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Waiver Provisions in the SCRA and USERRA

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About Sam Wright

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The SCRA and USERRA are often confused, but they are separate laws enacted at different times for separate but related purposes. They share the same underlying purpose, which is to ensure (to the maximum extent feasible) that the service member on active duty can devote his

[1]I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice at Tully Rinckey PLLC (TR), and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (May 2015), concerning the accomplishments of the SMLC. After ROA disestablished the SMLC last year, I returned to TR, this time in an "of counsel" role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

or her full attention to military duties, especially when deployed, and that the service member not be unduly distracted by legal, business, or employment issues back home.

This is a safety issue, for the individual service member and for his or her colleagues in arms. If I am in the foxhole next to Josephine Smith, I should not have to worry that she is not paying full attention to her sector of the perimeter because she cannot put out of her mind her worry about losing permanent custody of her child, or being sued and the plaintiff getting a default judgment because she is not there to answer and give her side of the story, or being unable to pay her credit card bills and other debts, or losing her civilian job.

These two laws also have in common that they are decades old and are part of the fabric of our society. We will celebrate the 76th anniversary of the reemployment statute next month and the 100th anniversary of the civil relief statute next year.

Military judge advocates and other attorneys who advise and represent service members (especially National Guard and Reserve members who are intermittently on and off active duty) need to have a detailed familiarity with the SCRA and USERRA, and they can use our "Law Review Library" to help them gain that familiarity. We have more than 1000 articles about USERRA and more than 100 about the SCRA, plus another 300 articles about other laws that are especially pertinent to those who serve our country in uniform. We have a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. We add new articles each month.[3]

When Congress enacted these two laws, it fully recognized that these laws sometimes impose burdens on landlords, parties to civil litigation, banks, employers, co-workers and supervisors, and others, but the burdens imposed on these other parties are tiny as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform, either in the Active Component (AC) or the Reserve Component (RC).[4]

Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). If the services are to recruit and retain a sufficient quality and quantity of RC and AC personnel to defend our country, we need to maximize the incentives and minimize the disincentives to military service. The SCRA and USERRA are two of the most

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[3]*See* FN 1.

[4]Our nation has seven Reserve Components. In order of size, they are the Army National Guard (ARNG), the Army Reserve (USAR), the Air National Guard (ANG), the Navy Reserve (USNR), the Marine Corps Reserve (USMCR), and the Coast Guard Reserve (USCGR). More than 940,000 RC personnel have been called to the colors since the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time. Please see Law Review 16057 (June 2016) and Law Review 16019 (March 2016) concerning a comparison of the trivial burdens imposed

important statutes that Congress has enacted to encourage qualified young men and women to enlist and reenlist. Without these laws, our country would simply be unable to defend itself.[5]

The Soldiers' and Sailors' Civil Relief Act (SSCRA) and the Servicemembers Civil Relief Act (SCRA)

In April 1917, our country entered "The Great War" as World War I was then known. John Henry Wigmore was already a distinguished legal scholar[6] and was the Dean of the Northwestern University School of Law. After our country joined the war, Wigmore volunteered to serve as a 56-year-old Major in the Army's Judge Advocate General Department. In a prodigious effort of scholarship and drafting, he crafted the Soldiers' and Sailors' Civil Relief Act (SSCRA) in a matter of days, and Congress quickly enacted his handiwork into law.

As our country geared up for war from a very low base of military personnel numbers and readiness, millions of "doughboys" and a few thousand "doughgirls" were called to the colors. Some were drafted. Some voluntarily enlisted. Some were called to active duty from the nascent USAR, ARNG, USNR, and USMCR. Regardless of how they entered active duty, they left behind business affairs, potential lawsuits (for them or against them), apartment leases, and other civilian concerns. Major Wigmore and then Congress recognized that these service members should not be distracted from their duties while in training and in combat. In the immortal words of George M. Cohan, these service members "won't be back until it's over over there." These civilian concerns could be and should be held in abeyance during the service member's active military service.

