a disappointing reality. The proud tradition is Congress' bipartisan support and approval of legislation to protect our servicemembers. And the unfortunate and very disappointing reality is that too many of the rights enshrined in those statutes are effectively dead letter because of structural and procedural barriers to enforcement. When servicemembers cannot find lawyers to take their cases, they cannot get a ruling on the merits even when they make it to court, and they cannot receive adequate compensation even when they win, in that case the laws on the books are not as strong or even adequate as they should be.

So we are here about the Uniformed Services Employment and Reemployment Rights Act, which is a classic example. USERRA, as

it is called, passed the House and the Senate by a voice vote, believe it or not. It stands for the simple proposition that American workers should not be discriminated against because they have chosen to serve in our Nation's Armed Forces. It is hard to imagine a less controversial principle.

And yet USERRA has some of the weakest remedies, some of the very least adequate remedies of any comparable statute. A member of the National Guard or Reserve who is fired because they are deployed, they stand to win only back pay, reinstatement, and maybe some compensation for lost health care or pension benefits. If they experience prolonged unemployment—if they lose their home, their car, their credit—a court award will not even come close to making them whole.

So employers know they face such a small punishment when they violate USERRA; they have little incentive to comply with the law. And even when a servicemember can show that an employer willfully violated the law, which is difficult to show, that servicemember can expect only to collect double whatever damages they would otherwise receive. In many cases, even this amount will not fully compensate the servicemember, and it rarely provides an adequate deterrent for the employer.

There are other ways that USERRA is weak in the remedies it affords. I am going to put my full statement in the record. But I want to say that servicemembers are uniquely vulnerable in this respect to abusive practices, and it includes abusive lending practices in the financial marketplace.

Congress has repeatedly acted to protect servicemembers, and it has done so again in a bipartisan fashion. The Servicemembers Civil Relief Act, like USERRA, which protects servicemembers from foreclosure and default judgments while they serve, passed the Senate by voice vote. The House passed the bill 425-0. The Military Lending Act—better known as the Talent amendment—was a bipartisan proposal that was rolled into the National Defense Authorization Act without controversy. And it was intended to protect servicemembers from loan shark interest rates of 30-plus percent.

These statutes have made a difference, but commonsense reforms are needed to enable them to live up to their goals. And servicemembers saddled with unfair loans too often find these protections intended to protect them from debt collector harassment simply do not work.

So while it would be illegal for a third-party debt collector to harass a servicemember by going to the servicemember's commanding officer, creditors can and do call commanding officers directly, sometimes scaring servicemembers into debts they do not even owe.

I have called on the Consumer Financial Protection Bureau to help address this problem, and I hope the administration shares my view that servicemembers must be protected.

I hope that regulations will be issued on a timely basis by the Department of Defense to make these laws more effective and more enforceable and that servicemembers will be provided with stronger protections as a result.

[The prepared statement of Chairman Blumenthal appears as a submission for the record.]

Chairman BLUMENTHAL. So I want to thank our first panel for being here today. Before I swear you in for your testimony, I want to thank Senator Hatch again and give him the opportunity to make an opening statement.

**OPENING STATEMENT OF HON. ORRIN G. HATCH,
A U.S. SENATOR FROM THE STATE OF UTAH**

Senator HATCH. Thank you, Mr. Chairman. I know this is the last hearing for you as the Chairman of this Subcommittee. I have enjoyed working with you, and I am sure you will take your determination and focus with you as you chair a Subcommittee on the Armed Services Committee.

The hearing today focuses on our Nation's veterans to whom we owe so much and for whom we sometimes do too little. The list of issues and challenges facing veterans is long, and I know that you, Mr. Chairman, will be looking today at areas such as employment and lending. I understand that you have a bill that has been referred to the Veterans' Affairs Committee.

Another and perhaps more immediate challenge for veterans is the difficulty and delay in receiving benefits that Federal law provides. In particular, servicemembers who come back with disabilities are entitled to disability benefits when they meet the statutory burden of proof. The delay in granting those benefits is a disgrace.

Last year, Mr. Chairman, you and I joined 65 of our colleagues in signing a letter to President Obama on this precise issue. I have that letter here, and I would ask consent that it be made part of the record.

Chairman BLUMENTHAL. Without objection.

[The letter appears as a submission for the record.]

Senator HATCH. In that letter we wrote, "This country must be grateful for the safe homecoming of every single man and woman who has served in harm's way. Our joy at their return must be reflected in our commitment to help all of those who serve."

I am glad that the Deputy Legislative Director from the American Legion could be with us today to discuss this issue. The name of this Subcommittee includes "Agency Action." In previous hearings, Mr. Chairman, you have pointed out that executive agencies are sometimes inactive, so I think it is appropriate with today's focus on veterans to include the issue on which there is such strong bipartisan support.

Now, Mr. Chairman, Senator Flake was unable to be here today, so he asked me if you would be good enough to put his statement in the record.

Chairman BLUMENTHAL. Without objection.

Senator HATCH. He says in the first paragraph, he says, "While I am pleased the Senate is focusing on our veterans today, I am disappointed more attention is not being paid to the failures of the Veterans Administration to provide veterans their medical services and benefits. Congress has a responsibility to address this problem since the administration is apparently failing to do so." And I would ask that the rest of it be placed in the record at this point.

[The prepared statement of Senator Flake appears as a submission for the record.]

Senator HATCH. Mr. Chairman, I would also ask that—well, I have already put this in.

All right. Well, I just want to thank you for holding this hearing, and I want to thank all these witnesses for appearing with us and helping us on these very important issues, and we really appreciate what you do. Thanks so much.

Chairman BLUMENTHAL. Thank you.

Senator Franken, did you want to make any opening remarks?

Senator FRANKEN. No, that is okay. Why don't we go right to the testimony?

Chairman BLUMENTHAL. Great. Let me just introduce before swearing them in our two witnesses this afternoon. They are, first of all, Colonel Paul Kantwill, who is Director of the Office of Legal Policy of the Under Secretary of Defense. He has an extraordinary record of service to our Nation in uniform, including in Afghanistan and the Persian Gulf War, and is the recipient of the Legion of Merit, two Bronze Star medals, and numerous other military awards and decorations. As Director of the Office of Legal Policy in the Office of Under Secretary of Dodd-Frank (Personnel & Readiness), he is the principal advisor to the Secretary of Defense and the Under Secretary of Defense on legal policy matters, including the issues that we have before us today.

Dwain Alexander is the legal services attorney for the United States Navy. He is a retired United States Navy Captain also with a record of extraordinary service. He is the senior supervisory civilian attorney and subject matter expert for the Region Legal Service Office, Mid-Atlantic, in Norfolk, Virginia.

We thank both of you for being here today, and I am going to ask you, as is our custom in this Committee, to please rise and take an oath.

Do you affirm that the testimony that you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Colonel KANTWILL. I do.

Captain ALEXANDER. I do.

Chairman BLUMENTHAL. Thank you. And if you have an opening statement, we would be very pleased to hear it.

STATEMENT OF COLONEL PAUL KANTWILL, DIRECTOR, OFFICE OF LEGAL POLICY, OFFICE OF THE UNDER SECRETARY OF DEFENSE, PERSONNEL AND READINESS, DEPARTMENT OF DEFENSE, ARLINGTON, VIRGINIA

Colonel KANTWILL. Thank you and good afternoon, Mr. Chairman, Ranking Member Hatch, and Members of the Committee. It is an honor to appear before you and to represent the Department of Defense and all of our great people. On behalf of the Department, I thank you for your assistance and for your support in protecting our servicemembers' access to their Federal rights and for the opportunity to address you today regarding those rights in the consumer financial marketplace.

I will discuss first the Servicemembers Civil Relief Act. I will then discuss other challenges confronting servicemembers and their families in today's marketplace, focusing on issues and challenges

relating to the Military Lending Act, as the Department sees this as one of the biggest current financial challenges facing our force.

The Department recognizes and appreciates fully the critical importance of the SCRA. No other statute provides the breadth of benefits and protections for servicemembers that the SCRA does, and over its long history of more than 70 years now, it has lessened some of the very many significant burdens associated with military service.

Congress has continued to play a critical role in protecting our servicemembers and their families, strengthening the Act and its protections in many ways, especially in recent years.

It is with pride, therefore, that we assert that the current status of SCRA education, compliance, and enforcement is largely a “good news story.” We have all read accounts of mortgage foreclosure abuses, and we know well the ravages that the economic crisis and the burdens of more than 13 years of deployments have had on the financial fitness of military families.

We believe, however, that we have been very effective in curbing foreclosure abuses against military personnel and their families. This is the result of much sustained and very hard work within the Department and with other governmental agencies and the financial industry.

The Department is fortunate to enjoy a tremendous relationship with other Federal agencies relating to consumer law issues—the Department of Justice, the CFPB, and the Office of the Comptroller of the Currency, to name just a few. Federal enforcement actions brought by our colleagues at Justice have been swift and effective. We are pleased always to have the CFPB at our sides. State and local enforcement and compliance efforts are critical.

There may still be, however, foreclosures out there, and we may yet to be out of the economic woods. Nor are we prepared to say that everything on the SCRA front is a completely rosy picture. We are looking closely, for example, at issues like the reduction of interest rates on student loans under the SCRA and are pleased to be joined in these efforts by the Department of Justice and by our friends at the CFPB and OSA.

We also have concerns regarding waivers under the SCRA, a topic that my friend and colleague Dwain Alexander will speak to you about momentarily.

There are other SCRA issues out there as well, and I am pleased that a great patriot and dear friend, Colonel (Retired) John Odom, will address that from a practitioner’s viewpoint on the second panel.

Despite many of the successes we can cite on the SCRA front, however, we have concerns regarding small dollar lending and related products and services. Significant departmental, interagency, and congressional action resulted in the Military Lending Act more than 7 years ago, we have stamped out the majority of abuses in the areas regulated. Several years removed from its enactment, however, many parties, from services to State Attorneys General, have expressed concerns that the industry, including some unscrupulous lenders, have sought and are seeking to create products and services which fall outside of the MLA. This has not escaped our or Congress’ attention, and at your direction, the Department is

studying changes in the credit marketplace and their effects on servicemembers and their families.

The Department's Advanced Notice of Proposed Rulemaking was published in June of 2013. We received and analyzed responses to our Federal Register notice in order to obtain a broad basis of feedback from consumer advocates, financial industries, Federal and State regulators, and engaged citizens in order to determine the potential benefits, pitfalls, and consequences of extending the definitions in the regulation to cover additional forms of credit.

The Department assembled the prudential regulators and the CFPB to explore potential revisions to the regulation. This group included a team of skilled economists, analysts, and drafters to assist us in the rulemaking.

We remain committed to balancing regulation with education and assistance to maintain financial readiness, and the Department plans to maintain a steady approach to the implementing regulation to balance the protections offered through the regulation while sustaining access to helpful financial products.

On behalf of the Department, I thank you for your assistance and support. It is my privilege to be before you, and I look forward to your questions.

[The prepared statement of Colonel Kantwill appears as a submission for the record.]

Chairman BLUMENTHAL. Thank you very much, Colonel Kantwill.

Mr. Alexander.

STATEMENT OF DWAIN ALEXANDER, II, ESQ., CAPTAIN, U.S. NAVY, RETIRED, AND NAVY LEGAL ASSISTANCE ATTORNEY, U.S. NAVY, REGION LEGAL SERVICE OFFICE, MID-ATLANTIC, NORFOLK, VIRGINIA

Captain ALEXANDER. Chairman Blumenthal, Ranking Member Hatch, and distinguished Members of the Committee, I am honored and humbled to have the privilege of speaking before you and to represent the Navy's Judge Advocate General's Corps and our servicemembers we support.

I am a civilian legal assistance attorney. My office supports mission readiness by addressing servicemembers' legal issues. We provide wills, family law advice, but the issues that follow the servicemembers, the ones where we can make a change that helps today, are the consumer law issues—issues like those faced by the thousands of sailors who deploy with the USS George H.W. Bush strike group. Those sailors left their homes and affairs to tend to the Nation's business. They were concerned about their families, their property, and the obligations they were leaving behind.

Successful mission completion and a safe return depend upon their ability to focus on their duties. The Servicemembers Civil Relief Act's purpose, its sole purpose, is to relieve servicemembers from civil distractions so that they can focus on defending the Nation.

The SCRA is the advocates' and the servicemembers' most powerful legal readiness resource. Working with the SCRA, I have observed that our national defense comes at a cost to everyone. I see the anxiety in the deploying servicemember. I hear the stress from

the family members that are left behind. And I listen to business concerns that the servicemember may be unable to comply with an obligation or that additional costs may be incurred in resolving problems. The SCRA strikes a balance between those individual interests and the Nation's need for a mission-ready, focused fighting force.

There are several changes that would enhance the SCRA. Colonel Odom will address those later. But I am concerned that there is one change that, if not made, will allow the balance and the protections provided by the SCRA to be totally circumvented. That needed change is a prohibition of pre-dispute waivers.

Section 517 of the SCRA allows the servicemember to waive any and all rights provided by the Act. The waiver provision can be beneficial. For instance, if the service had a beater that they left on the waterfront and that was towed, the SCRA would require that the towing company go to court before they could sell that vehicle. During that time it is earning fees that could exceed the value of the vehicle. If the servicemember waived his rights under the SCRA, that could be sold, saving both time, money, and expense for the servicemember.

In that instance, though, the servicemember is aware of his rights. He is aware of the fact that there is a risk involved with this property, and he makes a knowing and voluntary choice to waive his rights. In fact, many States make voluntary and knowing act a requirement for a valid waiver, which is especially important considering that our servicemembers' future, location, mission, and needs are subject to change with little notice.

Contrast that scenario with the pre-dispute waiver used in contracts today. In markets with large military populations, residential leases will frequently contain an SCRA waiver. There are samples of several of these waivers attached to my formal written statement. The waivers are required at the inception of the contract, and they remove the right to reopen a default judgment, protection from eviction, and the right to terminate a lease. The servicemember who signs a pre-dispute waiver with a landlord will be denied his rights under the SCRA. This servicemember will be exposed to financial risks from the vacant property during the 8-month deployment, or he could be prevented from sending his family home to a more secure and supportive environment. The inability to challenge a default judgment could impact his security clearance and his mission readiness, and the emotional stress placed on the family from the situation can be devastating.

Circumvention of these rights affords servicemembers through the pre-dispute waiver removes the balance created by the SCRA and shifts the entire burden for mission readiness to the individual servicemember. It effectively places command and control of the SCRA as a readiness tool in the hands of the company seeking to enforce the waiver.

The application of pre-dispute waivers has the potential to undermine the SCRA and the national policy it supports. The pre-dispute waiver can be employed as burden-shifting and cost-savings measures by all types of businesses: mortgage lenders, banks, credit unions, subprime lenders, automobile dealerships, merchants, and others. In fact, after the JPMorgan Chase settlement with the

Department of Justice for violations of the SCRA, it requested that servicemembers waive all of their rights as a precondition for short sale assistance, with no guarantee that there would actually be a short sale. As they had encountered problems, it was easier to have the rights waived so they would not violate the law again than to comply.

A company should not be allowed to undermine the important policy that the SCRA represents and determine that their needs are more important than the servicemember's or the national defense.

I thank you for your time and for the opportunity to speak before you. Thank you.

[The prepared statement of Captain Alexander appears as a submission for the record.]

Chairman BLUMENTHAL. Thank you. Thank you both for those excellent opening statements.

Let me begin with the first round of questioning. I think we will allot 7 minutes to each of us.

Colonel Kantwill, as you know, and as noted in your testimony, consumer credit lenders often can make minor changes, like the term of a loan by 1 day, and the servicemember loses MLA protection. I am happy here that the Department is writing new regulations to deal with these issues, and I am wondering if you could describe how quickly those regulations will be available and what the process will be going forward.

Colonel KANTWILL. Yes, Senator, and I would first like to thank you and your staff and the Committee staff for holding this very important hearing. It has been wonderful working with all of them. They have been quite helpful, and the Department certainly appreciates it.

Chairman BLUMENTHAL. Thank you.

Colonel KANTWILL. As I indicated my statement, the Advanced Notice of Proposed Rulemaking was accomplished last summer, and since that time the drafting committee has been hard at work. We are at the stage now where the rule is very near finalization, and we are preparing now to post it in the Federal Register, which we hope to accomplish in certainly less than 60 days, for the comment period. And then we hope to finalize the rule by the end of this calendar year, so the end of September this year. So things are moving rapidly along.

Chairman BLUMENTHAL. You know, and I do not mean this by any way critically, but for the average person out on the street, in fact, maybe the average servicemember, the end of the year looks a long ways away. And part of the reason that we are having this hearing—and we have held other hearings on other rules and rule-making that seems to have been unfortunately delayed too long, and in many instances much longer than this rule—is because rules delayed are justice denied. And for servicemembers who are victims of these MLA abuses, that is a long time to wait for a rule that will protect them.

I do not mean in any way to be critical of you personally or even the Department because I know that there are requirements under the Administrative Procedures Act that have to be followed. But I

wonder whether there is any possibility of accelerating that process.

Colonel KANTWILL. Your point is well taken, Senator, and we recognize fully that each passing day potentially costs people money, anguish, et cetera. This has been a heavy lift, I must admit. It is a gargantuan task. We are very, very grateful for the assistance from the Federal Deposit Insurance Corporation, from members of the Federal Reserve Board, the OCC, the OSA, all of those folks. And we have been very careful, and we have been very considerate. We wanted this to be an open and transparent process. We wanted, Senator, to comply with all of the statutes and regulations.

So we are moving and I pledge to you that we will move with all due consideration for the folks who need our assistance, and we will produce the best product we possibly can in the shortest possible amount of time.

Chairman BLUMENTHAL. Thank you. And I appreciate that very welcome approach of wanting to do everything as possible as quickly as possible, with the knowledge that if it is not done right, it will be vulnerable to attack.

Let me switch topics slightly. Have you or the Department given any consideration to incorporate financial training into mandatory training for the members of the Armed Forces—in other words, financial education as a required component for military training?

Colonel KANTWILL. We have, Senator, and I am pleased to report that we do. We are now training people on financial awareness in very many respects, from even before the time that they enlist. So through our colleagues at the CFPB and the OSA, we have training programs consistent with the delayed entry program.

We have financial education and training embedded into nearly every stage of training. We present it at basic training, at advanced individual training. It happens—it follows a servicemember, if you will, at each particular installation to which they are assigned. It is embedded into the pre-mobilization process and the post-mobilization process as well.

We have individual—certainly we have classroom-type facilities where briefings are given. We also have assistance of people like Mr. Alexander, the boots on the ground, the attorneys who are helping them in the field. We have personal financial managers at each and every installation that provide them that sort of assistance as well. The legal assistance attorneys are very proactive with their preventive law programs.

So I am pleased to report, Senator, that we think this is a very robust and successful program.

Chairman BLUMENTHAL. Thank you.

Mr. Alexander, do you think that reforms are needed to Section 517 to improve protection for our servicemembers? And if so, what kinds of reform do you think would be advisable?

Captain ALEXANDER. I think that as the Act currently stands, the ability to waive any and all rights before you know what rights you are waiving is hazardous for the servicemember and overly beneficial to the community. That balance-shifting problem exists.

The idea that a pre-dispute waiver is acceptable is considered in other laws and banned, so there are laws that are already on the books where they say you cannot pre-dispute waive your rights

under the Employment Rights Act or civil rights laws. And I think that the policy expressed in the SCRA of providing for our national defense is an important enough policy that it also should have some protections from pre-dispute waivers.

Chairman BLUMENTHAL. So that is the reform that you think is important?

Captain ALEXANDER. On that issue, yes, sir.

Chairman BLUMENTHAL. And what about other issues? What other issues do you think need to be addressed?

Captain ALEXANDER. The waiver of the SCRA is a central problem. In contracts today, there are also arbitration provisions. Those provisions are essentially another form of waiver. If you can get into a contract signed to waive your rights, you can also get in a contract signed to this arbitration provision. And when you do that, you in effect waive your rights because you remove from consideration the rights you have under the SCRA, and that is an important problem. So putting in—allowing—or stopping pre-dispute arbitration provisions would also protect servicemembers.

Chairman BLUMENTHAL. Do you know of individual circumstances where servicemen and -women have been harassed and you or your fellow advocates have been unable to protect them?

Captain ALEXANDER. Yes, sir. Chairman, as you know, the Fair Debt Collection Practices Act protects people from third-party collection agencies and actions. However, the primary creditor has basically no restrictions, and so the ability of that party to pursue a collection action through the command and with the servicemember is present and threatening.

Chairman BLUMENTHAL. So strengthening the Fair Debt Collection Practices Act also would be advised.

Captain ALEXANDER. Yes.

Chairman BLUMENTHAL. And do you have any specific suggestions about how it should be strengthened?

Captain ALEXANDER. I think I should take that question for the record.

Chairman BLUMENTHAL. Okay.

[The information appears as a submission for the record.]

Chairman BLUMENTHAL. Well, if I may suggest, maybe increasing the penalties and the specificity of prohibitions would be two areas that we might want to think about. Would you agree?

Captain ALEXANDER. I would agree. The businesses make decisions sometimes on a cost/benefit analysis, and if the cost is too high, the risk too extreme, those decisions will not be made.

Chairman BLUMENTHAL. Thank you.

Senator Hatch.

Senator HATCH. Well, thank you. I just want to thank both of you for your service and tell you we really appreciate your testimony here today.

Thank you, Mr. Chairman.

Chairman BLUMENTHAL. Thank you.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman, for holding this hearing.

Mr. Alexander, you just talked about pre-dispute arbitration clauses in contracts that essentially waive SCRA rights of our serv-

icemen and -women. In December, I held a hearing on the Arbitration Fairness Act, a bill I introduced to prohibit the use of mandatory pre-dispute arbitration in employment and consumer and civil rights contracts and antitrust cases. That bill would reopen the courthouse doors to servicemembers whose rights are violated under a number of statutes that we're discussing today—USERRA, SCRA, and the Military Lending Act, and others. I would invite my colleagues—in fact, I know the Chairman has cosponsored this piece of legislation. I would invite Senator Hatch to do so as well.

I would also invite my colleagues to review the testimony of Vildan Teske. She is an attorney from Minneapolis who represents servicemembers. She testified and talked about how arbitration clauses effectively insulate corporations from accountability and block servicemembers from enforcing their rights. She shared several cases with us, including an SCRA case she filed on behalf of a soldier from Minnesota who was foreclosed upon while serving at Camp Anaconda in Balad, Iraq.

The complaint said that the lender, the bank, submitted a false affidavit stating under oath that the bank knew the soldier was not in military service, and he was. So their affidavit was totally untrue under oath.

Using that false affidavit, the lender got the sheriff to put the soldier's house up for sale, and the lender ended up buying the house at auction for a fraction of the value of the house—while he was serving our country in Iraq.

The soldier wanted to hold the bank accountable for its actions, and he wanted to make sure that other soldiers could protect their rights, too. So he filed a class action complaint. But buried in the soldier's stack of mortgage documents was an arbitration clause which not only pushed the soldier out of court, but also required him to go it alone. He could not even do a class arbitration.

To me, this is an outrage. It is no way to enforce the law. He wanted to go, and he wanted to make sure that other soldiers, other servicemen and -women knew that this was happening and be able to find other members that it happened to.

Captain Alexander, what are your thoughts on this? You can elaborate on your written testimony that arbitration agreements—and just your testimony to the Chairman that arbitration agreements can be used to nullify the SCRA and put undue burdens on individual servicemembers. What do you think about this?

Captain ALEXANDER. Senator Franken, the contracts that my clients see are sometimes pages long with very small print. Their preprinted portion is not negotiable for that servicemember, so the portion that contains the arbitration provision is really consideration for will that be in there or not and what it means is really understood by the servicemember when they are agreeing to these terms. You may be able to negotiate the price or the years or the interest. Those things may be somewhat negotiable. But the provisions for collection or dispute or other things that are in the contract are not negotiable. So finding it buried in the bottom of the contract, as Vildan Teske did, seems like something that would happen to most consumers and servicemembers today.

The class action perspective, servicemembers are frequently relocating. They are a transient population. And so the ability to en-

force the rights of many through the actions of one through class action would probably be beneficial to servicemembers, and that right is also gone.

If you looked at the purpose of consumer laws and the SCRA, they do not represent—they do not protect consumers and servicemembers. They protect our economy. Consumer laws were written to protect our market economy from bad players, to keep things fair for the businesses that participate. And the SCRA was written to protect our Nation through providing for servicemembers.

Those are big policies that are undermined by arbitration because you no longer have the individuals who are supposed to enforce those rights doing it. Consumers are able to enforce their rights under consumer laws when they can go to court to do that. When the arbitration provisions are in place, it takes away the venue decisions that might be discussed or would be available under normal law. It takes away the cost provisions that might be less under normal law. And it exposes the servicemember to the issues and things that they would not normally have to consider.

We had a case recently where a servicemember did everything right. If he was my client or I was advising him, he did everything right. He saved his money. He bought a vehicle for cash. He bought a vehicle that met his needs, not his wants. He also bought a warranty to protect himself in case something went wrong. The vehicle was sold as is, and the dealer understood the condition of the vehicle because they had it on their lot and inspected it before they sold it to him.

The warranty company refused to—the vehicle has failures later on that should have been covered. The warranty company failed to repair the vehicle, as would have been required, but it had an arbitration provision that required that this decision be considered in New York. It is a \$4,000 vehicle. Everything happened in Virginia. But this case would have to be arbitrated in New York. And those are the type of issues that our servicemembers are facing that just takes this completely out of the consideration, not to mention that if the servicemember needed to have any forms of evidence or discovery in this process, that would not be available under arbitration.

My main concern with arbitration, though, is that if you are a good business using the law as it was intended to be used, it may be not harmful at all. But my servicemembers encounter sometimes the worst, the least scrupulous business out there, and these businesses—car dealers, merchants selling anything or using arbitration provisions—to basically make a profit at the expense of the consumer and the servicemember. So they choose the arbitration, the provider of the service; they choose the venue where it is going to happen; they can then sell junk, commit fraud and misrepresentation, and say, “But you cannot sue me. There is an arbitration provision.”

Senator FRANKEN. Right.

Captain ALEXANDER. And that takes it out of our hands totally.

Senator FRANKEN. So just one last yes-or-no question. In your view, would it benefit our servicemembers if Congress amended the Federal Arbitration Act to prohibit the use of mandatory pre-dis-

pute arbitration in cases involving employment and consumer claims?

Captain ALEXANDER. You want a "yes" or "no" answer? Yes.

Senator FRANKEN. Okay.

Chairman BLUMENTHAL. You can give a longer answer if you wish.

Senator FRANKEN. Yes, how would it—

[Laughter.]

Senator FRANKEN. Well, I was over my time, but how about—okay, how?

Captain ALEXANDER. My thought, sir, was that, again, if most common laws require for a waiver, that there be knowledge and a voluntary act. And arbitration is, in fact, for all practical purposes, a waiver that stopping a pre-dispute arbitration provision would be the same thing as stopping the pre-dispute waiver provision. And they are both very important. In every instance where a consumer or an individual is dealing with another company or an entity, they are at a disadvantage because it is generally one person versus an entity with money and time and resources that writes the contract.

Senator FRANKEN. It is a contract of adhesion.

Captain ALEXANDER. It is a contract where the parties are not equal in dealing with their concerns, and that unequal status leads to unfortunate consequences for servicemembers.

Senator FRANKEN. Thank you.

Thank you, Mr. Chairman.

Chairman BLUMENTHAL. Thank you, Senator Franken.

This set of issues is hugely important, and I want to thank both of you and your staffs and everyone under your command for your very diligent and significant work. And thank you for being here today.

We are going to be moving on to the next panel, but I hope that I and my staff can continue to work with you. Even though I am not going to be the Chairman of this Subcommittee, I have a very active interest in it as a Member of the Armed Services Committee, the Veterans' Affairs Committee, and this Committee, the Judiciary Committee. So I hope that we can continue to work together on the Military Lending Act, the regulations that you are going to be issuing, as well as the work that you are doing, Mr. Alexander. And, again, my sincere thanks for being here today.

Captain ALEXANDER. Thank you, Mr. Chairman.

Colonel KANTWILL. Thank you, Mr. Chairman.

Chairman BLUMENTHAL. We will move on to the next panel. We will ask them to come forward, and while you are doing that, let me just say that I am going to go slightly out of order here and ask Ian dePlanque to be the first witness and give Senator Hatch an opportunity to ask some questions of him because of the scheduling needs that we have on this side of the bench, so to speak. And we welcome all of you here today.

I am going to ask all of you, now that you have made yourselves comfortable and sat down, to please rise and take the same oath. Do you affirm the testimony you are about to give to the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DE PLANQUE. I do.

Colonel ODOM. I do.

General DAVIS. I do.

Lieutenant SAVAGE. I do.

Chairman BLUMENTHAL. Thank you.

Mr. dePlanque is a deputy director in the Legislative Division of the American Legion, and he focuses there on issues related to veterans benefits and health administration. He has served as a sergeant in the Virginia Army National Guard and was deployed to Afghanistan during his service. He has been on the staff with the American Legion since 2007, and his experiences advocating for veterans certainly contribute to the conversation today.

John Odom, as was mentioned earlier, has been a long-time expert on the issues that are presented today. In fact, he wrote the benchbook used by Federal district court judges on the Servicemembers Civil Relief Act and is one of the Nation's foremost experts on USERRA. He is a retired United States Air Force Colonel.

Major General Andrew Davis is executive director of the Reserve Officers Association. He retired from the Marine Corps in October 2008 after a 38-year career, including tours in three wars. During his career he served as an infantry officer and major general. He assumed the duties of executive director of the 60,000-member Reserve Officers Association of the United States on November 1, 2011. And through its Servicemembers Law Center, the Reserve Officers Association offers expert legal information on employment, military voting rights, and other legal issues that are important to citizen warriors.

Finally, Lieutenant Kenneth "Gene" Savage, United States Naval Reserve, was a servicemember for 24 years and decorated Reserve officer who was fired from his job after attempting to secure rights protected by USERRA.

And I want to thank every one of the members of our panel for your service to our Nation, and ask Mr. dePlanque to please go first, and then I am going to yield to Senator Hatch for any questions that he may have.

**STATEMENT OF IAN DE PLANQUE, DEPUTY LEGISLATIVE
DIRECTOR, THE AMERICAN LEGION, WASHINGTON, DC**

Mr. DE PLANQUE. Thank you, Mr. Chairman, and I fully understand being flexible, having come from an infantry background. And I want to thank you, Ranking Member Hatch, and the Members of the Committee for having the American Legion here to talk about this and for talking about it outside of a venue that is not normally seen.

And the backlog is a big concern. Just yesterday morning, our National Commander, Dan Dellinger, was addressing a joint session of the House and Senate Veterans' Affairs Committees on behalf of the 2.4 million members of the American Legion, and one of the top concerns that he had was the claims backlog.

What does the claims backlog mean? A number of years back, Secretary Shinseki defined it as "any claim waiting over 125 days." Currently of the over 630,000 claims pending, it is about 55, 56 percent of those claims. When he initially made the promise back in 2009, 2010, to get rid of the backlog, it was only about 38 per-

cent of the claims pending. It has been continuing to grow for a while, and it is something that is deeply concerning.

There are a number of reasons for this, and I want to address two of them, kind of go into more detail and hopefully flesh out some of the things that are in the written remarks that I offered.

One of them is there is a tremendous pressure on VA employees the way their work credit is counted to just get the claim off their desk to the next thing. They do not get any credit differently whether they do the claim right or whether they do the claim wrong. And they have a lot of people, including many of the people in Congress, many of the people in the veterans community, who are pushing them to get these claims done. You have veterans waiting a year or 2 years for an initial claim when they are trying to get it to a target of 125 days.

The American Legion does 10 to 15 regional office visits, Regional Office Action Review visits. They take about a week. We go to a regional office across the country. We look at recently adjudicated claims. We ask the VA for a random sample of the ones in the American Legion POA, and we take a look at the claims. We interview the VA personnel. We interview our service officers. We have over 2,900 service officers accredited throughout the country helping veterans with their claims. And I was talking to a VA employee, a veteran of Afghanistan, National Guard, who had just gotten back. We were talking about the places he had served, and he worked on claims, decided claims, and he points to a stack from a folder that was about this tall, and he said, "You know, I put the face of a member of my platoon on every claim that I work on. I am a veteran. I am helping veterans, and I am trying to do that. I have a stack this big of papers to get through. I have 2 hours to look at that claim. How am I giving that veteran justice?"

And I think the system the way it is in place right now, the way VA looks at work credit, because there is such pressure on that and there is not as much pressure on accuracy, it puts employees in a position where they may feel the need to cut corners. So that is one thing.

