All Quiet on the Employment Front: Mandatory Arbitration Under the USERRA

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I. INTRODUCTION

Following the terrorist attacks on September 11, 2001, and the subsequent protracted conflicts in Iraq and Afghanistan, the military has relied to an extraordinary level on its U.S. Reserve and National Guard members to support its overseas battlefield operations. The significant increase in combat deployments, both in numbers and in length, has taken a heavy toll on both the Reservist employee and the employer. Modern trends indicate that reliance on Reservist forces is likely to continue due to cost effectiveness and fundamental changes in military...
structure and purpose. Under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), it is unlawful for employers to discriminate against servicemembers based on their military service. Furthermore, the USERRA guarantees returning members of the military reinstatement to the same jobs they enjoyed before service interrupted their private lives. The USERRA expressly forbids retaliatory and related adverse discriminatory actions based on military status, but its application remains unclear in other areas. Specifically, an issue that has emerged under USERRA is whether the statute precludes mandatory arbitration provisions in employment contracts. With USERRA claims on the rise, it is increasingly important to understand whether agreements to arbitrate USERRA claims are enforceable.

When Michael Garrett was preparing for a combat deployment to Iraq as a Marine Reserve Lieutenant Colonel, he understandably expected to maintain his position at Circuit City and not receive disparaging treatment because of his military status. However, beginning in late 2002, when it became clear that United States military action against Iraq was imminent, he began to receive unjustified criticism and discipline from his [Circuit City] supervisors, culminating in his firing in 2003. Garrett brought suit against Circuit City under the USERRA and alleged that he was terminated based solely on his status as a Marine Reserve Officer. In response to the suit, the

7. See id. § 4301(a)(3).
8. Id. § 4301(a)(2).
9. See id. § 4301(a)(3).
10. See id. § 4311(a) (explaining that the USERRA’s antidiscrimination provision prohibits an employer from denying initial employment, reemployment, or any other benefit of employment to a person on the basis of membership in a uniformed service).
11. See Hardy, supra note 3, at 338.
13. See Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 674 (5th Cir. 2006).
15. Garrett, 449 F.3d at 674.
16. Id.
MANDATORY ARBITRATION UNDER THE USERRA

Company claimed that a program adopted over a decade earlier that required mandatory arbitration for any employee-employer disputes applied. Garrett never signed an arbitration agreement, but he acknowledged the policy and did not opt-out of the arbitration provision. Nevertheless, based on the agreement, Circuit City argued that Garrett could not sue in federal court to enforce a violation of his rights under the USERRA. Garrett alleged that section 4302(b) of the USERRA precluded the enforcement of the arbitration agreement. Specifically, section 4302(b) provides that the Act supersedes any contract, agreement, or policy “that reduces, limits, or eliminates in any manner any right or benefit provided . . .” under the USERRA. However, the United States Court of Appeals for the Fifth Circuit rejected Garrett’s argument and held that his USERRA claims were subject to mandatory arbitration pursuant to the Federal Arbitration Act (“FAA”).

Garrett’s story is similar to that of many veterans returning from Afghanistan and Iraq. For instance, in one recent case, the Ninth Circuit affirmed a district court’s order compelling arbitration under USERRA where the plaintiff, who served in the United States Naval Reserve, was fired after he informed the defendant company that he was being recalled for active duty in Afghanistan. Overall, the strain on private employers in the economic downturn has encouraged many employers to resort to using arbitration agreements as an attempt to circumvent USERRA. Although Congress enacted the USERRA to ensure employment protections for military members, it did not anticipate that the number of activated military Reservists would swell to

17. See id.
18. See id.
19. See id.
20. Id.
22. See Garrett, 449 F.3d at 681.
842,510 members over the past decade. This significant increase in combat veterans has tested the effectiveness of the USERRA.

Importantly, mandatory arbitration presents a distinct disadvantage for military members due to the costs, limited discovery, absence of juries, lack of neutrality, lack of any appellate process, and the effect of military regulations upon their duties. More broadly, mandatory arbitrations are highly private proceedings, as such, the decisions do not become part of the public record, which means that employment discrimination against returning veterans is hidden from the public. After Garrett, most federal courts determined that returning servicemembers could not bring their employment discrimination claims in federal court, chiefly because of the national policy strongly favoring arbitration of such claims. These federal courts have mainly based their pro-arbitration decisions on Supreme Court cases involving the FAA.

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27. See Carpenter, supra note 26.

28. See infra note 134 and accompanying text.


30. See Landis v. Pinnacle Eye Care, LLC, 537 F.3d 559, 560-61, 563 (6th Cir. 2008); see also Hardy, supra note 3, at 331.


32. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, NOTICE NO. 915.002, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (July 10, 1997), http://www.eeoc.gov/policy/docs/mandarb.html [hereinafter EQUAL EMP'T OPPORTUNITY COMM'N, NOTICE NO. 915.002] ("The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts—an avenue of redress determined by Congress to be essential to enforcement."); see also U.S. EQUAL EMP'T OPPORTUNITY COMM'N, NOTICE NO. 915.055, POLICY GUIDANCE ON VETERANS' PREFERENCE UNDER TITLE VII, https://www.eeoc.gov/policy/docs/veterans_preference.html (last modified Aug. 23, 2007) [hereinafter EQUAL EMP'T OPPORTUNITY COMM'N, NOTICE NO. 915.055] (explaining that
As such, these recent decisions severely undermine the overarching purpose behind the USERRA—to protect the employment rights of military members.\textsuperscript{33}

This paper argues that USERRA claims should be heard in court rather than subjected to mandatory and binding arbitration. Because of the USERRA's highly unique legislative history, which is reinforced by the Supreme Court's noteworthy liberal approach to veterans' employment rights and statutory construction,\textsuperscript{34} this paper further contends that the USERRA is simply not comparable to other federal employment statutes, including other antidiscrimination statutes that have been permitted to proceed through arbitration under the FAA. Part II of this paper discusses the background of the USERRA, including its history and intent. Part II also discusses arbitration and the FAA. Part III explores the unresolved landscape of mandatory arbitration actions brought pursuant to the USERRA, as well as the various approaches taken by federal courts throughout the country. Part IV then discusses the specific reasons USERRA claims should supersede mandatory arbitration, including certain policy reasons. Finally, Part V contains positive suggestions for how the problem can be ameliorated.

II. THE USERRA, ARBITRATION, AND THE FAA

In order to understand the current conflict between the USERRA and the FAA, it is important to establish a baseline understanding of the relevant statutes.\textsuperscript{35} Section A reviews the history of the USERRA, how it operates, and how the Supreme Court has interpreted the statute. Section B explores how the modern military policies and deployment tempo put veteran employees, especially Reservists, at a severe disadvantage in the employment arena. Section C briefly reviews what arbitration is and what the process entails, including its advantages and disadvantages. Section D then discusses the FAA and the development of the Supreme Court's strong pro-arbitration stance.


\textsuperscript{34} \textit{Id.} at 273-75, 278-79.

\textsuperscript{35} \textit{Id.} at 268, 272.
A. The USERRA

The first effort by Congress to provide legislative protections to military members in employment occurred during World War II when Congress passed the Selective Training and Service Act of 1940 ("STSA"). The STSA required employers to keep employment positions open for military members called away for military service. In later years, the STSA was modified and renamed and eventually became the Veterans Reemployment Rights Act ("VRRA") during the Vietnam War. Congress specifically modified the VRRA to provide broader protections for servicemembers largely in response to reports that servicemembers, particularly Reservists and Guard members, faced increased discrimination that had not been adequately addressed through previous legislative attempts. This discrimination was mainly manifested through the denial of promotions or termination due to military obligations. The VRRA allowed a veteran to ask for a leave of absence from a private employer to go on active duty and guaranteed the veteran the same position upon return, with the same seniority, status, pay, and vacation as if they had not been absent.