The SSCRA applied during the period of national emergency that began in April 1917 and ended in 1919, a few months after Armistice Day (November 11, 1918). Less than a generation later, in September 1939, an even greater war was set off when Adolph Hitler's Germany invaded Poland. Our country did not formally enter World War II until December 7, 1941, the original "date which will live in infamy" in the immortal words of President Franklin Delano Roosevelt. But in 1940 Congress recognized that it was at least possible that our country would again be dragged into the conflagration, and Congress initiated essential measures for national defense readiness, including the renewal of the draft. Congress reenacted the SSCRA for this new national emergency.

In the aftermath of World War II, our country became, along with the Soviet Union, one of two superpowers in the bipolar Cold War world. Our country needed a large Army, Navy, Marine Corps, Air Force, and Coast Guard in peacetime as well as wartime. Accordingly, Congress reenacted the SSCRA and made it permanent this time.

The SSCRA served our country well through two world wars, the Korean War, the Vietnam War, and the long Cold War competition with the Soviet Union. By the time of the First Gulf War of

[5] *See* Law Review 16057 and 16019.
[6] The first edition of *Wigmore on Evidence* was published in 1905.

1990-91, the SSCRA was showing its age. There were important changes in the economy and the legal system that Professor Wigmore could not have anticipated in 1917.

For example, the SSCRA gave the service member the right to a continuance and to protection against default judgment in federal and state judicial proceedings, but the SSCRA did not apply to administrative proceedings. Administrative proceedings started to become common in the "New Deal" era of the 1930s. By 1990, important legal rights and obligations were frequently determined in federal, state, and local government administrative proceedings, and the lack of protection for service members in those proceedings was a significant problem.

For another example, the SSCRA gave the person entering active duty the right to terminate a lease on premises (apartment, house, office, store, farm, etc.), but the SSCRA did not apply to vehicle leases. In 1917, a brand-new Model T only cost $400, so why would anybody want to lease a vehicle? By 1990, vehicle leases were common, but the SSCRA did not give the person entering military service the right to terminate a vehicle lease. And of course, Professor Wigmore could not anticipate the cell phone in 1917.

During the 1990s, judge advocates of the five armed forces (including the Coast Guard) studied the SSCRA in detail, with a view toward updating and improving it, and Congress gave careful consideration to their work. On December 19, 2003, President George W. Bush signed into law the SCRA[7] as a long-overdue rewrite of the SSCRA. This new law made some significant improvements, including:

a. The right to a continuance and to protection against a default judgment was expanded to apply to federal, state, and local administrative proceedings, as well as federal and state judicial proceedings.
b. The right of a person entering active duty to terminate a lease was expanded to include vehicle leases as well as premises leases.

Like the SSCRA, the SCRA was codified in the "Appendix" of title 50 of the United States Code. In 2015, as part of a recodification of title 50, the confusing and cumbersome "Appendix" was eliminated. The SCRA is now codified in title 50 at sections 3901 and following.[8]

Some of the SCRA rights apply only to a person who enters into a transaction or incurs a financial responsibility *as a civilian*[9] and who thereafter, during the term of the transaction, or before the financial obligation has been paid in full, enters active duty. These SCRA rights include:

a. The right to terminate a lease on premises or a vehicle.[10]

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[7]Public Law 108-189, 117 Stat. 2935.
[8]50 U.S.C. 3901 et seq.
[9]For this purpose, a member of the National Guard or Reserve *who is not on active duty* at the time he or she enters into the transaction or incurs the financial responsibility is considered to be a civilian.
[10]50 U.S.C. 3956.

b. The right to terminate a cell phone contract.[11]
c. The right to reduce the interest rate on financial obligations incurred as a civilian to 6%, during the period of active duty.[12]
d. The right to avoid the eviction of the service member's dependents from leased premises if the individual signed the lease as a civilian and is then called to active duty during the term of the lease, and if the person's entry on active duty has reduced his or her income so as to make it impossible for the person to pay the full amount of the rent.[13]