The other thing I want to think about is the electronic transmission of information back and forth between VA and the DOD. The claims backlog actually is not a new thing. If you look at the metaphor for bureaucratic failure in America, it is red tape. And a lot of people do not know the origin of that, but if you go back, the origin of the phrase "red tape" goes back to these red ribbons they used to tie around the War Department folders for Civil War soldiers. And when you were trying to get your benefits after the Civil War, to cut through the red tape was to actually be able to get at the information in those files and go do that.

This is a problem that has been around for a while. But the problem is we are in the 21st century, and when the VA has to go get their files on the veterans so that they can determine what is going wrong with their claim, and they go to the DOD or when you have the National Guard involved, then you have to get the state records, and it gets very complicated and convoluted. It can take 6 months. It can take 8 months. It can take a long time to get those records. This is the 21st century. We should be able to transmit that information back and forth instantly.

There was broad bipartisan support, both of the recent administrations have been in support of a single unified electronic record. Both sides of Congress have been in support of a single unified electronic record. They attempted to push forward and do this. They spent over \$1 billion trying to develop one, and just in the past year, VA and DOD said, you know what? We are going to go our separate ways. Each of us are going to come up with our own electronic recordkeeping system, but we will make sure that it communicates with the others.

Well, that does not instill a lot of confidence in the veterans that are out there, that they would spend that much time and still not be able to do something that should be basic to the 21st century.

So there is still pressure that can be put on both the VA and DOD to improve that handoff piece. There are other things, but the last thing that I want you to remember, that I want you to take away is, when we think about the backlog, we are winding down the war in Afghanistan. We have already wound down the war in Iraq. The wars are going away from the front page. But the veterans who are still dealing with the system are not going away from the front page. And it does take not just the Veterans Committees in Congress, but it takes everybody in Congress to help keep the attention on it.

So thank you, and I am happy to answer any questions that you have.

[The prepared statement of Mr. de Planque appears as a submission for the record.]

Chairman BLUMENTHAL. Thank you.

I am going to yield to Senator Hatch for his questions. Before I do, let me just say on this issue of the records handoff, as you put it, the supposed seamlessness of the records, I do not know whether you are aware, but I have actually introduced an amendment that would require the DOD and the VA—an amendment to the National Defense Authorization Act and then to the omnibus veterans bill. I could not agree with you more. I have been deeply disappointed, in fact, pretty angry about the failure so far to make them completely transparent and seamless, transparently seamless. And I am going to yield to Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman. I appreciate it. And I appreciate all four of you, as well as the other witnesses. We appreciate you taking the time to come and help us to understand this. And I am sorry I have to go to the floor, but I just thought I would ask a couple questions.

Is it pronounced “de Planque”?

Mr. DE PLANQUE. That is correct.

Senator HATCH. Well, I am grateful to have all of you here today and for the great work that the American Legion does. In your testimony, you note that Veterans Affairs Secretary Shinseki said in 2010 that claims should take no more than 125 days to process and that the backlog would be eliminated by 2015. Now, that was 4 years ago.

My reading of your testimony is that the number of claims pending longer than that 125-day benchmark has risen by 78 percent since then. And the percentage of all claims that exceed that benchmark has risen from 139 percent in 2010 to almost 56 per-

cent today. Naturally, I think that is going in the wrong direction. I am sure you do, too.

Do you believe that the Secretary's goal of eliminating the backlog by next year is going to be met at all? And let me ask one more. Do you see any numbers or trends or anything positive in this area?

Mr. DE PLANQUE. Thank you, Senator, and that is a very good point. And you are absolutely right to see that the trend has not gone in the right direction. Certainly for the first several years of that, it definitely—the backlog continued to rise, the number of days it took to work the claims continued to go up, and that was very troubling.

There has been a slight turn this year, a slight turn to the better. Believe it or not, looking at that 55 percent, that is actually a little better than we started the year out. So they are starting to turn the tide, but we do have a concern that the VA is going to feel that they are under so much pressure that they have to meet that deadline by 2015 that they are going to meet it no matter what and that there is going to be blowback. And I want to kind of explain some of that.

Last year, they did a provisional ratings for claims that had been waiting 2 years or longer, and the Office of the Inspector General found that in one of the offices in Los Angeles, they misinterpreted the directions from central office, and they just prematurely issued denials in 91 percent of the cases when they were still waiting for medical exams and other things. And so those veterans now have to appeal. That claim does not count as an initial claim. That claim is now an appeal, so it is not in what we see of the backlog. So their numbers went down a little bit, but that is certainly veterans who are still waiting for justice. And as the Chairman said earlier, justice delayed is justice denied.

So we are a little bit concerned. We do not want it to be a situation where they are so concerned about making those numbers that they start sacrificing the accuracy and the justice for those veterans. It needs to be a situation where we get the result that we want, not necessarily the number that we want.

Senator HATCH. Thank you. Here in the Senate, a bipartisan group of eight Senators have formed a VA Claims Backlog Working Group. Mr. Chairman, I have received statements from two of the leading Senators in that working group, Senator Robert Casey of Pennsylvania and Senator Dean Heller of Nevada, which I ask consent to be made part of the record at this point.

Chairman BLUMENTHAL. Without objection.

Senator HATCH. Thank you.

[The letter appears as a submission for the record.]

Senator HATCH. Now, Mr. dePlanque, Senator Casey states that by "refining management practices in the Veterans Affairs regional offices and modifying current procedures, the VA can serve our veterans more quickly."

Do you agree with that? And could you please mention just a couple of changes in this area that you think might or could really make a difference?

Mr. DE PLANQUE. Absolutely. And thank you for mentioning Senator Heller and Senator Casey's Backlog Working Group. I think

they are doing a tremendous job looking at the problem, and I think one of the best things they did, one of the first things they did was they reached out to the veterans groups that are out there. They reached out and asked the veterans, "What problems are you having accessing the system?"

As I mentioned, we have 2,900 accredited service officers who are helping veterans in every county in the country. So they deal with this on a daily basis, and they were listening to what we had to do, and they worked throughout the process with us.

Some of the things that they have, there are ways that—if a veteran works with a service officer, VA developed something that they call the "fully developed claims program," and the working group made recommendations to kind of strengthen that program. Working with the service officer, you can provide most of the information the VA needs up front, and they can make the decision faster.

The VA likes this because they do not have to do as much work tracking down all the information. The veterans and the service groups like it because they can get a decision much faster. You know, instead of waiting 300, 400 days for a decision, you are waiting 100 days for a decision. And so that is one way in which they can work.

There have been other things that they have mentioned about providing veterans information about how they can get faster hearings, whether they utilize videoconference hearings or in-person hearings, getting more information to them to help make the choices that are going to help them navigate the system better, and I think those have been good. And the important thing has been having VA, Congress, and the veterans all involved in the conversation from the very beginning, from the ground up, because those are all people who have to deal with the system.

Senator HATCH. Mr. Chairman, I have got to run to the floor. Could I—

Chairman BLUMENTHAL. Absolutely.

Senator HATCH. Mr. dePlanque, I appreciate you being here, appreciate all of you being here, and I am sorry that I have to leave, especially in this particular case, because we appreciate all you do.

Chairman BLUMENTHAL. Thank you. Thank you, Senator Hatch, for being here. I know that you have a busy afternoon.

We are going to be here for a while, and I hope that I can continue some of the questions with you, Mr. dePlanque, because also in your written testimony you make some very important points about loopholes in the current law.

But let me go back to the regular order, so to speak, going from your right to left, and ask each of you to make whatever opening remarks you may have, beginning with Mr. Odom. Thank you again for your service.

**STATEMENT OF JOHN S. ODOM, JR., COLONEL, USAF JAGC,
RETIRED, JONES & ODOM, LLP, SHREVEPORT, LOUISIANA**

Colonel ODOM. Thank you, Mr. Chairman. As we say down home, it is just us chickens now, so let me go one on one with you, if I could. My name is John Odom. I am an attorney from Shreveport, Louisiana, and for all of my adult life, I have been a JAG in the

Air Force practicing law. I was a judge advocate for about 35 years, and I have continued with a practice that primarily relates to representing servicemembers in various types of actions. My area is really the Servicemembers Civil Relief Act. I am very familiar with the Act. I have been privileged to work with a number of staff and members and passed amendments to the Act, and I think, Mr. Chairman, that your initial remarks really sort of reflected exactly what I tried to convey to the Committee in my written remarks.

I would like to give you a very short quote from one of my heroes, General George Marshall, who said, "We are going to take care of the troops first, last, and all the time." And that is really what I think the SCRA does. It is a fantastic statute. Its breadth is breathtaking for those of us who work with it every day.

After the education and policy efforts of Colonel Kantwill and the Office of Legal Policy have gone on, and after the retail work of Dwain Alexander and all of the thousands of legal assistance attorneys that represent all four branches of the service, after their efforts of persuasion have been ineffective, they run out of airspeed and altitude, and we would say in the Air Force, and along I come. It is time to sue somebody, and that is what I do for a living. I am really happy to do it, too. My clients are always on the side of the angels, so it is a good thing. Just give me a jury, Senator Blumenthal, just give me a jury and let me work on that a little bit.

Chairman BLUMENTHAL. There are days when I wish we had a jury instead of the process we have here.

[Laughter.]

Colonel ODOM. Well, I will make my opening statement in less than another 2 minutes then.

Let me suggest, though, that with every great piece of legislation, every once in a while it is time to pull it out and dust it off and look and see if the people that are trying to get around it are doing a better job than the people who are trying to enforce it. And so it is with the SCRA.

I give this briefing all over the country, and I have got to quit calling it "the new Act," because it was enacted in 2003. Okay, it is 11 years later. It is no longer "the new Act."

But let me just make some nuts-and-bolts suggestions to you, sir, on how a very good Act could be tweaked in a prospective manner at no cost to the Government and make it ever more effective for the enforcement of our servicemembers' rights.

A lot of the points that I am going to address very, very briefly—and they are covered at length in my written statement—you co-sponsored Senator Sanders' bill that had almost every one of—I keep a wish list of what I would like to see, and I am pleased to tell you that eight of the ten things that I suggested made it into a bill introduced by Senator Rockefeller, and then that got pulled out and pulled in Senator Sanders' overarching bill. Unfortunately you know where that one went, but there is a possibility that we can get some resurrection on that.

Let me give you just some real nuts and bolts. There is a default judgment provision that says that creditors can only take default judgments against servicemembers in strict accordance with the Act. Nobody ever does it right. At a very minimum, the Act ought

to say that the creditor must certify that they have done a due diligence search to see whether or not the defendant is or is not in the military. It takes about 15 seconds on the website of the Defense Manpower Data Center. It is available to the public. It is probably the most effective governmental agency I have ever worked with. They are fantastic in the database management that they do. Everybody can go back and find out from 1983 until the present, give a specific date, and in 15 seconds you can know whether or not the person was or was not on active duty on that date. So requiring at a bare minimum a DMDC SCRA database search seems to be sort of a no-brainer.

Then as hard as this may be to believe, I just finished settling a case in Florida against a major national bank, who must remain unnamed because of the Compton-Shelley Clause—but they do know how to write large checks. I was pleased about that. But the bank's counsel, when I pointed out to them the illegal foreclosure that they had done through a default judgment that did not follow the statute, he suggested that even though his client, the bank, had in their records the knowledge that the defendant was on active duty with the Navy and even had an email address for the person, that they had no obligation to share that information with the attorney appointed to represent the absent servicemember, and that attorney filed an answer with the court that said we do not know if the person is alive or dead, we do not know whether they are in the military, but we see no defense to the action; whereupon, a default judgment was taken. The foreclosure took place. The bank bought the house for \$100, and then the Department of Veterans Affairs paid off on the loan because it was a VA-guaranteed loan. There needs to be a really easy fix to default judgments.

There was a drafting error in 2005 when a protection was added to Section 305 about how you go about canceling a lease. There was a drafting error. They put the definition of "military orders" in Section 305. It really needed to go in the definitions section. All we need is to take it out of 305 and put it in the definitions section so that it will apply to the entire Act.

The term "permanent change of station" is used in Section 305. If you get permanent change of station orders or what we call PCS orders to move to another base, you can terminate your lease. Well, permanent change of station is defined in the joint Federal travel regs to include separation and retirement moves. You try to get an apartment manager that when you are separating, it is a PCS move and, therefore, you have the right to cancel your lease, you cannot do it. All we need to do is define "permanent change of station." It is a fairly simple thing.

You ought to be able to refinance a pre-service obligation, either a student loan or a mortgage, to get lower interest rates without converting that obligation from a pre-service obligation to an obligation incurred during service, because if you do that, you would lose all your SCRA protections. These are really, really very small things.

One more point. There is a section in the SCRA, Section 602, that says the Secretary of the service concerned will issue certificates of service, which will be *prima facie* evidence of the active duty status of an individual. They do not do that. That is what the

DMDC SCRA website does. You could not find a Secretary of the Army or Secretary of the Air Force or Secretary of the Navy or whatever, you cannot find them—they do not understand that exists. So that is a section that needs to be simply overhauled where technology has outstripped the legislation.

One more point, and I know I am over my time, but I appreciate your indulgence. Mr. Alexander testified at some length about pre-dispute mandatory arbitration clauses. If Congress in the SCRA and the real protective provisions in Title III provided that—it does not say you cannot foreclose. It does not say you cannot evict. It does not say you cannot repossess. It says you cannot do those actions except with a valid court order. Congress has already understood the importance of interposing a neutral and detached judge between Big Bank and Sergeant Snuffy. Why would Congress ever want to allow Big Bank to require Sergeant Snuffy to sign away his or her rights to be protected by that neutral and detached magistrate?

If after the event occurs both parties with their eyes open say, “We agree we ought to submit this to arbitration,” as opposed to litigation, that is a different topic. That is fine, if you go into it knowing it. But if a 19-year-old signs a credit card agreement before he has any idea that he is ever going to be protected by the SCRA, then when he is 23 he goes on active duty, and then when he is 25 he has an SCRA-protected action that would otherwise be capable of taking to court and the credit card company says, “So sorry, partner, back when you were 19 you waived all of those rights because you signed this little piece of paper”—in the 2-point type that you can barely see. So I think that could be fixed.

And, by the way, that was in both Senator Rockefeller’s bill and Senator Sanders’ bill.

The last point. I do some USERRA practice. The same arguments about pre-dispute mandatory arbitration clauses that apply to SCRA would apply to USERRA, but there is an extra kick. There is a point at which USERRA and SCRA overlap. Under SCRA, if an individual is in a court proceeding and he or she is unable to get to court because of military duties, they can demand a mandatory stay of the proceedings, and it has to be granted if they follow the statute properly. That provision would not apply to arbitrators. The arbitrator could schedule the arbitration while Lieutenant Savage was down range fixing airplanes in Djibouti, and it would go on because he could not stop it.

So there is an interaction between USERRA and SCRA, and as far as the arbitration provision is concerned, I think that it should be limited to post-dispute—in other words, no pre-dispute mandatory arbitration.

I thank you for your attention. I will certainly answer any questions if you have any, sir.

[The prepared statement of Colonel Odom appears as a submission for the record.]

Chairman BLUMENTHAL. Thank you very much, Mr. Odom, and also thank you for being here and for your service after your military service as well.

General Davis.

**STATEMENT OF MAJOR GENERAL ANDREW DAVIS, EXECUTIVE
DIRECTOR, RESERVE OFFICERS ASSOCIATION OF THE
UNITED STATES, WASHINGTON, DC**

General DAVIS. Chairman Blumenthal—also a Marine.

Captain ALEXANDER. Thank you.

General DAVIS. The Reserve Officers Association thanks you for the invitation to appear and give testimony today. I am also authorized to speak on behalf of the Reserve Enlisted Association.

Although contingency operations in Afghanistan are winding down, there are still more than 40,000 Reserve and Guard members who are deployed worldwide of the 1.1 million men and women in the Reserve and Guard. Many outstanding citizen soldiers, sailors, airmen, Marines, and Coast Guardsmen have put their civilian careers on hold while they serve our country in harm's way. They share the same risks with their counterparts on the active components on the battlefield, but do not always have assurances of a job when they return home.

While laws exist to provide re-employment and employment protection, many Reserve and Guard members had to seek private representation when the Department of Labor or the Department of Justice failed to address their cases.

Just last week, we passed the 894,000 mark for the number of Reserve and Guard servicemembers who have been activated since 9/11. More than 336,000 of them have been mobilized two or more times. It is important, therefore, that we do not squander this valuable resource of experience, nor ignore the protections that they are entitled to because of their selfless service to our country.

Thirty percent of those who served in Iraq or Afghanistan are Reserve or Guard veterans, according to the Department of Labor. The dual status of veteran and serving members complicates the employment of Reserve and Guard members returning from mobilization. They face returning to communities that do not have the same support structure that is available if they were on or near military bases. High numbers of them have been unable to find re-employment during this war and the economic recession. Some Army National Guard units returned with unemployment levels over 35 percent.

ROA and REA fear that the unemployment rate is so high because employers are shying away from hiring potential employees who are serving in the Reserve components. We call this "stealth discrimination," and because of employer concerns about reactivation by an operational Reserve, unemployment for 18- to 19-year-old Reserve and Guard members is nearly triple the unemployment rate for non-affiliated veterans. Bureau of Labor Statistics reports that in February, unemployment has risen back to 16.6 percent of veterans between 18 to 24 years old and has climbed to 18.8 percent of veterans between 25 and 29.

The 18- to 24-year-old age group and the 25- to 29-year-old group are made up in large part of the Reserve and Guard. The overall veteran unemployment rate was just 6.3 percent.

Higher unemployment rates for younger Reserve and Guard members provides silent testimony that stealth discrimination remains. Smaller businesses can ill afford to lose key people and remain productive. They may congratulate a Reserve Force applicant

on his or her military service and then simply fail to follow up, putting the résumé into the circular file, although such discrimination is clearly unlawful under USERRA.

Three surveys show that between 60 to 70 percent of employers will not hire new employees who are affiliated with the Reserve and Guard, but this is hard to prove unless the employer is naive enough to verbalize his or her prejudice—although there are some. Both DOD's ESGR and Department of Labor fall short at helping the number of Reserve and Guard members facing employment challenges. Where once ESGR counseled employers and employees about USERRA, now the weight falls upon the shoulders of the accuser (employee) to generate the complaint against the employer as ESGR remains neutral. If a case is referred to DOL from ESGR, the VETS Office is supposed to complete the review and take action within 90 days but rarely does. The results of the investigation are shared with the affected Reservist who is briefed on the choice he or she has. DOJ reviews the cases, but does not brief the complainant about why a case may be turned down. As most Reserve Force members work for small businesses or local governments, they rarely have Federal representation.

In fiscal year 2012, VETS referred 111 cases to the Department of Justice. DOJ filed just nine USERRA complaints of that 111 in that same year. Unfortunately, the number of cases supported by Federal agencies does not reflect the needed support of Reserve and National Guard members. Federal emphasis has shifted from representation to education, which does not help individuals facing employment or re-employment problems. While moral suasion is importance, it does not always reach the middle managers where the problems occur, even in big corporations.

ROA's pro bono Servicemembers Law Center is receiving more than 800 calls a month on average, about half of those related to employment issues. ROA would like to share our garnered knowledge with the Committee as we see trends and problems facing our servicemembers. Leading the list is USERRA enforcement.

Thank you, and I stand by for your questions.

[The prepared statement of General Davis appears as a submission for the record.]

Chairman BLUMENTHAL. Thank you, General. I am going to follow up on some of those really excellent points. I appreciate your talking about discrimination against our Reserve and against veterans.

Lieutenant Savage.

**STATEMENT OF LIEUTENANT KENNETH "GENE" SAVAGE,
U.S. NAVAL RESERVE, MEMPHIS, TENNESSEE**

Lieutenant SAVAGE. Good afternoon, Mr. Chairman and distinguished Members of the Committee. I would like to first thank the Committee for the opportunity to share my story here today.

My name is Ken Savage, but my friends and family call me "Gene." I currently live in Memphis, Tennessee, with my wife, Michelle, of 10 years. I have a son, Quentin, and a stepdaughter, Kathryn. I served on active duty in the enlisted ranks of the Navy for 9 years, and I am currently serving in the Navy Reserves as

a Lieutenant with VR-54 in New Orleans, Louisiana. I am proud to tell you I have served our country for over 24 years.

In addition to my Naval service, I also had a promising career with FedEx Express as senior aircraft maintenance technician until I spoke out about FedEx's discrimination against servicemembers and I was fired as a result.

I first discovered in August of 2004 that FedEx made a policy change that punished Guardsmen and Reservists who were serving on military duty for less than 30 days, which is the most common type of service. Under this policy change, if we were not available for overtime work because we were serving our country, we were charged with a penalty that kept us from being able to take overtime opportunities upon returning to work. This hurt FedEx's military families financially.

In May of 2007, FedEx's unjust treatment towards Guardsmen and Reservists was illustrated again with a policy change that deprived us of employee benefits, including health care, when we were on military service.

What is even more disheartening is that FedEx knew as far back as 2006 it had an issue with properly crediting servicemembers' retirement accounts.

In March of 2008, fellow servicemembers and I publicly expressed our concerns over FedEx's new retirement plan. FedEx assures us that its new system would properly credit our retirement accounts while on military duty. But in June of 2012, I noticed discrepancies streaming from 2001 in my own retirement account. I expressed my concerns to the benefits department, but to no avail. Rather than fix the problem, FedEx sent me bouncing from one department representative to another. Two months later, I was fired.

I filed a complaint with DOL VETS which investigated and found that my case was meritorious and that FedEx violated multiple parts of USERRA. Nonetheless, FedEx refused to reinstate my employment and reimburse me for warranted back pay. I consulted with Captain Sam Wright of the Reserve Officers Association, who gave me invaluable advice.

I was fortunate that a former Navy SEAL, now attorney, Joe Napiltonia, agreed to take my case on a contingency fee basis and front all of the costs of the litigation, despite the fact that the statute does not guarantee that he will even be compensated if we prevail.

You are probably thinking why don't I just go get another job, I have all this experience. The short answer is professionally, if I obtain a job with one of the big air carriers, I would have to start my career all over again. When I started at FedEx, I worked the graveyard shift for approximately 9 years before I earned enough seniority to finally obtain a daytime shift where I could spend quality time with my family.

On a personal note, because of my unwarranted termination, I have been in such financial straits that my wife and I were forced to sell personal and family belongings, including the family car, to make ends meet. Ten months after my termination, we were forced to short-sell our home of almost 10 years, which in turn has negatively impacted both of our credit. If FedEx had reinstated me with

back pay pursuant to DOL VETS' findings, this would not have happened.

The hardship my family has encountered motivated me to see that this does not happen to other servicemembers. I felt it was my duty to speak out on behalf of all servicemembers who face discrimination because of their military service.

This does not have to be the end of my story, though. It has become clear to me that certain legislative actions can and must be taken to help protect servicemembers, small business consumers who should all have the same access to the justice system as corporations like FedEx. If corporations like FedEx are not held accountable, everyone's financial security will be at risk. My fight to hold FedEx accountable continues in Federal court.

In speaking with you, I hope I have been able to shed some light on just how critically important this issue is nationwide. Theodore Roosevelt said it best when he said, "A man who is good enough to shed his blood for his country is good enough to be given a square deal afterwards."

Please act swiftly and address these issues and know that I look forward to engaging in a meaningful conversation with the Committee Members today. Thank you so much for your time and consideration.

[The prepared statement of Lieutenant Savage appears as a submission for the record.]

Chairman BLUMENTHAL. Thank you very much. Thank you for your courage in being here today and telling your story, which I think does shed a great deal of light on the issues and problems that bring us here. And I would like to begin with a few questions to you that may elicit some additional facts, and the other witnesses may wish to comment on it.

First of all, I understand that your wife is a patrol officer in the Collierville Police Department and has been for 18 years.

Lieutenant SAVAGE. Yes, sir.

Chairman BLUMENTHAL. So I thank her for her service as well.

Lieutenant SAVAGE. I will pass it on.

Chairman BLUMENTHAL. And I understand also that because of your family obligations, you cannot just travel anywhere in the United States to get a job. You are tied to the Memphis area because of your son's schooling requirements. Is that correct?

Lieutenant SAVAGE. Yes, sir.

Chairman BLUMENTHAL. Which I think happens to a lot of folks. They have ties to their communities. They cannot just move anywhere in the country to practice their skills. And you certainly have a very useful and important skill, and I can understand that you do not want to begin in the graveyard shift. You want the status and seniority that you are entitled to receive, and that is one of the reasons that brings you to Federal court. And your action is currently pending against FedEx?

Lieutenant SAVAGE. Yes, sir.

Chairman BLUMENTHAL. By the way, is your attorney here today? Thank you for your service to our Navy and also thank you for taking this case.

Mr. NAPILTONIA. Thank you, Senator.

Let me ask you, I understand, going by your written testimony, that FedEx actually originally reinstated you and then fired you again. Is that correct?

Lieutenant SAVAGE. Yes, sir. During the course of the VETS DOL investigation, for reasons unannounced to me, they hired me back and 4 days later upheld the termination and fired me again.

Chairman BLUMENTHAL. And did they give you a reason for, you know—I know that—

Lieutenant SAVAGE. My VETS DOL investigator, she did not really tell me a reason. It was a major surprise to her. She was asking me to get figures together for back pay, and like I say, 4 days later they terminated my short-lived employment again.

Chairman BLUMENTHAL. So they gave you no reason, they just showed you the door?

Lieutenant SAVAGE. Yes, sir. I did not even really return to work.

Chairman BLUMENTHAL. And did they make any offers to you of coming back under other circumstances? And, by the way, if you want at any time during my questions to ask your attorney—I know you have a case pending, so I do not want to ask you questions or elicit answers that may be harmful or work to your disadvantage in court. So feel free to ask your attorney. Did they make any offers to you about coming back?

Lieutenant SAVAGE. No, sir. In fact, I have the DOL investigative paper here, if you would like to have a copy. It was very clear in what DOL was expecting FedEx to do for violating these sections of USERRA. And we gave them 30 days to comply with the written investigative conclusion, and it was not until I told DOL that I was going to refer my case to the Department of Justice, they sent FedEx a letter to that effect, and then FedEx came back and said that “we would like to just mediate this retirement issue with Mr. Savage.” But there was no word of reinstatement, missed income, benefits, no, sir.

Chairman BLUMENTHAL. Do you have any views as to why FedEx did not comply after the Labor Department told them, in effect, that they were breaking the law?

Lieutenant SAVAGE. I would only have to speculate and say that, you know, FedEx is a huge employer in the Memphis area, and they have thousands of people in their employ. So to me, I was probably just another number, and they did not feel it necessary to engage in this type of enforcement.

I know from working in the mechanic field, if they get a violation from the FAA, they straighten up real quick because they enforce monetarily. That I think needs to be under consideration.

Chairman BLUMENTHAL. And, you know, I know you are not a lawyer, but you have just articulated what I think is one of the major takeaways from your experience, that penalties for breaking the law may be insufficient to deter that kind of misconduct. Is that where you are going?

Lieutenant SAVAGE. Yes, sir. I think if these guys were held accountable for the actions that they did against me and DOL had more enforcement rights, there might have been a different outcome.

Chairman BLUMENTHAL. Let me turn to two really very distinguished and experienced lawyers, Mr. Odom and General Davis.

Would you care to comment on either that observation or other facets of this case?

Colonel ODOM. General? The colonels always defer to the generals.

Chairman BLUMENTHAL. Well, I got no higher than sergeant. I am outranked by everyone.

General DAVIS. And I am not a lawyer. I am not a lawyer, but I think that this case is really emblematic of employers' lack of incentive to follow the law. Unfortunately, we see a real gap in the ability of both DOJ and DOL to step up. As I said, when fewer than 10 percent of the cases are even addressed, that shows that, by example, the Government is not taking this as seriously as it should and the impact is on the Reservist servicemember. And as I said, often the impact is in a stealth mode. Most employers are not foolish enough to say, "I am not hiring you because you are a Reservist," or "I am terminating you because of your Reserve service." Other means and other reasons are found. And, quite frankly, we are at ROA perplexed about what a legislative relief to that stealth discrimination might even be.

There are employers—we have one case that we advocated and had to turn over to a civilian lawyer. A prominent cable television anchor person had a Reserve commitment. She was, no kidding, a hurricane hunter, and her Reserve service interfered with her cable television anchoring duties. And she was—her contract was terminated. That employer was not smart enough to say we are not doing this because you are Reservist. They actually said, "Your Reserve duty is getting in the way of your job, and find another job." That was a year and a half ago, and we are still—she has still not reached resolution of her employment case.

Colonel ODOM. Senator, could I add just one thing to what General Davis has said? You have seen Lieutenant Savage. You have heard him say that as a result of the loss of that job he and his wife lost their house; they had to sell their car. He has been out of work for over 2 years. If any fair-minded person thinks that just paying Gene Savage his past lost wages even with a reinstatement is full compensation for the anguish, the heartbreak, the misery, the ruined credit and everything else that he and his wife have gone through, I do not think they can come to that conclusion.

If USERRA never has an opportunity for the aggrieved servicemember to receive compensatory damages, everybody else in a Title VII case gets some type of compensatory damages for the emotional distress, the mental anguish, the grief, the loss, the disruption of their family lifestyle, that should be compensable even more so if the employment action was taken against someone as a result of their service to the country in the Guard or the Reserve or the Active Force.

Chairman BLUMENTHAL. How about punitive damages?

Colonel ODOM. Oh, I love that concept, Senator Blumenthal. What a great idea, sir. Well, yes, sir, I think that if—the punitive damage aspect of USERRA now is just double the past wages if you can prove that the action was taken intentionally. It is a rare case, it is a unicorn where they are dumb enough to leave a complete paper trail where you can show there is a memo from the CEO that

says, "Fire that man because he is gone too much for the Reserve." That does not exist very much.

So I think that the full range of damages that are available in other types of—in 42 U.S.C. 1983, a civil rights violation, you are entitled to compensatory and punitive damages. Why shouldn't a servicemember be entitled to precisely that same type of relief?

USERRA is much like SCRA. It is a great statute, but it is time to update it to reflect the realities of the employment workplace.

Chairman BLUMENTHAL. And to provide the incentive for attorneys to take these cases.

Colonel ODOM. And disincentives for employers to violate the Act in the first place.

Chairman BLUMENTHAL. Right.

Colonel ODOM. If they know that their main—the bottom line to them, sir, is "I have got to retake this kid and I have got to pay him a couple years in past due wages," sir, that is a rounding error. That is a rounding error to a big major Fortune 500 corporation. But if they knew that if Gene Savage's very competent attorney could get to a jury and talk to them about the damage to the Savage household, that would probably make them much more inclined to, "Well, let us talk about this, maybe we can resolve this quickly and get you back to work."

Chairman BLUMENTHAL. Thank you.

Let me go back to General Davis, and I did not mean to be disparaging by incorrectly referring to you as an attorney.

[Laughter.]

Chairman BLUMENTHAL. You are distinguished, but not as an attorney. And apologies to Mr. Odom. Only a fellow member of the bar could make that joke.

What about the Department of Justice? Does it need additional authority? We have been talking about private enforcement. Should the Department of Justice have additional authority to enforce USERRA cases?

General DAVIS. Thank you, Senator, and in my civilian career of 35 years, I was actually a newspaper reporter, editor, and publisher, so I am not sure which is more distinguished.

Colonel ODOM. I will turn my mic off now.

General DAVIS. If the Department of Justice were inclined and had the resources to take up these cases, I think that that would be a marvelous first step. I think it is—while a worthy representation by attorneys like Mr. Odom to have the Government actually take its prosecutorial responsibilities seriously would be a terrific cudgel in giving power to the USERRA law, unfortunately that is not the case. And we at ROA have a great poster child of that. Our elected national president was a contractor who was on a contract to Department of Homeland Security. He was activated, mobilized, and deployed to Iraq, and when he returned, it turned out that Homeland Security preferred the replacement contractor that had taken his job. And his employer did not want to jeopardize the contract, so he was let go.

It seems like a pretty clear-cut case of violation of USERRA and discrimination, both by the contractor and by the Department of Homeland Security. The Department of Justice would not take up

the case even though the recommendation by Labor was that they do so.

Thankfully, the Reservist ultimately prevailed against both the Department of Homeland Security and the contractor, but it took private representation when all it would have taken was Justice to weigh in earlier on in the case.

Chairman BLUMENTHAL. Do you have any views, Mr. Odom, on the involvement of DOJ in these cases?

Colonel ODOM. I can give you a specific example. A few years back, Captain Sam Wright and I—I had been mobilized. I was back on active duty. We had a Reservist in the State of Alabama, which had a sovereign immunity issue. The Reservist was employed by one of the State universities in the State of Alabama, and Captain Wright and I were attempting to assist him in resolving a USERRA claim. He came back from the war. They did not rehire him.

Because of the sovereign immunity and Eleventh Amendment problems, the only entity that could sue on behalf of this Reservist was the United States Attorney for the Middle District of Alabama, as I recall, where it was located. We simply could not get that guy to take the case. It was very clear. And this individual had no right of action in State or Federal court because of the Eleventh Amendment and the way the Alabama Constitution reads. We could not get the local U.S. Attorney.