Against the backdrop of the fall of the Berlin Wall and the subsequent end of the Soviet Union and the Cold War, the United States readjusted its national defense strategy. The new strategy became known as the Total Force policy. This monumental change in strategy involved cutbacks and an increased reliance on the Reserve component of the military. Unlike the Vietnam conflict in which Reserve and

37. Id. at 281-82 (applying to specified circumstances such as when the servicemember was still capable of performing job duties and applied for reemployment within forty days of returning from this service).
38. Id. at 282; see also Penni P. Bradshaw & Richard E. Fay, "When Johnny Comes Marching Home Again": The Veterans' Reemployment Rights Act and Employer Obligations to Military Reservists, 15 AM. J. TRIAL ADVOC. 79, 80 (1991) (explaining the history of the VRRA and how it works).
39. See Bradshaw & Fay, supra note 38, at 81-82; Bugbee, supra note 36, at 282.
40. Bugbee, supra note 36, at 282.
43. See id. at 868; Hartzell, supra note 1, at 539-40.
44. See Hartzell, supra note 1, at 540; Fernandez, supra note 42, at 868 (explaining that the "post-cold war reserves were not merely an appendage to the active duty personnel, now they were
Guard forces were noticeably absent, the Total Force policy was intended to amplify the Guard and Reserve components and integrate them more closely with regular active forces. More specifically, "[i]t was not until the [advent of] the Global War on Terror, including [the military] involvements in Iraq and Afghanistan, that the effectiveness of the Total Force policy's heavy reliance on the Reserve [and Guard forces] was truly called into question."

To enable the new strategy, Congress replaced the VRRA by passing the USERRA in 1994 in order to address the new realities of military policy. The chief intention of Congress in enacting the USERRA was to "prohibit discrimination against persons because of their service [or status] in the uniformed services." Congress further intended for the USERRA to encourage non-career military service and minimize employment disadvantages and disruptions due to military service. USERRA has unique protections and rights not found in other employment discrimination statutes. USERRA is unique among anti-discrimination statutes because it has protections and rights that other employment discrimination statutes do not have. Furthermore, USERRA contains incredibly broad powers, which extend to all employers in the United States. The Act symbolizes Congress' promise that military members "will not suffer negative employment repercussions based on their military service." In order to accomplish its objectives, Congress designed the USERRA in three main parts to provide essential protections: "(1) a prohibition on employment discrimination against service members; (2) reemployment rights for

an entity with their own roles and missions supplementing the 'Total Force.'

45. See Hartzell, supra note 1, at 539-40 ("[R]eserve forces were envisioned in the vanguard, fighting alongside active duty units.").
46. Leyda, supra note 4, at 858-59.
47. See Hardy, supra note 3, at 334.
49. See id. § 4301(a)(1); H.R. REP. NO. 103-65, at 53 (1993), as reprinted in 1994 U.S.C.C.A.N. 2449, 2486 ("If the United States is going to rely on reservists to shoulder a larger share of our national defense, those reservists must know that their jobs are secure while they are serving their country.").
50. See Bugbee, supra note 36, at 284.
52. See 38 U.S.C. § 4303(4)(A)(ii) (2012). The statute specifies that employer means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities. Id.
53. Andrew P. Sparks, From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act, 61 HASTINGS L.J. 773, 775 (2010).
persons absent from employment [due to] military service; and (3) perseverance of benefits for persons absent from employment [due to] military service." In recommending passage of the bill, the Committee on Veterans’ Affairs made clear that it “intend[ed] that these anti-discrimination provisions be broadly construed and strictly enforced.”

In order to assert a servicemember’s USERRA rights, a USERRA plaintiff has two options. The first option is that a USERRA plaintiff can file a claim with the Secretary of Labor, which can then be referred to the Attorney General, who may prosecute. The second option is that a USERRA plaintiff can pursue a civil action directly in federal court. Notwithstanding whether USERRA claims are filed by individuals or by the United States on their behalf, the statute expressly provides jurisdiction against private employers to the federal district courts. USERRA also provides a number of remedies such as equitable relief, lost wages and benefits, and liquidated damages in the event the employer is willfully noncompliant. In addition, USERRA allows the courts to award reasonable attorney’s fees and court costs if the USERRA plaintiff is successful.

Statutory interpretation by the United States Supreme Court establishes USERRA to be more protective than other discrimination statutes. Historically, the Court has construed statutes strongly in favor of the veteran plaintiff. In Fishgold v. Sullivan Drydock & Repair Corp., the Court explained that the veteran was “to gain by his service for his country an advantage which the law withheld from those who stayed behind.” The Court stressed that a “liberal . . . construction for

57. Id. § 4323(a)(1). After sixty days, the Attorney General must make a decision whether to appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted; the USERRA plaintiff must then be notified in writing of such decision. Id. § 4323(a)(2).
58. See id. § 4323(a)(3).
59. Id. § 4323(b)(1).
60. Id. § 4323(d)-(e).
61. Id. § 4323(h)(2).
64. Fishgold, 328 U.S. at 284. The Supreme Court in Fishgold interpreted one of the predecessor statutes to USERRA, specifically section 8(c) of the Selective Training and Service Act of 1940, which protected a veteran against discharge within one year after restoration of his job following military service. Id. at 284-85. This case established the Fishgold “escalator” principle for the statutory scheme that Congress had established regarding veteran protections. Id. The
the benefit of the veteran" was therefore necessary. The *Fishgold*
Court explained that instead of reading various sections in a vacuum,
separate provisions should be treated as "parts of an organic whole and
give each as liberal a construction for the benefit of the veteran as a
harmonious interplay of the separate provisions permits."[66]

Three decades later, the Court in *Alabama Power Co. v. Davis*,
reiterated that veterans' statutes should be broadly read to afford the
veteran the greatest benefit.[67] In this case, the Supreme Court
interpreted the Military Selective Service Act of 1967.[68] Significantly,
the Supreme Court held that the Act was designed to enable veterans to
transition to civilian life as easily as possible by ensuring that the jobs
they held prior to their service were still available.[69] Once again, the
Court stressed that veterans' employment statutes were to be broadly
applied to ensure the veteran benefited.[70]

Ever since World War II, the Court has liberally construed
veterans' employment statutes in order to strongly favor the veteran
employee-plaintiff.[71] Furthermore, lower courts have mostly followed
the Supreme Court's guidance by giving the USERRA's application
requirement liberal construction.[72] The Department of Labor (DOL)
similarly adheres to a "liberally construed" standard regarding USERRA
protections for veterans.[73]

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65. *Id.* at 285.
66. *Id.*
68. See *id.* at 583-89.
69. *Id.* at 583.
70. *See id.* at 584.
71. See *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (interpreting USERRA's predecessor, Vietnam Era Veterans' Readjustment Assistance Act of 1974); *see also* *Rogers v. City of San Antonio*, 392 F.3d 758, 764-65 (5th Cir. 2004) (discussing the USERRA's predecessor statutes and judicial interpretation of such statutes).
72. See, e.g., *Gordon v. Wawa, Inc.*, 388 F.3d 78, 81 (3d Cir. 2004) (citations omitted); *Hill v. Michelin N.A.*, 252 F.3d 307, 312-13 (4th Cir. 2001) ("Because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries.").
Notwithstanding these liberal or expansive interpretations of the USERRA, the interaction of the USERRA and the FAA has yielded a more grudging interpretation of veterans' rights. The USERRA includes a murky relation-to-other-laws provision, which has been difficult for courts to apply. Section 4302(a) provides as follows:

Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

Section 4302(b), however,

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 receipt of any such benefit.