Other SCRA protections apply to persons who have been on active duty for some time, as well as those who have entered active duty (voluntarily or involuntarily) recently. These protections include:

a. The right to be protected against a default judgment, in administrative as well as judicial proceedings, if the person is on active duty and his or her military duties preclude him or her from filing a timely answer or otherwise participating in the proceeding.[14]
b. The right to a stay of the administrative or judicial proceeding.[15]
c. The statute of limitations establishing a deadline for the active duty service member to sue another person or entity is tolled during the service member's active duty.[16]

When it enacted the SCRA, Congress recognized that a landlord, bank, or other individual or entity could make a mockery of the SCRA if the law permitted the other party to trick the service member or future service member into waiving valuable SCRA rights or to force the service member to waive those rights as a condition precedent for getting a lease, a loan, or a job. Accordingly, section 3918 of the SCRA provides:

(a) In general. A servicemember may waive any of the rights and protections *provided by this Act.* Any such waiver that applies to an action listed in subsection (b) of this section is effective only if it is in writing and is executed *as an instrument separate from the obligation or liability to which it applies.* In the case of a waiver that permits an action described in subsection (b), the waiver is effective *only if it is made during or after the servicemember's period of military service.* The written agreement shall specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the servicemember concerned.

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[11] 50 U.S.C. 3956.
[12] 50 U.S.C. 3957.
[13] 50 U.S.C. 3951.
[14] 50 U.S.C. 3931.
[15] 50 U.S.C. 3932.
[16] 50 U.S.C. 3936. It should be noted that section 2926 is a double edged sword. The statute of limitations applicable to another person or entry that has a cause of action against the service members is also tolled during the service member's active duty period. For example, let us assume that Alice Adams is on active duty in the Coast Guard. While on active duty, and while driving her own vehicle not in the course and scope of her Coast Guard duties, she is involved in a serious accident with Bob Barnes, the driver of the other vehicle. Barnes was seriously injured in the accident, and he claims that Adams was primarily or exclusively at fault for the accident. The statute of limitations for Barnes' potential lawsuit against Adams is tolled while Adams is on active duty.

(b) Actions requiring waivers in writing. The requirement in subsection (a) for a written waiver applies to the following:

(1) The modification, termination, or cancellation of—

(A)a contract, lease, or bailment; or

(B)an obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage.

(2)The repossession, retention, foreclosure, sale, forfeiture, or taking possession of property that—

(A)is security for an obligation; or

(B)was purchased or received under a contract, lease, or bailment.

(c) Prominent display of certain contract rights waivers, Any waiver in writing of a right or protection *provided by this Act* that applies to a contract, lease, or similar legal instrument *must be in at least 12 point type.*

(d) Coverage of periods after orders received. For purposes of this section—

(1) a person to whom section 106 [50 U.S.C. 3917] applies shall be considered to be a servicemember; and

(2) the period with respect to such a person specified in subsection (a) or (b), as the case may be, of section 106 shall be considered to be a period of military service.[17]

This is a clear and effective limitation-on-waiver provision that should serve as a model for such provisions in USERRA and other statutes. Does this SCRA limitation-on-waiver provision apply to waiver of USERRA rights? No. In more than one place, this SCRA provision includes a statement that the limitation of waiver applies to "any of the rights and protections *provided by this Act*" (the SCRA).

To see how the SCRA limitation-on-waiver provision works, let us consider a hypothetical but realistic situation. Charlie Cox is a talented web designer for a major Madison Avenue advertising firm in the Borough of Manhattan, New York City. Charlie earns salary and bonuses in excess of $200,000 per year, but he has been spending more. His rent on a Manhattan apartment is enormous. Charlie has obtained, maxed out, and fallen behind on several credit cards.

Charlie's largest credit card balance is $7,000, on a Visa card issued by Carolina Mega Bank (CMB). Because Charlie missed several minimum payments, CMB raised the interest rate to 29%.

When Charlie obtained this credit card, he signed a multi-page application form with many pages of boilerplate in tiny print. Paragraph 69 provides that by applying for the credit card

[17]50 U.S.C. 1918 (emphasis added).

Charlie is waiving his right to apply at any time in the next decade for a reduction in interest rates under any federal or state statute or regulation.