Now, subsequent to that time, the Department of Justice has established a USERRA Enforcement Division. I cannot stress to you enough the importance of when an employer gets a letter from Big Justice. I hate to admit this, Senator, but it is different than when they get a letter from John Odom. It really has a different impact on them.

And I would also, just to kind of come full circle, I would point out to you that when private counsel engages in a USERRA action, if that action goes to an arbitrator, we do not have the Federal Rules of Civil Procedure at our back to do the appropriate discovery that would be necessary to flesh out a case like Gene Savage's case, which requires a lot of data searching to find out and resolve all those pension issues and especially if there are other Reservists that have had similar things. You have got to have the Federal Rules of Civil Procedure at your back to compel discovery, and that is not available in an arbitration.

I did not mean to skip across the streams, but I thought that was an appropriate point to emphasize what were talking about, pre-dispute mandatory arbitration.

Chairman BLUMENTHAL. Well, I think those comments by both of you are very well taken, and both the authority and the resources available to Justice in these cases ought to be strengthened and enhanced.

You know, I have looked at the letter that is dated March 22, 2013, in your case, Lieutenant Savage, and it is striking in the unequivocal conclusion—I am quoting just one part of it: "Based on the facts as determined in our investigation and the application of the law to the facts, it is VETS' position that Mr. Savage's allegations are meritorious. Specifically, we find that FedEx is not in compliance with"—and it lists the statute. You know, I think that

enforcement by the United States Department of Justice in that kind of case would be absolutely appropriate. And an increase in the remedies that are available to plaintiffs like yourself both to deter misconduct and to provide for fairer compensation for the losses just described by Mr. Odom and yourself are absolutely appropriate as well.

Lieutenant SAVAGE. Sir, if I did not mention before, I did refer my case to the Department of Justice Civil Rights Division. That is who deals with these type issues. I was denied, and with really no concrete reason as to why. And so without the attorneys like Joe and Mr. Odom, I would have been dead in the water. There is not a lot of attorneys out there to take these cases. I am very fortunate to have these guys here doing this type of work.

Chairman BLUMENTHAL. Well, when I talk about the Department of Justice being strengthened in its authority, it may also need greater encouragement to take these cases and use both its existing authority and any new authority that it is given.

Mr. dePlanque, you have been very patient and very helpful in response to Senator Hatch's questions, and I do have a couple of inquiries based on your written testimony. I notice that you refer to a couple of the same gaps or loopholes in the law that I think General Davis may have mentioned regarding the refinancing of student loans and also the refinancing of mortgages. And you touch upon the loss of SCRA protections against exorbitant interest rates in both those circumstances. In other words, if a student loan is refinanced, the legal protections no longer apply. The same is true of refinancing of mortgages or home loans. And I wonder whether—you may not be authorized to say it, but whether the American Legion would support a legislative effort to fill those gaps and reform the law?

Mr. DE PLANQUE. Well, you know, the American Legion, we are a resolution-based organization. We are grass roots. We take our mandate for advocacy from what our members pass up. And the loan specifically is a little bit outside of my area of expertise, but I do have some colleagues who are very sharp on that. So I would be happy to, for the record, take that back, compare it to that, and get you an answer very quickly as to how our resolutions address that specific provision and certainly continue to work with you on that.

[The information appears as a submission for the record.]

Chairman BLUMENTHAL. And I think it was Mr. Odom who mentioned this gap, and it was the American Legion in their testimony before the VA Committee that spoke about it. So I would appreciate any additional information you may have on it.

And I appreciate your comments on the backlog in the remarks that you gave today. Senator Hatch has given me a couple of questions just to ask you for the record, if you do not mind responding. The Senate Working Group that he mentioned when he spoke to you issued a report a week or two ago, and the report reveals data about the numbers of claims and the rate at which they are processed. But it also says—and here is the quote: “Since at least 1993, the VA has underperformed in its duties to provide timely and accurate disability compensation claims for veterans. The VA continues to see the backlog rise every few years.”

Do you agree with that assessment that the problem has persisted and even growth for more than two decades? And the second part of his question is: What do you think is the primary reason that this has been such an intractable problem for so long?

Mr. DE PLANQUE. Well, first of all, I wanted to address something you said earlier when you were discussing your amendment, which we are aware of, to kind of hold VA and DOD's feet to the fire, and I wanted to thank you for that amendment and your commitment on that.

Second, as to the specific thing, yes, there has been a long trend, I would say even more than two decades. I have a poster in my office of the 1928 Poppy Days of the American Legion, which was a fundraising effort to help World War I veterans with their claims. And they certainly dealt with that. You know those stories of the compensation army that marched on DC.

This has been a consistent problem as it has gone through. There are a variety of reasons for it. Some of the ones that are most critical right now, in some cases it was a planning issue, not expecting certainly as a section of the workforce was moving towards retirement and as the baby boomers reach that age and not necessarily having new people to replace it. There have been some plus-ups to VA personnel in the last several years, some big plus-ups to personnel. But the VA themselves will tell you that when a claims worker starts working on it, it can take him 2 years to get up to speed to really be doing regular production level stuff. And so even if you double the staff in an office—I looked at statistics at one point last year that said that in most VA regional offices, 50 percent of the employees had been there less than 3 years. So you have some new employees who are being brought in to plus-up those levels, and so there is a learning curve for working with this. It is a little bit different than many adjudication systems, and so it takes some work. They need to have the time for training. They need to have—you know, as it stands right now, they are committed to 80 hours for training, but that sometimes gets sacrificed because you have to just keep doing production, you have to keep doing production. And we need to look at that.

VA employees have been pushed very hard, and they have been going on 3 years of mandatory overtime now. You know, 3 months of mandatory overtime might be taking care of a problem. Three years, you might have to look at whether or not you have the right number of people working on that job.

So both sides of the aisle have been very sympathetic to making sure and asking VA, "Do you have the right resources you need to meet this task?" They have consistently said that they have, but I think maybe some outside investigation and looking into that.

I think it is important when you look at what a group like the American Legion is, a third-party group that goes in there, we are not there to dig the VA, we are not there to do any—but we are there to look from the outside with no other interest than let us make sure that we get this right. The working group is a great example, again, of a bipartisan effort that went to listen to what the veterans had to say.

There are a number of things that go with that. VA did a better job of aggregating the errors that they get. Now that they are

tracking everything electronically—they are operating on a fully electronic model now—they should easily be able to list what are our common errors: do we have problems rating back claims, do we have problems rating PTSD claims, do we need to develop our training based on that, if there was a better aggregated system of that. They are just starting to use these sort of 21st century all electronic office place tools. It just went completely online last year. As with any new IT project, that takes a while, and there are going to be bugs and so forth. But we need to hold them kind of to the fire to make sure that as you put these tools in, you are really transforming the way you are working.

I mentioned at one point having electronic tools, it is not a cure-all. It is not something you can wave a wand and fix everything with. In some ways, if you just keep doing things the way you did it before, it just gives you the ability to make mistakes faster, and that is not helpful to anyone.

What you want to do is really look at the process and how you do that, and, you know, VA is a large veterans employer. I think they are the largest veterans employer in the Federal Government. There are a lot of veterans who go to work every day at the VA and believe that their mission is, “I am here to help veterans.” But a lot of them are frustrated because the system demands pressure to just turn it over without necessarily paying attention to the detail to get it right.

In the Army, as a sergeant, we used to teach our people, slow is smooth, smooth is fast. It is okay to sometimes take time, pay attention to detail. There is nothing wrong with just being a sergeant.

So I think if they take some of those messages back, and most importantly, if they continue to talk to the stakeholders, the veteran service officers, the people who are sitting there working on the other side of the claims system every day, if they take that feedback, if we continue to have a two-way street of dialogue and do not look at each other as adversaries but look at each as people who were trying to work towards—the point of the VA is to serve not the veteran service groups, not the VA employees, but the point of the VA is to serve the veterans. And so if we can work together to make that happen, I think communication is key to that.

Chairman BLUMENTHAL. Thank you. I have just a couple more questions from Senator Hatch. One is based on Senator Heller’s statement, which he submitted for today, which emphasizes that veterans have to be better informed and given the tools to understand the claims process and provide necessary information. I assume that you think that information is important and that we can improve that process.

Mr. DE PLANQUE. Absolutely, and we did a lot of discussion with Senator Heller and Senator Casey’s office, and I am working on those and getting the forms, getting the information to the veterans so that they can make an informed decision. You know, a veteran might have a choice between doing two types of hearings. If I order a book on Amazon, it is going to come up at the end, and it is going to say, “Do you want it in 4 or 5 days?” It is free. “Do you want it tomorrow?” It is going to cost you 12 bucks to do that.

If a veteran can look at that and say, you know, do you want an in-person hearing, that is going to take 12 to 15 months. Do you want a video hearing? We can do that in 5 months? Some veterans might think, you know, "An in-person hearing is more important for me. I need to sit there right across the table and look that person in the eye. I am willing to wait a little bit longer to get that." They make that informed choice because they have information from the VA about what that is going to be. Whereas, other veterans would say, "You know what? Fastest option, I am going to go with that." But they are making the choice that—and in that way, that helps the VA reduce some of the load to then be able to process some of the other claims in time. It is a better sort of triage. By giving them more information, we are not limiting the veterans' choices. We are giving them the information so they can make the right choice.

Chairman BLUMENTHAL. You have talked about various numbers, we have been discussing various numbers, and as high as they are, they only cover a portion of the benefit claims. In other words, those numbers only cover disability claims and do not include various other categories of benefits. Do you have any assessment of the overall situation when those other areas are included?

Mr. DEPLANQUE. Well, if you want to look at it, there are a number of other things that are out there. There are things that are called dependency claims. It could be a simple action. It is just adding—if I am a veteran and I have a husband or a wife, if I have a child that I want to add, because if I am disabled veteran above a certain percentage, I get additional compensation if I also have family members that I am supporting. Well, those dependency claims are only worth a tenth of a point in work credit. They receive a very low priority in the office because it takes work to do it and they do not really get a lot of credit in what they are graded on.

Some offices, because of the pressure to get the production down, we have understood talking to some of the people in the offices that they have pushed those aside entirely. They are not working those dependency claims at all. Well, that is going to create another backlog.

And keep in mind, for those veterans that are entitled to benefits based on having a spouse or based on having a number of children, if you are delaying that, you are delaying the benefit that they are getting. That is not fair.

You also look at the appeals side of things, and this is something—so much of this attention is focused on the initial claims of veterans. We are not seeing the appeals side, both the decision review officers in the regional offices, but also the Board of Appeals and then eventually sometimes the Court of Appeals for Veterans' Claims.

But when we look at a veteran who is taking maybe 400 days to get an initial claim decided, maybe a year or two to get an initial claim decided, once that claim goes into appeals status and goes up to the Board of Appeals, you can be looking at 4, 6 years or longer. I mean, it is a massive increase in time, which is one of the reasons that we have always stressed working on getting it right the first time so the veteran does not have to appeal it. Well, if they are

rushing to make decisions on some of these things with some of the provisional decisions, that is a situation where now a veteran has to appeal that, and now they are stuck in a situation where they have an even longer wait. You know, you get through one line, and then you realize that there is an even longer line over here that you now have to go stand in. And that is unfortunate.

We have recently had some conversations with both VA and some Members of the House and the Veterans' Affairs Committees of looking at ways—there were ways we improved some of the speed on initial claims with the fully developed claims process, possibly looking at things that may apply to that for the appeals process and see if there are things that—lessons that have been learned already in helping to slowly chip away at the backlog on the one side that are going to be helpful on the appeals side. And that is important because the appeal is going to be an issue. All of the attention is focused right now on the initial claims, but those appeals are out there. Those dependency claims are out there. Those death benefits claims and things like that, those are out there, and they are not necessarily counted in the numbers that people look at Monday morning.

Chairman BLUMENTHAL. Thank you.

I have one more area of questioning that I would like to direct to both General Davis and Mr. Odom and Lieutenant Savage if he has any comments on it. And you alluded to it, General Davis, I think Mr. Odom as well, when you said that most employers are, in quotes, savvy enough to avoid leaving a trail of evidence to show intent or motivation when they discriminate. And, of course, under USERRA, liquidated damages depends on a defendant willfully violating the law. The proof of willfulness I would guess is one of your major hurdles, never having done one of these cases myself. But in your experience and opinion, does the standard need to be changed? Does the law need to be reformed in some way so that either a private plaintiff or even the Department of Justice, because it has to meet a similar kind of burden of proof, have to be changed in order to make the law more enforceable?

Colonel ODOM. Senator, I will tackle that one first. I think you are going to have a difficult time redefining the word "intentional" in the statute, but I would urge the Senator to remember that even if you are able to prove an intentional violation, all you do is double the past due wages, which is really not adequate compensation.

I know this may be beyond the purview of what you really wanted to hear, but the way to put teeth in USERRA is to allow proof of compensatory and/or punitive damages.

When the mortgage industry straightened up and started flying right was when the DOJ came after them. I can file individual suits until the cows come home, and I am a rounding error to them on one day's trade. DOJ comes after them, that gets their complete and undivided attention because they are nationally chartered and you hold their charter, and they are going to pay pretty much when DOJ says, "You need to cough up some dollars."

And I do not mean to be anti-corporation. I have represented corporations throughout my legal practice and hope—before today's hearing, I had hoped to possibly do so after this hearing. But here is the reality: The potential for getting hit with a big damage

award makes people act better. And if that is what we need to do to make the employer see the light, then that is where the law needs to be changed, as opposed to requiring proof of intentional damages, which does nothing more—you could leave intentionality in there and then say and if intentionality is proven, then in addition to double the wages, you are entitled to—you are liable for compensatory and/or punitive damages, plus a mandatory award of attorneys' fees. That is going to get big business' attention, not just saying you have got to rehire him. With all respect, sir, I think that is where the—it might be a tough battle, but that is where you would get real teeth into the statute.

Chairman BLUMENTHAL. Thank you.

General Davis.

General DAVIS. Thank you, Senator. I would like to defer that question to our expert, who is Captain Sam Wright, who was one of the co-authors of the USERRA Act, an expert more than I on this subject.

Captain WRIGHT. Thank you. I just wanted to bring up Staff Sergeant—

Chairman BLUMENTHAL. Just for the record, sir, if you could identify yourself.

Captain WRIGHT. Yes, I am Samuel F. Wright, and I am the Director of the Servicemembers Law Center for the Reserve Officers Association.

Chairman BLUMENTHAL. Welcome, and thank you for your service.

Captain WRIGHT. Thank you. And the case of Staff Sergeant Copeland in South Carolina, where he was re-employed, but the State of South Carolina Department of Corrections did not reinstate his health insurance, so he had to utilize the VA process, and that took—I am not talking about compensation. I am talking about medical care, and that took many months. And then when he finally was able to get a colonoscopy, it turned out he had colon cancer. You know, if they had complied with USERRA, it would have been discovered maybe a year earlier, and the chance of successful treatment would have been much better.

That is not the kind of thing that under USERRA as currently enacted there is any relief for. You get compensation for the salary, wages, benefits, you know, maybe they would have to compensate what they would have paid for the health insurance, but not the damage to his life expectancy and his quality of life because of the delay in getting the medical care.

Chairman BLUMENTHAL. Thank you.

Lieutenant Savage, if you have any further comment?

Lieutenant SAVAGE. Could Mr. Napiltonia—

Chairman BLUMENTHAL. Without objection.

Colonel ODOM. Senator, we now have General Davis surrounded on both sides by lawyers.

Chairman BLUMENTHAL. Yes, but he is a Marine.

[Laughter.]

Chairman BLUMENTHAL. If you would identify yourself. You can turn on your microphone and identify yourself, please.

Mr. NAPILTONIA. Thank you, Senator. Joe Napiltonia. I am an attorney representing Lieutenant Savage.

What I will tell you is this: I just want to touch on what you said in your opening remarks about the damages. I think from a practitioner's standpoint, you are exactly correct. The damages are not adequate enough to deter bad behavior by companies. They are just not. And something akin to Title VII damages would be a good starting point. The question begs, as a veteran myself, why is it that sex discrimination and race discrimination claims are treated better or offered more remedies than a servicemember who is discriminated against? It just does not make sense to me. So that would be a good starting point.

In regard to the willfulness standard, for the record I think something similar to the Fair Labor Standards Act would be appropriate. I can tell you this: Many, if not most, of the servicemembers I represent have jobs that are low-paying. They are blue-collar folks, men and women, working class, whose damages are rather low, and so there is no incentive for an employer to do the right thing. They look at their ultimate exposure, and so it is rare that they are willing to come to the table and broker a deal.

I will tell you this, Senator: The only way oftentimes that I am able to negotiate a deal is through the threat of the attorneys' fee provision—which incidentally is not guaranteed. The statute says “may” and not “shall,” interestingly enough. But it is the threat of having to go through a trial, and you as an attorney understand how significant that would be in Federal court, a couple hundred thousands dollars to get through a trial and pre-trial motions. That is ultimately the deterrent. The problem is there are not enough attorneys like myself and Colonel Odom who are willing to invest our time without getting paid and the significant amount of out-of-pocket costs to litigate these cases.

And so I just wanted to thank you and say that I think that you have it correct. The damages are very inadequate, and they do not deter bad behavior.

Chairman BLUMENTHAL. Thank you. Thank you for being here today, and thank you for your representation of Lieutenant Savage. I want to thank all of the members of this panel, as well as the previous one, for, again, your service to our country and your service to the United States Senate in being here today.

I am going to use the material that we have gathered today and what I hope we may be able to gather from you in subsequent questions that we may have for you in arming ourselves to seek some of the changes that have been described today in the disability claims system and most especially in USERRA and the Military Lending Act and other statutes that are supposed to offer better protection to our servicemen and -women and our veterans than they have right now. I know that you have served many individual men and women who have been victims of some of these abuses, and their stories really need to be told just like Lieutenant Savage's has been told today.

And, in closing, let me just offer my thanks again to Lieutenant Savage for your courage in coming forward. You know, this hearing is not about FedEx; it is not about big corporations. It is about really the rule of law and honoring our servicemen and -women who honor us with their service, just as you have.

I know that the Military Officers Association and a number of other organizations have submitted statements, and they will be made part of the record, as will all of your written testimony.

[The statements appear as submissions for the record.]

Chairman BLUMENTHAL. I will be speaking out and doing so on the floor of the Senate and every opportunity I have to try to build momentum for the kinds of reforms that we have been discussing today. So once again, thank you for your service and for your help today.

We are going to keep the record open in case any of my colleagues have questions for you that they want to submit, and you can respond in writing. And with that, this hearing is adjourned. Thank you.

[Whereupon, at 5:08 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

UPDATED Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on Oversight, Federal Rights, and Agency Action

On

“Access to Justice for Those Who Serve”

Thursday, March 27, 2014
Dirksen Senate Office Building, Room 226
3:00 p.m.

Panel I

Col. Paul Kantwill
Director, Office of Legal Policy
Office of the Under Secretary of Defense (Personnel & Readiness)
Department of Defense
Arlington, VA

Dwain Alexander, II, Esq
Capt., United States Navy (ret.)
Navy Legal Assistance Attorney
United States Navy, Region Legal Service Office, Mid-Atlantic
Norfolk, VA

Panel II

John S. Odom, Jr.
Colonel, USAF JAGC (Ret.)
Jones & Odom, LLP
Shreveport, LA

Maj. Gen. Andrew Davis
Executive Director
Reserve Officers Association
Washington, DC

Lt. Kenneth “Gene” Savage
United States Naval Reserve
Memphis, TN

Ian DePlanque
Deputy Legislative Director
The American Legion
Washington, DC

**STATEMENT OF
COLONEL PAUL KANTWILL
DIRECTOR, OFFICE OF LEGAL POLICY
OFFICE OF THE UNDER SECRETARY OF DEFENSE (PERSONNEL & READINESS)
DEPARTMENT OF DEFENSE

BEFORE THE

COMMITTEE ON JUDICIARY,
SUBCOMMITTEE ON OVERSIGHT, FEDERAL RIGHTS, AND AGENCY ACTION

UNITED STATES SENATE

ON COMPLIANCE AND ENFORCEMENT OF THE SERVICEMEMBER'S CIVIL
RELIEF ACT AND FINANCIAL CHALLENGES CONFRONTING
SERVICEMEMBERS, VETERANS, AND THEIR FAMILIES IN THE CONSUMER
FINANCIAL MARKETPLACE**

MARCH 27, 2014

Good Morning, Chairman Blumenthal, Ranking Member Hatch, and Members of the Committee. It is an honor to appear before you and represent the Department of Defense and all of our great men and women in uniform. On behalf of the Department, I thank you for your assistance and support in protecting our Servicemembers and their families in the consumer financial marketplace. It is a pleasure to testify before you regarding the consumer financial issues we see affecting Servicemembers and their families and the Department's response to these issues and challenges.

I should first like to provide a bit of background on the current state of the Department's involvement in consumer law issues and financial readiness. I will then turn my focus to the Servicemember's Civil Relief Act (SCRA), with specific focus on the Department's efforts to support compliance and enforcement thereof. Thirdly, I will discuss other financial challenges confronting Servicemembers, , and their families in today's consumer marketplace. These challenges are many and varied, but I will focus primarily on issues and challenges that relate to the Military Lending Act (MLA)-- use of high cost loan products, particularly by Service members who have already exceeded their ability to repay their existing debt--as the Department sees this as the biggest, current financial challenge facing our Servicemembers and their families. I will conclude with some very specific observations on where the Department sees the consumer credit industry going and the actions currently underway in very specific response to these developments.

Department of Defense Financial Readiness Programs

The financial readiness of Servicemembers and their families is essential to their well-being and their ability to contribute to the mission. Over the course of my career as a Judge

Advocate, I have assisted Servicemembers and their families in deployed and garrison environments, and know well that a Servicemember distracted from the tactical mission by financial issues cannot be completely mission-focused. Thus, the Department has, for over a decade, created, refined, and enhanced financial readiness programs predicated on Servicemembers and their families receiving reasonable protections, acquiring at least a basic understanding of finances, and receiving access to helpful financial products and services.

Since the term “Financial Readiness” was first coined in 2003, the Department has continually improved and expanded its financial readiness campaign to increase Servicemember awareness of saving and financial stability, and enhance understanding of financial products and services. Utilizing a combination of education, resources, programs, and protections (such as the SCRA and the MLA), the campaign’s goal is to reduce the financial stress on military families, thereby enhancing overall mission readiness.

The Financial Readiness Campaign involves eight pillars of financial readiness:

1. Maintaining good credit
2. Achieving financial stability
3. Establishing routine savings
4. Participation in the Thrift Savings Plan and Savings Deposit Program
5. Retention of the Service-member’s Group Life Insurance and other insurance
6. Utilization of low-cost loan products as an alternative to payday lending and predatory loans
7. Use of low-cost Morale, Welfare and Recreation programs such as the Commissary and military exchange system
8. Preservation of Security Clearances

The campaign has been effective and is on-going. Servicemember participation in the Thrift Savings Program is strong. The Savings Deposit Program, available to all deployed Servicemembers, enjoys similarly strong participation rates. The campaign is augmented by nonprofit organizations that produce programs and campaigns such as “SaveandInvest.org” and “Military Saves.” The recent “Military Saves” campaign was very successful.

An essential element of our Personal Financial Readiness Program is proactive life cycle financial management services. The program addresses the effects of financial decisions on personal and professional lives, provides resources needed to make prudent consumer decisions, and offers related services and support.

A variety of resources are available to help Servicemembers and their families avoid the consequences of poor financial decisions, and to put them on the path to financial freedom. Education, counseling, and training are available both on-line and in-person to military members and families of all components. The Department has Personal Finance Managers (PFMs) at every military installation who provide financial counseling, education, training, and services. All PFMs hold a nationally recognized financial counselor certification.

As part of the DoD Military Family Life Consultants program, the Department has additional resources in the form of Personal Financial Counselors who augment other resources and provide “surge” capability to units or installations at critical times or with critical needs.

Other excellent resources, such as Military One Source (MOS), a confidential, Department of Defense-funded program providing comprehensive information on military life at no cost to active duty, Guard and Reserve Component Members and their families, are available 24 hours per day for all Service members and their families. MOS offers free and confidential

financial consultations over the phone or face-to-face, in addition to providing specialized financial and tax planning consultations. The “Money” section of MilitaryOneSource.com provides financial information and resources that include calculators, tips, books and CDs, and personal finance newsletters.

The Department has also partnered with nationally-recognized, financial literacy non-profit organizations. Groups like the Consumer Federation of America (CFA), the Better Business Bureau Military Line, and the Financial Industry Regulatory Authority Education Foundation provide tremendous resources free of charge. The Department and CFA conduct the tremendously-successful Military Saves Campaign every year. DoD also partners with the Department of the Treasury and the Federal Trade Commission (FTC)—just two of more than twenty such organizations with whom we work in Treasury’s Financial Literacy and Education Commission to address consumer awareness, and provide information on identity theft and insurance scams to Servicemembers and families.

The Servicemember’s Civil Relief Act

The Department recognizes and appreciates the critical importance of the SCRA. It is clear that no other statute provides such a unique breadth of benefits and protections for Servicemembers. The purpose of the SCRA is a lofty one, to provide Servicemembers’ peace of mind, knowing that their personal affairs and economic interests will be protected while they put their lives on the line in defense of our Nation, and the Act has lived up to that goal.

The Act’s protections are broad and diverse. It protects Servicemembers from evictions, default judgments, and foreclosure. It allows them to delay judicial proceedings and to place caps on their interest rates. It also provides them and their spouses certain tax relief. Over its

long history of more than 70 years, it has lessened some of the many burdens associated with military service.

Congressional Efforts to Strengthen Enforcement of the SCRA

Congress has continued to play a critical role in protecting our Servicemembers and their families. Over the last few years Congress has strengthened the SCRA's protections through such measures as the Veterans' Benefit Act of 2010, which provided for additional civil enforcement, as well as monetary damages and attorneys' fees. It also clarified that the Attorney General has similar enforcement authority on behalf of Servicemembers and other aggrieved persons.

Congress has extended the 6% interest rate cap for pre-service mortgage obligations. This interest rate cap, which had been in effect for decades, had previously applied only to actual periods of active duty. Now the interest rate cap for pre-service mortgage obligations has been extended for an additional 12 months after leaving active duty. Congress also amended the SCRA to extend protections from foreclosure on pre-service mortgage obligations for twelve months after the Servicemember leaves active duty..

SCRA Education and Enforcement

Congressional support through the SCRA and other measures, however, means little if our Servicemembers are not aware of their rights. Thus, the Department has developed programs to ensure that Servicemembers know about the benefits and protections of the SCRA. This educational process involves coordinated and overlapping efforts to alert Servicemembers and their commanders of these benefits and protections and then to ensure that the proper counselors

are there to help the Servicemember fully understand the nuances of the relevant laws and receive their full protections under the law.

The Department's efforts to educate Servicemembers and their families center around installation readiness facilities, pre-deployment and re-deployment process facilities, and reserve component mobilization and demobilization processing centers. These reserve component processing centers have been of critical importance because two of the most important economic protections and benefits—the 6% interest rate cap and the extension of foreclosure protections—apply only to pre-service obligations and thus effect predominately Reservists and National Guardsmen called to active duty. As a result, SCRA and related financial training at pre-deployment and re-deployment processing facilities is more detailed and helpful than ever before.

Thus, it is with pride we assert that SCRA education, compliance, and enforcement is a “good news story.” Certainly there have been accounts of mortgage foreclosure abuses and other prominent SCRA violations. We know well, the ravages the economic crisis and burdens of more than 13 years of sustained conflict with related deployments have had upon the financial fitness of military families.

As it relates particularly to the SCRA, however, we have been effective in curbing foreclosure abuses against military personnel and their families. While there may still be some foreclosures in process or in the “pipeline,” it appears that the majority of the abuses seen in the past have been curbed. This is the result of sustained and hard work within the Department, with other government agencies, as well as with the financial industry.

The Department is fortunate to enjoy a very cooperative working relationship with other federal agencies relating to consumer law issues—the Department of Justice, the Consumer

Financial Protection Bureau (CFPB), the CFPB's Office of Servicemember Affairs (OSA), and the Office of the Comptroller of the Currency (OCC), to name just a few. Federal enforcement actions brought by our colleagues at Justice have been swift and effective. State and local compliance and enforcement efforts are critical. We are grateful for our cooperative working relationships with consumer advocates and other organizations such as the CFA and the HOPE NOW Alliance, dedicated to assisting all persons with their financial needs—but who are also tremendously dedicated to our military families.

We have been and remain engaged with the consumer financial industry. If we are to represent and protect our Servicemembers and their families—and we will—it is essential to have open lines of communication with the industry. We are proud of our cooperation with the American Bankers Association, the Association of Military Bankers of America, the Credit Union National Association, and the Defense Credit Union Council, in efforts to keep them apprised on the SCRA and the MLA, and advise them of issues affecting our Force. Our close working relationship with the Financial Services Roundtable and the Housing Policy Council has allowed us to advocate frequently and effectively on financial issues affecting the Force. The industry remains supportive and complementary of the Department's enhancements to the Defense Manpower Data Center's database capabilities, providing industry with real-time, public-access, large batch data search capabilities and allowing industry to identify military customers and provide them SCRA and other benefits to which they are entitled. Other initiatives include forms, accepted by the financial industry, that allow Servicemembers to invoke their SCRA protections more easily. Our work with industry and other agencies has already produced great developments regarding protections and benefits for military families disadvantaged by Permanent Change of Station moves.

In conclusion, while there may be more foreclosures on the horizon, and we are not yet out of the "economic woods," we are very encouraged by solid progress on the SCRA front.

The Military Lending Act and Related Financial Challenges

Despite the aforementioned successes on the SCRA front, we have commensurate concerns regarding small dollar lending and related products and services. Seven years ago, the Department recognized there were some specific lending practices causing problems for Servicemembers and their families which could not be adequately addressed through education programs and awareness campaigns. Significant Departmental and Inter-Agency action resulted in our Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents (2006), and subsequent Congressional action in the form of the Talent Amendment, commonly referred to as the Military Lending Act (MLA) (Sec 670 of the John Warner National Defense Authorization Act for FY 2007). The MLA gave the Department authority to write a regulation to define "credit" subject to the limitations posed by the MLA.

With the assistance of the Prudential Regulatory Agencies we did just that, and the resulting rule (32 CFR Part 232) covered tax refund anticipation loans and closed-end payday loans and vehicle title loans -- both of which are tightly defined. This good work stamped out the majority of abuses in the areas regulated, and we have relied upon the enforcement efforts of Federal and state regulators to great effect.

The Department has remained vigilant in this area. Annually, we send a representative to the National Conference of Consumer Credit Administrators to ensure uniformity in compliance by covered creditors. Each year the regulators have reported that their examinations have found compliance with the Rule and no need for enforcement action. In some states where such loans

are authorized, but in which enforcement authority has not been provided, the Department has engaged the States, requesting they make technical amendments to their statutes allowing for administrative enforcement. To date, 37 States either do not authorize these loans or provide their regulators with adequate administrative enforcement authority.

The Department has also been working with the FTC and the CFPB to assist in recording violations of the SCRA and the MLA in the FTC's law enforcement database – Military Sentinel. DoD legal assistance attorneys and financial counselors assist military clients with recording instances of fraud, deception, abusive practices, and identity theft into the database so U.S. Attorneys, State Attorneys General, Federal and state regulators, and other law enforcement agencies have access to allegations.

Our Servicemembers, families, legal assistance attorneys, and financial counselors have informed us that the MLA legislation has been extremely effective in stamping out abuses involving the types of credit covered. In addition, military Relief Societies, military banks, and credit unions have assisted Servicemembers and families in need. However in response to changes in the marketplace and Federal and state policies, lenders have sought, and are seeking, to create products and services which fall outside of the MLA and the enforcement actions mentioned above.

Several years removed from its enactment, however, our financial counselors and legal assistance attorneys still see clients who have payday or vehicle title loans. They also report that internet and overseas opportunities exist outside of the law, and that some unscrupulous lenders – and even borrowers – still attempt to skirt or evade the law, by entering into loans that are covered by the MLA. Additionally, many lenders now offer loans in addition to those covered by the MLA that charge interest greater than 36 percent and contain terms that are outside of the

current definitions in the implementing regulation for the MLA. The credit marketplace has changed since 2007 and we anticipate that it will continue to adjust to market demands and changes in state and Federal policy.

Lending over the internet remains an issue, with the most egregious offenders located offshore or outside the United States, thereby avoiding coverage under the Act. The use of allotments in consumer credit transactions and the abuse of high cost installments loans are also of concern to the Department.