In other words, section 4302(a) permits agreements and laws that make veterans better off, while section 4302(b) prohibits agreements that make veterans worse off. In explaining the latter provision, the House Report states in no uncertain terms that "resort to mechanisms such as grievance procedures or arbitration ... is not required," and that "any arbitration decision shall not be binding as a matter of law." The House Report further states 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 the Committee bill and would be void."81 The House Report favorably cited *Kidder v. Eastern Air Lines, Inc.* 82 In *Kidder*, a federal district court in Florida rejected an employer's contention that a servicemember waives his right to seek court relief under the VRRA by invoking a grievance procedure and processing his service-related grievance through several steps of the procedure.83 The *Kidder* court explained that even if the servicemember had proceeded to arbitration and received an adverse ruling, his right to file a lawsuit under the Act still would have been preserved because federal courts are the exclusive forum for the vindication of veterans' rights.84 Furthermore, the DOL regulations state that section 4302(b) "includes a prohibition against the waiver in an arbitration agreement of an employee's right to bring a USERRA suit in Federal court."85

**B. Modern Problems for Veteran Employees: The Rise of the Perpetual Deployment**

The terrorist attacks on September 11, 2001, and the protracted wars in Iraq and Afghanistan have put Reserve and Guard forces in a perilous employment position.86 Over 850,000 Reservists and Guard members have been activated since September 11, 2001, with over 50,000 currently on active duty as of 2013.87 At one point, Guard and Reserve troops accounted for forty percent of the frontline troops in Iraq and over fifty percent in Afghanistan.88 Furthermore, some states have had seventy-five percent of their National Guard troops activated and serving in combat roles, the highest rate in American history.89 These

81. *Id.*
82. *Id.* (citing *Kidder v. E. Air Lines, Inc.*, 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978)).
84. *Id.* at 1065.
86. See Sparks, *supra* note 53, at 781-83; see also Suskin & Wimmer, *supra* note 12 (noting that the recent wars have put employers and military members on notice that a combat deployment is highly likely).
88. ILONA MEAGHER, MOVING A NATION TO CARE: POST-TRAUMATIC STRESS DISORDER AND AMERICA'S RETURNING TROOPS 95 (Ig Publishing, 1st ed. 2007).
89. *Id.*
military members have repeatedly deployed for time periods of up to fifteen months. After the election of President Barack Obama in 2008, the United States continued to rely on Reservists and Guard members. Since 2009 the Administration called 40,453 reservists for active duty. "Modern trends indicate that reliance on reservist forces... is likely to continue due to cost effectiveness and fundamental changes in military structure and purpose." 

National Guard and Reservists face other significant challenges. Generally, they are required to participate in four to eight weeks of training before they deploy to combat. As a result, a twelve-month deployment actually means they spend over a year and a half away from their families, placing a lot of strain on familial relationships. One commentator notes that National Guardsmen and Reservists face a very difficult transition from the battlefield to the civilian sector because they must quickly leave the familiar support structure of the military shortly after their return. In addition, the transition is complicated because many of these military members live in suburban or rural areas away from major centers of military resources. As a result, mental health treatment for afflictions such as post-traumatic stress disorder ("PTSD") can be incredibly burdensome. In addition to combat deployments and the necessary training obligations, National Guardsmen are also

91. See Sparks, supra note 53, at 781.
92. Id.
93. Id. at 782; see also Wedlund, supra note 5, at 801.
94. Sparks, supra note 53, at 782 ("The most significant ramifications of large-scale mobilizations of reservists occur in the reservists' work and family life.").
96. Id. (explaining that this additional time is significant because stress is highest before the deployment). The United States Army has recognized the strain that this has had on servicemembers. See Thom Shanker, Army Is Worried by Rising Stress of Return Tours to Iraq, N.Y. TIMES (Apr. 6, 2008), http://www.nytimes.com/2008/04/06/washington/06military.html ("Among combat troops sent to Iraq for the third or fourth time, more than one in four show signs of anxiety, depression or acute stress, according to an official Army survey of soldiers' mental health.").
97. See Seesel, et al., supra note 95, at 256-57.
99. Id. at 302.
routinely required to take part in state emergency response, disaster relief, and law enforcement missions.\textsuperscript{100} Unfortunately, the heavy reliance on Reservist forces has had particularly devastating ramifications in the employment arena.\textsuperscript{101} In many cases, civilian employers can be insensitive or downright hostile to their veteran employees' wartime experiences; oftentimes such employer sentiments can result in terminations or demotions for the veteran employees.\textsuperscript{102} "The federal government also reported that 16,000 formal and informal complaints were filed by service members who encountered problems getting rehired when they returned from military service to their jobs during the years of 2004 and 2005."\textsuperscript{103} The Pentagon's Office of Employer Support of the Guard and Reserve, which assists veteran employees in exercising their rights under the USERRA, received more than 13,000 calls for assistance in 2007, and around 8,000 in the first half of 2008.\textsuperscript{104} According to a Workforce Management online survey, sixty-five percent of employers would not hire an active Guard member or Reservist.\textsuperscript{105} "Despite the USERRA guidelines, created to protect against hiring or re-employment discrimination, employers worry that they might not be able to afford the cost of absence for training obligations or deployment, or be able to rehire a returning veteran."\textsuperscript{106} Moreover, the Pentagon has reported that over ten percent of returning servicemembers face difficulties returning

\textsuperscript{100} \textit{Active Duty vs. Reserve or National Guard, Veteran Affairs} (Apr. 6, 2012), https://www.va.gov/vetsinworkplace/docs/em_activeReserve.html; see also Carpenter, supra note 26 (noting that the combat deployments and state emergency responsibilities make many military members a perceived liability in the job market).


\textsuperscript{105} See Ted Daywalt, \textit{Over 65 Percent of Companies Won't Hire Active Members of the National Guard and Reserve}, HUFFINGTON POST, http://www.huffingtonpost.com/ted-daywalt/65-percent-of-companies-w_b_1418721.html (last updated June 12, 2012) (arguing that this explains why many deployed National Guard brigades have had unemployment rates ranging from thirty to sixty-eight percent).

to work and asserting their rights under the USERRA.\textsuperscript{107} The strain between veteran employees and many employers acutely worsened during the economic downturn in 2009.\textsuperscript{108} Because of the financial strain, many employers felt that Reservists and Guardsmen had highly disruptive and unpredictable schedules that created insurmountable difficulties.\textsuperscript{109} In recent years, returning servicemembers have experienced “increasing problems reintegrating into the workforce, as evidenced by disproportionately high unemployment rates among veterans compared to” their civilian counterparts,\textsuperscript{110} “as well as increasing numbers of employment-related inquiries and complaints” filed with the Departments of Labor and Defense.\textsuperscript{111} For these reasons, a growing number of employers “refuse to reemploy their former service-member employees, while others [actively] avoid hiring Reservists and National Guardsmen at all.”\textsuperscript{112} Even if the servicemembers are rehired, many assert that they are not really welcome at their old jobs, where they regularly face adverse changes in employment and disparaging treatment.\textsuperscript{113} It is this baseline antagonism toward Reserve and Guard employees and their military service obligations that has led to the fairly widespread use of mandatory arbitration provisions for USERRA actions.\textsuperscript{114}

\section*{C. Arbitration: A Brief Overview}

“[E]mployees who have agreed to arbitrate workplace disputes may not file employment discrimination suits in court.”\textsuperscript{115} Instead, the decision to arbitrate “reallocates jurisdiction over employment [disputes] from the public judicial system to a private forum,” known as arbitration hearings.\textsuperscript{116} In arbitration hearings, a third party, in most cases the arbitrator or arbitration panel, “reviews the parties’ arguments and issues

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\textsuperscript{107} See David Ogles, Life During (and After) Wartime: Enforceability of Waivers Under USERRA, 79 U. Chi. L. Rev. 387, 425 n.7 (2012) (noting that there are many reasons to suspect “that such occurrences between employers and returning servicemembers will rise in the near future, as troops return home due to recent withdrawals from Iraq and Europe”).
\textsuperscript{108} See Leyda, supra note 4, at 853-54.
\textsuperscript{109} See id. at 854.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 855.
\textsuperscript{113} Id.
\textsuperscript{114} See Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 671 (5th Cir. 2006).
\textsuperscript{116} Id.
\end{flushleft}
a decision."\textsuperscript{117} Unlike judges, "[a]rbitrators are not officials of the state . . . .\textsuperscript{118} Instead, arbitrators "are individuals acting in a private capacity who are selected by the parties, commonly because of [their] experience in a particular industry or knowledge of the subject . . . .\textsuperscript{119}