Charlie is also a Third Class Petty Officer (E-4) in the Coast Guard Reserve. In April 2017, there is a new major oil spill disaster in the Gulf of Mexico, and Charlie is involuntarily called to active duty for four months. His call to the colors makes his financial situation go from bad to worse.

Shortly after receiving his Coast Guard mobilization orders, Charlie visits a Coast Guard judge advocate for legal advice. The judge advocate assists Charlie in drafting and sending a certified letter to CMB, requesting that the bank reduce the interest rate on the credit card debt from 29% to 6% during Charlie's Coast Guard active duty period. Charlie sent CMB a copy of his mobilization orders, as an enclosure to the certified letter. The bank responded in writing, invoking Paragraph 69 of the credit card application. The bank's position is that Charlie cannot get the interest rate reduced to 6% because he waived that right when he applied for the credit card.

Is Paragraph 69 effective in waiving Charlie's right to get the interest rate reduced? No, for at least three reasons. First, section 3918(a) requires that the written waiver must be "executed as an instrument separate from the obligation or liability to which it applies." Paragraph 69 was not part of a separate instrument. It was part of the same instrument that created the liability in the first place—the credit card application.

Second, section 3918(a) requires that the written waiver be "made during or after the servicemember's period of military service." Charlie signed the credit card application, including Paragraph 69, months before he was called to active duty.

Third, section 3918(c) requires that the written waiver "must be in at least 12 point type." Paragraph 69 and the other boilerplate paragraphs of the credit card application were in 6 point type.

Charlie has not effectively waived his right to get the interest rate reduced from 29% to 6% during his Coast Guard active duty period (four months, or longer if his active duty period is extended voluntarily or involuntarily). This interest rate reduction will slow the rate of increase of the debt. Any payments that Charlie makes while on active duty will be applied to principal and interest at the 6% rate, not the contract rate of 29%. When Charlie leaves active duty, if a balance remains, the interest rate reverts to the contract rate. The difference between 6% and 29% is forgiven, not just deferred. It would be unlawful for CMB to raise the interest rate to 35% after Charlie leaves active duty to "make up for" the reduction in the interest rate during his active duty period.

Let us assume that the credit card application that Charlie signed also contained a mandatory arbitration clause, in which Charlie agreed that if he ever had a dispute with CMB about the terms of the credit card debt he would submit the dispute to binding arbitration, in lieu of filing

a lawsuit in federal or state court. Does the section 3918 limitation-on-waiver provision apply to this agreement to binding arbitration? I say yes.

Section 802 of the SCRA explicitly creates a private right of action for a service member to enforce his or her SCRA rights in a civil action in court and to obtain appropriate declaratory and injunctive relief as well as money damages and attorney fees and costs.[18] The SCRA does not appear to make a distinction between substantive rights and procedural rights, and a substantive right without an effective procedure to enforce it is almost worthless. I contend that section 3918 renders ineffective the agreement to binding arbitration in CMB's standard credit card application form. As of now, there apparently is no published court decision directly on point.

Waiver of USERRA rights

Section 4302(b) of USERRA provides:

> This chapter supersedes any State law (including any local law or ordinance) *contract, agreement,* policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites* to the exercise of any such right or the enjoyment of any such benefit.[19]

USERRA's legislative history provides:

> Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights. *See Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Department of the City of New York,* 675 F. Supp. 847 (S.D.N.Y. 1987), and *Fishgold, supra,* 328 U.S. at 285, which provide that no employer practice or agreement can reduce, limit, or eliminate any right under chapter 43. *Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. See McKinney v. Missouri Kansas Texas Railway Co.,* 357 U.S. 265, 270 (1958); *Beckley v. Lipe-Rollway Corp.,* 448 F. Supp. 563, 567 (N.D.N.Y. 1978). It is the Committee's [House Committee on Veterans' Affairs] that even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. *See Kidder v. Eastern Airlines, Inc.,* 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978). The Committee wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either expressly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific,

[18] 50 U.S.C. 4042.
[19] 38 U.S.C 4302(b) (emphasis supplied).

unequivocal, and not under duress. *Moreover, only known rights which are already in existence may be waived. See Leonard v. United Air Lines, Inc.,* 972 F.2d 155,159 (7th Cir. 1992). *An 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 the Committee bill and would be void.*[20]

Garrett v. Circuit City Stores, Inc.