The Department's Efforts

This has not escaped our—or Congress'—attention, and at the direction of the Congress, the Department is studying changes in the credit marketplace and their effects on Servicemembers and their families. DoD posted an Advanced Notice of Proposed Rulemaking (ANPR) in the Federal Register on June 17, 2013 through August 1, 2013, requesting public comment on the report request made on pages 782 and 783 of House Report 112-329, to accompany H.R. 4310. Specifically, the ANPR requested the public respond to the following four questions:

- (1) The need to revise the implementing regulation (32 CFR Part 232), with special attention to the definition of covered consumer credit;
- (2) If there is a need for change, what should be included in any revision and why;
- (3) What should not be included in any revision and why; and
- (4) Examples of alternative programs designed to assist Servicemembers who need small dollar loans.

The perspective provided in the responses depended primarily on the role of the respondents or the constituents the respondents represented. Eleven letters from 5 bank associations, 7 credit union associations/affiliates/councils/leagues, 2 financial services/installment lender associations, one credit union and one financial services company expressed their satisfaction and support for the current regulation and warned against the potential for unintended consequences if the scope of the definitions are extended. Four of the responses from credit union associations and the one financial services company went further to say DoD should continue to take targeted action through the regulation against problematic lenders. Three responses from rent-to-own (RTO) companies expressed that RTO is not credit and therefore should not be subject to the regulation and that RTO is “an attractive marketplace choice for many, including some service members.” The response from the online lenders defended the need for access by Servicemembers to small dollar, short term credit. Seven letters from 45 consumer advocacy groups advocated extending the scope of the definitions in the regulation, and 44 consumer groups recommended extending the scope of the definitions to cover all credit subject to the Truth in Lending Act (TILA). One of the Military Relief Societies, a national veterans support organization, and two individuals also provided input to extend the scope of the definitions in the regulation.

The perspective of agencies within state governments has been particularly insightful to the Department, since many of these organizations have oversight and enforcement responsibility over several of the credit products in question. Fourteen State Attorneys General recommended covering the full range of credit products and advocated including overdraft protection and RTO. Three State Departments of Veterans Affairs and the association representing 49 state credit regulators recommended covering all credit subject to TILA. Finally, a letter signed by 54

Members of the House of Representative recommended extending the scope of the definitions to close loopholes that allow continued access to payday and vehicle title loans, and a letter signed by 23 Senators advocated extending the scope of the definitions, along with covering installment loans.

Loan providers expressed their concern that changes in the MLA may have unintended consequences for military borrowers (such as limiting credit), add to their regulatory burdens, or restrict their ability to offer high cost loans. Consumer advocates and state officials said that if the MLA has been designed to protect military borrowers from high cost loans (even if limited to payday and vehicle title loans), the MLA cannot fulfill its role without considering loans with longer terms (that can feature installments), open-end credit, and increased principal. These opposing viewpoints lead to the important question whether the limitations provided by the MLA since 2007 can be continued without creating undesirable consequences.

As a result of what we have learned, the Department assembled the Prudential Regulatory Agencies and the CFPB to explore revisions to the regulation. We established a team of skilled economists and analysts to assist us in this initial rulemaking, in addition to a similarly-skilled team of drafters. From all of these sources, and with all of this assistance, we will determine the best course our proposed rulemaking should take.

As our work progresses, and in response to these challenges and in support of our Servicemembers and their families, the Department remains proactive and vigilant; employing multi-faceted education and training programs, and leveraging all available resources, including extensive cooperation with all of the Agencies and partners described above.

The Services Legal Assistance Programs have continued to provide expert legal assistance in all consumer law areas. These services, focused where needed at the installation

level, are available to assist in a large number of consumer law related areas. These include services in all the areas noted above, to include the burgeoning areas of suspect auto loans/purchase practices, deployment-related SCRA violations, and aggressive debt collection practices.

The Services continue to designate consumer law matters in their highest tiers of available services and provide specialized training to all legal assistance practitioners. The Department's long-term association with the Legal Assistance for Military Practitioners Committee of the American Bar Association (ABA) and its Pro Bono Project (PBP), enables the Services' Legal Assistance organizations to refer eligible clients to the PBP, where they receive both in- and out-of court-representation from local volunteer attorneys who are subject matter experts in consumer law. The PBP has been so successful that the ABA has pushed the concept to state and local bar associations, who are now offering very similar programs in conjunction with their local military installations.

The Way Ahead

Current efforts of the Department, other Government agencies, and non-profit organizations are important. But even more important are future efforts to protect and advocate for our Servicemembers, the way ahead on consumer law issues affecting the Force, and how we work to meet those challenges. We remain committed to balancing regulation with education and assistance to maintain the financial readiness of the force. The MLA and implementing regulation have done what was intended over the past seven years, and the Department plans to maintain a steady approach to the implementing regulation to balance the protections offered through the regulation while sustaining unimpeded access to helpful financial products.

On behalf of the Department, I thank you for your assistance and support. It is my privilege to appear before you and I look forward to your questions.

NOT FOR PUBLICATION
UNTIL RELEASED BY THE
SENATE COMMITTEE ON THE JUDICIARY

STATEMENT OF
DWAIN ALEXANDER, II
SENIOR CIVILIAN ATTORNEY
REGION LEGAL SERVICE OFFICE, MID-ATLANTIC
UNITED STATES NAVY
BEFORE THE
SENATE JUDICIARY SUBCOMMITTEE ON OVERSIGHT, FEDERAL RIGHTS AND
AGENCY ACTION
ON
MARCH 27, 2014

NOT FOR PUBLICATION
UNTIL RELEASED BY THE
SENATE COMMITTEE ON THE JUDICIARY

Chairman Blumenthal, Ranking Member Hatch, and distinguished members of this Subcommittee, as a legal assistance attorney in the United States Navy, I am honored and humbled to have the privilege of representing the Navy's Judge Advocate General's Corps and the servicemembers we support.

I am a civilian legal assistance attorney, who, like all uniformed and civilian legal assistance attorneys, works to support and enhance sailor and mission readiness by addressing their legal readiness issues. From my practice I am constantly reminded that our national defense begins with the individual servicemember. There is and has to be a great deal of focus on the military training and equipment that will be applied in battle. It is important to remember that the servicemember is not a machine that can be programed, fueled, launched and repaired. Servicemember mission readiness must include the legal, financial, medical, and familial issues that are part of the human element. Denial or inattention to the human elements of readiness can impact the servicemember negatively, affecting focus, morale, dedication, and in the end - success and survival. My office focuses on the legal needs of the servicemember.

One of the best protections the law provides the servicemember is the Servicemember's Civil Relief Act (SCRA). The Act contains 60 statutory sections that among other rights and benefits provide for the: reduction of interest rates, termination of certain contracts, stay of civil proceedings, reopening of default judgments, tolling of the statute of limitations, and court intervention prior to action to foreclose or repossess property.

Working with the SCRA I have seen its impact on the servicemember, the military family, and the businesses that engage in commerce with the servicemember. I have learned that our national defense comes at a cost to everyone. The servicemember risks her life and faces the uncertainty of the diverse defense needs of the Nation. The servicemember's family deals with frequent moves, fear and anxiety over dangerous duties, deployments, and the possibility of prolonged absences. Individuals engaged in commerce manage the cost associated, with the risk that the servicemember may be unable to comply with an obligation due to military duty or that additional costs may be incurred in transactions with the military. The SCRA provides the men and women of our armed forces flexibility in their private lives enabling them to provide service to the nation without being penalized and distracted by their inability to comply with some civil matters. In providing this flexibility and protection the SCRA strikes a balance between individual rights and the nation's need for a mission ready fighting force.

The SCRA embodies a public policy extending and protecting the rights of servicemembers that dates back to at least the civil war where Congress acknowledged that a focused servicemember is vital to successful mission accomplishment. This public policy and its implications for the nation's defense can be thwarted by the application of one provision of the SCRA. Section 517 of the SCRA allows the servicemember to waive any and all rights provided by the Act. It sets forth the conditions for this waiver, but in comparison to many other statutes that establish a policy protecting a national interest, the SCRA does not expressly and specifically prohibit the prospective use of the waiver or any other law that would act as a waiver. The laws of many states require that a valid and enforceable waiver be voluntarily executed with an understanding of the rights being waived and the facts that give rise to the right.

This knowledge requirement is especially important for the servicemember who may be called to serve at any moment in response to national or international developments. The use of prospective waivers removes the element of knowledge and makes the waiver unenforceable.

The application of waiver requirements found in state law is not an effective defense for servicemembers. Young sailors and soldiers do not have the financial resources or legal understanding to argue the law. They are trained to follow orders and regulations. The prospective waiver on its face appears to be lawful. For Example: Section 535 of the SCRA allows a servicemember to terminate a lease any time after she receives orders to deploy in 90 days or more or for permanent change of station (PCS). The servicemember who signs a prospective waiver with a landlord and then receives orders to deploy or PCS may not know the law or challenge the waiver. This servicemember will follow the landlord's direction that she waived her rights under the SCRA and comply with the written contract. This servicemember will be subject to additional costs and penalties that could: prohibit her from terminating the lease, expose her to financial risk from the vacant property, add transportation costs, substantially increase living expenses, and/or prevent her from sending her family home to a more secure and supportive environment. The emotional stress placed on the servicemember and her family from this housing situation can be devastating. Most of our servicemembers will follow the terms of the contract and waiver to their detriment. The fact that prospective waivers are unenforceable does not matter to the young servicemember when she does not know the truth.

Individuals and companies employing the prospective waiver seek to avoid the risks and cost of conducting business with the men and women of the military. There are two primary reasons for this: they believe that the law as applied in their case against is unfair and/or that the servicemember does not need to use the law.

The perception that the application of a given law in a given case may be unfair is not unusual and in fact may be correct in some cases. The application of the SCRA, at times, may appear unfair, as is true with many of the statutes and regulations imposed on an industry to effectuate national policy. However, when the policy objective of the law is a national priority, the needs of the nation must prevail over the individual. The avoidance of the rights afforded servicemembers under the SCRA through waiver, arbitration, or declaration remove the balance imposed by the SCRA and shift the burden for mission readiness to the individual servicemember. Once this burden is shifted, the commanding officer can no longer issue an order to deploy knowing that the civil legal matters of his servicemembers are protected during the deployment. The members of her unit will have to address the: distractions of law suits, loss of property, and denial of rights. The use of the waiver effectively places command and control of this aspect of readiness in the hands of the individual or company seeking to enforce the waiver.

When an individual or company evaluates the rank, duties or status of a servicemember and determines that for this individual the SCRA should not apply, they fail to understand the importance of every individual in the armed forces. Each servicemember is part of a unit and that unit is an integral part of the command's overall mission. There are no superfluous

members of a command or mission. An E-3 is a junior ranking enlisted servicemember. This individual may be trained to maintain any number of complex offensive or defensive systems on a ship. One such defensive system is the close in weapons system (CIWS) that protects our warships. It detects incoming threats and propels a wall of bullets to destroy the threat. This E-3 is important to the command's mission and the ship's defense. Distractions to this individual can result in faulty maintenance and weapon malfunction. The cook is a position in the military that may not be considered an element of combat; however, that cook may prepare meals for 500 sailors on a ship. That cook is critical to the command's mission. The health and morale of an entire command can be impacted by one cook. If he is distracted due to legal issues and makes a mistake he can give those 500 people food poisoning. A company or individual cannot be allowed to select a servicemember and determine that because of his rank or position he should have fewer rights than others.

The application of prospective waivers under the SCRA's waiver provision has the potential to undermine the entire Act and the national policy it supports. It is a natural function of an effective business to want to control costs. However, if the use of the prospective waiver is considered an acceptable means to control costs, the provision will be employed and deployed by all types of businesses: mortgage lenders, banks, credit unions, sub-prime lenders, automobile dealerships, motor vehicle leases, furniture merchants, service contract companies, storage facilities, and others. Any entity that disagreed with the application of the law could require a waiver. When one company obtains an advantage because of the waiver, then others will follow. Once the market is saturated with waivers in contracts the election is no longer voluntary and the impact on the SCRA is disastrous. A company or individual should not be allowed to undermine this important policy and determine that their needs are more important than either the servicemember's rights or the nation's defense.

We do our best to educate servicemembers on their rights and to protect servicemembers when their rights are violated. It is important that the SCRA is clarified to allow a waiver only after the event giving rise to the right for which the waiver is sought exists and is understood by the servicemember.



JPMorgan Chase Bank, N.A.
PO BOX 469030
Glendale, CO 80246-9030

May 27, 2011

John [REDACTED]
[REDACTED]
[REDACTED]

SCRA short sale inquiry

Account: [REDACTED]
Property Address: 228 [REDACTED]
[REDACTED] 4

Dear John [REDACTED]:

We are responding to your recent request about a short sale for the account above. You recently asked about your eligibility to participate in the short sale option through our Homeowners Assistance Department.

We would like to take this opportunity to remind you of benefits potentially available to you under the Service members Civil Relief Act ("SCRA"). You may be eligible for an interest rate cap of 6% per year on your loan while you are on active duty and for one year after your active duty service ends. In addition, you may qualify for protections from foreclosure, sale, and seizure of property while on active duty and for nine months after your active duty military service ends. Further, you may be eligible for protections from negative credit reporting and eviction. You may wish to speak with an attorney about the benefits potentially available to you before continuing with the proposed short sale.

If you still wish to proceed, in order for us to begin the short sale process, the attached Voluntary SCRA Waiver must be signed and returned to us at the address or fax number provided below. If the Waiver is executed, acknowledged, and/or initialed via fax, it will be considered the same as an original signature.

Regular/Overnight Mail: Chase Fulfillment Center
710 South Ash St.
Suite #200
Glendale, CO 80246

Fax: (866) 282-5682

Please note that a short sale option will not be considered until a signed copy of the enclosed Voluntary SCRA Waiver is received by us at the address or fax provided above.

Voluntary Waiver of SCRA Rights

I, [REDACTED], acknowledge that I may be eligible for protections under the Service members Civil Relief Act ("SCRA"). I understand that the benefits of the SCRA for eligible service members include, for certain debts, a maximum interest rate of 6% per year while on active duty and for one year after the completion of active duty service. In addition, the SCRA provides qualifying service members protection from sale, foreclosure, or seizure of property, or eviction, during active duty and for nine months after the completion of active duty service, and from default judgments.

I have a loan serviced by JPMorgan Chase Bank, N.A. ("Chase"). The loan number on my loan is [REDACTED]. The loan has a current unpaid principal balance of \$[REDACTED] as of May 27, 2011. The loan is secured by an interest in property located at [REDACTED]. I acknowledge that as a service member as defined by the SCRA, I may be eligible for certain SCRA protections on this loan. I acknowledge that as a service member, as defined by the SCRA, Chase extends additional benefits for loans beyond those required by the SCRA. The benefits available to service members under Chase policy may include loan modifications, deeds in lieu of foreclosure, and forbearances, among other loss mitigation alternatives. In addition, Chase policy may provide for interest rates below 6% and foreclosure protection beyond nine months after the completion of military service. In addition, Chase may provide for additional foreclosure protections for active duty service members in some circumstances.

I acknowledge and understand the various protections and/or benefits potentially available to service members under the SCRA and Chase policy. Understanding these benefits, it is my intent for Chase to approve the short sale of the property located at [REDACTED]. I acknowledge that Chase has in no way solicited, required, demanded, or otherwise requested that I waive any of my SCRA rights. I have been advised that I should seek the advice of an attorney prior to executing this waiver. I have also been advised that I should seek professional tax advice regarding the effects of this waiver. I acknowledge that I have read and understand this waiver. No conditions or promises were made to me in conjunction with this waiver. I hereby, knowingly and voluntarily, consent to the short sale of the property referenced above, and waive and surrender any and all rights to which I may be eligible under the SCRA in connection with that sale. This waiver is executed during or after my period of active service.



**LEASE ADDENDUM REGARDING
U.S. SERVICEMEMBERS' CIVIL RELIEF ACT**
(Each Tenant must sign a separate Addendum)

- 1. **Reason for Addendum.** In order to balance the needs of Landlord and Tenants and allow Tenants that are service members in military service with the Army, Navy, Air Force, Marines or Coast Guard (whether on active duty with the regular armed services, National Guard or Reserves) or commissioned officers of the Public Health Service or the National Oceanic and Atmospheric Administration (collectively "Servicemember") to meet their military service obligations and, further, in order to comply with the requirements of the U.S. Servicemembers' Civil Relief Act ("SCRA") and the Virginia Residential Landlord Tenant Act ("VRLTA"), Landlord and each Tenant have executed this Addendum.
2. **Military Status; Notice Requirement.** The undersigned Tenant ____ is or ____ is not a Servicemember entitled to benefits under the SCRA. Tenant agrees to notify Landlord at any time, if and when Tenant's military status changes, they are required to go on temporary duty ("TDY") for three (3) months or more, they receive orders for a permanent change of station ("PCS") or their duty station changes or is scheduled to change, or if Tenant's military duties otherwise interfere or reasonably may interfere with Tenant's duties and obligations under the Lease.
3. **TDY and PCS.** Tenant acknowledges that Para. # ____ of the Lease requires that Tenant notify Landlord if Tenant is not going to occupy the property or be away from the property for more than seven (7) consecutive calendar days, even if Tenant goes on TDY or receives orders for a PCS. If such event(s) occur, Tenant shall timely notify Landlord prior to such TDY or PCS (except in emergency situations) and make suitable arrangements to ensure that the remaining terms and conditions of Tenant's Lease are satisfied. Specifically, Tenant is reminded of their duty to timely pay any and all rent due, protect the property, and keep the property secured.
- 4. **Waiver of SCRA; Non-Waiver of VRLTA Rights.** In accordance with SCRA § 517 (as amended or replaced from time to time) Tenant hereby waives all rights, duties and liabilities of any kind under the U.S. Servicemembers' Civil Relief Act, including but not limited to those provisions relating to automatic stays of proceedings for eviction, for nonpayment or rent or other breach of the Lease. This waiver shall not be deemed or construed to reduce or adversely affect Tenant's rights reserved under the VRLTA, namely Va. Code Ann. § 55-248.21:1 (Early Termination of Rental Agreement by Military Personnel), including but not limited to Tenant's right to terminate the Lease early if certain conditions relating to TDY or PCS occur. All other rights, duties and obligations of Landlord and Tenant set forth in the Lease shall remain unchanged and in full force and effect.

LANDLORD:**TENANT:**_____
Sign and Print Name (Date)_____
Sign and Print Name (Date)



**VIRGINIA ASSOCIATION OF REALTORS®
RESIDENTIAL LEASE**



(This is a legally binding contract. If not understood, seek competent advice before signing.)

EFFECTIVE DATE OF LEASE: _____

This Property will be shown and made available to all persons without regard to race, color, creed, religion, national origin, sex, familial status, handicap or elderliness in compliance with all applicable and federal, state and local fair housing laws and regulations.

THIS LEASE AGREEMENT (the "Lease") is made as of the ____ day of _____, 20____, by and between _____ ("Landlord") whose address is _____ through _____ ("Listing Broker," who represents Landlord) whose address is _____ ("Tenant"), and _____ ("Leasing Broker," who does _____ or does not ☐ represent Tenant). Listing Broker is sometime hereinafter referred to as "Agent".

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained therein, Landlord and Tenant agree as follows:

Landlord does hereby lease and demise unto Tenant, and Tenant does hereby lease and take from Landlord the Dwelling Unit hereinafter described (the "Dwelling Unit") on the terms and conditions set forth in this Lease.

1. SUMMARY OF LEASE TERMS:

a. Address of Dwelling Unit:

b. Term

Commencement Date of Lease: _____ at _____ am/pm
Length of Term is: _____
Lease Term Ends: _____ at _____ am/pm

c. Rent

Monthly Rent: \$ _____
Per Diem Rent: \$ _____
Prorated Rent (for period from _____ to _____): \$ _____
Additional Rent:
 Non-Refundable Lease Fee: \$ _____
 Non-Refundable Pet Fee, if applicable: \$ _____
 Pet Rent, if applicable: \$ _____
 Damage Insurance: \$ _____
 Actual cost of policy: \$ _____
 Administrative fee: \$ _____
 Opt-out fee: \$ _____
 Renter's Insurance: \$ _____
 Actual cost of policy: \$ _____
 Administrative fee: \$ _____
 Opt-out fee: \$ _____

Landlord and Agent will not be liable to Tenant or any guest, invitee, or occupant for injury, damage or loss to person or property caused by criminal conduct of other persons, including theft, burglary, assault, vandalism, or other crimes. Landlord and Agent will not furnish security personnel, security lighting, security gates or fences, or other forms of security. If the employees of Landlord or Agent are requested to render services not contemplated in this Lease, Tenant will hold Landlord and Agent harmless from any and all liability for same. If information on Tenant's rental history is requested by others for law enforcement or business purposes, Landlord may provide same in accordance with the "Tenant Consent Form." Landlord and Agent, in addition, shall not be liable under any circumstances of Tenant's failure to provide Landlord or Agent with prompt notice of any such conditions existing in the Dwelling Unit or Premises. Tenant hereby releases Landlord and Agent from any and all liability and agrees to indemnify Landlord and Agent for such losses, with respect to Tenant, and all authorized occupants and guests or invitees of Tenant.

14. **PETS.** No pets of any kind will be allowed to be kept or maintained on the Dwelling Unit without Landlord's prior written consent and the execution of an addendum entitled "Pet Addendum." Landlord reserves the right, however, to prohibit pets, except for qualified service animals, completely from the Dwelling Unit and Premises.
15. **REPRESENTATIONS IN APPLICATION FOR LEASE.** This Lease has been entered into in reliance on the information given by Tenant on Tenant's "Application for Lease", which by this reference is made a part of this Lease. Tenant shall advise Landlord or Agent in writing of any changes to the information contained in the application. If any of Tenant's material representations are found to be misleading, incorrect, untrue or omitted, Landlord may immediately terminate this Lease and require Tenant to vacate the Dwelling Unit.
16. **FINANCIAL RESPONSIBILITY.** If Landlord is required to make any payment to Tenant hereunder, Tenant agrees that such financial obligation will be satisfied solely from Landlord's estate and interest in the Dwelling Unit and the real estate upon which the Dwelling Unit are situated and the improvements of which it is part, or the proceeds thereof, so that Landlord will incur no individual or other liability for such financial obligations.
17. **NOTICE.** All notices shall be in accordance with Section 55-248.6 of the VRLTA, which provides for written notice to be given by regular mail or by hand delivery, with the party giving notice retaining a certificate of mailing, or delivery of the notice, as the case may be. Notice to the Landlord will be given to the Agent's Office or to such other place as may be specified by Landlord or Agent. Notice to Tenant will be given to the address of the Dwelling Unit. Landlord reserves the right for Landlord and Tenant to send notices in electronic form; however, if Tenant so requests, Tenant may elect to send and receive notices in paper form. If electronic delivery is used, the sender shall retain sufficient proof of the electronic delivery, which may be an electronic receipt of delivery, a confirmation that the notice was sent by facsimile, or a certificate of service prepared by the sender confirming the electronic delivery.
- ➔ 18. **MILITARY.**
 - a. Any Tenant who is a member of the armed forces of the United States or a member of the Virginia National Guard serving on fulltime duty or a Civil Service technicians with a National Guard unit may, through the procedure detailed in subsection (b) of this section, terminate this Lease if the Tenant (i) has received permanent change of station orders to depart thirty-five miles or more (radius) from the location of the Premises; (ii) has received temporary duty orders in excess of three months' duration to depart thirty-five miles (radius) from the location of the Premises; (iii) is discharged or released from active duty with the armed forces of the United States or from full-time duty or technician status with the Virginia National Guard; or (iv) is ordered to report to government-supplied quarters resulting in the forfeiture of basic allowance for quarters.
 - b. If Tenant qualifies to terminate this Lease pursuant to subsection (a) of this section, Tenant may do so by serving on Landlord a written notice of termination at least thirty (30) days prior to the next Rent due date. The termination date shall be no more than sixty (60) days prior to the date of departure necessary to comply with the official orders. Prior to the termination date, Tenant shall furnish Landlord with a copy of the official notification of the orders or a signed letter, confirming the orders, from Tenant's commanding officer.
 - c. Nothing in this section shall limit the amount of the Security Deposit that Landlord may retain as provided in section 3 of this Lease.
 - ➔ d. Landlord reserves the right to require, as a condition of this Lease, that Tenant execute a waiver of all or

- c. part of the rights the Tenant may otherwise have under the Servicemembers Civil Relief Act. If no waiver of rights under the Servicemembers Civil Relief Act is required by Landlord, in the event of a nonpayment of rent by Tenant, Landlord reserves the right to request an allotment from the pay of the servicemember tenant as permitted in the Servicemembers Civil Relief Act.

19. CANCELLATION; RENEWAL.

- a. Either party may terminate this Lease in accordance with section 1(j) of this Lease. If notice of termination is not timely given, the Term of this Lease shall be extended upon the same terms and conditions as set forth in this Lease, for the term specified in section 1(j) until either party gives timely notice to terminate in accordance herewith, unless this Lease is terminated in accordance with any other applicable provision of this Lease or Virginia law; provided, however, that if the duration of the renewal term as set forth herein is less than the number of days specified in section 1(j) to terminate this Lease, then the notice period for terminating any renewal term of this Lease shall be the same period as the renewal term.

If Landlord intends to change the terms or conditions of this Lease, including increasing the Rent, for any renewal term thereafter, Landlord shall give Tenant written notice in accordance with section 1(j) of this Lease, advising Tenant of the new terms and conditions of a renewal lease. Should Tenant fail to provide Landlord timely written notice of Tenant's intentions to terminate the Lease in accordance with the preceding subsection (a), Tenant shall be deemed to have agreed to the terms and conditions set forth in Landlord's notice, and shall be bound for such, until such time as the Lease is terminated in accordance with this section.

- b. Upon termination of this Lease, Tenant shall surrender the Dwelling Unit in good condition, with the exception of reasonable wear and tear and must pay for all damages or assessments for damages made by Landlord against Tenant in accordance with the Damage Addendum, other provisions of this Lease, or as Landlord reasonably determines.

20. ACTION BY LANDLORD UPON DEFAULT BY TENANT. Under Virginia law and this Lease, Landlord may terminate this tenancy during the term of the Lease upon one of the following:

- a. Material Noncompliance by Tenant Failing to Pay Rent When Due. If Tenant fails to pay Rent when due or pays Rent with a bad check, and such failure continues after Landlord has served a five-day notice of material noncompliance for failure to pay Rent, Tenant shall be in default, and Landlord may terminate this Lease and Tenant's right to possession in accordance with law and seek such damages as are appropriate under this Lease and the VRLTA.
- b. Material Noncompliance by Tenant Which Can Be Remedied Within 21 Days. If Tenant fails to comply materially with any other provision of this Lease, Landlord may serve on Tenant a material noncompliance notice stating that if Tenant does not remedy the specified noncompliance(s) within twenty-one (21) days after receipt of such notice, then if such noncompliance is remediable, this Lease will terminate thirty (30) days after Landlord has served such notice.
- c. Repeat Violations. If Tenant has been served with a prior written notice that required Tenant to remedy a breach, and Tenant remedied such breach, if Tenant intentionally has committed a subsequent breach of a like nature as the prior breach, Landlord may serve on Tenant a thirty (30) day termination notice for such repeat violation. Such notice must make reference to the prior breach of a like nature and state that the Lease will terminate in thirty (30) days for the reasons stated therein without allowing Tenant an opportunity to remedy such subsequent breach.
- d. Nonremediable Violations/Criminal Acts. If Tenant commits a material noncompliance that is not remediable, Landlord may serve on Tenant a termination notice stating that this Lease will terminate in thirty (30) days for the reasons stated therein without allowing Tenant an opportunity to remedy such breach. If a breach of Tenant obligations under Virginia law or this Lease involves or constitutes a criminal or willful act that is not remediable and that poses a threat to health or safety, Landlord may terminate this Lease immediately by giving of written notice thereof. Tenant and any other persons in or about the Dwelling Unit with consent of Tenant, including but not limited to members of the family, guests, invitees or authorized occupants, shall not engage in criminal activities or activities intended to facilitate criminal activities including any illegal drug-related activity on the Dwelling Unit and any area of the Premises, including common areas and streets, involving a controlled substance (as defined in Section 54.1-3401 of

AGREEMENT REGARDING THE SERVICEMEMBERS CIVIL RELIEF ACT

(Each Tenant must sign a separate Agreement)

1. **Agreement:** This Agreement relates to the rental agreement dated 09/17/2013 between Timbers Norfolk, LLC DBA Timbers Townhomes (the Lessor) and Riana Feemster (Tenant/Dependant) for the leased premises described 7010 #4 Northgate Drive Norfolk, VA 23513 (the Lease).
- 2. **Reason for Agreement:** For purposes of the Servicemembers Civil Relief Act ("SCRA"), it is important for the landlord to be advised of the military status of the Tenant. Further, the SCRA permits the waiver of certain rights under the SCRA, and this Agreement contains such a waiver.
3. **Military Status:** The tenant represents as follows:
 The Tenant (check one) XIS or IS NOT an active member in the military service of the United States.
 If the Tenant is in the military service of the United States, the names, address and telephone number of the Tenant's command is:

- The Tenant agrees to immediately notify the landlord in writing of changes to the Tenant's or the Tenant's command's mailing address or phone number or changes to the Tenant's military status.
- 4. **Waiver:** In accordance with the provisions of 50 App. U.S.C.A. 517, if the Tenant is, at the time of signing this Agreement, in the military service of the United States, the tenant/Dependant may waive certain rights under the Servicemember Civil Relief Act relating to the Lease, including the Landlord's need to appoint a Guardian Ad Litem to represent our interest before obtaining judgment for rent, interest, utilities, late fees, attorney's fees and other damages as well as eviction from the leased premises. The service member expressly acknowledges by executing this agreement that he/she waives such rights under the Servicemembers Civil Relief Act and that Landlord will not be required to appoint a Guardian At Litem (should Tenant/Dependant fail to appear in court) in order to obtain judgment for the items listed above and possession of the leased premises.
5. **Other rights unchanged:** This Agreement is separate from the Lease and does not, except as expressly state herein, modify any of the contractual rights and duties of the Landlord or the Tenant set forth in the lease.

Signature of Tenant/Dependant

(SEAL) 9/17/13

Date

8/15/2012 we

WAIVER ADDENDUM
REGARDING THE
SERVICEMEMBERS CIVIL RELIEF ACT
(Each Resident Must Sign a Separate Agreement)

THIS WAIVER ADDENDUM REGARDING THE SERVICEMEMBERS CIVIL RELIEF ACT (this "Addendum") to the Apartment Lease dated 8/15/2012 (the "Lease"), by and between Landlord and Resident is incorporated and made an integral part of the Lease. Any term with its initial letter capitalized and not defined in this Addendum shall have the meaning given to it in the Lease.

A. Landlord: _____
 B. Resident(s): _____
 C. Community: Diamond Springs Apartments & Townhomes

RESIDENT HAS READ AND SHALL ABIDE BY ALL OF THE RULES, REGULATIONS AND AGREEMENTS IN THIS ADDENDUM AND THE LEASE.

RESIDENT:

Signature: _____

Date: 8/16/12

LANDLORD/MANAGEMENT:

By: _____

Name:

Title: Assistant Property Manager

Date: 7/8/12

RESIDENT AND LANDLORD AGREE AS FOLLOWS:

→ 1. **Reason for Agreement.** For purposes of the Servicemembers Civil Relief Act, 50 U.S.C. app. § 501 *et. seq.* (the "Act"), the Landlord hereby requires Resident to disclose whether the Resident is a member of any branch of the United States Military, including, but not limited to, the Air Force, Army, Coast Guard, Marine Corps, Navy, the Virginia National Guard, or the National Guard of any other State or United States Territory, either active duty or reserves. Further, pursuant to the provisions of the Act, the Landlord requires all Residents to waive any and all rights under the Act. The Landlord is entitled to rely upon Resident's assertions for any and all purposes.

2. **Military Status.** The Resident states as follows:

I affirm that I AM AM NOT a member of the United States Military, either active duty or reserves.

If the Resident is in the military service of the United States, the names, address, and telephone number of the Resident's command is:

Branch: _____

Commanding Officer: _____

Address: _____

Phone Number: _____

Military Email: _____

3. **Notice Requirement.** The Resident agrees to immediately notify the Landlord in writing of any change to his or her command or military status during the term of the Lease. This obligation includes, but is not limited to, the requirement that any Resident not currently in the service of the United States military, must immediately notify the Landlord if he or she hereafter becomes a member of the military.

→ 4. **Waiver.** In accordance with the provisions of 50 U.S.C. app. § 517, if the Resident is, at the time of signing this Agreement, in the military service of the United States or a dependent of a service member in the military service of the United States, the Resident waives all rights under the Servicemembers Civil Relief Act relating to the Lease, the termination of the Lease, and/or eviction from the leased premises.