Arbitration proceedings use rules of evidence and procedure but oftentimes "use simpler or more flexible rules than a court would.\textsuperscript{120} Generally, "[a]rbitration can be either 'binding' or 'non-binding.'\textsuperscript{121} If arbitration is non-binding, the arbitrator's decision is only effective after the parties know what the decision is and agree to its resolution.\textsuperscript{122} "If the arbitration decision is 'binding,' the parties agree in advance to abide by the arbitrator's decision," regardless of the judgment reached.\textsuperscript{123} There is also an important distinction between "mandatory" and "voluntary" arbitrations.\textsuperscript{124} In mandatory arbitration, employment contracts contain provisions that designate arbitration as the exclusive remedy to resolve disputes after the contract becomes effective.\textsuperscript{125} In the event that a dispute arises, these provisions prevent the complaining party from filing suit in court, leaving arbitration as the only available remedy.\textsuperscript{126} In contrast, voluntary arbitration allows the complaining party to either file suit or pursue arbitration.\textsuperscript{127} For these reasons, "mandatory, binding arbitration" leads to the most abuse because the parties are required to use arbitration to resolve any and all future disagreements by contractual agreement, subject to the arbitrator's final decision.\textsuperscript{128} Further, with these "mandatory, binding arbitration" agreements, the parties have no recourse for seeking relief in court or via other methods of dispute resolution.\textsuperscript{129} As such, if a party is not satisfied with the outcome of the arbitration, the party usually has no alternative remedies.\textsuperscript{130}

In determining whether a dispute is subject to arbitration, courts

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  \item 118. Moohr, \textit{supra} note 115, at 402.
  \item 119. \textit{Id.}
  \item 120. Feingold, \textit{supra} note 117, at 283.
  \item 121. \textit{Id.}
  \item 122. \textit{Id.}
  \item 123. \textit{Id.}
  \item 124. \textit{Id.}
  \item 125. \textit{Id.}
  \item 126. \textit{Id.}
  \item 127. \textit{Id.}
  \item 128. \textit{Id.}
  \item 129. \textit{Id.}
  \item 130. \textit{Id.} at 284.
\end{itemize}
usually engage in a two-step process. First, the court must determine whether a valid agreement to arbitrate exists between the parties. If so, the court must then determine whether the dispute at hand fits within the parameters of the arbitration agreement.

Some common criticisms of mandatory arbitration agreements are that they eliminate access to courts and juries, lack neutrality, have high costs, reduce claimants' remedies, eliminate class actions, and curtail discovery. "Arbitrators generally have no obligation to provide a factual or legal discussion of their decision in a written opinion." One commentator argues that:

[f]ederal courts are preferable forums for employees to have their complaints resolved for multiple reasons: (1) discovery is broader in federal courts; (2) federal judges, as opposed to industry insiders, are more qualified to interpret federal statutory language and meaning; (3) written opinions are needed for consistency in statutory application; (4) federal courts may impose a broad range of remedies; and (5) federal court oversight is more likely to produce broad industry changes.

Meanwhile, proponents of arbitration argue that it decreases litigation costs and provides timely resolutions of disputes. Moreover, proponents assert that "mandatory arbitration offers a more egalitarian system of dispute resolution." Arbitration is faster, cheaper, and less formal than litigation, making it more readily accessible for all, including low-income employees.

131. See, e.g., Fleetwood Enters. Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002) (explaining the process that federal courts use to determine whether the contracting parties agreed to arbitrate).
132. Id.
133. Id.
139. See id.
Nevertheless, mandatory arbitration of employment claims has been criticized as being skewed in favor of the employer defendant. One notable advantage for the employer is that a veil of privacy protects arbitrations from public scrutiny because arbitrations are held out of the public’s view. Indeed, arbitrations are usually private proceedings in which papers are filed with arbitrators and are not part of any public record. Additionally, the proceedings occur in private offices instead of public courtrooms, and the media is usually much less interested in covering arbitration proceedings. Arbitration outcomes are usually confidential as well. For these reasons, businesses have traditionally favored binding arbitration because of the privacy surrounding the dispute resolution and the presence of neutral decision makers. In a policy statement opposing mandatory arbitration of discrimination claims, the Equal Employment Opportunity Commission (“EEOC”) argues that the employer has “a valuable structural advantage because it is a ‘repeat player.’” Put simply, “the employer is a party to arbitration in all disputes with its employees,” whereas the employee is a “one-shot” player in the particular employment dispute. As a consequence, the employee is less likely to make an informed selection of arbitrators compared to the employer; the employer also has the ability to track the arbitrator’s record. Further, the arbitrator may very well be biased in favor of the employer because the employer, and not the employee, is a potential source of future business for the arbitrator. Furthermore, the unavailability of discovery evidence skews the system strongly in favor of the employer defendant, especially because the

140. See id. at 1254.
142. See Schwartz, Enforcing Small Print to Protect Big Business, supra note 141, at 61.
143. Id.
144. Id.
146. EQUAL EMP’T OPPORTUNITY COMM’N, NOTICE NO. 915.002, supra note 32.
147. Id.
149. Id.
plaintiff has the burden of production of evidence that the employer defendant is very likely possesses.  

D. The FAA

American courts generally disfavored the use of arbitration to resolve legal disputes in the early 1900s. This systemic antagonism toward arbitration spurred the passage of the FAA, which was signed into law by President Calvin Coolidge on February 12, 1925. The FAA expressly states that written arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity of any contract." Beginning in the 1980s, the Court began consistently holding that arbitration agreements pursuant to the FAA were enforceable. Important in Southland Corp. v. Keating, the Court held that the FAA superseded any state laws barring the arbitration of any disputes stemming from contracts rooted in state law. In another case decided in the 1980s, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the Supreme Court held that the arbitration of statutory claims does not require the abdication of substantive rights, but instead is an agreement to resolve the dispute in an alternative forum. In Mitsubishi, the Court also established that "if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deductible from text or legislative history." The Court expanded upon Mitsubishi in Gilmer v. Interstate/Johnson Lane Corp. In Gilmer, the plaintiff filed suit in
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federal court alleging that his termination violated the Age Discrimination in Employment Act ("ADEA") and was compelled to enter arbitration under a prior agreement.161 The Court concluded that the plaintiff's claim was covered by the arbitration clause and that arbitration was his sole remedy.162 The Court found that nothing in the ADEA or its underlying policy would preclude mandatory arbitration.163 Here, the Supreme Court reiterated that claims brought under statutes are subject to arbitration pursuant to the FAA except in circumstances where the party arguing that it is not subject to arbitration can demonstrate that Congress' intent was to foreclose a judicial waiver under the specific statute at issue.164 The Court explained that the inquiry into Congressional intent "must be addressed with a healthy regard for the federal policy favoring arbitration."165 The Gilmer decision "shocked many employers and employees, who had previously assumed that public policy concerns would prevent courts from compelling employees to resolve employment discrimination claims through binding arbitration."166

The Supreme Court has remained unwaveringly in favor of arbitrations in recent years.167 In Circuit City Stores, Inc. v. Adams,168 the Court held that the FAA applied to all employment contracts, unless the contract was explicitly exempt under the FAA.169 After Circuit City, it became common for courts to enforce boilerplate, mandatory arbitration provisions, even when the employee had no meaningful ability to reject binding arbitration.170 In Hall Street Associates, L.L.C. v. Mattel, Inc.,171 the Court held that the FAA provides the exclusive