Michael T. Garrett was a Lieutenant Colonel (now a Colonel) in the Marine Corps Reserve. On the civilian side, he worked for Circuit City Stores Incorporated (CCSI) as a manager. During his CCSI employment, he was frequently hassled by his CCSI supervisors concerning his Marine Corps Reserve training and service and the absences from his CCSI job that were necessitated by such training and service, although those absences were clearly protected by USERRA. In March 2003, just as the United States invaded Iraq, CCSI fired Garrett. Garrett alleged (with apparent justification) that the firing was motivated by Garrett's Marine Corps Reserve service and the likelihood that he would be called to active duty for the Iraq war.

Section 4323 of USERRA[21] provides that a person claiming that his or her USERRA rights have been violated by a private employer or a political subdivision of a state[22] can file suit against that employer in the United States District Court for any district where the employer maintains a place of business.[23] The individual claiming USERRA rights can be represented by the United States Department of Justice (DOJ), if the individual filed a formal written complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and if that agency referred the case to DOJ after completing its investigation, and if DOJ agrees that the claimant is entitled to the USERRA benefits that he or she seeks.[24] Alternatively, the person claiming USERRA benefits can be represented by private counsel that he or she has retained, if the individual chose not to complain to DOL-VETS, or if the individual complained to DOL-VETS but chose not to request referral to DOJ after completion of the DOL-VETS investigation, or if DOJ turned down the individual's request for representation.[25] If the individual is represented by private counsel and prevails, the court may award the individual reasonable attorney fees, expert witness fees, and litigation expenses.[26]

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[20]House Committee Report, April 28, 1993 (H.R. Rep. No. 103-65, part 1) (emphasis supplied). This report is reprinted in full in Appendix B-1 of *The USERRA Manuel,* by Katheryn Piscitelli and Edward Still. In the 2016 edition of that book, the quoted language can be found at pages 660-61. Please see Law Review 16044 (May 2016), concerning the value of *The USERRA Manuel.*

[21]38 U.S.C. 4323.

[22]A political subdivision of a state is treated, for USERRA enforcement purposes, as if it were a private employer. 38 U.S.C. 4323(i). there is a different enforcement mechanism for USERRA cases against states because the 11th Amendment to the United States Constitution.

[23]38 U.S.C 4323(c)(2).

[24]38 U.S.C 4323(a)(1).

[25]38 U.S.C 4323(a)(3).

[26]38 U.S.C 4323(h)(2).

In this case, Garrett chose not to file a complaint with DOL-VETS. Instead, he retained attorney Robert E. Goodman, Jr., of Dallas, Texas, and filed suit against CCSI in the United States District Court for the Northern District of Texas. The case was assigned to Judge Barbara M.G. Lynn.

In lieu of filing an answer, CCSI filed a motion to compel arbitration, based on an "agreement" that Garrett "signed" in which he "agreed" that if he ever had a dispute with CCSI related to his employment he would submit the dispute to arbitration rather than filing suit in federal or state court. Sometime after Garrett was hired by CCSI, the company sent to each employee (including Garrett) a letter and package of materials about CCSI's recently adopted arbitration program. Each employee was given 30 days to respond if he or she desired to opt out of this arbitration mechanism. Like the vast majority of CCSI employees, Garrett did not respond to the letter. Based on this "agreement by default," CCSI asserted that Garrett was bound to submit his USERRA dispute to arbitration rather than to the federal district court. Accordingly, the company argued that the court should grant the company's motion to compel arbitration.

Garrett's attorney (Goodman) contacted me, and I contacted Reserve Officers Association (ROA) member Colonel John S. Odom, Jr., USAFR (now retired), an attorney in Shreveport, Louisiana and an expert on USERRA, the SCRA, and other laws that are especially pertinent to those who serve our country in uniform. On behalf of ROA, Colonel Odom and I drafted and filed an *amicus curiae* (friend of the court) brief, and Colonel Odom argued orally for ROA in the district court hearing on the arbitration issue. Colonel Odom and I cited the text and legislative history[27] of USERRA and asserted that the motion to compel arbitration should be denied because section 4302(b) renders void agreements to submit future USERRA disputes to binding arbitration.