5. **Other rights unchanged.** This agreement does not, except as expressly stated herein, modify any of the contractual rights and duties of the Landlord or the Resident set forth in the Lease. To the extent that any laws impose any requirement on Landlord or Resident that is contrary to any provision of this Waiver Agreement, this Waiver Agreement shall be deemed to be automatically amended so as to comply with such law. The reformation of any provision of this Waiver Agreement shall not invalidate the Lease. If an invalid provision cannot be reformed, it shall be severed and the remaining portions of this Waiver Agreement and the Lease shall be enforced.

MILITARY WAIVER

DATE:

THIS MILITARY WAIVER, by and between Archer's Green II, LLC, doing business as Archer's Green Apartments, hereinafter called Landlord; and hereinafter called Resident(s).

The Lease Agreement dated 2012 by and between Landlord and Resident(s) (the "Lease"), as written, is all inclusive and binding on Landlord and Resident(s), with the exception of the following amendments and/or revisions:

- 1. I agree to waive any and all rights which may be afforded to me or to which I may be entitled under the Servicemembers Civil Relief Act, (the "SCRA"), including the right to a stay of a judgment under Section 204 of the SCRA, and my eviction rights under Section 301 of the SCRA. Notwithstanding the preceding, I shall retain the right to terminate the Lease prior to the end of its term, in accordance with the provisions of Section 305 of the SCRA.
2. This waiver only applies to my rights and obligations relating to the Lease, and does not affect any other rights to which I may be entitled under the SCRA.

Please check one of the following boxes, as applicable:

- ☐ I am currently either a "Servicemember" or "Dependent," as those terms are defined in Section 101 of the SCRA, and/or Section 106 of the SCRA regarding members of the military reserves applies to me.
- ☐ I agree that should I become either a "Servicemember" or "Dependent" during the term of the Lease, and/or I become a reserve member ordered to report for military service pursuant to Section 106 of the SCRA, that this Military Waiver shall be binding.

IN WITNESS WHEREOF, Landlord and Resident(s) have executed this Military Waiver on the dates reflected below.

WITNESS our signatures:

Date: _____
Landlord

Date: _____
Resident

Date: _____
Resident

MILITARY TRANSFER ADDENDUM

1. Addendum. This Addendum to the Lease dated 09/17/2013, between [redacted] Company, Agent for [redacted] JA Timbers Townhomes known as Lessor and Riana Peemster for the dwelling unit [redacted] shall be incorporated in the aforesaid Lease.

For the purposes of this addendum, "you" means a service member as defined by the "U.S. Service members Civil Relief Act" (SCRA).

2. Reason for Addendum. Congress has enacted into law the "U.S. Service members Civil Relief Act" (SCRA). This law, among other things, modifies the rights of military personnel to terminate a lease in certain cases and provides that military personnel may waive their rights under the SCRA in certain circumstances. There are different interpretations of how the SCRA affects dependents' and occupants' rights to terminate a lease in the event of a deployment. This addendum clarifies your rights and our obligations in the event of a deployment. This addendum provides for a limited waiver of the terms of the SCRA. However, we agree to grant individuals covered by the SCRA and their spouses all the rights described in this addendum.

3. Military personnel right to terminate. Except as provided in paragraphs 4 or 10 below, you or your spouse may terminate the Lease if you enlist or are drafted or commissioned in the U.S. Armed Forces during the original or renewal Lease term. You or your spouse also may terminate the Lease if:

- a. you are (1) a member of the U.S. Armed Forces or reserves on active duty or (2) a member of the National Guard called to active duty for more than 30 days in response to a national emergency declared by the President; and
- b. You (1) receive orders for permanent change of station, (2) receive orders to deploy with a military unit or as an individual in support of a military operation for 90 days or more, or (3) are relieved or released from active duty.

If you or your spouse terminates under this addendum, we must be furnished with a copy of your military orders, such as permanent change-of-station orders, call-up orders, or deployment orders or letter. Military permission for base housing does not constitute permanent change-of-station orders.

4. Exception for termination upon deployment orders. If you or your spouse are terminating the Lease due to deployment orders, you or your spouse may terminate the Lease only on the condition that during the remainder of the original or renewal Lease term neither you nor your spouse will accept an assignment for or move into base housing, or move into other housing located within 45 miles of the dwelling unit described above.

If you or your spouse terminate the Lease and violate this paragraph, the Lease shall be deemed to have not been legally terminated and you and your spouse shall be in default under the Lease. In that event, we will have all legal remedies, including those described in the Lease, such as charging a termination fee as described in the Lease Termination Addendum and liquidated damages.

5. Effect of housing allowance continuation. The fact that the service member continues to receive a housing allowance for the service member's spouse and/or dependents after deployment does not affect the right of the service member or the service member's spouse to terminate unless otherwise stated in paragraph 10 of this addendum.

6. Other co-residents. A co-resident who is not a spouse of a service member may not terminate under this addendum. You and your spouse's right to terminate the Lease under this addendum only affect the Lease as it applies to you and your spouse; other resident's rights and obligations under the Lease remain unchanged.

7. Termination date. If you or your spouse terminate under this addendum, all rights and obligations of you and your spouse under the Lease will be terminated 30 days after the date on which the next rental payment is due, with the exception of obligations arising before the termination date and lawful security deposit deductions.

8. Representations. Unless you state otherwise in paragraph 10 of this addendum, you represent when signing this addendum that: (1) you have not already received deployment or change-of-station orders; (2) you will not be retiring from the military during the Lease term; and (3) the term of your enlistment or obligation will not end before the Lease term ends. Liquidated damages for making a false representation of the above will be the amount of unpaid rent for the remainder of the Lease term when and if you move out, less rent from others received in mitigation under the terms of the Lease. You must immediately notify us if you are called to active duty or receive deployment or permanent change of station orders.

9. Other rights unchanged. All other contractual rights and duties of both you and us under the Lease remain unchanged.

10. Addition provisions. The following provisions will supercede any conflicting provisions of the Lease and this addendum.

NONE

By:

Authorized Management Representative

Resident

Date

Resident

Date

Resident

Date

Oct/12/2012 11:05:13 AM

**AGREEMENT REGARDING THE
SERVICEMEMBERS CIVIL RELIEF ACT**
(Each lease signer must sign a separate Agreement)

1. **Agreement.** This Agreement relates to the lease agreement dated 04/01/2012, ("the Lease"), between the Landlord and Resident/Dependent identified below for the Leased Premises described as follows:

→ 2. **Reason for Agreement.** For purposes of the Servicemembers Civil Relief Act ("SCRA"), it is important for the Landlord to be advised of the military status of the Resident. Further, the SCRA permits the waiver of certain rights under the "SCRA", and this Agreement contains such a waiver.

3. **Military Status.** The Resident represents as follows:

The Resident (*check one*) _____ IS or _____ IS NOT an active member in the military service of the United States.

If the Resident is in the military service of the United States, the names, address, and telephone number of the Resident's command is:

The Resident agrees to immediately notify the Landlord in writing of changes to the Resident's or the Resident's command's mailing address or phone number or changes to the Resident's military status.

→ 4. **Waiver.** In accordance with the provisions of 50 App. U.S.C.A. § 517, if the Resident is, at the time of signing this Agreement, in the military service of the United States or a Dependent of a servicemember in the military service of the United States, the Resident/Dependent may waive certain rights under the Servicemembers Civil Relief Act relating to the Lease, including the Landlord's need to appoint a Guardian Ad Litem to represent our interests before obtaining judgement for rent, interest, utilities, late fees, attorney's fees and other damages as well as eviction from the leased premises. The service member expressly acknowledges by executing this agreement that he/she waives such rights under the Servicemembers Civil Relief Act and that the Landlord will not be required to appoint a Guardian Ad Litem (should Resident/Dependent fail to appear in court) in order to obtain judgment for the items listed above and possession of the leased premises.

5. **Other rights unchanged.** This Agreement is separate from the Lease and does not, except as expressly stated herein, modify any of the contractual rights and duties of the Landlord or the Resident set forth in the Lease.

Printed Name of Resident _____

SSN _____

Resident Signature _____

Date _____

Authorized Agent for Owner _____

Date _____

**STATEMENT OF
JOHN S. ODOM, JR., ESQ.
JONES & ODOM, L.L.P.
SHREVEPORT, LOUISIANA**

**BEFORE THE
SUBCOMMITTEE ON OVERSIGHT, FEDERAL RIGHTS
AND AGENCY ACTIONS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

“ACCESS TO JUSTICE FOR THOSE WHO SERVE”

MARCH 27, 2014

**John S. Odom, Jr., Esq.
Colonel, USAF JAGC (ret.)
Jones & Odom, L.L.P.
2124 Fairfield Avenue
Shreveport, Louisiana 71104
318-221-1600
john.odom@jodplaw.com**

Chairman Blumenthal, Ranking Member Hatch and members of the Subcommittee. My name is John S. Odom, Jr., and I am an attorney from Shreveport, Louisiana. I am also a retired Air Force judge advocate and served over 31 years of combined active and Reserve duty. In 2010 I was recalled to active duty from retirement to author a report to Congress for the Department of Defense concerning certain matters related to proposed amendments to the Servicemembers Civil Relief Act. The vast majority of my civilian law practice involves representing servicemembers in claims they have against banks and other institutions and individuals who have violated their rights under the SCRA. In 2011, I represented a Michigan National Guard soldier in a suit against his mortgage servicing company, in what was the first federal jury trial involving claims under the SCRA in the history of the Act. I frequently teach at each of the service judge advocate schools and speak to judges' associations, attorneys general training seminars and both industry and consumer groups around the country on matters related to the SCRA. From 2006 to 2009, I served on the American Bar Association Standing Committee on Legal Assistance to Military Personnel and am the author of *A Judge's Benchbook for the Servicemembers Civil Relief Act*, published by the ABA in 2011.

I am grateful for the invitation to appear today and offer comments and observations on the degree to which our servicemembers do or do not have access to justice with regard to SCRA enforcement and other servicemember protections. This Committee's oversight of the federal judiciary is an ideal forum in which to analyze whether or not the Act is working as Congress intended it to for the protection of servicemembers.

The subcommittee has witnesses planned for today to cover the entire spectrum of SCRA issues including policy and education of the troops to the efforts of active duty legal assistance attorneys to persuade creditors and their counsel to abide by the SCRA. As private counsel for

servicemembers, I usually don't arrive on the scene until policy and persuasion have failed. I come along when it's time to sue someone for trampling on a servicemember's federally-protected rights. In that regard, I seek to judicially enforce someone's rights under the Act every day of the week in federal courts across the nation.

Over the past few years as the number of litigated SCRA cases have increased, I have come to realize that the Act means only what the judge in front of whom I am standing at that moment thinks it means. Litigation under the Act is a somewhat uncommon event for most federal and some state judges and the number of judges and opposing counsel who have served in the military – and therefore appreciate how devastating some of these violations can be – is shrinking with every passing year. With the advent of PACER and online legal search engines, I'm seeing district court rulings on Rule 12(b)(6) motions cited as authoritative law by opposing counsel. There was recently a decision dismissing a SCRA case in a federal court in California in which the servicemember was a *pro se* litigant. The court's decision was absolutely wrong, but no appeal was taken. Now I'm seeing that case cited against my clients in virtually every new case. All of that is to say: the battle goes on to protect servicemembers' federally-protected rights in courts across the nation.

There are several recurring issues for the troops the impact of which could be lessened or completely eliminated by a few technical amendments to the SCRA that would not cost the taxpayers a dime. A number of bills proposing SCRA amendments have been introduced on the Senate side during the 113th Congress, the most comprehensive of which was S. 1579. After the Veterans Affairs Committee held hearings on that bill on October 30, 2013, portions of it were inserted into Senator Sanders' larger S. 1982 – and there they died when the bill was defeated on

procedural votes on February 27, 2014. I appreciated that your Chairman, among 28 other Senators from both sides of the aisle, was a co-sponsor of that proposed legislation.

Speaking from personal experience, in 2010 I had urged every Congressional staffer who would give me five minutes that the Act should be amended to confirm that a private right of action for damages and attorneys fees existed when SCRA rights were violated. That amendment, which became Section 802 of the Act, was passed on the last legislative day of that Congress, so I know that the score can change rapidly. I have learned that there are two rules in the legislative process: Rule No. 1 – if Congress does not want a bill to pass, no power on earth can push it into law. Rule No. 2 – if Congress wants a bill to pass, no power on earth can stop it. I have hope for some much-needed SCRA technical amendments yet to come from this session.

Today I'd like to identify several issues that cause frequent and unnecessary problems for our servicemembers – all of which could be vastly decreased or eliminated entirely with the passage of the technical amendments to the SCRA I am suggesting. In the interest of time, I have attached my complete “wish list” of SCRA amendments, but want to highlight what I consider to be the changes in the Act that are most critically needed.

Default Judgments

First, the protection against default judgments provided in Section 201 needs to be improved to mandate that a litigant seeking a default judgment must make a due and diligent effort – an actual inquiry – to ascertain if the defendant is or is not on active duty with the military. At a bare minimum, the plaintiff should be required to access the Defense Manpower Data Center SCRA database (a process that takes no more than 15 seconds) before stating in an affidavit that the defendant is not on active military duty. Further, if the plaintiff has in its

possession information on how to contact a defendant who is on active duty, the plaintiff should be required to furnish that information to the attorney appointed to represent the servicemember.

As hard as this may be to believe, in a recent case I handled for a Navy servicemember and his wife in Florida, counsel for one of the largest national mortgage servicing companies said that unless I could show him a case holding that under Section 201 there was an obligation for his client to pass that contact information on to the attorney appointed to represent the absentee sailor, he felt there was no requirement that his client was obligated to have done so. At the end of the mediation the defendant wrote a large check to settle the matter and avoid a judicial determination of who was correct.

Definitions of “permanent change of station” and “military orders”

At least three or four times a month, I receive calls or emails from military legal assistance attorneys who are jousting with apartment complex managers over the meaning of “orders for a permanent change of station” as found in Section 305 of the Act. The term “permanent change of station” is not defined in the Act, and the definition of “military orders” is found at the end of Section 305 – so that it only applies to Section 305 instead of the entire SCRA. The Joint Federal Travel Regulations (“JFTR”) define “permanent change of station” to include separation and retirement moves, which apparently no apartment complex manager in the world is willing to accept. So, when a soldier at Fort Hood, Texas separates or retires from the Army and wants to move to Shreveport to accept a job at the new steel factory there, the manager of the XYZ Apartments in Killeen, Texas tries to hold him up for the remainder of his lease term saying that a move when the soldier separates or retires from active duty is not a permanent change of station. The JFTR says it is. The solution is incredibly simple – define “permanent change of station” in Section 101 (the definitions section) as having the same

definition as that found in the JFTR. Additionally, Congress should move the definition of “military orders” from Section 305 (where it was added in a hasty 2004 amendment seeking to overcome new and ingenious arguments offered by a number of Texas apartment complex managers) to Section 101 so that it would apply to the entire Act and not just the section pertaining to termination of leases. These amendments are purely technical in nature, require zero outlay of federal funds and would be of tremendous benefit to our servicemembers.

Orders to move into Government housing

Another recurring problem arises when a servicemember who has rented a house or an apartment receives orders to move into Government quarters on base or on post. Apartment managers – some of whom have actually read Section 305 of the SCRA – proudly point out that such a move is not a permanent change of station or covered specifically by Section 305 of the Act, and therefore routinely refuse to allow the servicemember to break the lease to move on base. Another simple fix – provide that a move into Government quarters (including privatized Government quarters) constitutes grounds for termination of a lease. Both of these suggested technical changes were included in S. 1593 which was reported favorably by the Veterans Affairs Committee on November 19, 2013.

Clarification of the existence of private causes of action

The adoption of new Section 802 (50 U.S.C. App. §597a) in 2010 concerning private causes of action under the SCRA brought a new wave of motions by defendants claiming that prior to the enactment of that amendment, there really was no private right of action for damages. Fortunately, since a number of cases had previously held that there was an inherent right of action to sue violators of the SCRA for damages, I’ve been successful in overcoming the latest arguments thus far. However, it would be extremely helpful to servicemembers if Congress

would clarify that such a private right of action has existed since the Soldiers' and Sailors' Civil Relief Act of 1940 was enacted. Such a provision appears in S. 1579 and was in the now-defeated S. 1982 (Senator Sanders' bill).

Post-event affirmation of forced arbitration agreements

The prevalence of forced arbitration agreements embedded in virtually every mortgage instrument and credit card agreement has caused many of our servicemembers who have disputes with creditors to be denied access to a federal or state court for resolution of their complaint. Instead, if a dispute arises creditors point to a mandatory arbitration clause that may have been signed long before the individual became protected by the SCRA. The creditor then requires the American Arbitration Association rules to be followed – sometimes over a dispute involving only a few hundred dollars in overcharged interest. When the servicemember discovers that the filing fee and the “proceed fee” of the arbitration proceeding – not to speak of the charges that arbitrators require to be paid in advance of the arbitration – are more than the entire amount in dispute, the matter is dropped because the servicemember frequently cannot afford the process.

A reasonable compromise would be to amend the SCRA to provide that after a dispute under the SCRA arose, the parties would be free to then mutually agree to arbitration, but arbitration could not be mandated on the basis of some document signed prior to the dispute. In other words, *in futuro* waivers of rights under the SCRA would not be allowed. I have long interpreted Section 107 to mean that you cannot waive a right under the SCRA until you have that right (as a result of the occurrence of circumstances giving rise to the right) – but no case has ever decided the issue and at this point, this is my interpretation of the Act. *Ipsi dixit*, as one of my law professors used to say: “it is because I say it is.” A legislative fix for the problem outlined above was proposed in both S. 1579 and in S. 1999.

Re-financing of pre-service mortgages and student loans

Servicemembers should be able to re-finance mortgages and student loans they incurred prior to active duty at lower interest rates without such transactions nullifying their rights to the protections of the SCRA. Such a proposal concerning student loans (but not home mortgages) is found in S. 1399. Without an amendment to the SCRA, if a servicemember re-finances a pre-service debt – either a student loan or a home mortgage – during a period of active duty, the servicemember will lose the protections of the SCRA. That protection against home foreclosures except in conformity with the Act is perhaps the single most vital protection in the entire SCRA.

I was pleased to be able to work with Senator Rockefeller's staff on many of the provisions that appear in S. 1579. The proposed amendments in the list attached to my testimony are based on real world problems I have encountered and attempted to solve on behalf of servicemembers and their families. Some, but not all of these proposals have been covered in my testimony today. I am happy to offer any Member or their staff the benefit of 40 years of experience with the SCRA and nearly three decades of litigation experience with the Act in the continuing efforts of Congress to keep the Act up to date.

Revision of Section 602 (50 U.S.C. App. §582)

Section 602 provides that a certificate "signed by the Secretary of the service concerned" shall be accepted as *prima facie* proof of military status. Theoretically, to establish that someone was or was not on active duty on a particular date, you would then have to obtain certificates from the Secretaries of the Army, Navy, Marine Corps and Air Force plus the Secretary of the Department of Homeland Security for the Coast Guard. To my knowledge – and I've asked – there is no service Secretary with a process for the issuance of such certificates. That role has been taken over by the Internet-based services provided by the Defense Manpower Data Center

and its SCRA database. All of the services' records have been consolidated in the DMDC, which is among the most efficiently run and helpful of all Government agencies.

The Act simply needs to be updated to provide that certificates of service may also be issued by the DMDC through its SCRA database. This is merely an example of the legislation being overtaken by the technology. As with the other amendments I have suggested in today's testimony, the legislative fix is technical in nature and would not require the expenditure of any federal funds except to print the change.

SCRA Enforcement by State Attorneys General

Last week I went to New York City to teach SCRA to the National Attorneys General Training and Research Institute. The session sought to encourage increased state efforts at enforcement of the various state "mini-SCRAs". Those state AGs should also be allowed to enforce the SCRA when their state statutes do not provide sufficient protections for servicemembers. The more watchdogs there are keeping the wolves at bay, the better the flock will be protected. I know that one of the aspects of protecting the rights of servicemembers being considered by this subcommittee is increasing the cooperation between the state attorneys general and the Department of Justice. Violations of the Act happen on both a local and a national basis. The closer to the scene of the action we can find efforts to enforce the Act, the better. I strongly encourage such mutual enforcement efforts and, to the extent an amendment of the Act is needed, urge the Members of this subcommittee to consider proposing such legislation.

USERRA Damages

On several occasions over the past decade I have represented clients who had USERRA claims. In very brief summary, let me say that the biggest problem with USERRA for a private practitioner is the fact that the statute lacks an adequate provision for imposing damages on

violators. It's as simple as that. There is a requirement that a USERRA plaintiff seek to mitigate damages, meaning your client has to be out looking for work while the case progresses. If they find employment elsewhere, then they have just cut the measure of their damages by the amount of their new salary. This result is because, as a general rule, damages under USERRA only involve payment of past-due wages unless intentional violation can be proven. Even if intentional violation can be proven, the damages only increase to twice the past-due wages, net of whatever the plaintiff has managed to earn elsewhere. Without compensatory and punitive damages, USERRA is the proverbial toothless tiger from the standpoint of attracting private attorneys willing to take on these types of cases. In many cases, the employer may ultimately agree to rehire the plaintiff but only if the plaintiff drops the claim for past-due wages and attorney's fees. The client, desperate to get his old job back and willing to waive the past-due wages, wants to settle. That means the attorney who took on the case takes it in the neck because there are no funds from which a fee can be paid, making counsel most reluctant to take future USERRA cases.

I thank the Members for their attention to these critically important protections for our servicemembers and their families and would be pleased to respond to any questions you or your staffs might have now or in the future.

Respectfully submitted,

John S. Odom, Jr., Esq.
Colonel, USAFR JAGC (ret.)

Attachment: Suggested SCRA Technical Amendments and Additions

SUGGESTED SCRA TECHNICAL AMENDMENTS AND ADDITIONS

John S. Odom, Jr., Esq.
Col, USAF (ret.)
Jones & Odom, L.L.P.
Shreveport, Louisiana
318-221-1600
John.odom@jodplaw.com

27 March 2014

The suggested amendments to the SCRA listed below are in numerical order as they would be found in the SCRA, not in order of importance:

1. Amendment to Section 102 (50 U.S.C. §512)

Provide that mandatory arbitration agreements, unless ratified by the servicemember after rights under the SCRA have accrued and a controversy has arisen, are invalid.

2. Amendment to Section 107 (50 U.S.C. §517)

Provide that waivers of rights under the SCRA (including waiver of the right to bring a civil action rather than submit to mandatory arbitration) cannot be executed until after the right accrues and must be in an instrument separate from the document that created the obligation.

3. Amendments to Section 201 (50 U.S.C. App. §521)

- a. Require that the attorney appointed to represent the absent servicemember make some reasonable effort to locate the servicemember and, at a minimum, run a check through the DoD Defense Manpower Data Center SCRA website and attach a copy of that search results.
- b. Require that any information in the hands of the plaintiff concerning the whereabouts or identify of the person for whom the attorney has been appointed be communicated by plaintiff or plaintiff's counsel to the appointed attorney.
- c. Amend Section 201(b)(2) to provide that the reasonable fees of the attorney appointed to represent the servicemember shall be taxed as costs of court, unless the creditor seeks relief from such charges from the court

4. Amendment to Section 303 (50 U.S.C. App. §533)

Revise first sentence of (a) to read “This section applies only to an obligation on real or personal property owned by a servicemember or an obligation on real or personal property for which a servicemember is personally liable as a guarantor or co-maker that – “

5. Amendments to Section 305 (50 U.S.C. App. §535)

- a. Change the title of the section to “Termination of premises or motor vehicle leases” *(It currently reads “Termination of residential or motor vehicle leases” but authorizes the termination of leases for both residential purposes and many other purposes. This is going to cause a problem someday.)*
- b. Provide that an order to move into base housing (including privatized housing) is a grounds for terminating a lease;
- c. Define a “permanent change of station” (subsections (b)(1)(B) and (b)(2)(B)) as the same as the definition found in the Joint Federal Travel Regulations.
- d. Move subsection (i) to the end of current Section 101 (50 U.S.C. App. §511), so that those definitions will apply to all sections of the SCRA.

6. Amendment to Section 501 (50 U.S.C. App. §561)

Add a new subsection (a)(3) to protect from tax sales:

“real property occupied for professional, trade, business or agricultural purposes by a business (without regard to the form in which such profession, trade, business or agricultural operation is carried out) owned entirely by a servicemember or a servicemember and his or her spouse, when written notice has been given by the servicemember to the taxing authority of the servicemember’s active duty status.”

A Guardsman or Reservist’s small business is likely going to be a Subchapter S corporation or a limited liability company. The servicemember will not be personally liable for property taxes on the business property. However, if a taxing authority seizes and sells the servicemember’s company’s property for unpaid taxes while the servicemember is gone on deployment, for example, the injury to the servicemember is just as great as it would be if he/she owned the property personally. Since the taxing authority would have no way to know the property was owned by a servicemember-owned business, written notice of active duty status should be required from the servicemember to the taxing authority (which would not be the case in the event the property was owned in the name of the servicemember.)

7. **Amendment to Section 602 (50 U.S.C. App. §582)**

This section needs to be completely re-written. At present, no Service Secretary issues the types of certificates of service contemplated by Section 602. The SCRA should provide that a certificate from the Defense Manpower Data Center SCRA database (which can be accessed free of charge via the Internet) could be substituted as one of the documents that will be considered *prima facie* evidence of active duty status.

8. **Amendment to Section 802 (50 U.S.C. App. §597a)**

Clarify that the section (providing for private causes of action to sue for damages for violations of the SCRA) applies to any violation of the SCRA occurring on, before or after October 13, 2010.

9. **New added Section on expiration of licenses and continuing education required to maintain licenses during periods that servicemembers are entitled to hostile fire pay:**

Add a section to provide that:

- a) if any license issued by a state or local government (including licenses for drivers of vehicles or motorcycles, truck drivers, nurses, attorneys, architects, engineers, doctors, contractors or any other trade or profession licensed by a state) expires during a period that a servicemember is entitled to hostile fire pay, the license shall be automatically extended for a period of 180 days after the servicemember's entitlement to such hostile fire pay terminates; and
- b) If any continuing education courses are required of a servicemember to maintain a license for a trade or profession, the requirement for such continuing education hours shall be extended during any period that the servicemember is entitled to hostile fire pay and for a period of 180 days after the servicemember's entitlement to such hostile fire pay terminates.

Guardsmen and Reservists who are deployed cannot renew licenses and should not be penalized or deterred from re-employment when they return home after their duty. Similarly, there is no place in a war zone for continuing legal education classes and examinations or similar mandatory training for doctors, CPAs, engineers, nurses and the like. It should all wait until after the Guardsman or Reservist returns home and has a reasonable amount of time to get current on training/certification requirements.

Reserve Officers Association of the United States
And
Reserve Enlisted Association

From Major General Andrew "Drew" Davis, USMC (ret.)
National Executive Director, ROA

for the

Senate Judiciary Committee
Subcommittee on Oversight Federal Rights, and Agency Actions

"Access to Justice for Those Who Serve"

March 27, 2014



"Serving Citizen Warriors through Advocacy and Education since 1922."™



Reserve Officers Association
1 Constitution Avenue, N.E.
Washington, DC 20002-5618
(202) 646-7719

Reserve Enlisted Association
101 Constitution Ave N.E. Suite 200
Washington, DC 20002
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The Reserve Officers Association of the United States (ROA) is a professional association of commissioned and warrant officers of our nation's seven uniformed services and their spouses. ROA was founded in 1922 during the drawdown years following the end of World War I. It was formed as a permanent institution dedicated to National Defense, with a goal to teach America about the dangers of unpreparedness. When chartered by Congress in 1950, the act established the objective of ROA to: "...support and promote the development and execution of a military policy for the United States that will provide adequate National Security."

The Association's 55,000 members include Reserve and Guard Soldiers, Sailors, Marines, Airmen, and Coast Guardsmen who frequently serve on Active Duty to meet critical needs of the uniformed services and their families. ROA's membership also includes commissioned officers from the U.S. Public Health Service and the National Oceanic and Atmospheric Administration who often are first responders during national disasters and help prepare for homeland security.

ROA is a member of The Military Coalition where it co-chairs the Guard and Reserve Committee. ROA is also a member of the National Military/Veterans Alliance and the Associations for America's Defense. Overall, ROA works with 75 military, veterans, and family support organizations.

| | |
|--|--------------|
| President: | |
| Col. Walker Williams, USAF (Ret.) | 202-646-7706 |
| Staff Contacts: | |
| Executive Director: | |
| Major General Andrew "Drew" Davis, USMC (Ret.) | 202-646-7726 |
| Legislative Director: | |
| CAPT Marshall Hanson, USNR (Ret.) | 202-646-7713 |
| Air Force Director: | |
| Col. Bill Leake, USAFR | 202-646-7713 |
| Army and Strategic Defense Education Director: | |
| Mr. "Bob" Feidler | 202-646-7717 |
| USNR, USMCR, USCGR: | |
| CAPT Marshall Hanson, USNR (Ret.) | 202-646-7713 |
| Service Members' Law Center Director: | |
| CAPT Sam Wright, JAGC, USN (Ret.) | 202-646-7730 |

The Reserve Enlisted Association is an advocate for the enlisted men and women of the United States Military Reserve Components in support of National Security and Homeland Defense, with emphasis on the readiness, training, and quality of life issues affecting their welfare and that of their families and survivors. REA is the only joint Reserve association representing enlisted reservists – all ranks from all five branches of the military.

| | |
|--------------------------------|--------------|
| Executive Director | |
| CMSgt Lani Burnett, USAF (Ret) | 202-646-7715 |

DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Reserve Officers and Reserve Enlisted Associations are member-supported organizations. Neither ROA nor REA have received grants, subgrants, contracts, or subcontracts from the federal government in the past three years. All other activities and services of the associations are accomplished free of any direct federal funding.

EXECUTIVE SUMMARY

Improvements to increase employment supported by ROA and REA follow:

Employer Support:

- Continue to enact tax credits for health care and differential pay expenses for deployed Reserve Component employees.
- Provide tax credits to offset costs for temporary replacements of deployed Reserve Component employees.
- Support tax credits to employers who hire service members who supported contingency operations.

Employee Support:

- Permit delays or exemptions while mobilized of regularly scheduled mandatory continuing education and licensing /certification/promotion exams.
- Continue to support a law center dedicated to USERRA/SCRA problems of deployed Active and Reserve service members.

Uniformed Services Employment and Reemployment Rights Act (USERRA)/Servicemembers Civil Relief Act (SCRA):

- Improve SCRA to protect deployed members from creditors that willfully violate SCRA.
- Fix USERRA/SCRA to protect health care coverage of returning service members and family for continuation of prior group or individual insurance.
- Broaden the types of insurance that the service member is entitled to reinstate after returning from military service, such as protections for professional, dental, and disability coverage.
- Enact USERRA protections for employees who require regularly scheduled mandatory continuing education and licensing/certification and make necessary changes to USERRA to strengthen employment and reemployment protections.
- Amend SCRA to add a provision that the expiration dates of any license or certification issued by any state or federal agency (including driver's, nurses', contractor's licenses, etc.) shall be extended to a period of 90 days after release from active duty.
- Include protections on leases and contracts impacting mobilized small business owners, including the ability to terminate or suspend a contract or lease for services or goods.
- Exempt Reserve Component members from federal law enforcement retirement application age restrictions when deployment interferes in completing the application to buy back retirement eligibility.
- Encourage Federal agencies to abide by USERRA/SCRA standards.
- Ensure USERRA isn't superseded by binding arbitration agreements between employers and Reserve Component members.
- Make State employers waive 11th Amendment immunity with respect to USERRA claims, as a condition of receipt of federal assistance.
- Make the award of attorney fees mandatory rather than discretionary.

INTRODUCTION

On behalf of our members, the Reserve Officers and the Reserve Enlisted Associations thank the committee for the opportunity to submit testimony on access to justice for those who serve, and how this can be improved. ROA and REA applaud the ongoing efforts by Congress and this committee to address employment problems faced by so many veterans and service members.

Many outstanding citizen Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen have put their civilian careers on hold while they served our country in harm's way. They shared the same risks with their counterparts in the Active Components on the battlefield, but did not always have assurance of a job when they returned home. While laws exist to provide reemployment and employment protection, many

Reserve and Guard members had to seek private representation, when the Department of Labor, or the Department of Justice failed to address their cases.

Just last week, we passed the 894,126 mark for the number of Reserve and Guard service members who have been activated since post-9/11 with nearly 40,500 still on active duty. More than 336,250 have been mobilized two or more times. The United States has created a new generation of combat veterans that come from its Reserve Components (RC). It is important, therefore, that we don't squander this valuable resource of experience nor ignore the protections that they are entitled to because of their selfless service to our country. Thirty percent of those who served in Iraq or Afghanistan were Reserve or Guard veterans, according to the Department of Labor.