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161. See id. at 23-24.
162. Id. at 35.
163. Id. at 26.
164. Id. at 26.
165. Schwartz, Mandatory Arbitration and Fairness, supra note 134, at 1637-38.
166. See id. at 1638. Likewise, state courts are strongly pro-arbitration. See, e.g., Aguillard v. Auction Mgmt. Corp., 908 So. 2d 1, 18 (La. 2005) (holding that resolution of any doubt concerning whether a dispute should be arbitrated should be resolved in favor of arbitration).
168. Id. at 122-23.
169. Kathryn A. & David C. Vladeck, Contracting (Out) Rights, 36 Fordham Urb. L.J. 803, 819 (2009) ("In the aftermath of Circuit City, courts have routinely enforced boilerplate, mandatory arbitration provisions in employment contracts, even where there is clear evidence that, due to the disparity in bargaining power, the employee had no meaningful right to reject binding arbitration.").
grounds for judicial review, vacatur, and modification, and that such grounds may not be modified by contract. \(^{172}\) The court noted that the FAA permits parties to tailor many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, and which issues are arbitrable, along with procedure and choice of substantive law. \(^{173}\) In 2011, the Court issued its decision in *AT&T Mobility LLC v. Concepcion*, \(^{174}\) in which the Court held that the FAA preempts state laws that invalidate arbitration agreements containing class action waivers. \(^{175}\) Since its decision in *Concepcion*, the Supreme Court has issued three additional decisions broadly reaffirming its commitment to arbitration. \(^{176}\) It is this highly favorable approach toward arbitration agreements by the Supreme Court and Congress that has largely been used to justify the mandatory arbitration of USERRA claims. \(^{177}\)

## III. THE CONFLICT BETWEEN THE USERRA AND THE FAA

Even though there is not much case law regarding mandatory arbitration under the USERRA, a number of courts across the country have addressed the particular concern. \(^{178}\) The case law over the issue can be broken down into two distinct categories: pre-*Garrett* decisions and *Garrett* and its progeny. \(^{179}\) This part explains and deconstructs the...
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relevant case law.

A. Pre-Garrett Decisions

Several federal district courts addressed the issue and refused to compel arbitration of USERRA claims under an otherwise applicable arbitration agreement. In *Breletic v. CACI, Inc.*, a federal district court in Georgia found that the USERRA expressly grants the right to pursue claims in a judicial forum and therefore preempts an arbitration agreement. The plaintiff in *Breletic* was an operations research analyst employed by CACI, an information technology company. As a condition of his employment, the plaintiff was required to sign a mandatory arbitration agreement. He signed the agreement in February of 2000. In October of 2001, the plaintiff was ordered to active duty in the United States Army. Upon release from active duty, he was told his former job had been eliminated, and he was denied reemployment notwithstanding the fact that CACI was advertising for "positions nearly identical to that which he had in 2001." The plaintiff filed a USERRA complaint in federal court in November of 2004 alleging that the company had discriminated and retaliated against him on account of his military service. The plaintiff was then offered a new position and required to sign another arbitration agreement in 2004. The new arbitration agreement provided that "[t]he arbitrator, and only the arbitrator, will decide any and all disputes regarding whether a claim is arbitrable." The question before the court in *Breletic* was whether the

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182. See id. at 1337.

183. Id. at 1331.

184. Id.

185. Id.

186. Id. at 1332.

187. Id.

188. Id.

189. Id.

190. Id. at 1333.

191. Id. at 1336.
arbitration agreement foreclosed the plaintiff's right to pursue his
USERRA claim in federal court or whether he had to submit them to
arbitration pursuant to the arbitration agreement he had signed.192 After
a thorough canvassing of the case law of the FAA, the court then
focused on the text of the USERRA and its legislative history.193 The
court concluded, pursuant to the text and legislative history of the
statute, that "Congress intended to grant certain rights to those who serve
in the armed forces" and those rights included the "right to bring [a
USERRA claim] in a judicial forum."194 The court relied on language in
the House Committee Report that states "[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 the Committee bill and would be void" to reach the
conclusion that Congress' intent that a judicial forum waiver should not
be considered enforceable.195

In Lopez v. Dillard's, Inc., the plaintiff was employed at a Dillard's
store in Wichita, Kansas, and was a member of the Kansas National
Guard.196 In 2003, the plaintiff received notice that she was being called
for active duty to serve in Iraq.197 The plaintiff was informed by the
store that her job would be waiting for her when she returned from her
combat deployment.198 However, after the plaintiff returned, the store
forced her to reapply for her old position;199 she was never hired back in
her former position or in any other capacity.200 The plaintiff then filed a
USERRA claim, and the store moved to compel arbitration.201 The court
rejected the employer's motion to compel arbitration and held that the
arbitration agreement at issue was not permissible under the USERRA
because it created a burden to the employee's USERRA rights.202 The
court noted that section 4302(b) supersedes any agreement that imposes
additional "prerequisites to the exercise of any . . . right or the receipt of
any . . . benefit" provided by the act.203 The court then found that the

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192. See id. at 1337.
193. See id. at 1336.
194. See id. at 1335, 1338.
197. Id.
198. Id.
199. Id.
200. Id.
201. Id. at 1246.
202. Id. at 1248-49.
203. Id. at 1247.
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arbitration agreement constituted an impermissible prerequisite because it mandated that before exercising her rights under USERRA and obtaining the relief to which she is entitled thereunder, plaintiff must participate in an arbitration proceeding.\textsuperscript{204} In so ruling, the court found that the plain language of section 4302(b) requires that the arbitration agreement be superseded by the USERRA.\textsuperscript{205}

B. Garrett v. Circuit City Stores and Its Progeny

In 2006, the United States Court of Appeals for the Fifth Circuit issued its decision in Garrett.\textsuperscript{206} This case marked the first time a federal circuit court addressed whether the USERRA forecloses mandatory arbitration agreements.\textsuperscript{207} The unique background of the case is highly illustrative. Michael Garrett had worked for Circuit City since 1994;\textsuperscript{208} he was also a Marine Reserve officer.\textsuperscript{209} After Garrett began working at Circuit City, the company implemented a new system to resolve employment disputes.\textsuperscript{210} The company-wide system, called the Associate Issue Resolution Program, was designed to require employment disputes to be resolved using mandatory arbitration; the program was enforced in accordance with the FAA.\textsuperscript{211} Even though Garrett acknowledged in writing that he received information on the arbitration program, he did not opt out of the arbitration system during the required thirty-day time period.\textsuperscript{212} Garrett alleged that his supervisors began to unjustifiably criticize and discipline him during the period in which the United States military was preparing for combat in Iraq, between December 2002 and March 2003.\textsuperscript{213} In March 2003, around the advent of the Iraq War, Garrett was fired;\textsuperscript{214} he contended he was terminated exclusively because of his servicemember status.\textsuperscript{215} Garrett filed a USERRA suit against Circuit City in a Texas federal

\begin{footnotes}
\textsuperscript{204} Id. at 1248. The court noted that “[s]ince that type of proceeding was not addressed in the USERRA, it stands as an additional prerequisite to the exercise of plaintiff’s rights and the receipt of any benefits to which she might be entitled under the act.” Id.
\textsuperscript{205} Id. at 1247-48.
\textsuperscript{206} See Garrett v. Circuit City Stores Inc., 449 F.3d 672, 673 (5th Cir. 2006).
\textsuperscript{207} See id.
\textsuperscript{208} Id. at 674.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} See id.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\end{footnotes}
court;\textsuperscript{216} the company then moved to compel arbitration because of the arbitration agreement between the parties.\textsuperscript{217} Garrett argued that Section 4302(b) of the USERRA prevented any enforcement of such an arbitration provision because the USERRA supersedes any conflicting law or contract that limits the rights or benefits guaranteed by the USERRA.\textsuperscript{218} Specifically, Garrett claimed that a “right or benefit provided by” the USERRA includes a plaintiff’s right to bring suit in federal court.\textsuperscript{219} Circuit City filed a motion to compel arbitration, in accordance with its Associate Issue Resolution Program.\textsuperscript{220}