Judge Lynn agreed with our argument and denied the motion to compel arbitration. Her scholarly opinion includes the following paragraph:

> USERRA's text and legislative history evidence Congress's clear intent to treat the right to a jury trial as a right not subject to waiver in favor of arbitration. Furthermore, the Court is cognizant that USERRA and its predecessor statutes have been liberally interpreted, "for the benefit of those who left private life to serve their country in its hour of great need." *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977), citing *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).[28]

CCSI appealed to the United States Court of Appeals for the 5th Circuit,[29] and Colonel Odom and I filed a new *amicus* brief in the appellate court. The 5th Circuit reversed Judge Lynn and granted the motion to compel arbitration. The 5th Circuit decision includes the following paragraph:

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[27]USERRA's pertinent legislative history is quoted above.

[28]*Garrett v. Circuit City Stores, Inc.*, 338 F. Supp. 2d 717, 722 (N.D. Tex. 2004).

[29]The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas. There are 11 numbered circuits plus the District of Columbia Circuit and the Federal Circuit.

> It is not evident from the statutory language [of USERRA] that Congress intended to preclude arbitration simply by granting the possibility of a federal judicial forum. As noted above, the Supreme Court has held that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum. *Mitsubishi,* 473 U.S. at 626-27. In cases involving the Sherman Act, the Securities and Exchange Act of 1934, the civil protections of the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Securities Act of 1933, the Court has held substantive rights enforceable through arbitration. With this in mind, it is significant that section 4302(b) does not mention mandatory arbitration or the FAA [Federal Arbitration Act], notwithstanding the *Gilmer* decision,[30] issued only three years before the enactment of section 4302(b). When Congress enacts laws, it is presumed to be aware of all pertinent judgments and opinions of the judicial branch. *United States v. Barlow,* 41 F.3d 935, 943 (5th Cir. 1994). Congress was on notice of *Gilmer* but did not speak to the issue in the text of section 4302(b). The text of section 4302(b) is not a clear expression of Congressional intent concerning the arbitration of servicemembers' employment disputes.[31]

The 6th Circuit[32] later followed the 5th Circuit and held that section 4302(b) of USERRA does not preclude the enforcement of agreements to submit future USERRA disputes to binding arbitration.[33] The other circuits have not addressed the specific question of whether section 4302(b) renders mandatory arbitration clauses unenforceable.

It is true that an arbitrator adjudicating a USERRA case is required to apply the text, legislative history, and case law of USERRA, just as a federal district judge would. The problem is that there is no remedy if the arbitrator misapplies or even flouts a statute like USERRA, because the FAA severely limits judicial review of arbitrators' decisions.[34]

The arbitrator has an enormous financial incentive to rule for the employer and against the employee in a USERRA case or other employment law case. For the individual employee, arbitration of an employment dispute is probably a once in a lifetime experience, but for the employer arbitration is a regular occurrence. If the arbitrator can develop a pro-employer reputation, the arbitrator will get a great deal of repeat business.

We need legislation to overturn *Garrett* and to make clear that a person claiming USERRA rights is entitled to have legal issues decided by a federal district judge (with appeal to the circuit

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[30] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[31] *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 677 (5th Cir 2006).

[32] The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[33] *See Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559 (6th Cir. 2008).

[34] Please see law Review 1233 (March 2012).

courts and potentially the Supreme Court) and to have factual issues determined by a jury, in accordance with the Seventh Amendment to the United States Constitution.[35]

Please join or support ROA

This article is one of 2,300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established on 10/1/1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's eight[36] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
1 Constitution Ave. NE

[35]Please see Law Review 16052 (June 2016) concerning pending legislation in the 114th Congress (2015-16) that would render unenforceable agreements to submit future USERRA disputes to binding arbitration.
[36]Congress recently established the United States Space Force as the 8th uniformed service.