The dual status of veteran and serving member complicates the employment of Guard and Reserve members returning from mobilization. They face returning to communities that don't have the same support structure that is available if they were near military bases. High numbers of them have been unable to find reemployment during this war and economic recession. Some Army National Guard units returned with unemployment levels above 35 percent.

The unemployment rates of veterans and Guard and Reserve members have been higher than the national average rate for veterans overall. The Bureau of Labor Statistics reports that in February 2014, unemployment has risen back to 16.6 percent of veterans between 18 to 24 years of age, and climbed to 18.8 percent of veterans between 25 to 29 years of age. The 18 to 24 year old group and the 25 to 29 year old group are made up in large part of the National Guard and Reserve members.

While non-affiliated veterans have a better employment rate than the national average at 6.3 percent, stealth discrimination continues to make employment and even reemployment harder for returning Reserve and Guard members, because they are veterans who continue to serve.

ROA and ROA fear that the unemployment rate is so high because employers are shying away from hiring potential employees who are serving in the Reserve Components, although such discrimination is clearly unlawful under section 4311 of USERRA. Three surveys show that between 60 to 70 percent of employers won't hire new employees who are affiliated with the Reserve and the Guard.

EMPLOYMENT

Employment Protections

Veterans and service members are provided protections through the National Committee for Employer Support of the Guard and Reserve (ESGR), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Servicemembers Civil Relief Act (SCRA).

Notwithstanding the protections afforded veterans and service members, as well as antidiscrimination laws, it is not unusual for members to lose their jobs due to time spent away while deployed. Sometimes this is because the employers have gone out of business, but more often because it costs employers money, time, and effort to reintroduce the employee to the company, thus violating USERRA obligations.

Higher unemployment rates for younger Reserve and Guard members provide silent testimony to the stealth discrimination that remains. Faced with an operational Reserve model, many employers anticipate that Reserve Component members will continue to be called up once every five years. Smaller businesses

can ill-afford to lose key people and remain productive. They may congratulate an applicant on his or her military service, and then simply fail to follow-up.

USERRA's enforcement mechanism for States, political subdivisions of States, and private employers involves the U.S. Department of Labor (DoL) as well as the Department of Justice (DoJ). On paper, the Department of Labor (DOL) and Department of Defense (DoD) share responsibility for promoting a clear understanding of USERRA among employers and individuals concerning their respective rights and responsibilities under USERRA. DOL's Veterans' Employment and Training Service (VETS) and DOD's National Committee for Employer Support of the Guard and Reserve (ESGR) provide extensive public education, outreach, and compliance assistance with the goal of preventing violations caused by ignorance or misunderstanding of the law and ensuring that protected individuals understand their rights and know what assistance is available to help them secure those rights.

Both DoD's ESGR and DoL fall short at helping the number of Reserve and Guard members facing employment challenges. In the vast majority of USERRA cases filed in court, the plaintiff has been represented by private counsel or (worse) has proceeded pro se, and in only a very small minority of cases has DoJ acted as attorney for the plaintiff, as Congress intended.

ESGR: While the National Committee for Employer Support of the Guard and Reserve has done a commendable job in the past, ROA is concerned that it has shifted its focus from working to help the individual serving member to recognizing supportive employers. ESGR (Employer Support of the Guard and Reserve) is tasked with being the first bridge-gap to moderate the unemployment problem. With over 4,900 volunteers, ESGR fielded 21,521 USERRA inquiries and handled 2,793 cases in FY-2012, a 3 percent decline in inquiries. In FY 2012, ESGR volunteers communicated with 161,440 employers and 482,916 service members, informing both groups on the responsibilities and rights under USERRA.

If ESGR can't resolve differences between the employer and the Reservist, then the cases are sent to the Department of Labor for review, and the Department of Labor can't handle the number of requests as formal cases. Most successful reemployment lawsuits are being handled by private lawyers.

The Commission on the National Guard and Reserve made key recommendations including expansion of the ESGR to enable it to work new employment as well as reemployment opportunities, the creation of an employer advisory council, and regular surveys to determine employer interests and concerns over reemployment of Guard and Reserve members. Unfortunately, the budget recommendation is to reduce ESGR's budget.

Dept of Labor: If a service member believes his or her USERRA rights have been violated, he or she may file a complaint with the United States Department of Labor – Veterans Employment and Training Service (VETS). VETS will analyze the complaint, determine if a violation of USERRA has occurred and, if it has, try to negotiate a resolution of the situation with the employer. In FY 2012 alone, VETS presented USERRA information to more than 75,000 people

A Fiscal Year 2012 U.S. Department of Labor report found that nearly 37 percent of the complaints reviewed by its Veterans' Employment and Training Service under the Uniformed Services Employment

and Reemployment Rights Act contained allegations of discrimination on the basis of past, present, or future military service or status. An additional 27 percent of the complaints involved allegations of improper reinstatement into civilian jobs following military service. In all VETS reviewed 1,466 unique USERRA complaint cases in FY 2012, according to the report.

If unable to negotiate a resolution, VETS has no enforcement authority. The service member will then be informed that he or she may initiate a legal action against the employer, whether with or without an attorney. VETS typically will also ask the service member if he or she wants the matter forwarded to the Office of Special Counsel for cases involving when the Federal agencies are employers, or to the United States Attorney General for cases involving State, local or private sector employers. However, these officials typically decline to pursue the matter. The Department of Justice tends to pursue only the most high visibility cases. As most Reserve Force members work for small business or local governments they rarely have federal representation.

DOL involvement doesn't always help a Reservist. Evan Hart was a dentist who served in Iraq. After returning to work, Dr. Hart was notified by his boss on day-3 that he would be terminated in 60 days. That 60 days' notice became 30 days' notice when Hart protested. After Hart filed a USERRA complaint with the Department of Labor, the Department told Hart's employer that he could not be fired for 180 days. Management complied with that directive, and fired him after 180 days. Courts held that Hart didn't have a USERRA case for continued complaint.

Unfortunately, the number of cases supported by federal agencies doesn't reflect the needed support by Reserve and National Guard members. The federal emphasis has shifted from representation to education, which doesn't help individuals facing employment or re-employment problems.

ROA, with a one man office provides information to over 800 contacts each month. In 2013, 48.6 percent of the queries were USERRA related. Information about ROA's Law Center can be found later in this testimony.

USERRA EXAMPLES

Just this week, the Department of Justice filed a lawsuit today against Con-Way Freight Inc. alleging that the company violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) by failing to promptly reassign a Navy Reservist, Dale Brown, to his former position as a driver with appropriate seniority once he notified the company that he had fully recovered from a temporary service-related medical disability.

In 2006, Brown was working at Con-Way's Rock Island, Ill. facility when he reported to active duty. While in Iraq, Brown suffered a serious shoulder injury in a truck accident during a night

mission and returned to Con-Way in 2009 following an honorable discharge. Con-Way placed him in a lower-paying position due to medical restrictions that prevented him from returning to his pre-service position.

In February, DOJ filed a lawsuit against the Missouri National Guard (MNG) alleging that the MNG violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) by requiring its dual technician employees to resign from their civilian positions prior to active duty service in the U.S. Army Guard and Reserve. The MNG's resignation requirement denied the complainant the benefit of 15 days of annual, and paid annual military leave that she would have been entitled to as a dual technician.

The DOJ successfully sued the City of Milwaukee in 2010, claiming that the city violated USERRA when it did not provide a police officer with the opportunity to take a make-up examination for promotion to detective that he missed while on active duty military service, thereby denying him the seniority, status and compensation he would have received but for his active duty service in the military. The city later promoted the officer to detective after he passed the next scheduled examination, but the delay still resulted in his loss of pay, seniority and other benefits, including eligibility for future promotions. The settlement provided for retroactive promotion date in the rank of detective, \$21,190 in back pay, retroactive seniority and other benefits.

In FY 2012, VETS referred 111 cases to the Justice Department's Civil Rights Division and 23 cases to the Office of Special Counsel.

DOJ filed nine USERRA complaints in FY 2012, 12 USERRA complaints in FY 2011, and five complaints in FY2010. DOJ peaked in FY 2009 working 22 complaints, compared to 12 in 2008, seven in 2007 and three in 2006. DOJ tends to be selective, pursuing highly visible actions, based either on the size of the plaintiff or the subject of the complaint.

Most Reserve and Guard members are hired by smaller companies. Over 35 percent of employees in America work for businesses with 100 employees or less, according to the Census Bureau. These small businesses violations most often fly below the Department of Justice's radar.

The USERRA case that was heard at the Supreme Court – Staub v. Proctor Hospital - was represented by private counsel. The Supreme Court ruled unanimously that an employer may be liable under the USERRA when the discriminatory actions of an intermediate supervisor who doesn't make firing decisions influence the firing decision maker. Vincent Staub, a member of the Army Reserve, sued his employer after his employment was terminated. He alleged that he was a victim of anti-military discrimination in violation of USERRA. Mr. Staub based his claim

on his supervisors' alleged anti-military bias, asserting that they influenced the manager who fired him, even though the manager claimed she didn't take such bias into account.

Subordinate discrimination at the middle manager level has been hard to prove, which was why the complainant sought private counsel. Vincent Staub claims he first went to DoL seeking assistance, but VETS denies it.

Sgt. Maj. Richard Erickson was fired in 2000 by the Postal Service for taking too much time off for National Guard duty – he was terminated for taking "excessive military leave." A federal board denied a Postal Service appeal and ordered the agency to restore his job and give him 14 years of back pay and other benefits that could total about \$2 million. This case was handled by a private attorney, and it reflects the amount of time that a law firm can invest in a contingent fee arrangement case. USERRA cases are complex, which is why there is an aversion for private lawyers to accept such cases.

In 2009, a federal judge in the case of *Michael Serricchio v. Wachovia Securities L.L.C.*, New Haven, Connecticut, awarded Serricchio \$291,000 in back pay and \$389,000 in damages, plus fees and costs. The judge also ordered Wachovia to reinstate Serricchio as a financial advisor with the full package of employment benefits. The case was filed in 2005 after Mr. Serricchio had returned from active duty and he was represented by a private firm. What was unique about this case was that it determined that USERRA applies to employees who work on commission, and that a corporation that assumes ownership of another corporation, also inherits responsibilities. Wachovia had become part of Wells Fargo & Co.

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| USERRA CASES AGAINST STATES |
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It is particularly important that DoJ act as attorney in those cases where the defendant (employer) is a state, because in those cases there is literally no remedy if DOJ does not get involved. It has been held that USERRA is unconstitutional, under the 11th Amendment, insofar as it authorizes a private individual to bring suit, in his or her own name, in Federal District Court, against a state.

Congress solved the 11th Amendment problem by amending USERRA in 1998. Congress added the following sentence: "In the case of such an action [to enforce USERRA] against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action." 38 U.S.C. 4323(a)(1) (final sentence). Only DoJ can bring an action in the name of the United States. When the employer is a state, there can be no enforcement of USERRA unless DoJ brings the suit.

A compelling example of this problem is the case of Staff Sergeant Aldous Copeland, of the South Carolina Army National Guard.

Mr. Copeland was called to the colors and deployed to Afghanistan. He left his job at the South Carolina Department of Corrections (SCDC). After his deployment and release from active duty, he returned in January 2012 and requested reinstatement to work in April from the State of South Carolina. He met the USERRA eligibility criteria for reemployment (see appendix).

Staff Sergeant Copeland was entitled to prompt reemployment in his civilian job, and under section 4317(b) of USERRA; he was also entitled to immediate reinstatement of his health insurance coverage, through his civilian job, with no waiting period and no exclusion of pre-existing conditions. SCDC failed to reinstate his health insurance coverage upon his reemployment, in a clear and egregious violation of USERRA.

Staff Sergeant Copeland did not realize that his health insurance coverage had not been reinstated until several months later, when he scheduled a routine check up with his doctor. The visit was canceled at the last minute when it was realized that the State had not reinstated his health insurance coverage, and he was uninsured.

When symptoms appeared for colon cancer, Mr. Copeland sought coverage and treatment by the United States Department of Veterans Affairs as this was the only option he was left. As a combat veteran, he scheduled a colonoscopy through the Department of Veterans Affairs (VA), but because of a backlog at the VA, several months went by before the colonoscopy could be performed.

When the colonoscopy was finally done, colon cancer was diagnosed. The delay in the medical procedure has deprived Staff Sergeant Copeland of the opportunity to get timely and effective treatment and has greatly diminished his quality of life, his life expectancy and increased his suffering. The delay in the medical procedure has caused unknown medical irreparable harm to Staff Sergeant Copeland, and he is forced to drive two (2) hours from home to receive chemotherapy treatments whereby he then must stay in a hotel to recover until he is healthy enough to drive the two (2) hours back home. His filed complaint is that this delay in diagnosis and treatment is directly attributable to South Carolina's failure to comply with USERRA.

Because of the 11th Amendment to the United States Constitution, Mr. Copeland cannot sue the State of South Carolina in federal court, so he filed suit in state court. SCDC's attorneys have claimed the State's Leave Without Pay ("LWP") Policy is not pre-empted by USERRA. The State's LWP Policy contradicts USERRA whereby the State is claims that because Aldous Copeland didn't *specifically* ask for his health insurance to be reinstated within thirty-one (31) days, he had to wait until January 2014 during open enrollment to re-apply.

The State has not denied that they violated USERRA, but they contend that “you cannot do anything about it because we have sovereign immunity.”

Mr. Copeland is most ably represented by attorney John G. Reckenbeil of Spartanburg, South Carolina. Mr. Reckenbeil is present in the hearing room and available to answer any questions that you may have about this case.

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| SERVICE MEMBERS LAW CENTER |
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To better serve Reserve Force and active duty members and veterans on legal issues, the ROA established in the summer of 2009 the Service Members Law Center (SMLC) as a source of information on legal issues relating to military service.

The Law Center’s goals include the following:

- Advise Active and Reserve members who have been subject to legal problems that relate to their military service.
- Develop a network of legal scholars, law school clinics and private practitioners interested in legal issues of direct importance to service members.
- Advance world-class continuing legal education on issues relating to the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA).
- Broaden the existing database of USERRA and SCRA research.
- In conjunction with bar associations, develop standards that will help to ensure that lawyers to whom service members are referred for legal services have the requisite expertise to represent them effectively.

Recruiting and retaining members of the armed services, especially those in the National Guard and Reserve, depends in part on assuring current and future Citizen Warriors that laws and regulations are in place to protect them effectively from discriminatory practices.

The Law Center is functioning at a modest but effective level. ROA is pursuing efforts to obtain private or public funding and to identify public and private entities willing to sustain this effort in order to expand this service to fuller capacity. This is especially needed following potential cuts to ESGR.

As part of the SMLC and under director Captain Samuel F. Wright, JAGC, USN (Ret.) the Law Center maintains the “Law Review” data base and indices contain over 1000 articles on USERRA and other military legal topics (available at www.servicemembers-lawcenter.org). On a monthly basis CAPT Wright receives about 750-800 calls from concerned service members, family members, attorneys and others. Almost half of these calls are about USERRA.

The Law Center’s services include:

- Counseling: Review cases, and advise individuals and their lawyers as to lawfulness of actions taken against deployed active and reserve component members.
- Referral: Provide names of attorneys within a region who successfully taken up USERRA, SCRA and other military-related issues.
- Promote: Publish articles encouraging law firms and lawyers to represent service members in USERRA, SCRA and other military-related cases.
- Advise: File amicus curiae or “friend of the court” briefs on service member protection cases.

- Educate: Seminars to educate attorneys and give them a better understanding of USERRA, SCRA and other military-related issues.

The Service Members Law Center is available at www.servicemembers-lawcenter.org .

Appendix
Background about USERRA

Perhaps the most important law, especially for RC service members, is the Uniformed Services Employment and Reemployment Rights Act (USERRA), which was enacted in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940 as part of the Selective Training and Service Act, our nation's first peacetime conscription law.

Under USERRA, a person who leaves a civilian job for voluntary or involuntary military service, in the AC or the RC, is entitled to reemployment in the pre-service job if he or she meets five simple conditions:

- a. Must have left the civilian job for the purpose of performing voluntary or involuntary service in the uniformed services—active duty, active duty for training, inactive duty training, initial active duty training, etc.
- b. Must have given the employer prior oral or written notice.
- c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years. All involuntary service and some voluntary service are exempted from the computation of the individual's five-year limit.
- d. Must have been released from the period of uniformed service without a disqualifying bad discharge from the military.
- e. After release, must have made a timely application for reemployment with the pre-service employer.

A person who meets these simple conditions is entitled to prompt reinstatement in the position that he or she would have attained if continuously employed, which is usually but not always the position the person left. Upon reemployment, the person must be treated as if he or she had been continuously employed in the civilian job, for seniority and pension purposes. USERRA also makes it unlawful for an employer to deny a person initial employment (not hiring), retention in employment (firing), or a promotion or benefit of employment on the basis of the person's membership in a uniformed service, application to join a uniformed service, performance of service, or application or obligation to perform service.

USERRA applies to almost all employers in the United States, including the Federal Government, the states and their political subdivisions, and private employers, regardless of size. You only need one employee to be an employer for purposes of USERRA, although other federal laws (including Title VII of the Civil Rights Act of 1964) only apply to employers with 15 or more employees.

Among employers in the United States, only religious institutions (on First Amendment grounds), Native American tribes (on residual sovereignty grounds), and international organizations (World Bank, United Nations) and foreign embassies and consulates (on diplomatic immunity grounds) are exempt from USERRA enforcement.

USERRA applies all over the world to the U.S. Government and to U.S. companies. It protects:

1. Re-employment Upon Return from Active Duty
2. Initial employment hiring
3. When employment conflicts with Inactive Duty Training
4. Health Insurance Guarantee
5. Freedom From Discrimination and Retaliation

The federal reemployment statute has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act, Congress expanded the application of the law to include state and local governments. In 1974, the Senate Veterans' Affairs Committee explained the rationale for this expansion:

"The Department of Labor generally favors such an amendment to the law. It believes that school teachers, policemen, and other public employees returning from military service should not be denied reemployment rights provided for other veterans.

"The Military Selective Service Act of 1967 declares it to be the sense of Congress that States and their subdivisions extend to veterans the same reemployment rights as do the Federal Government or private industry under present law. The provision now relating to State and local governments, however, is not binding under the law and, as a consequence, many returning veterans have found that their jobs in State or local government no longer exist. Furthermore, because these stated reemployment rights are not mandatory upon State and local governments, these veterans lose all benefits which would have accrued to them had they not entered military service.

"This year [1974] it is expected that an estimated half million Vietnam veterans will be separated from military service. More than half of these young men were employed prior to their entering service. Under the Military Selective Service Act of 1967, those who held jobs with the Federal Government or private industry are assured that their job rights are protected. This is not the case with those veterans who previously held jobs as school teachers, policemen, firemen, and other State, county, and city employees.

"Although a number of States have enacted legislation providing reemployment rights to veterans, the coverage, the rights provided, and the availability of enforcement machinery all vary considerably from state to state. Also, some State and local jurisdictions have demonstrated a reluctance, and even an unwillingness, to reemploy the veteran. Or if they do, they seem unwilling to grant them seniority or other benefits which would have accrued to them had they not served their country in uniform." - Senate Report No. 93-907, 93rd Congress, Second Session, pages 109-110 (June 10, 1974).

**Kenneth “Gene” Savage
Lieutenant, United States Navy Reserve
Memphis, Tennessee**

**U.S. Senate Committee on the Judiciary Hearing:
“Access to Justice For Those Who Serve”
Wednesday, March 24, 2014
3:00 p.m.**

Good afternoon Chairman Blumenthal, Chairman Leahy, Ranking Member Hatch and other distinguished Members of the Committee. I would like to thank the Committee for the opportunity to share my story here today.

My name is Kenneth Eugene Savage, Jr. My friends and family call me "Gene." I am proud to tell you that I have served over 24 years in the U.S. Navy. I began serving on active duty in the Navy from February 1990 to November 1998, as an Aircraft Electrician; attaining the rank of 2nd Class Petty Officer. Just a few days after my honorable discharge from active duty, I subsequently enlisted in the Navy Reserve. Whilst serving, I earned a Bachelor of Science in Professional Aeronautics with a Minor in Aviation Business Administration from Embry-Riddle Aeronautical University and then applied for a Direct Commission Officer and was awarded the designation of Aircraft Maintenance Duty Officer. I currently serve as a Lieutenant with VR-54 in New Orleans, LA, as a member of a C-130 unit delivering personnel and cargo around the globe.

I was born in Mobile, Alabama, where my father served as a Seaman in the Coast Guard. I currently live in the Memphis-area with my wife of 10 years, Michelle. I have one son named Quentin, a junior at Fayette Academy, and a step-daughter named Kathryn Luckman, a junior at Austin Peay State University. I have worked in the aviation maintenance industry all of my life.

I began my career at FedEx in 2001, as a junior aircraft maintenance avionics technician, working the graveyard shift. Early on in my career at FedEx, I became aware that the company had policies that discriminated against its employees who were service members like me. In August of 2004, FedEx, in both policy and practice, punitively charged Guardsmen and Reservists for overtime opportunities they were unavailable for because they were completing their required military service. At the same time, non-service member employees who were on vacation, celebrating holidays, on temporary assignments, even doing jury duty, were *never* charged for missing those same overtime opportunities when not available to work at their assigned work centers. And then, because employees with the lowest number of cumulative overtime hours are offered overtime first, service members at FedEx were less likely to be offered overtime opportunities as a result of accumulating overtime hours while performing military service. The cost of this disparate treatment to individual service members had the potential to amount to thousands or even tens of thousands of dollars annually. After working with other service members over the course of 8 months, we were finally able to change this discriminatory policy and end the practice.

FedEx's contempt towards Guardsmen and Reservists was illustrated again in May 2007, with a policy and practice that placed service members on "Military Leave of Absence" while performing any military duty. "Military Leave of Absence" was the means by which FedEx deprived Guardsmen and Reservists of both seniority and non-seniority based employee benefits. In short, FedEx's policies and practices surrounding the use of "Military Leave of Absence" deprived service members of things like: participation of work shift

bidding, bidding on training/career development classes, bidding on overtime, scheduling of vacation and holidays, use of company jumpseats, and means of accruing vacation and company scheduled holidays. FedEx corrected some of these individual disparate conditions after the Veterans Employment and Training Service within the Department of Labor (DOL VETS) investigated and determined that the "Military Leave of Absence" policies and practices were in fact discriminatory per USERRA.

In March 2008, fellow FedEx employee, service members and I publicly expressed our concerns about FedEx's new Portable Pension Account retirement program, as it applied to periods of military service. The Senior VP of Technical Operations at FedEx, Gregory Hall, assured us that the new system would credit service and applicable imputed income when employees return to active employment. He further stated, "Any missed employer matching contributions will be credited monthly in the same amount as if you had been working during the period of military leave." As far back as 2006, FedEx knew that it had an issue with properly crediting service member's retirement accounts. In January 2010, FedEx admitted it had failed to make appropriate contributions into a fellow reservist's 401K account and then made an un-substantiated contribution correction. Finally, in June 2012, I became concerned with apparent discrepancies in my own retirement plans due to my years of military service dating back to the start of my employment with FedEx in August 2001. I again expressed my concerns to the benefits department to include the public announcement made by the Sr. VP in March 2008, but to no avail. Rather than fix the problem with the failed contributions to my pension plan, FedEx sent me bouncing from one department representative to another. Two months later, I was terminated!

It was apparent from my sudden termination that FedEx was upset with my persistence in questioning its policies and practices relating to service members and retaliated against me by falsely accusing me of violating their reduced-rate shipping and FedEx office discount policy. This was a policy that FedEx changed without prior notification to employees only days before my alleged violation. I used FedEx's appeal process, a three-tier progression that ended with President and CEO, David J. Bronczek, and other Sr. VP's upholding my termination.

I then filed a complaint with the DOL VETS which, after a thorough investigation, found that FedEx had in fact discriminated and retaliated against me, which led to my wrongful termination. During the course of the investigation, FedEx reinstated my employment but that was short-lived. Four days after I was reinstated, they once again overturned their decision and fired me again. Also, the questions I had about my retirement benefits were discussed at that time. FedEx openly admitted that my retirement accounts were incorrectly credited throughout my entire 11 year career. Apparently, the same error that FedEx made with my retirement account was also made to other service members in their employ. Despite all of this, FedEx refused to reinstate me after the conclusion of the DOL VETS' investigation in March, 2013, which found my complaint to be meritorious. When I asked my DOL VETS investigator, Wendy Harrison, what stood out in her determination

in my case, she told me that FedEx could not demonstrate to her any other similarly situated employees that were terminated for violating the same policy either in a civilian or military capacity that were not reinstated to their former fulltime position. It was obvious to her that having a strong military voice and expressing my concerns about some of FedEx's policies and practices, especially when I started looking into the retirement issue, was the underlying motivation in FedEx's decision to terminate my employment.

After two failed mediation attempts to correct my missing retirement funds, (based in part on FedEx not providing detailed calculations as to how they derived at the figures they presented), the DOL VETS concluded their attempts to work this out and told me to refer my case to the Department of Justice (DOJ) for legal representation. DOJ declined to take my case, offering no reason or explanation as to why. I then consulted with Captain Sam Wright at the Reserve Officers Association who gave me invaluable advice. I later retained Joe Napiltonia who agreed to take my case on a contingency fee basis and front all of the costs of the litigation, even though the statute does not guarantee that he will even be compensated if we prevail. For some reason the statute states that attorney's fees "may" be awarded to a service member who prevails, but it does not say "shall" like other employment-related litigation.

You're probably thinking, "So why doesn't he just go get another job, he's got all this experience." The short answer is professionally, if I obtain a job with one of the big air-carriers, I would have to start my career all over again. As I mentioned earlier, when I started at FedEx, I worked the graveyard shift for approximately nine years to earn enough seniority to finally obtain a daytime shift so I could spend quality time at home with my family. At FedEx, I earned approximately \$95,000 per year working a straight 40-hour week, not to mention extra pay with overtime.

On a personal note, because of my unwarranted termination, I was in such dire financial straits that my wife and I were forced to sell personal and family belongings and my vehicle to make ends meet. Ten months after my termination, my family was forced into a short-sale of our home of almost 10 years which in turn has negatively impacted both my and my wife's credit. In addition, after my sons 14th birthday, I was granted sole custody of him. A major stipulation in the parenting plan was that he finish school at Fayette Academy, where he has been a student since Pre-K. Being tied to the Memphis-area until June 2015 limits my ability to find another job in the aviation industry. Despite my best efforts, I'm still unemployed. I feel it very important to be with my son during his final years in high school, since he is destined to go to college and then pursue a sound career path, at which time I'll never be able to be as close to him again. If I took a job that placed me out of the Memphis-area, it would severely impact my relationship with him.

Coming here today to testify before this Committee was a perplexing decision. But at the end of the day, the tragedies my family has been put through since my wrongful termination motivated me to do everything I can to make sure this doesn't happen to another fellow service member and their family. I felt it

was my duty as a Naval Officer to speak on behalf of other service members who face discrimination because of their military service.

This doesn't have to be the end of the story. It has become clear to me that certain legislative actions can and must be taken to help protect service members and their families. Service members, American consumers, and even our small businesses should have the SAME access to the justice system as corporations, like FedEx.

In speaking to you, I hope I have been able to shed some light on just how critically important this issue is nationwide. Quoting Theodore Roosevelt: "A man who is good enough to shed his blood for his country is good enough to be given a square deal afterwards."

Please act swiftly to address these issues and know that I look forward to engaging in a meaningful conversation with the Committee members today. Thank you for your time and consideration.



STATEMENT OF
IAN DE PLANQUE, DEPUTY DIRECTOR
LEGISLATIVE COMMISSION OF THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT, FEDERAL RIGHTS AND AGENCY ACTIONS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
“ACCESS TO JUSTICE FOR THOSE WHO SERVE”

MARCH 27, 2014

Chairman Blumenthal, Ranking Member Hatch and distinguished Members of the Subcommittee, on behalf of National Commander Daniel Dellinger and the 2.4 million members of The American Legion, I thank you and your colleagues for the attention you are devoting to the struggles of American veterans as they seek benefits and compensation for their injuries and illnesses sustained in service to this country.

Yesterday, National Commander Dellinger addressed a joint session of the House and Senate Veterans' Affairs committees and the claims backlog at the Department of Veterans Affairs (VA) was at the forefront of concerns he brought before that body. The Commander decried an adjudication process “rife with errors and inconsistencies” and stressed that efforts to eliminate the backlog must include reform of the work credit system as well as improvement in communication between VA and the Department of Defense.

The American Legion has been deeply dedicated to working to end the backlog. The American Legion has over 2,900 accredited service officers nationwide, working from the county to the state to the national level to assist over three quarters of a million veterans with their disability claims. Annually, The American Legion conducts Regional Office Action Review (ROAR) visits in 12 to 15 regional offices. These weeklong ROAR visits examine a random sampling of recently adjudicated claims provided to The American Legion by VA, as well as interviews with VA staff and American Legion service officers working in the regional offices to determine how national policies are being implemented in the field.

It is important to The American Legion to get outside the beltway and out where the rubber meets the road to examine the problem. Often, even the best conceived policies struggle when inconsistently implemented. What we have found is a wide range of effectiveness in regional offices. The variances and lack of consistency contribute to overall efforts to solve the problem.

To understand the problem, it is important to understand how the backlog is defined. In 2010 at The American Legion annual convention in Milwaukee, WI, the Secretary of Veterans Affairs Eric Shinseki laid out the laudable goal of eliminating the backlog by 2015. Secretary Shinseki promised no claims pending for longer than 125 days, and claims being decided with 98 percent accuracy. Since that time, the definition of backlog has been generally agreed upon as any claim pending longer than 125 days.

The most recent figures from VA indicate that of the current 630,110 claims pending, 351,120 of those claim, or 55.7 percent of those claims, have been pending longer than 125 days.¹ For comparison's sake, in 2010, when the major effort to reduce the backlog began, VA counted 510,827 claims pending, with 197,231 of those claims pending over 125 days, representing only 38.6 percent of the inventory². While the numbers today are certainly higher than they were when the major backlog efforts began, at least in 2014 they have finally started to trend back downwards after several years of steady increases.

The American Legion is concerned however, because some of the factors in the declining numbers may not represent the whole picture. Last year, VA made a major push to work on initial claims that had been pending longer than two years, with a subsequent push to address claims pending longer than one year. These claims had provisional decisions issued, so they are no longer counted as initial claims. However, there were problems with the provisional ratings. Investigation by VA's Office of the Inspector General (VAOIG) found that 91 percent of the provisional rating decisions issued were in error, not in compliance with the Veterans Benefits Administration (VBA) guidance related to the two year old claims initiative³. The American Legion service officers in other regional offices found similar rates of inconsistency with these claims.

Those claims will have to be appealed. An appealed claim no longer counts as an initial claim, and is not as visible statistically when looking to evaluate the state of the backlog. Furthermore, while an initial claim may take over a year to resolve, appealed claims can take four to five years or longer, thus further denying justice to veterans and increasing their wait times.

One of the contributing factors to this is the way VA counts work credit. As the current work credit system stands, there is no factor for whether the work is done correctly or not. When the work is incorrect, veterans must appeal their claims, and clog the system up for a longer period of time. While many VA employees would like to be fully attentive to every detail of a claim, they are under tremendous pressure to churn out a certain number of claims every day, and cutting corners becomes natural to meet work quotas. There must be balance.

¹ VA Monday Morning Workload Reports – March 22, 2014

² VA Monday Morning Workload Reports – March 20, 2010

³ Statement of Sondra F. McCauley - Deputy Assistant Inspector General for audits and evaluations Office of Inspector General, Department of Veterans Affairs before the Subcommittee on Disability Assistance and Memorial Affairs Committee on Veterans' Affairs, United States House of Representatives hearing on "adjudicating VA's most complex disability claims: ensuring quality, accuracy, and consistency on complicated issues" December 4, 2013

The American Legion recommends examining the work credit system, and developing a work credit system that adequately addresses not only the quantity of work performed by employees, but also the quality of work⁴. Even a system as simple as giving the employee credit for each claim completed, but removing credit when such work is found to be in error would be both possible in the new electronic processing environment, and would provide a more reliable picture of how work progresses in the offices. Furthermore, getting the claim done right the first time would be equally incentivized with getting the claim to the next desk in the chain.

Finally, a contributing factor to the backlog of claims is the delays in communication between the VA and the Department of Defense (DOD). Because of the difficulties and delays, in 2009 President Obama committed to the long requested goal of a single, interoperable electronic health record that would follow a veteran from the moment they swore their enlistment oath to the sad day when their family must file for honorable burial in a veterans' cemetery. After several years and over a billion dollars working towards the Integrated Electronic Healthcare Record (IEHR) last year VA and DOD announced they could not come to a reasonable agreement on a single record, and would pursue independent systems on their own, that would be compatible with one another.

Our service members and our veterans deserve better and Congress must stop the bureaucratic bickering between the two departments. Hold VA and DOD to their commitments, and make clear to them that if they do not honor these commitments, the funds to continue their path of folly will not be continued.