The district court ruled in favor of Garrett, and denied Circuit City’s motion to compel arbitration because the court found that Section 4302(b) of the USERRA and its legislative history overrode the enforcement of the arbitration agreement.\textsuperscript{221} As a result, Circuit City filed an appeal with the Fifth Circuit.\textsuperscript{222} In an opinion by then-Chief Judge Edith Jones, the Fifth Circuit reversed the district court, and held that USERRA claims are subject to mandatory arbitration under the FAA.\textsuperscript{223} In order to reach this conclusion, the Fifth Circuit chiefly relied on the Supreme Court’s line of FAA cases and the Court’s unabated pro-arbitration position.\textsuperscript{224} The court required Garrett to show that Congress intended to foreclose the use of arbitration to resolve USERRA claims and found a lack of explicit intent.\textsuperscript{225} The court applied a strict textual approach to determine that Congress did not intend to prohibit arbitration because the statutory language did not expressly limit jurisdiction to the federal district courts.\textsuperscript{226} The Fifth Circuit noted that there is a difference between procedural and substantive rights; the court explained that ensuring access to the courtroom rather than an arbitration forum was not a substantive right arising under USERRA.\textsuperscript{227} Instead,
the Fifth Circuit determined that the arbitration agreement was a forum selection clause because substantive rights under the USERRA can be enforced via arbitration.\textsuperscript{228} In the decision, the court pointed to the similarities between USERRA and other employment discrimination statutes, including Title VII (racial groups) and the ADEA (elderly).\textsuperscript{229} The Fifth Circuit simply dismissed the House Committee Report addressing USERRA arbitration and noted that the report was not precedential.\textsuperscript{230} The court further explained that there is no inherent conflict between arbitration and USERRA’s underlying structure and purposes, because arbitration can provide a fair opportunity to present and prevail upon a claim of a USERRA violation.\textsuperscript{231} In reaching this conclusion, the court focused on the differences in procedures used in the proposed arbitration and in federal court, concluding that Garrett had failed to show that arbitration brought pursuant to the company’s rules would not afford him an adequate forum.\textsuperscript{232} The court also dismissed Garrett’s contention that mandatory arbitration would clash with the USERRA’s underlying public policy to protect military members and ensure national security.\textsuperscript{233} The court found that the “enforcement of employment arbitration agreements does not disserve or impair the protections guaranteed by USERRA.”\textsuperscript{234} The court equated the USERRA to statutes like the Sherman Act,\textsuperscript{235} the Securities Exchange Act of 1934,\textsuperscript{236} the Racketeer Influenced and Corrupt Organizations Act (“RICO”),\textsuperscript{237} and the Securities Act of 1933,\textsuperscript{238} which are all subject to

\begin{itemize}
  \item \textsuperscript{228} Garrett, 449 F.3d at 678.
  \item \textsuperscript{229} Id. at 680-81.
  \item \textsuperscript{230} Id. at 679. The court noted that there was no comparable report from the Senate, that the House Report did not mention Gilmer, and that the courts in the cases cited in the Report prevented intrusions into the rights of veterans by the operation of laws, contracts, or plans to which the employee was not or could not be a party. Id. at 679, 680 n.10. Furthermore, the Fifth Circuit noted that the “snippet of legislative history” reference merely addressed the different situation of employees covered by a labor contract. Id. at 679; see also, Breletic v. CACI, Inc., 413 F. Supp. 2d 1329, 1337 (N.D. Ga. 2006) (relying on the same Congressional report in reaching its holding that mandatory arbitration did not preclude USERRA claims).
  \item \textsuperscript{231} Garrett, 449 F.3d at 681 (finding no conflict because arbitrator required to apply relevant law and because procedural safeguards existed).
  \item \textsuperscript{232} Id. at 681, 681 n.11.
  \item \textsuperscript{233} Id. at 681 (noting that even though USERRA protects important interests, it would be incorrect to assume that military members’ substantive rights would not be fairly and adequately protected during arbitrations brought under the FAA).
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Id. at 677.
  \item \textsuperscript{236} Id.
  \item \textsuperscript{237} Id.
  \item \textsuperscript{238} Id.
\end{itemize}
arbitration under Supreme Court case law.\textsuperscript{239}

With its ruling, the Fifth Circuit dramatically changed the mandatory arbitration landscape under the USERRA.\textsuperscript{240} Indeed, the \textit{Garrett} decision had immediate and negative ripple effects.\textsuperscript{241} Many courts across the country justified severe limitations on USERRA rights based almost entirely on \textit{Garrett}.\textsuperscript{242} Significantly, the Fifth Circuit categorically ignored the Supreme Court’s well-established rule that veterans’ employment rights and accompanying statutes are to be liberally construed in favor of the veteran plaintiff. Instead of adhering to this maxim, the Fifth Circuit focused squarely on the Supreme Court’s FAA case law.\textsuperscript{243} Consequentially, after \textit{Garrett}, other federal courts across the country generally replicated the Fifth Circuit’s methodology.\textsuperscript{244}

The next federal appellate court to address the issue of mandatory arbitration under the USERRA was the United States Court of Appeals for the Sixth Circuit in \textit{Landis v. Pinnacle Eye Care, LLC}.\textsuperscript{245} In this case, Dr. Timothy Landis, an optometrist and member of the Indiana National Guard, signed an employment agreement at the beginning of

\textsuperscript{239} Id. at 681. The Fifth Circuit relied on \textit{Gilmer} to support this conclusion. \textit{See id.} (citing \textit{Gilmer v. Interstate/Johnson Lane Corp.}, 500 U.S. 20, 28 (1991)).

\textsuperscript{240} \textit{See Bodine v. Cook’s Pest Control Inc.}, 830 F.3d 1320, 1327 (11th Cir. 2016) (holding that a USERRA claim was subject to arbitration even where the underlying arbitration agreement contained terms that violated the statute because those terms could be severed from the agreement).

\textsuperscript{241} \textit{See, e.g., Will v. Parsons Evergreene, LLC}, No. 08-cv-00898, 2008 WL 5330681, at *3-4 (D. Colo. Dec. 19, 2008) (stating Congress intended to prevent arbitration involving USERRA claims because the statute prevented the establishment of prerequisites to exercise any of the legislation’s benefits. However, the court found that the arbitration clause was not a prerequisite, rather it operated as a waiver of a judicial forum, and there was no indication that the veteran’s rights under USERRA could not be fully realized in arbitration); \textit{Ohlfs v. Charles Schwab & Co.}, No. 08-cv-0070, 2008 WL 4426012, at *4 (D. Colo. Sept. 25, 2008) (concluding USERRA claims must be arbitrated pursuant to FAA); \textit{Ernest v. Lockheed Martin Corp.}, No. 07-cv-02038, 2008 WL 2958964, at *9 (D. Colo. July 29, 2008) (adopting the reasoning in \textit{Garrett}); \textit{Klein v. City of Lansing}, No. S-06-CV-142, 2007 WL 1521187, at *4 (W.D. Mich. May 21, 2007) (“While this is a close question, the Court sides with \textit{Garrett} as to those collective bargaining agreements which provide an elective method for arbitrating USERRA rights.”).

\textsuperscript{242} \textit{See, e.g., Will}, 2008 WL 5330681, at *3-4 (holding that the district court in \textit{Lopez} erred because the enforcement of an arbitration agreement does not function as a “prerequisite” to the exercise of any right under the USERRA. Instead, it serves as a waiver of a judicial forum for resolution of the rights under USERRA, which can then be fully vindicated in arbitration. The court heavily relied on \textit{Garrett} as persuasive authority); \textit{see also Ohlfs}, 2008 WL 4426012, at *4 (following the decision of the \textit{Garrett} court in holding that the plaintiff’s USERRA claims were to be arbitrated “pursuant to the mandate of the FAA.”).

\textsuperscript{243} \textit{Garrett}, 449 F.3d at 674-75.


\textsuperscript{245} \textit{See Landis v. Pinnacle Eye Care, LLC}, 537 F.3d 559, 562 (6th Cir. 2008).

http://scholarlycommons.law.hofstra.edu/hlelj/vol34/iss2/6
his employment that specified that any employment dispute was subject to mandatory and binding arbitration. Later, Landis signed a similar agreement that contained an identical arbitration clause. Dr. Landis was activated in April 2004 and he deployed to the war in Afghanistan with his National Guard unit. Dr. Landis claimed that he had arranged for his patients to be taken care of by other optometrists before he deployed to Afghanistan. Landis claimed that the defendant company did not honor the terms of the agreement upon his return and he was demoted; he also alleged that he was threatened with termination if he continued to serve in the military. Landis subsequently filed a USERRA suit in Kentucky federal district court, contending that he experienced employment discrimination solely because of his servicemember status. The district court ordered the matter to arbitration and held that USERRA did not supersede the arbitration provision contained within Landis’s agreement.