The project is simple. From the day a servicemember takes their oath of office and passes their initial physical examination to enter military service the VA must be aware of that service member's healthcare record because, at some point in time -- whether it be the near future or thirty years later -- DOD and VA both know that new incoming servicemember will be leaving military service and entering the VA system and will have earned a certain amount of earned benefits, including, perhaps, certain healthcare benefits. A single system, or instant transmission of the information could cut substantial time off of the processing of most veterans' claims. The system must include National Guard and Reserve records, which often present addition challenges and delays.

Again, The American Legion is grateful to this committee for its attention to this and other issues where veterans struggle for justice. It is vitally important that Congress maintains their focus on these issues, even as the size of the military is slashed and our veterans are returned from wars overseas. When the wars are no longer front page news, the wounds our veterans suffer will still remain. They cannot suffer those wounds in silence, lost and forgotten from the attention of the government they honorably served. The voice of The American Legion and the voice of every veteran across America is vital in understanding the struggles they must overcome for basic compensation for the injuries and illnesses they incurred defending this nation.

Questions concerning this testimony can be directed to The American Legion Legislative Division (202) 861-2700, or ideplanque@legion.org

⁴ American Legion Resolution No. 118 -- Revision of Work-Rate Standards for Department of Veterans Affairs Adjudicators -- AUG 2012

ACCESS TO JUSTICE FOR THOSE WHO SERVE
March 27, 2014
Senator Blumenthal Opening Statement

General Introduction

Thank you for joining us today for a hearing on what I believe is an absolutely crucial question: whether the rights of our servicemembers are adequately protected. I want to thank Ranking Member Hatch for helping to make this hearing happen. And of course I want to thank all of the witnesses.

This will be my last hearing as the chair of the Subcommittee on Oversight, Federal Rights, and Agency Action. Over the course of this Congress, we have been able to explore a variety of issues related to the federal government's duty to protect its citizens, and I am proud of what we have accomplished. I want to particularly thank Senator Leahy, chairman of the Judiciary Committee, for working with me to make this new subcommittee a success.

The Scope of the Problem

Today's hearing is the product of a proud tradition and a disappointing reality. The proud tradition is Congress's bipartisan tradition of passing legislation to protect our servicemembers. The disappointing reality is that too many of the rights enshrined by Congress are effectively dead letter in the face of structural and procedural barriers to enforcement. When servicemembers cannot find lawyers to take their cases, cannot get a ruling on the merits even when they make it to court,

and cannot receive adequate compensation even when they win—in that case the laws on the books are not the strong protections they should be.

USERRA

The Uniformed Services Employment and Reemployment Rights Act is a classic example. USERRA—as it is called—passed the House and the Senate by voice vote. It stands for the simple proposition that American workers should not be discriminated against because they have chosen to serve in their country's armed forces. It is hard to imagine a less controversial principle.

Yet USERRA has some of the weakest remedies in any comparable statute. A member of the National Guard or Reserve who is fired because they get deployed stands to win only back pay, reinstatement, and maybe some compensation for lost health care or pension benefits. If they experience prolonged unemployment—if they lose their home, their car, their credit—a court award will not even come close to making them whole. Further, because servicemembers are required to mitigate damages, awards are frequently far less than a servicemember's lost wages. Few private attorneys will take a case where the award after a long and difficult case is likely to be less than \$20,000 and may be even less than \$10,000.

And because employers know that they face such a small punishment when they violate USERRA, they have little incentive to comply with the law. The worst

that happens if they lose is that they have to pay the money they were always required to pay—so why not roll the dice and see if you can get away with it. Even when a servicemember can show that an employer willfully violated the law—a very difficult thing to show—that servicemember can only expect to collect double whatever damages they would otherwise get. In many cases, even this amount will not fully compensate the servicemember; and it rarely provides an adequate deterrent for the employer.

USERRA stands in stark contrast to other workplace protection statutes. An employee fired in violation of Title VII stands to get full compensation for any harm that results. They can also collect punitive damages. In other words, most discriminatory actions by employers come with large and powerful penalties. But if an employer discriminates against a servicemember, the penalties are negligible.

USERRA is also unusual in other ways. If the Justice Department finds a pattern or practice of discrimination under Title VII, they can file suit to vindicate everybody who has been harmed. If they find a pattern or practice of discrimination against servicemembers, they are powerless. If a state government employer violates Title VII, they are fully liable. If the same employer discriminates against servicemembers, they are not. At every step, servicemembers have weaker protections than almost any other category of litigants.

The Financial Marketplace

Servicemembers also face special difficulties in the financial marketplace.

Servicemembers are taught to repay their debts, no matter how onerous. The Uniform Code of Military Justice tells them that failure to repay a debt is a punishable offense. And many servicemembers know that an unpaid debt could lead to a lost security clearance and, in turn, a lost job. Unscrupulous lenders know that where a normal consumer might refuse to pay a predatory loan or seek legal assistance to have the loan cancelled, a servicemember may not.

For all these reasons, servicemembers are uniquely vulnerable to abusive lending practices. More importantly—when abusive practices are targeted at servicemembers, we are all worse off. A soldier who is afraid that he will lose his house cannot focus on his mission. A soldier whose family is being harassed by debt collectors is less able to keep the rest of us safe.

Congress has repeatedly acted to protect servicemembers, and it has done so in a bipartisan fashion. Like USERRA, the Servicemembers Civil Relief Act—which protects servicemembers from foreclosure and default judgments while they serve—passed the Senate by voice vote. The House passed the bill 425 to 0. The Military Lending Act—better known as the Talent Amendment—was a bipartisan proposal that was rolled into the National Defense Authorization Act without controversy. It was intended to protect servicemembers from loan shark interest rates of more than 36 percent.

Yet while these statutes have made a tremendous difference, commonsense reforms are needed for them to live up to their goals. The Servicemembers Civil Relief Act—better known as the SCRA [“Sick-Ruh”]—can be waived by contract. As a result, the worst lenders can protect themselves from liability just by demanding that servicemembers give up their rights. The Military Lending Act suffers from an outdated implementing regulation that allows lenders to avoid the act’s protections with small, cosmetic tweaks to their loans.

And servicemembers saddled with unfair loans too often find that federal protections intended to protect them from debt collector harassment do not work. While it would be illegal for a third party debt collector to harass a servicemember by going to the servicemember’s commanding officer, creditors can and do call commanding officers directly, sometimes scaring servicemembers into paying debts they don’t even owe. I have called on the Consumer Financial Protection Bureau to help address this problem, and I hope that the Administration shares my view that servicemembers must be protected.

Conclusion

As I said at the beginning, Congress has done great work to protect servicemembers, and we have done it on a bipartisan basis. I hope that the effort to make these protections truly work for our men and women in uniform will also be

bipartisan. I intend to listen hard today, and if there are legislative solutions needed I will work with my colleagues to get that done.

With that, I want to again thank Senator Hatch for being here and to recognize him for a statement.

Statement of Senator Jeff Flake
“Access to Justice for Those Who Serve”
Senator Committee on the Judiciary
Subcommittee on Oversight, Federal Rights, and Agency Action
March 27, 2014

While I am pleased the Senate is focusing on our veterans today, I am disappointed more attention is not being paid to the failures of the Veterans Administration to provide veterans their medical services and benefits. Congress has a responsibility to address this problem since the administration is apparently failing to do so.

For example, a recent CNN investigation revealed dozens of veterans with medical conditions are suffering at the hands of the VA, while thousands more wait months to receive basic medical care. Sadly, reports indicate that more than 20 veterans have died or are dying of cancer “because they had to wait too long for diagnosis or treatment” at a VA facility in South Carolina. In the Texas region, seven vets or their families were sent disclosures about adverse events and serious injuries suffered because of delayed care. These are just a few examples of veterans nationwide who have suffered due to the failures of VA hospitals.

Here is another startling statistic. In 2013, only 41 percent of new primary care appointments for our veterans were completed within 14 days of when the appointment was scheduled. In other words, 60 percent of all new appointments require veterans to wait more than two weeks to see the doctor. It is troubling to think that veterans are waiting more than fourteen days to receive an initial doctor’s appointment.

The Veterans Administration’s processing of veterans’ disability benefit claims is troubling as well. According to a recent study, it takes an average of 376 days for the VA to process veterans’ disability benefit claims. In Cleveland, Ohio, it takes an average of 464 days for the VA to process veterans’ disability benefit claims. Approximately 34,000 veterans have

been waiting for a year or longer on requests for disability compensation. A March 2014 analysis of the VA claims backlog found approximately 400,000 veterans are still waiting for their claims to be processed. This administration has seemingly done little to combat this problem.

I believe that Congress has an obligation and duty to provide veterans with adequate healthcare and benefits. Unfortunately, too many veterans have to wait too long to receive their benefits. Towards a solution, I cosponsored an amendment to the Veterans Health and Benefits and Military Retirement Pay Restoration Act, which would have compelled the VA to process the backlog of claims. Although the amendment was not adopted, I believe Congress should first focus on efforts like mine to eliminate this backlog and ensure the federal government is providing veterans with the benefits they were promised and certainly deserve.

QUESTIONS FOR THE RECORD

Senate Judiciary Committee

“Access to Justice for Those Who Serve”

March 27, 2014

Senator Amy Klobuchar

Question for Col. Paul Kantwill and Dwain Alexander, II, Esq

I know that ensuring our service members have all the necessary information about their rights is very important for making sure that they get the protections in the Uniformed Services Employment and Reemployment Rights Act and the Servicemembers Civil Relief Act.

How can we improve our efforts, so that those who serve are aware of these important consumer protections?

QUESTIONS FOR THE RECORD

Senate Judiciary Committee

“Access to Justice for Those Who Serve”

March 27, 2014

Senator Amy Klobuchar

Question for John S. Odom, Jr., Maj. Gen. Andrew Davis, and Ian DePlanque

A number of federal agencies have a role in upholding the rights of our service members.

How can we improve agency collaboration and coordination to ensure that our service members get the protections in the Uniformed Services Employment and Reemployment Rights Act and the Servicemembers Civil Relief Act?

Senate Judiciary Committee Hearing
Subcommittee on Oversight, Federal Rights, and Agency Action Subcommittee on the
“Access to Justice for those who Serve”
Questions for the Record Submitted by Senator Al Franken

Questions for Major General Davis

Question 1. I'd like to thank the Reserve Officers Association for its support of the Arbitration Fairness Act. Can you share with this Committee the ROA's reasons for supporting the bill?

Question 2. The Minneapolis Star Tribune recently ran an editorial in which it said: “There are already solid laws on the books to protect the financial security of military men and women. Provisions under the Servicemembers Civil Relief Act include a cap on interest rates, stays on proceedings and protections from evictions. The Military Lending Act guards against loans notorious for high interest rates, such as payday loans and auto title loans. The problem is that service members often are unaware of these safeguards.” One of the reasons servicemembers are unaware of their rights is that we've basically gotten rid of class notice under *Concepcion*. What can Congress do to make sure servicemembers know about their rights under the laws we're discussing today?

Senate Judiciary Committee Hearing
Subcommittee on Oversight, Federal Rights, and Agency Action Subcommittee on the
“Access to Justice for those who Serve”
Questions for the Record Submitted by Senator Al Franken

Questions for Colonel Odom

In your written testimony, you wrote, “The prevalence of forced arbitration agreements embedded in virtually every mortgage instrument and credit card agreement has caused many of our servicemembers who have disputes with creditors to be denied access to a federal or state court for resolution of their complaint.” You also pointed out that a lot of servicemembers will abandon their cases instead of incurring the filing fees and costs associated with arbitration. Could you elaborate on your recommendation that we eliminate pre-dispute arbitration for SCRA claims?

**“Access to Justice for Those Who Serve”
March 27th, 2014
Senator Blumenthal
Questions for the Record**

Does the American Legion support providing servicemembers with SCRA protections for student loans and home loans?

For Ian DePlanque

Mr. DePlanque, when the American Legion presented its 2014 legislative agenda to the Senate Veterans Affairs Committee, it argued quite powerfully that the Servicemembers Civil Relief Act should protect servicemembers from excessive student loan interest rates. In his testimony for today’s hearing, Mr. Odom has pointed out a loophole in SCRA [Sick-Ruh] protections in this area. Currently, if a servicemember refinances his student loans during his period of service, he loses SCRA protections against exorbitant interest rates. Senator Durbin has proposed closing this loophole, and I believe Mr. Odom has made a compelling case for that reform.

1. Does that strike you as the kind of reform the American Legion would support as part of its effort to protect servicemembers from excessive student debt?

The American Legion has also been a leader in trying to reduce homelessness among servicemembers and veterans. Mr. Odom points out that servicemembers

who refinance home loans also lose SCRA protections designed to protect servicemembers from losing their homes.

- 1. Would closing this loophole, so that servicemembers retain SCRA protections against foreclosure during their period of service, help reduce homelessness among servicemembers and veterans?**
- 2. Is such a reform consistent with the American Legion's goals?**

CHARRTS No.: SJC-01-001
Hearing Date: March 27, 2014
Committee: SJC
Member: Senator Klobuchar
Witness: COL Kantwill
Mr. Dwain Alexander II
Question: #1

Consumer Protections

Question: I know that ensuring our service members have all the necessary information about their rights is very important for making sure that they get the protections in the Uniformed Services Employment and Reemployment Rights Act and the Service members Civil Relief Act. How can we improve our efforts, so that those who serve are aware of these important consumer protections?

Answer:

The Department of Defense has developed forward-leaning programs to ensure that Service members know about the benefits and protections of the SCRA and USERRA. This educational process involves coordinated and overlapping efforts to alert the Service members and their commanders of these benefits and protections, and then to ensure that the proper counselors are there to help individuals fully understand the nuances of the relevant laws and receive their full protections under the law.

First, it is vital that we actively listen to Service members and their families, taking stock of what they have to say, in order that we can assess what we are doing and how we can improve. What products are they using? How frequently are they using them? Why are they using them? What is their assessment of their own financial situation? What help do they need? In order to do this, the DoD has commissioned three surveys of DoD personnel: (1) members of our force; (2) the "boots on the ground" financial counselors; and (3), legal assistance attorneys, consumer watchdogs and advocacy groups that help us look out for military families.

Secondly, based upon what we hear and what these surveys tell us, we will then appropriately tailor the education and training of our Total Force. Specifically, the Department's efforts to educate Service members and their families are centered at our installation readiness facilities, pre-deployment and re-deployment process facilities, and reserve component mobilization and demobilization processing centers. Reserve component processing centers, in particular, have been of critical importance because two of the most important economic protections and benefits—the 6% interest rate cap and the extension of foreclosure protections—apply only to pre-service obligations and thus predominately affect Reservists and National Guardsmen called to active duty from the civilian workforce.

Likewise, USERRA protects the job rights of individuals who voluntarily or involuntarily leave civilian jobs to perform service in the uniformed services. As a result, SCRA, USERRA, and related financial training at pre-deployment and re-deployment processing facilities is more

detailed and helpful than ever before. To the extent that we can, it is the Department's goal to get out in front of these issues through education, counseling, and offering a range of programs, as well as individual counseling, that better meet our Service members' needs.

Regarding USERRA, the Employer Support of the Guard and Reserve (ESGR) is a DoD office which helps inform and educate Service members and their civilian employers about their rights and responsibilities under the Act. ESGR serves as a neutral, free resource for employers and Service members. Furthermore, ESGR's Ombudsman Services Program provides information and mediation on issues related to USERRA. The ESGR Customer Service Center is available to answer USERRA questions. Specially trained ESGR Ombudsmen are also available to assist members of the Guard and Reserve in resolving disputes with their civilian employers related to service in the uniformed services through neutral and impartial mediation throughout the U.S. and U.S. territories. In Fiscal Year (FY) 2013, more than 4,700 ESGR volunteers donated 230,850 hours of time assisting service members, recognizing employers and helping resolve employment and reemployment issues.

Last but not least, these results are reinforced through sustained, proactive engagement between the DoD and other government agencies, as well as with the financial industry. The Department is fortunate to enjoy a very cooperative working relationship with other Federal agencies relating to consumer law issues—the Department of Justice, the Consumer Financial Protection Bureau (CFPB), the CFPB's Office of Service member's Affairs, and the Office of the Comptroller of the Currency, to name a few. These cooperative working relationships enable swift and effective Federal enforcement actions brought by our colleagues, as well as critical compliance and enforcement efforts at State and local compliance and enforcement efforts. Our overarching goal is to provide comprehensive support for our Service members and their loved ones, ensuring a well-informed, financially-secure, and resilient force.

QUESTIONS FOR THE RECORD

Senate Judiciary Committee

“Access to Justice for Those Who Serve”

March 27, 2014

Senator Amy Klobuchar

Question for John S. Odom, Jr., Maj. Gen. Andrew Davis, and Ian DePlanque

A number of federal agencies have a role in upholding the rights of our service members.

How can we improve agency collaboration and coordination to ensure that our service members get the protections in the Uniformed Services Employment and Reemployment Rights Act and the Servicemembers Civil Relief Act?

Response of Col John S. Odom, Jr.

My primary area of practice is SCRA-related, so I will confine my response to that portion of the question.

Agency collaboration and coordination are a starting point but certainly are not the complete solution. No level of coordination between agencies will solve the problems our servicemembers face when bad actors force their claims into mandatory, pre-dispute arbitration. When that happens and the servicemembers discover how much out-of-pocket expense is involved merely to invoke and pursue mandatory arbitration over what might be an amount that is less than the cost to arbitrate the matter, they are just going to abandon all efforts to enforce their SCRA rights. That is yet another reason that mandatory pre-dispute arbitration clauses should be disallowed under the SCRA.

From my perspective, the efforts of the DoJ, CFPB and banking regulators to investigate and bring to justice violators of servicemembers' SCRA rights have resulted in some monumentally large settlements, but I have continuing questions about how much of that money actually percolates down to the troops' pockets. As a private attorney, I am still a big believer in the rights of an individual to seek justice from a jury in a trial. I know that the settlements I have obtained for my clients account for significantly larger damage payments than those negotiated in the various OCC and DoJ settlements, but that's probably just in the nature of working one-on-one as opposed to working an issue from an industry-wide standpoint.

There will always be a need for close collaboration between the DoD and the various agencies that seek to enforce SCRA rights on behalf of servicemembers (DoJ, CFPB, FTC, OCC and others) to make the agencies outside of DoD aware of trends in SCRA violations that legal assistance officers see on a daily basis. Armed Forces legal assistance attorneys should remain vigilant to help spot new trends in SCRA violations and to report those through appropriate channels so that federal enforcement agencies can be made aware of what is happening to servicemembers in the field and can take action to protect the rights of those servicemembers.

Senate Judiciary Committee Hearing
Subcommittee on Oversight, Federal Rights, and Agency Action Subcommittee on the
“Access to Justice for those who Serve”
Questions for the Record Submitted by Senator Al Franken

Questions for Colonel Odom

In your written testimony, you wrote, “The prevalence of forced arbitration agreements embedded in virtually every mortgage instrument and credit card agreement has caused many of our servicemembers who have disputes with creditors to be denied access to a federal or state court for resolution of their complaint.” You also pointed out that a lot of servicemembers will abandon their cases instead of incurring the filing fees and costs associated with arbitration. Could you elaborate on your recommendation that we eliminate pre-dispute arbitration for SCRA claims?

Response of Colonel John S. Odom, Jr.

None of the protections of the SCRA apply to anyone until they either enter the Armed Forces or, in the case of certain members of the Guard and Reserve, receive their orders notifying them of impending mobilization to active duty. For example, the typical 19-year old college student who receives a credit card application in the mail which contains a mandatory arbitration clause embedded in the agreement in very small type may have absolutely no clue that several years later, he or she may enlist in the Armed Forces. At the point in time when they receive the credit card or the card application application (many of which provide that by using the card for the first time, the user agrees to all the terms of a multi-page contract), they are not protected by the SCRA but as soon as they go into the Armed Forces they are protected by the Act. It simply is not fair to deny those persons the full range of protections found in the SCRA – the most important of which may well be the right to bring an action against violators in an appropriate court and seek justice from a court or a jury – because of a pre-dispute arbitration clause.

More importantly, as I pointed out in my written testimony, the provisions of the SCRA simply do not apply to private arbitration proceedings. Suppose Sergeant Snuffy’s rights are violated by a creditor under a contractual agreement containing a pre-dispute mandatory arbitration clause. Assume further that Sergeant Snuffy invokes the arbitration clause, pays the \$450 filing fee with the American Arbitration Association, nominates an arbitrator and pays that person several thousand dollars as a deposit to satisfy a condition for the designated arbitrator accepting the appointment. Then before the scheduled date for the arbitration the Army dispatches Sergeant Snuffy somewhere on the globe to go fight terrorists and he cannot attend the arbitration hearing. Under that scenario, the SCRA cannot be invoked to bring about a mandatory stay of the proceedings until such time as the servicemember can be present to participate. The obvious lack of fundamental fairness that such a realistic hypothet raises is sufficient by itself to justify my strong opposition to pre-dispute mandatory arbitration clauses when the contract subsequently becomes subject to the SCRA.

The proposal that if, once the dispute has arisen, the parties mutually agree to arbitration seems to be imminently fair. Otherwise, I am unalterably opposed to pre-dispute mandatory arbitration clauses.

Statement for the Record on the Department of Veterans Affairs Backlog
Senator Robert P. Casey, Jr.

The Department of Veterans Affairs (VA) is currently facing a disability claims backlog that has been a persistent and inexcusable problem. This backlog has been an issue for over twenty years as spikes in demands outpaced the VA's capacity. It is our duty to protect those who have protected this country. Our Nation's heroes shouldn't have to wait for months or more for their claims to be addressed. It is unacceptable that some veterans in Pennsylvania have waited a year or longer to get their disability claims processed. We must honor the valor of the men and women who served our country by acting to address this recurring issue. Our gratitude upon their return home must be reflected in our commitment to helping all those who have served, especially those who have suffered injuries of war. We currently have the resources to assist our veterans, however, too often we hear about the delay in the disability claims process. This is unacceptable.

We need a commonsense, bipartisan approach to bring all parties together to research and try and solve this national problem. That is why in July of 2013, Senator Heller and I established the bipartisan VA Backlog Working Group. Through this Working Group, we met with a variety of stakeholders to take a deeper look at this issue.

There are many things that can be done to assist the VA in addressing this issue. Secretary Shinseki and the employees at the VA have done an excellent job trying to bring down the backlog but we need to ensure they continue this progress. We must work to bring the VA benefits system into a 21st century delivery system.

By refining management practices in the Veterans Affairs Regional Offices and modifying current procedures, the VA can serve our veterans more quickly. We need to ensure that the VA has the adequate resources needed to implement these changes. In order to accomplish these goals, a greater demand for cooperation from federal agencies is required to obtain the necessary information and cooperation is needed from the VBA employees to quickly process information.

While the VA has done many commendable things to improve this backlog, we must continue to help them to serve our country's veterans as quickly as possible. My legislation with Senator Heller, will help to solve this problem. The 21st Century Veterans Benefits Delivery Act will ensure that all parts of this process, from the veteran to the government agencies, cooperate in providing benefits to the veterans who have earned them. Veterans deserve a comprehensive and permanent solution to this problem, and our hope is that this legislation will ensure we reach that goal.

*Statement of Senator Dean Heller before the
Senate Judiciary Committee's
Oversight, Federal Rights, and Agency Action Subcommittee
on "Access to Justice for Those Who Serve"
Thursday, March 27, 2014*

Thank you Chairman Blumenthal and Ranking Member Hatch for holding this hearing today.

One of our roles and responsibilities as Members of Congress is exerting oversight over federal agencies. An agency that I have focused on as a member of the Senate Veterans' Affairs Committee has been the Department of Veterans Affairs, and specifically, this agency's inability to process Veterans' claims in a timely manner.

This is an issue that impacts hundreds of thousands of our nation's Veterans, and I have been pleased to work with a bipartisan group of my Senate colleagues—Senators Casey, Moran, Heinrich, Vitter, and Tester—to address this problem.

In 2009, the VA committed to Veterans that they would receive a decision on their disability claim within 125 days; yet, nearly 400,000 Veterans nationwide, including 4,200 in my home state of Nevada, are waiting longer than the VA's 125-day deadline for their claim to be completed.

While it is easy to point fingers and place blame, I believe it is time for Congress to further engage on this issue beyond just oversight of the VA's efforts.

Seven months ago, Senator Casey (D-PA) and I established a VA Backlog Working Group to analyze the current problems facing the VA so that we could generate solutions that would help the VA reduce the claims backlog.

What became clear is that the backlog of claims is not new; it has been an issue plaguing the VA for two decades. Despite recommendations from numerous reports from the VA's Inspector General, the Government Accountability Office, and Blue Ribbon Commissions, the VA continues to face this problem because it is operating under a 1945 system in the 21st century.

Unless the claims process is overhauled, the VA will continue to see surges in claims that result in a backlog.

That is why I, along with Senators Casey, Moran, Heinrich, Vitter, and Tester, introduced the bipartisan 21st Century Veterans Benefits Delivery Act (S. 2091) and the VA Backlog Working

Group March 2014 Report to provide a full picture of the claims process and propose solutions to help the VA reach its goal of eliminating the backlog by 2015.

The 21st Century Veterans Benefits Delivery Act addresses three aspects of the claims process: claims submission, VA Regional Office (VARO) practices, and federal agency responses to VA requests.

First, Veterans must be given every tool to understand the claims process and what they can do to provide information that the Veterans Benefits Administration (VBA) needs by law to process the claim efficiently and accurately. To accomplish this, the legislation proposes improving education of the claims process and claims submission; increasing access to Veterans Service Organizations to assist the Veteran; and incentivizing and encouraging Veterans to submit fully developed claims.

If Veterans are fully informed, they will be better equipped to provide the necessary information that will allow the VA to move the claim through the system faster.

Second, the VAROs must implement efficient processes so that claims can be quickly processed, particularly as the VBA transitions to an electronic claims processing environment. I believe the workforce at each VARO is capable of tackling this enormous task, provided they have the resources and guidance that is consistent throughout the VBA.

Improvements to the current practices include analyzing consistency and accountability of VARO management; implementing process changes that allow claims to move quickly through an electronic system; and improving the transparency of the size and scope of the current backlog.

Third, and lastly, other federal agencies must make VA records request a priority. Files at other departments within the VA or at outside agencies are targeted as a reason for delays in the claims process. The VA is trying to become a 21st Century benefits delivery service for our Veterans, but cannot award claims when they lack evidence. In order to obtain this evidence, the VA and outside agencies must establish efficient processes for transferring records and set deadlines for such transfers, as well as ensure VBA employees are processing this information it receives in a timely fashion.

While there is no silver bullet that is going to fix this problem overnight, implementing these bipartisan, common sense proposals will help improve the current system and reduce the number of days it takes the VA to process claims accurately.

As this Subcommittee considers Congressional accountability over and action by federal agencies, I hope you will also consider the role that Congress plays in assisting the VA in reaching a goal that I believe is shared by every Member of Congress, the VA, the Veterans Service Organizations, and Veterans.

Thank you again Chairman Blumenthal and Ranking Member Hatch. I look forward to working with you and the rest of my colleagues to address this issue critical to America's Veterans who volunteered to serve and sacrifice to protect our freedom.

United States Senate

WASHINGTON, DC 20510

April 29, 2013

The President
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear Mr. President:

We are writing to request that you take direct action and involvement in ending the current Department of Veterans Affairs (VA) disability claims backlog.

After a decade of war, and despite the VA's efforts to modernize, more than 600,000 veterans are still stuck in the VA's disability claims backlog. While the average wait time for first time disability claims currently ranges between 316 and 327 days, veterans in certain parts of the country are waiting even longer – 681 days in Reno, 642 in New York, 625 in Pittsburgh, 619 in Los Angeles, 612 in Indianapolis, 586 in Houston, and 510 in Philadelphia. In the worst cases, veterans have waited and continue to wait 800 days, 900 days, and even more than 1000 days for a disability claims decision from the VA.

In the last four years, the number of claims pending for over a year has grown by over 2000%, despite a 40% increase in the VA's budget. As a reminder, during this same time period, Congress has given VA everything it has asked for in terms of more funding and more employees; however, this has not eliminated the backlog of claims. Solving this problem is critical for veterans of all generations. We need direct and public involvement from you to establish a clear plan to end the backlog once and for all.

This country must be grateful for the safe homecoming of every single man and woman who has served in harm's way. Our joy at their return must be reflected in our commitment to helping all who have served. We respectfully ask you and your administration to find a solution that ensures that no veterans are stuck in the VA backlog.

Thank you for your consideration of this matter.

Sincerely,


Bob Casey, Jr.


Tom Harkin

Mark R Warner

Kirsten E. Gillibrand

Angus King

Elizabeth Warren

Joe Donnelly

Jeff Fleck

Ron Paul

Jim Risch

John McCain

Marco Rubio

Pat Toomey

Ray Blunt

Tim Wainwright

Sally Clark

Michael B. Eni

Jerry Moran

Jeff Sessions

Mike McConnell

Mark Begala

Jimmy Kimmel

John Bozman Jeffrey A. Mackley
 Maria Cantwell Dennis Feinstein
 Mr. R. Chuck Grassley
 Devin Hatch Pat Roberts
 Frank R. Lautenberg Debbie Stabenow
 Tom Carper Dan Claitor
 Jeanne Shaheen Clara Kim
 Robert Menendez John P. Murtha
 Jay Byrnes Cindy McCardell
 John Cornyn Ben Cardin

D. M. King

M. J. & H. H. H. H.

Ted G.

Paul H. H.

R. W. H.

Mike C. H.

L. J. H.

Mark H.

J. L. H.

H. L. H.

Susan Collins

Heidi H.

Tom H.

Brian H.

Brian Nelson

Jim H.

Lee H.

John H.

Richard H.

Lee H.

Harry Reid

Tim L

Rob Portman

Kelly A. Ayotte

Jeff



STATEMENT FOR THE RECORD
MILITARY OFFICERS ASSOCIATION OF AMERICA
on
“Access to Justice for Those Who Serve”
USERRA and SCRA Improvements

2d Session, 113th Congress

Subcommittee on Oversight, Federal Rights, and Agency Action
Senate Judiciary Committee
March 27, 2014

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One Powerful Voice.

CHAIRMAN BLUMENTHAL, RANKING MEMBER HATCH, Members of the Subcommittee, the Military Officers Association of America (MOAA), is pleased to present its views on protecting reemployment and other rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA).

National Guard and Reserve service men and women who have served a qualifying period of active duty are unique in our Armed Forces community in that after being called to a period of active Federal service under Title 10 orders they become veterans while continuing to serve in active status in the Reserves.

These dual-status veterans face unique challenges associated with their service including multiple re-entries into civilian life, employment challenges and reduced civilian career potential due to workplace absences.

893,500 Guard and Reserve members (as of 11 March 2014), have served on operational active duty since September 10, 2001; more than 300,000 have served on multiple tours. Sustained reliance on citizen-warriors over the past 12+ years has no precedent in American history. Reliance on the “operational reserve” is likely to continue after the Afghanistan conflict.

Operational Reserve Policy

Reliance on National Guard and Reserve (G-R) forces for operational missions evolved gradually after the Vietnam war. Major policy changes led the way: first, a “total force policy” was established (1972) to upgrade the organization, training, equipment and integration of the G-R in the nation’s Armed Forces; second, the All-Volunteer Force replaced conscription. Then, in the mid-1970s, Congress adopted a provision that gave the Commander in Chief authority to activate the G-R on his own authority.

The activation of approximately 250,000 members of the G-R for Gulf War I in 1991 was the first large-scale “live fire” event that tested the total force policy. Until then, there was considerable political and public uncertainty that the President would actually invoke his authority to call up the reserve forces.

After Gulf War I, G-R call-ups steadily increased in the mid-late 1990s primarily as a result of peacekeeping operations in Kosovo and Bosnia.

Terrorist attacks on the homeland on Sept. 11, 2001 resulted in the largest sustained activation of the G-R since World War II. Senior civilian and military defense leaders began using the term “operational reserve” to signal a de-facto change in national security policy for the employment of reserve forces in the operating forces to conduct missions alongside active duty formations in Iraq, Afghanistan and elsewhere.

Secretary of Defense Robert Gates formally announced the operational reserve policy on January 19, 2007 in a memorandum, Utilization of the Total Force. “. . . the planning objective for involuntary mobilization of Guard/Reserve units will remain one year mobilized to five years demobilized ratio.”

The operational policy means that G-R members must be available for activation for extended active duty service multiple times over a 20-year or longer career.

Use of the Operational Reserve for Non-Emergency Missions

The National Defense Authorization Act (NDAA) for FY 2012 (P.L. 112-81) established even greater flexibility for accessing the G-R for operational missions. The statute authorizes the call-up of up to 60,000 G-R members for not more than 365 “consecutive days” active duty to perform “pre-planned” and budgeted active duty missions other than emergency and humanitarian operations. The missions must be funded and approved for a fiscal year or multiple fiscal years in the services’ budget planning materials.

The authority means that pre-planned and budgeted call-ups of the G-R can be made by the Service Secretaries, a policy that was unimaginable just a few years ago.

The recent report of the Commission on the Air Force recommends the new authority be considered by the Air Force in planning future mission allocation for the Air National Guard and Air Force Reserve.

With the accelerated drawdown of the armed forces due to Sequestration and withdrawal from Afghanistan, the G-R soon will constitute more than 50% of the nation’s military capability.

All of these factors place enormous demands on the National Guard and Reserve, employers, family members and communities in ways not envisioned at the dawn of the all-volunteer force / total force era forty years ago.

Ever greater reliance on the Reserves means that it will be critical for the Congress to ensure that reservists’ re-employment rights after call-ups are robust, transparent to all stakeholders and vigorously enforced. Similarly, personal financial protections need to be updated to reflect the sea-change in the use of the G-R in our armed forces.

USERRA

MOAA has long endorsed continuous review of the USERRA to ensure it meets the needs of our nation’s returning citizen-warriors after completing active duty service.

S. 944 and S. 1982, pending Veterans Omnibus Benefits bills, include provisions to improve reemployment rights. It’s our understanding that the provisions are largely based on recommendations from the Justice Department on the Act.

MOAA strongly supports the USERRA provisions in S. 944 and S. 1982:

- *Allow the United States to serve as a named plaintiff in all suits filed by the Attorney General, while preserving the right of the aggrieved person to intervene in such suits, or to bring their own suits where the Attorney General has declined to file suit. It*

would also allow the Attorney General to investigate and file suit to challenge a pattern or practice in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA)

- *Allow for the suspension and debarment of federal contractors that repeatedly violate the rights of members of the uniformed services provided for under USERRA*
- *provide the Special Counsel with authority to subpoena attendance, testimony, and documents from federal employees and federal executive agencies in order to carry out investigations related to USERRA*
- *Authorize the Attorney General to issue civil investigative demands in investigations under USERRA. It would not include the authority to compel oral testimony or sworn answers to interrogatories*

MOAA also supports making workplace arbitration agreements unenforceable in disputes arising under the statute.

Servicemembers Civil Relief Act (SCRA)

Operational reserve policies also point to the need to ensure that financial and legal protections are rock solid for G-R members called to active duty service.

MOAA recommends the Subcommittee endorse legislation that would impose civil fines for violations of the law; criminal penalties in egregious cases of violation of the statute; and recovery of reasonable attorneys' fees by servicemembers from SCRA violators.

MOAA and our Military Coalition (TMC) partners recently endorsed S. 1999, the Servicemembers Civil Relief Act Protections Act of 2014, a bi-partisan bill introduced by Senator Lindsey Graham (R-SC) and Senator Jack Reed (D-RI).

In a letter to the Senators on February 24, 2014 on S. 1999, TMC wrote:

“This important legislation would simply guarantee that our military servicemembers can enforce the rights already granted to them. Their mission can easily be jeopardized when their duties are interrupted with financial burdens back home in cases where companies take action against servicemember contracts due to forced arbitration clauses.

“Many of our servicemembers have been unable to enforce their SCRA rights due to the increased use of forced arbitration clauses buried in the fine print of all types of contracts, including mortgage origination documents, automobile leases, and student loans. These clauses eliminate access to the courts that would protect the servicemember and instead funnel all claims against those who are deployed into private, costly arbitration systems set up by the same businesses that hope to bypass the law in the first place.

“Congress has already passed laws to ban forced arbitration for disputes brought by auto dealers; certainly our nation’s servicemembers should be afforded the same protections on other types of contracts. It’s time Congress enhanced SCRA protections for our brave men and women who

commit their lives to defending our country.” (Military Coalition letter re: S. 1999, Servicemembers Civil Relief Act Protections Act of 2014, 24 February 2014).

A 2006 Department of Defense report concluded:

“Service members should maintain full legal recourse against unscrupulous lenders. Loan contracts to Service members should not include mandatory arbitration clauses or onerous notice provisions, and should not require the Service member to waive his or her right of recourse, such as the right to participate in a plaintiff class. Waiver isn’t a matter of ‘choice’ in take-it-or-leave-it contracts of adhesion.” (Department of Defense, 2006).

Conclusion

MOAA is grateful to the Members of the Subcommittee for your leadership in supporting our veterans and their families who have “borne the battle” in defense of the nation.



FOR IMMEDIATE RELEASE: MARCH 27, 2014
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**The National Employment Lawyers Association
 Urges Congress To Reform USERRA And The Tax Code
 To Protect Servicemembers' Employment Rights**

(Washington, DC) - Today, the U.S. Senate Committee on the Judiciary, Subcommittee on Oversight, Federal Rights And Agency Action held a hearing to examine whether current laws are protecting "[Access To Justice For Those Who Serve](#)." Subcommittee Chair Richard Blumenthal (D-CT) presided at the hearing.

NELA Legislative & Public Policy Director Julie M. Strandlie stated, "NELA commends the Subcommittee for convening this hearing. The Department of Defense increasingly relies on National Guard and Reserve forces for operational missions around the world. Since September 11, 2001, for example, nearly 900,000 reservists have been called up to Federal active duty for such missions and more than 300,000 have served on multiple call-ups. It's critical that the laws that protect National Guard and Reservists' civilian jobs are strengthened."

NELA submitted testimony for the record, prepared by NELA member Kathryn S. Piscitelli, urging Congress to reform the [Uniformed Services Employment and Reemployment Rights Act \(USERRA\)](#) and the Internal Revenue Code to ensure that servicemembers are treated fairly by both their employers and the Internal Revenue Service. USERRA ensures veterans and servicemembers that their jobs will not be jeopardized by their military service.

Among these reforms, NELA and its coalition partners strongly endorse two bipartisan bills, the **Servicemember Employment Protection Act of 2014**, soon to be reintroduced by Senators Mark Pryor (D-AR) and Lisa Murkowski (R-AK) and the **Civil Justice Tax Fairness Act (CJTFA, S. 1224/H.R. 2509)**, sponsored by Senators Ben Cardin (D-MD) and Susan Collins (R-ME). The Pryor/Murkowski legislation would ban forced arbitration of USERRA claims and provide servicemembers with additional Family and Medical Leave Act benefits. The CJTFA would end unfair taxation of settlements or awards received by individuals in employment cases brought under civil rights and worker protection laws, including USERRA.

NELA Executive Director Terisa E. Chaw added, "We, as lawyers and as Americans, must do all we can to help servicemembers who have suffered violations of their employment rights by improving USERRA's enforcement and remedial provisions. NELA, our members, and our Affiliates are honored to serve as advocates for servicemembers, and we are pleased to have the opportunity to do so in partnership with the Reserve Officers Association and other organizations that support our nation's military and their families."

#

The National Employment Lawyers Association advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. It is the country's largest professional organization exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 69 circuit, state, and local affiliates have more than 3,000 members around the country.

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STATEMENT OF KATHRYN S. PISCITELLI

Submitted On Behalf Of The
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

To The
Committee On The Judiciary,
Subcommittee On Oversight, Federal Rights And Agency Action
United States Senate
On The Subject Of
ACCESS TO JUSTICE FOR THOSE WHO SERVE

March 27, 2014
Updated April 3, 2014

Chairman Blumenthal, Ranking Member Hatch, and Members of the Subcommittee:

My name is Kathryn Piscitelli. I am an attorney in private practice in Orlando, Florida. I submit this testimony on behalf of the National Employment Lawyers Association (NELA) regarding its comments and recommendations for statutory changes to improve and ensure access to justice for our nation's servicemembers.

NELA is the country's largest professional organization exclusively comprised of lawyers who represent individual employees in cases involving employment discrimination and other employment-related matters. NELA and its 69 circuit, state, and local affiliates have more than 3,000 members around the country.

My law practice focuses on labor and employment law, and I am Board Certified by the Florida Bar in Labor and Employment Law and Vice Chair of the Florida Bar's Labor and Employment Law Certification Committee. I am a NELA member and serve as NELA's advisor on the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have taken a special interest in USERRA since the law's inception and wrote one of the first law review articles on the statute, *Veterans' Employment Rights: Keeping in Step with USERRA's Legion of Changes*, 46 Lab. L.J. 387 (1995). For many years now, Edward Still (who is also a NELA member) and I have co-authored *The USERRA Manual: Uniformed Services Employment and Reemployment Rights* (Thomson Reuters 2014) (and all prior editions).

NELA commends the Subcommittee for calling this hearing today. We, as lawyers and as Americans, must do all we can to help veterans and servicemembers who have suffered violations of their employment rights by improving USERRA's enforcement and remedial provisions. NELA and its members are honored to serve as advocates for military reservists and we are pleased to have the opportunity to do so in partnership with the Reserve Officers Association and other organizations that support our nation's military and their families.

Our testimony will address some of the enforcement obstacles—forced arbitration, sovereign immunity, weak remedies—and offer specific recommendations for strengthening the Act. We will also address another overlooked issue: the significant tax consequences for servicemembers who receive lump sum payments of back pay awards in compensation for violations of their employment rights.

USERRA Defined

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et seq.*, ensures veterans and servicemembers (including members of the Reserves and National Guard) that their jobs will not be jeopardized by their military service.

The Act protects against employment discrimination due to military membership or service; provides reemployment rights and benefits to employees who leave civilian jobs to perform military service; and entitles employees to certain rights and benefits while they are away for military service. USERRA permits persons who believe their USERRA rights have been violated to file a complaint with the Department of Labor's Veterans' Employment and Training Service (VETS) and—if VETS does not resolve their complaint—to request that the Department of Justice (DOJ) pursue litigation on their behalf.

The Act also provides individuals with a private right of action should they choose not to file a

complaint with VETS or pursue the DOJ representation procedure, or should DOJ decline to pursue the alleged violation. To facilitate the goal of full compensation for individuals wronged under the Act, the original legislation specifically authorized "the award of attorney fees, expert witness fees, and other litigation expenses as a further effort to make servicemembers whole and not have them suffer any loss in realizing their reemployment rights." Senate Report No. 103-158 at 69 (1993).

These remedies, however, are in fact very weak because they are allowable *at the court's discretion* for employees who obtain private counsel and prevail in USERRA lawsuits against private, state, or local government employers. As Lt. Savage testified today, these weak remedies make it very difficult for servicemembers to find counsel willing to take their cases. Furthermore, state and local government employers are arguing USERRA does not apply to them.

Barriers To Access To Justice: Forced Arbitration

Forced arbitration is a major problem for returning servicemembers attempting to get their jobs back under USERRA. In 2006, the United States Court of Appeals for the Fifth Circuit held USERRA claims are subject to forced, binding arbitration under the Federal Arbitration Act (FAA), despite express language in Section 4302(b) of USERRA prohibiting "any" contract that limits "any right or benefit" provided to servicemembers by USERRA, "including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."¹ The court misconstrued "right" as used in Section 4302(b) as inapplicable to the enforcement rights USERRA grants servicemembers.

In the wake of the Fifth Circuit's decision, numerous courts, including the Court of Appeals for the Sixth Circuit, have enforced forced arbitration clauses against servicemembers who sought to exercise their right under USERRA to have their claims heard in court.² The arbitration clauses enforced in these cases, like that in the Fifth Circuit case, were imposed by employers without the servicemembers' knowledge and consent and before the USERRA claims alleged in the cases had arisen. In fact, it is not unusual in such cases for the servicemember to have any

¹ *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006) (employer's pre-dispute arbitration policy provided to servicemember in 1995 treated as agreement to arbitrate his USERRA claims arising in 2002 and 2003 by virtue of his failure to opt out of policy within 30 days of receipt).

² See, e.g., *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559 (6th Cir. 2008) (pre-dispute arbitration clause in employment agreement); *McLean v. Byrider Sales of Indiana S, LLC*, 2013 WL 4777199 (S.D. Ohio 2013) (pre-dispute arbitration clause in job application); *Palmer v. Midland Food Servs. Inc.*, 2011 WL 4458781 (N.D. Ohio 2011) (pre-dispute arbitration clause in employment agreement; clause required veteran to pay cost to initiate arbitration) *Will v. Parsons Evergreene, LLC*, 2008 WL 5330681 (D. Colo. 2008) (pre-dispute arbitration clause in employment agreement); *Ohlfs v. Charles Schwab & Co., Inc.*, 2008 WL 4426012 (D. Colo. 2008) (pre-dispute arbitration clause in securities broker/advisor registration); *Ernest v. Lockheed Martin Corp.*, 2008 WL 2958964 (D. Colo. 2008) (pre-dispute arbitration agreement required as condition of employment); *Kitts v. Menards, Inc.*, 519 F. Supp. 2d 837 (N.D. Ind. 2007) (pre-dispute arbitration agreement in job application).

awareness or recollection of ever entering into any so-called "agreement" to arbitrate future USERRA claims.³

Properly construed, Section 4302(b) prohibits contracts requiring servicemembers to give up their enforcement rights under USERRA in order to gain employment or keep their jobs. USERRA's legislative history confirms this construction. In explaining Section 4302(b), the House Committee on Veterans' Affairs stated that "resort to . . . arbitration . . . is not required"; and that "[a]n express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in [USERRA] and would be void."⁴ Moreover, the Department of Labor interprets Section 4302(b) as prohibiting arbitration agreements waiving a servicemember's right to pursue a court action under USERRA.⁵

Nonetheless, the established and growing trend in the courts is to enforce pre-dispute arbitration contracts against unwilling servicemembers claiming violations of their rights under USERRA. **We urge Congress to stem the tide by amending USERRA to prohibit explicitly enforcement of pre-dispute arbitration provisions against servicemembers who want their USERRA claims to be heard in court.**

Senators Mark Pryor (D-AR) and Lisa Murkowski (R-AK) will soon reintroduce the **Servicemember Employment Protection Act**, which would ban forced arbitration of USERRA claims and provide servicemembers with additional Family and Medical Leave Act benefits. NELA strongly supports this bipartisan legislation, which was endorsed in the 112th Congress by organizations including the Reserve Officers Association, the Paralyzed Veterans Association, the Iraq and Afghanistan Veterans of America, the Military Officers Association of America, and the Veterans of Foreign Wars.

To combat forced arbitration against servicemembers and their families, NELA urges Congress to enact the Arbitration Fairness Act (AFA, S. 878). The AFA would ban forced arbitration of consumer claims (including those under the Servicemembers Civil Relief Act), as well as employment and civil rights disputes.

Barriers To Access To Justice: State Sovereign Immunity

Servicemembers seeking to bring lawsuits to enforce their USERRA rights against state employers have increasingly been denied access to courts.

³ See, e.g., *Ernest*, 2008 WL 2958964 (veteran required to arbitrate USERRA claim under pre-dispute mandatory arbitration agreement that he had no recollection of signing).

⁴ H.R. REP. NO. 103-65, pt. 1, at 20 (1993), as reprinted in 1994 U.S.C.C.A.N. 2449, 2453.

⁵ 70 Fed. Reg. 75,246, 75,257 (Dec. 19, 2005) ("Section 4302(b) of USERRA states that the statute supersedes 'any * * * contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by [the Act].' This provision against waivers . . . includes a prohibition against the waiver in an arbitration agreement of an employee's right to bring a USERRA suit in Federal court.") (internal citation omitted).

When enacted in 1994, USERRA authorized servicemembers to sue state employers in federal court. Based on well-established case law under USERRA's predecessor legislation, Congress's War Powers under Article I of the Constitution fully authorized Congress to subject states to private lawsuits to enforce servicemembers' civilian employment and reemployment rights.⁶

The tide turned, however, with the Supreme Court's 1996 decision in *Seminole Tribe of Florida v. Florida*, which held Congress cannot use its commerce powers under Article I of the Constitution to override states' immunity under the Eleventh Amendment from private suits for damages.⁷ Although *Seminole Tribe* did not concern Congress's War Powers, broad language in the decision suggested no Article I power authorized Congress to override the Eleventh Amendment. In the immediate aftermath of *Seminole Tribe*, some federal courts held states enjoyed Eleventh Amendment immunity from USERRA claims.⁸ Nonetheless, the Court of Appeals for First Circuit bucked the trend, ruling that *Seminole Tribe*'s "hold[ing] that Congress lacks the power to abrogate the Eleventh Amendment under the Commerce Clause ... does not control the War Powers analysis."⁹

In response to the post-*Seminole Tribe* decisions holding states have Eleventh Amendment immunity from private USERRA suits filed in federal court, and in an effort to ensure state employees a forum to bring lawsuits to enforce USERRA, Congress, in 1998, amended USERRA's enforcement provisions to (among other things) replace federal court jurisdiction over private suits against states with state court jurisdiction over such suits.¹⁰ The understanding at the time was that states would have no immunity from federal claims brought in state courts. In 1999, however, the Supreme Court ruled in *Alden v. Maine* that Congress's

⁶ See *Reopell v. Commonwealth of Mass.*, 936 F.2d 12 (1st Cir. 1991); *Peel v. Florida Dep't of Transportation*, 600 F.2d 1070, 1084 (5th Cir. 1979); *Jennings v. Illinois Office of Educ.*, 589 F.2d 935, 938 (7th Cir. 1979); *Moore v. State of Kansas*, 1979 WL 1866 (D. Kan. 1979); *Sheely v. Idaho Falls School Dist. No. 91*, 1978 WL 1667 (D. Idaho 1978); *Camacho v. Public Svc. Com. of Commonwealth of Puerto Rico*, 450 F.Supp. 231 (D.P.R. 1978).

⁷ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

⁸ See *Velasquez v. Frapwell*, 160 F.3d 389, 395 (7th Cir. 1998), *vacated in part*, 165 F.3d 593 (7th Cir. 1999); *Palmatier v. Michigan Dept. of State Police*, 981 F. Supp. 529 (W.D. Mich. 1997).

⁹ *Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616 n.9 (1st Cir. 1996).

¹⁰ See 38 U.S.C. § 4323(b)(2). **Note:** Federal appellate courts addressing the issue have ruled the 1998 amendment divested the federal courts of jurisdiction to hear private suits against states. See *Velasquez v. Frapwell*, 165 F.3d 593, 593–94 (7th Cir. 1999); *McIntosh v. Partridge*, 540 F.3d 315, 320–21 (5th Cir. 2008); *Townsend v. University of Alaska*, 543 F.3d 478, 484–85 (9th Cir. 2008); *Wood v. Florida Atlantic University Bd. of Trustees*, 432 Fed. Appx. 812, 815 (11th Cir. 2011) (citing *Velasquez*, *McIntosh*, and *Townsend*). See also *Rimando v. Alum Rock Union Elementary School Dist.*, 356 Fed. Appx. 989 (9th Cir. 2009) (California public school district is treated same as state for jurisdictional purposes under USERRA.).

authority under Article I did not include the power to subject nonconsenting states to private suits for damages in state courts.¹¹

Alden was not brought under USERRA and did not concern Congress's War Powers. Rather it was brought under the Fair Labor Standards Act, which is a commerce powers enactment. Nonetheless, in the wake of *Alden*, a number of state courts have held state employers enjoy immunity from USERRA claims brought in state court. Thus far, state courts in Alabama, Delaware, Georgia, New Mexico, and Tennessee have so held.¹² As a result, no forum is available for state employees in these states to bring private suits to enforce their rights under USERRA. State courts in only three states—Ohio, South Carolina, and Wisconsin—have found no state immunity from USERRA claims.¹³ Minnesota may be the lone state with a statute explicitly waiving sovereign immunity; the statute, Minn. Stat. Sec. 1.05, allows direct lawsuits under specific federal laws including USERRA. State employees in most other states have no assurance they can sue to enforce their USERRA rights.

As a solution, NELA recommends that Congress amend USERRA to provide explicitly once again for federal court jurisdiction over private USERRA suits against states. NELA believes Congress's War Powers authorize Congress to subject unwilling states to lawsuits in federal court under USERRA.¹⁴ NELA notes that a decade after deciding *Seminole Tribe*, the Supreme Court held in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), that the language in *Seminole Tribe* suggesting that Article I power cannot be used to override states' Eleventh Amendment immunity was dicta based on an "assumption" that "was erroneous."¹⁵ Significantly, *Katz* went on to hold that Congress's power under Article I to enact

¹¹ *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999).

¹² *Ramirez v. State ex rel. Children, Youth and Families Dept.*, — P.3d —, No. 31,820, 2014 WL 953425 (N.M. Ct. App. Mar. 3, 2014); *Smith v. Tennessee Nat. Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012), *appeal denied*, (Nov. 21, 2012), *cert. denied*, 133 S.Ct. 1471 (2013); *Anstadt v. Board of Regents of University System of Ga.*, 303 Ga. App. 483, 693 S.E.2d 868 (2010); *Janowski v. Division of State Police, Dept. of Safety and Homeland Sec., State of Delaware*, 981 A.2d 1166 (Del. 2009); *Larkins v. Department of Mental Health and Mental Retardation*, 806 So. 2d 358 (Ala. 2001).

¹³ *Copeland v. South Carolina Dept. of Corrections*, No. 2013-CP-42-2498 (S.C. Ct. Com. Pl. Mar. 28, 2014); *Scocos v. State Dept. of Veteran Affairs*, 2012 WI App 81, 343 Wis. 2d 648, 819 N.W.2d 360 (Wis. Ct. App. 2012); *Panarello v. State*, 2009 WL 301888 (R.I. Super. Ct. 2009).

¹⁴ For excellent law reviews on this subject, see Harner, *The Soldier and the State: Whether the Abrogation of State Sovereign Immunity in USERRA Enforcement Actions Is a Valid Exercise of the Congressional War Powers*, 195 Mil.L.Rev. 91 (2008); Hirsch, *Can Congress Use its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 Seton Hall L.Rev. 999 (2004). See also Brief for The United States as Amicus Curiae in Support of Appellee/Cross-Appellant, *Ramirez v. State ex rel. Children, Youth and Families Dept.*, — P.3d —, 2014 WL 953425 (N.M. Ct. App. Mar. 3, 2014) (No. 31,820), available at <http://www.justice.gov/crt/about/app/briefs/ramirezbrief.pdf>.

¹⁵ *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006).

bankruptcy laws included authority to subject states to bankruptcy proceedings.¹⁶ Certainly, the case for Congress's War Powers overriding states' claims of sovereign immunity is stronger than under the bankruptcy powers.¹⁷ Indeed, the United States has taken the position that Congress's constitutional War Powers empower Congress to subject nonconsenting states to private suits under USERRA.¹⁸

As a result of the 1998 amendment replacing federal court jurisdiction over private suits against states under USERRA with state court jurisdiction, the issue whether the War Powers authorize Congress to subject nonconsenting states to private suits in federal court under USERRA was not fully litigated and thus never reached the Supreme Court. NELA believes jurisdiction should be restored to the federal courts so that the matter can be fully litigated with possible ultimate review by the Supreme Court.

Barriers To Access To Justice: Weak Remedies

NELA urges Congress to strengthen USERRA's remedies for violations of the Act.

Damages for violations of USERRA in suits against private, state, or local government employers are limited to lost wages and benefits, plus, if willfulness is shown, an equal amount as liquidated damages.¹⁹ In USERRA actions against federal employers, damages are restricted to lost wages and benefits; liquidated damages are not authorized.

These monetary remedies are inadequate to compensate employees for violations of their rights under USERRA. Employees unlawfully denied reemployment upon their return from military service or unlawfully fired because of their military obligations who fully mitigate their wage and benefit losses in other employment will have no recoverable damages under USERRA. Employees who suffer USERRA violations involving no lost compensation, such as employees who experience unlawful harassment in the workplace because of their military status or service, have no recoverable damages under USERRA. In each of these examples, liquidated damages cannot be awarded regardless of the willfulness of the violations because liquidated damages are unavailable under USERRA in the absence of a wage or benefit loss.

¹⁶ *Id.* at 379.

¹⁷ *Cf. Lichter v. United States*, 334 U.S. 742, 781 (1948) ("[Congress's war] power, explicitly conferred and absolutely essential to the safety of the Nation, is not destroyed or impaired by any later provision of the constitution or by *any one of the amendments*." (quoting address by Hon. Charles E. Hughes) (emphasis added); *In re Tarble*, 80 U.S. 397, 408 (1871) (Congress's war powers are "plenary and exclusive").

¹⁸ See Brief for The United States as *Amicus Curiae* in Support of Appellee/Cross-Appellant, *Ramirez v. State ex rel. Children, Youth and Families Dept.*, — P.3d —, 2014 WL 953425 (N.M. Ct. App. Mar. 3, 2014) (No. 31,820), available at <http://www.justice.gov/crt/about/app/briefs/ramirezbrief.pdf>; United States' Brief as Intervenor, *Weaver v. Madison City Bd. of Educ.*, 2013 WL 4433799 (N.D. Ala. Aug. 14, 2013) (No. 5:11-cv-03558-TMP), available at <http://www.justice.gov/crt/about/app/briefs/weaverndala.pdf>.

¹⁹ See 38 U.S.C. §§ 4323(d), 4324(c)(2).

NELA further notes that even when a USERRA plaintiff can prove a wage or benefit loss, there is no guarantee the plaintiff will be awarded liquidated damages. An employer's violation of USERRA is willful if the employer knowingly violated the plaintiff's USERRA rights or did so in reckless disregard of the plaintiff's USERRA rights.²⁰ The plaintiff bears the burden of proof on the issue of willfulness.²¹ This is a difficult and sometimes impossible burden to meet. For example, courts have declined to award liquidated damages in USERRA cases where the employer claimed it consulted with counsel about its USERRA obligations,²² or contended its violation of USERRA was an honest mistake.²³ Because the plaintiff solely bears the burden of proof, the plaintiff must disprove such allegations to show willfulness.²⁴

Furthermore, because USERRA does not authorize awards of compensatory damages beyond lost wages and benefits, no matter how much an employee is injured in other respects as a result of a USERRA violation—whether through emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, other nonpecuniary losses; pecuniary losses other than lost wages and benefits; or future pecuniary losses—there is no remedy to compensate for the injury under USERRA.

Moreover, the absence of a monetary remedy for a USERRA violation can result in denial of a servicemember's access to justice. Courts have held servicemembers lacked standing to bring USERRA claims when the alleged violation resulted in no loss of wages or benefits.²⁵

NELA encourages Congress take the following actions to strengthen USERRA's remedies: (1) remove the willfulness requirement for awards of liquidated damages, but authorize a court to deny or reduce liquidated damages if the employer proves to the satisfaction of the court that the act or omission giving rise to the USERRA violation was in good faith and that the employer had reasonable grounds for believing the act or omission was not a violation of USERRA (this approach is authorized for cases under the Fair Labor Standards

²⁰ 20 C.F.R. § 1002.312(c).

²¹ See *Davis v. Crothall Services Group, Inc.*, 961 F.Supp.2d 716,736 (W.D. Pa. 2013); *Paxton v. City of Montebello*, 712 F.Supp.2d 1017, 1021 (E.D. Cal. 2010).

²² See, e.g., *Paxton v. City of Montebello*, 712 F. Supp. 2d 1017, 1021 (C.D. Cal. 2010); *Reed v. Honeywell Int'l. Inc.*, 2009 WL 886844, *9 (D. Ariz. 2009). See also *Davis*, 961 F.Supp.2d at 737 (noting that "if a jury believed that Defendant's actions, including consulting with its in-house counsel . . . , were a good-faith attempt to comply with USERRA, it would not award liquidated damages to Plaintiff").

²³ See, e.g., *Brill v. AK Steel Corp.*, 2012 WL 893902, *13 (S.D. Ohio 2012); *U.S. v. Nevada*, 2012 WL 1530619, *2 (D. Nev. 2012).

²⁴ See *Davis*, 961 F.Supp.2d at 736 (declining to shift burden of proof to employer on its contention that it relied on advice of counsel).

²⁵ See, e.g., *Dees v. Hyundai Motor Mfg. Alabama, LLC*, 368 Fed. App'x 49, 52–53 (11th Cir. 2010) (harassment claim); *Richards v. Canyon County*, No. 1:12-cv-424, 2014 WL 1270665 (D. Idaho Mar. 26, 2014) (claim alleging forced payout of vacation leave in violation of § 4316(d) of USERRA).

Act²⁶ and the Family and Medical Leave Act²⁷; (2) provide for awards of liquidated damages in a statutorily-mandated specific amount in cases where there is no wage or benefit loss (for example, a statutory amount could be set at \$25,000); (3) authorize awards of compensatory damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, other nonpecuniary losses, past pecuniary losses, and future pecuniary losses; (4) authorize awards of punitive damages for USERRA violations that are done with malice or reckless indifference; and (5) make available to federal employees awards of liquidated damages.

By so strengthening USERRA's remedies, Congress will provide fuller relief for servicemembers who have suffered violations of their USERRA rights and also more effectively deter future violations of USERRA.

Barriers To Access To Justice: Discretionary Award Of Attorney's Fees

NELA urges Congress to amend USERRA's attorney's fees provisions to make mandatory awards of reasonable attorney's fees to plaintiffs who prevail in USERRA cases. USERRA currently provides that a prevailing plaintiff's reasonable attorney's fees "may" be awarded.²⁸ The absence of a mandatory-fee provision for prevailing plaintiffs can deter servicemembers with meritorious USERRA claims from suing out of concern a court would exercise its discretion to deny recovery of fees. Further, the absence of a mandatory-fee provision may deter attorneys from representing servicemembers who have meritorious USERRA claims.

Amending USERRA to provide for mandatory awards of reasonable attorney's fees for prevailing plaintiffs is not a novel concept. Courts are required to award reasonable attorney's fees to plaintiffs who prevail on claims under the Fair Labor Standards Act,²⁹ Family and Medical Leave Act,³⁰ and Age Discrimination in Employment Act.³¹

Barriers To Access To Justice: Burdensome, Unfair & Confusing Tax Consequences

Reforms to USERRA would not be complete without making corresponding reforms to the tax code. Current tax law penalizes all workers who successfully vindicate their workplace rights under various federal, state, and local laws. These laws include USERRA, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act Amendments Act, the Family and Medical Leave Act, whistleblower protection statutes, and those regulating any aspect of the employment relationship.

²⁶ See 29 U.S.C. §§ 216(b), 260.

²⁷ See 29 U.S.C. § 2617(a)(iii).

²⁸ 38 U.S.C. §§ 4323(h)(2), 4324(c)(4).

²⁹ 29 U.S.C. § 216(b).

³⁰ 29 U.S.C. § 2617(a)(3).

³¹ 29 U.S.C. § 626(b) (incorporating by reference 29 U.S.C. § 216(b)).

Servicemembers who vindicate their rights under USERRA are especially affected because the only remedy currently available to them is back pay. Workers who recover compensation for multiple years of wages in one lump sum must pay taxes at higher rates because the payment is taxed entirely in the year received. For example, servicemembers who recover several years of back pay under USERRA are required to pay taxes on the entire amount for the year in which they receive payment, thus moving them into a higher tax bracket. The tax consequences for anyone receiving a lump sum recovery for lost wages in one year can be onerous. If the employer had not acted unlawfully, the worker's wages would have been earned and paid in the usual course of employment, and the worker would have been taxed at a lower rate. The artificial and temporary increase in annual income can also impact workers who have been forced to sell their homes to make ends meet or whose children are applying for college.

Senators Ben Cardin (D-MD) and Susan Collins (R-ME) have reintroduced bipartisan legislation, known as the **Civil Justice Tax Fairness Act (CJTFA, S. 1224)**, that would address this problem by mitigating the tax consequences of receiving and paying taxes on these back wages in one year. The bill would provide for income averaging. Also, S. 1224 would once again exempt from taxation compensatory damages received in employment and civil rights matters, including USERRA cases. While USERRA currently does not provide compensatory damages, experts seem to agree that Congress should amend USERRA to provide compensatory damages. Since 1996, compensatory damages in employment and civil rights cases have been taxed. Oddly, and unfairly, compensatory damages recovered in personal injury claims, such as those arising from car or slip and fall accidents, are not taxed.

Companion legislation, H.R. 2509, was reintroduced in the House of Representatives by Representative John Lewis (D-GA). Mr. Lewis was joined by a bipartisan group of original cosponsors, including fellow Ways & Means Committee member Aaron Schock (R-IL) and Judiciary Committee members Jim Sensenbrenner (R-WI) and Bobby Scott (D-VA).

NELA strongly supports the CJTFA. Organizations joining NELA in urging Congress to enact the CJTFA include the Reserve Officers Association, the Military Officers Association of America, the American Bar Association, the Association of Corporate Counsel, and the Leadership Conference on Civil and Human Rights.

Thank you for convening this hearing and for considering our recommendations. NELA, its members, and Affiliates stand ready to assist Congress in ensuring access to justice for our nation's servicemembers.

Respectfully submitted,

Kathryn Piscitelli On Behalf Of The
National Employment Lawyers Association