Landis filed an appeal of the district court’s order with the Sixth Circuit. The circuit court affirmed the district court’s order to compel arbitration by holding that Landis’s USERRA claims were subject to binding and mandatory arbitration because of the employment agreement. The Sixth Circuit completely accepted the Fifth Circuit’s Garrett decision and reasoning, specifically determining that there was no Congressional intent that USERRA claims were not subject to mandatory arbitration and that there was no direct conflict between USERRA’s purposes and arbitration.

In a separate concurring opinion in Landis, Judge Guy Cole admitted it was a “close case” but ultimately agreed with the majority opinion. Judge Cole explained that he wrote a separate concurrence “only to acknowledge the odd result this holding produces and to encourage Congress, when the issue comes up again, to be a bit more

246. Id. at 560.
247. Id.
248. Id.
249. Id.
250. Id. at 561.
251. Id.
253. Landis, 537 F.3d at 560.
254. Id. at 561.
255. See id. at 562. The Sixth Circuit also explained that the legislative history of the USERRA does not support Congressional intent to preclude arbitration. Id.
256. Id. at 564.
He examined the specific language of section 4302(b) of the USERRA and noted that the words "additional prerequisites" in the list of items that the USERRA supersedes were difficult to assess. Judge Cole determined that section 4302(b) was designed to ensure that arbitration would not be used as a precondition to filing in federal court. In his concurring opinion, Judge Cole was highly critical of the poor wording of section 4302(b) and he noted that there was no clear evidence in USERRA's text or the statute's legislative history that demonstrated a clear intent to foreclose a waiver of judicial remedies.

In his concluding remarks, Judge Cole stressed that Congress should use unambiguous language to show that it intends to preclude mandatory arbitration because a growing number of employers are using such arbitration provisions in employment agreements. In the recent Ziober case, in which the Ninth Circuit joined its sister circuits in holding that Congress did not intend to preclude compelled arbitration of USERRA claims, Judge Paul Watford cited to Judge Cole's concurring opinion by stating that Congress can easily amend USERRA "to make clear that it does render pre-dispute agreements to arbitrate USERRA claims unenforceable." The rationale underlying both the Garrett and Landis decisions directly clash with the pro-veterans' rights approach strongly advocated and advanced by the Supreme Court and Congress. The strict textualist approach used in both Garrett and Landis severely undermines the maxim to liberally construe veterans' employment statutes to favor the veteran plaintiff and the decisions, in turn, were ultimately harmful to servicemembers, the particular class that the USERRA is designed to protect. Indeed, by focusing almost exclusively on the Supreme Court's body of FAA case law, the Fifth and Sixth Circuit cases omitted any discussion of the Supreme Court's established maxim calling for the liberal construction of veterans' benefits statutes in favor of the veteran. The Garrett and Landis decisions paved the way for lower courts to

257. Id.
258. Id.
259. Id.
260. Id. at 564-65 ("Congress may not have intended members of our armed forces to submit to binding, coercive arbitration—indeed, I think quite the opposite—but nothing in the text of the USERRA, or its legislative history, evinces a clear intent to preclude a waiver of judicial remedies for the statutory rights at issue.").
261. Id. at 565.
262. Ziober v. BLB Res. Inc., 839 F.3d 814, 822 (9th Cir. 2016).
263. See Hardy, supra note 3, at 348 (arguing that the Garrett and Landis courts applied a "myopic 'textualist'" approach to the USERRA that was harmful to servicemembers).
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completely obfuscate the spirit of the USERRA. For instance, in *Kitts v. Menards, Inc.*, the court compelled arbitration and did not even discuss the overarching legislative purpose of the USERRA. Instead, the court focused almost exclusively on the FAA and the *Garrett* and *Landis* cases as persuasive authority. Courts that read the USERRA without considering its legislative intent and history, or without consideration for the possibility of expanding upon USERRA’s protections, ignore decades of Congressional and Supreme Court instructions to the contrary. Perhaps more importantly, *Garrett* and its progeny have allowed other USERRA rights to be undermined. For instance, the USERRA specifically prohibits requiring a USERRA plaintiff to pay fees or court costs. However, a federal district court in Ohio, relying on *Landis*, held that a mandatory arbitration agreement requiring that an employee pay a substantial filing fee to commence arbitration proceedings could be enforced against a USERRA plaintiff. The court made no mention of, and thus evidently was oblivious to, USERRA’s ban on requiring plaintiffs to pay court costs.

Some federal courts have rejected narrow mandatory arbitration provisions under the USERRA. In *Baudoin v. Mid-Louisiana Anesthesia Consultants, Inc.*, Bryan Baudoin, an anesthesiologist, claimed that he was denied partnership due to his military service. In 2005, Baudoin “was called to active duty with the United States Army at Walter Reed Army Medical Center for a ninety day tour of duty . . .” Prior to leaving for his assignment, Baudoin’s boss informed him “that the partners felt [he] wasn’t carrying [his] load and [he] wasn’t going to make partner.” Baudoin filed a lawsuit against his employers, arguing that he was denied partnership due to his status as a member of the

264. *Id.* at 349.
266. *See id.* at 844.
267. *See id.*
268. *See Leyda, supra* note 4, at 879-80; *see also* Rogers v. City of San Antonio, 392 F.3d 758, 762 (discussing the history of the USERRA and its predecessors).
269. *See Hardy, supra* note 3, at 349.
270. 38 U.S.C. § 4323(h)(1) (2012) (“No fees or court costs may be charged or taxed against any person claiming rights under [USERRA].”).
272. *See id.*
274. *Id.* at 189-91.
275. *Id.* at 190.
276. *Id.*
United States military.\textsuperscript{277} Baudoin’s employers argued “that Baudoin’s USERRA complaint was subject to mandatory arbitration pursuant to [the Garrett decision].”\textsuperscript{278} The Fifth Circuit, however, rejected the employers’ argument by distinguishing Baudoin’s arbitration provision as much narrower than the provision in Garrett.\textsuperscript{279} In so ruling, the Fifth Circuit made it clear that broad, catchall arbitration agreements are more likely to be enforceable.\textsuperscript{280}

IV. ARBITRATION: NOT INTENDED AND BAD PUBLIC POLICY FOR VETERANS

Many companies, with the help of the federal courts, are subverting Congress’s original intention in passing both the USERRA and the FAA.\textsuperscript{281} Instead of providing USERRA disputants with options for dispute resolution, the courts and a growing number of companies have used arbitration as a tool to evade federal courts and public scrutiny.\textsuperscript{282} Thus, many veterans have essentially been forced to forgo constitutional rights when disputes arise relating to their jobs.\textsuperscript{283} This part discusses the specific reasons why arbitration should not be compelled.

There are also a number of compelling public policy arguments that militate against mandatory arbitration under the USERRA.\textsuperscript{284} This Part, therefore, also discusses particular public policy arguments against binding arbitration. In contrast to arbitration, judicial adjudication generates deterrence against future violations, educates the public, creates precedent, develops uniform law, and forms public values.\textsuperscript{285} More specifically, the adjudication of USERRA claims is supported by several key arguments. The first argument is that public jury trials have enormous social value and make the costs of war a visceral reality. The second argument is that mandatory arbitration undermines democratic accountability. The final argument is that mandatory arbitration widens the civilian-military divide.

\begin{footnotes}
277. \textit{Id.} at 191.
278. \textit{Id.} at 193-94.
279 \textit{See id.} at 194.
280 \textit{See id.}
281. \textit{See} Hardy, \textit{supra} note 3, at 331.
283. \textit{See} Hardy, \textit{supra} note 3, at 331, 340.
\end{footnotes}
A. Why the USERRA Should Supersede Mandatory Arbitration Clauses: How Courts Should Approach Binding Arbitration under the USERRA

There are at least five reasons why USERRA plaintiffs should not be compelled to enter mandatory arbitration. First, Congress and the Supreme Court have put servicemembers in a protected classification apart from other non-military citizens and have determined that they are to be accorded greater rights in certain areas. By enacting the USERRA, Congress unmistakably indicated its intention that veterans and servicemembers must be treated differently from civilians regarding certain types of civil obligations and employment matters. No persons are entitled to the protections of the USERRA except servicemembers.

The reason why there is a difference between servicemembers and members of civilian society is clear: Regular civilian employees are not routinely called upon to risk their lives for the company. On the other hand, the members of the military are called upon to risk their lives for the nation on a daily basis. This enormous distinction in potential risk is what entitles servicemembers protected by the USERRA to a “liberal construction” in their favor of the law that protects their right to reemployment, protects their right to go into federal court to seek a jury decision enforcing their rights, and protects them against anyone placing on them “additional prerequisites to the exercise” of their rights under the USERRA.

The USERRA’s legislative history and purpose are unique based on the various restatements of veterans’ reemployment rights statutes, which have been enacted over the past seven decades, indicating that Congress intended such rights to grow over time and respond to social and economic developments as new issues arise. The Supreme Court has consistently held in Fishgold v. Sullivan Drydock & Repair Corp. that:

288. See id. at 254.
290. See Monroe v. Standard Oil Co., 613 F.2d 641, 644 (6th Cir. 1980), aff’d, 452 U.S. 549 (1981) ("The problem to be addressed under this statute and the nature of the remedy it was to provide were stated in a report of the Senate Armed Forces Committee. In Senate Report No. 1477, it said: ‘Employment practices that discriminate against employees with reserve obligations have become an increasing problem in recent years.’"); see also Leyda, supra note 4, at 879 (discussing USERRA predecessors and history).
and its progeny that the USERRA and its predecessor statutes have been liberally interpreted "for the benefit of those who left private life to service their country in its hour of great need." In a related vein, the drafters of the USERRA certainly did not intend to subject servicemembers to binding, coercive arbitration agreements as part of a broad effort to ensure protections for the uniformed services, particularly for Reserve and Guard forces. As such, the USERRA should not be read in a vacuum, rather, it should be read with an understanding that accounts for the goals Congress sought to accomplish by enacting the statute.

There are certain provisions in the USERRA that make it unique among other federal anti-discrimination statutes. It applies to all employers, regardless of the number of employees; the only person who has standing to initiate an action under USERRA is the person claiming rights or benefits under USERRA. In addition there are no filing fees or court costs and there is no statute of limitations. While the USERRA contains an anti-discrimination provision and an accompanying anti-retaliation provision, which are similar to provisions in other antidiscrimination statutes, it also provides reemployment rights, which are highly unique in the employment discrimination arena. A number of scholars contend that the USERRA is markedly different from other anti-discrimination employment laws because it not only combats discrimination against veterans but can also be considered a tax measure. Put simply, by imposing reemployment and other duties on employers, the federal government can more cheaply afford a large military Reserve and Guard force. While it is true that the Supreme Court has held that the arbitration of anti-discrimination claims such as Title VII or ADEA claims is allowable, there is a key difference between

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293. See Bugbee, supra note 36, at 284.
294. Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992) ("The Act [the VRRA] does not have a threshold business size for coverage, unlike many other acts which incorporate such limiting provisions such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. [section] 2000e et seq.").
296. Id. at §4323(h).
298. See Suskin & Wimmer, supra note 12.
299. See id.
300. See id.
these statutes and the USERRA.\textsuperscript{301} The classes of persons protected by the ADEA (elderly) and Title VII (race, sex, religion, and national origin) are substantially more far-reaching than USERRA plaintiffs, a highly specific class.\textsuperscript{302} Similarly, RICO and securities claims cited in Garrett and Landis can also be easily distinguished from USERRA claims because USERRA is only available to qualified military members whereas the other claims are generally applicable.\textsuperscript{305}

Second, the USERRA expressly provides that an action brought under it should be heard in federal court.\textsuperscript{306} Section 4323(b)(3) gives exclusive jurisdiction of USERRA claims to the United States district courts.\textsuperscript{307} Disallowing servicemembers to pursue their statutory claims in court clearly limits the avenues in which such persons may vindicate their rights.\textsuperscript{308} Without the option to go to court, the current reading of the USERRA under Garrett could lead to the inequitable application of USERRA's substantive law.\textsuperscript{309} Bypassing these laws is inequitable and eliminates their deterrent effects. Incidentally, the fact that Gilmer extends mandatory arbitration to claims arising under the ADEA is not controlling on claims arising under the USERRA.\textsuperscript{310}

Third, the clear language in section 4302(b) precludes arbitration.\textsuperscript{311} In brief, section 4302(b) prohibits agreements that make veterans worse off.\textsuperscript{312} Reading USERRA narrowly, particularly with regard to section 4302(b)'s superseding provision, permits a result clearly antithetical to

\begin{itemize}
\item 301. See Hardy, supra note 3, at 348 (discussing the difference between these statutes and the USERRA).
\item 303. See Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 677 (5th Cir. 2006).
\item 304. See Landis v. Pinnacle Eye Care, LLC, 537 F.3d 559, 561-62 (6th Cir. 2008).
\item 305. See Hardy, supra note 3, at 349-50; see also Landis v. Pinnacle Eye Care, LLC, No. 3:06-CV-569-R, 2007 WL 2668519, at *4 (W.D. Ky. Sept. 6, 2007) (discussing the court's interpretation of arbitration agreements in a securities context in Garrett).
\item 306. See 38 U.S.C. § 4323(b)(3) ("In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.").
\item 307. See id.
\item 308. See Bettenhausen, supra note 33, at 280.
\item 309. See id. at 280-281.
\item 310. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991); see also Bettenhausen, supra note 33, at 281.
\item 311. Lopez v. Dillard’s, Inc., 382 F. Supp. 2d 1245, 1248 (D. Kan. 2005) ("Hence, the plain language of 38 U.S.C. [section] 4302(b) requires that the arbitration agreement be superseded by the USERRA.").
\item 312. See 38 U.S.C. § 4302(b) (2012); see also Lopez, 382 F. Supp. 2d at 1248 n.2.
\end{itemize}
Congress’ goals for the statute. In addition, attempts to parse the various sections of the USERRA and divide “substantive” rights from “procedural” rights as the Garrett court did hardly amounts to the “liberal construction” in favor of the servicemember that Fishgold and its progeny command. If the USERRA does not preempt an arbitration clause within an employment contract, then the words of section 4302(b) are essentially meaningless. As a consequence, virtually all of the substantive provisions of the USERRA and all case law interpreting it would be severely undermined.

Fourth, the Seventh Amendment right to a jury trial over USERRA allegations is lost when arbitration is mandated. The Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” Because USERRA plaintiffs are entitled to liquidated damages upon a finding of willful violation of the statute, the USERRA plaintiff is entitled to a jury trial under the Seventh Amendment. Since the adoption of the USERRA, a number of federal courts have determined that the plaintiff-veteran is entitled to a jury trial. Specifically, these federal courts have found that there is a right to a jury trial because liquidated damages are legal damages as opposed to equitable relief. In Duarte v. Agilent Technologies, Inc., the court reviewed the punitive wage provisions of the USERRA and found them to be analogous to the liquidated damages provisions available under the ADEA that also require a finding of willfulness on the part of the...
defendant. The court in Duarte concluded, "[i]n reaching this conclusion, I am mindful that ‘maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Further, the legislative history evinces Congress’ clear intent to treat the right to a jury trial as a right not subject to waiver in favor of arbitration.

Fifth, mandatory arbitration constitutes an impermissible prerequisite. A requirement that USERRA plaintiffs submit their claim to an arbitrator for binding arbitration cannot be reasonably viewed as anything other than the establishment “of additional prerequisites to the exercise” of a seivicemember’s full range of rights under the USERRA. By “additional prerequisites,” Congress clearly meant to stop employers from requiring “additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals...” Importantly, “there is no obvious non-USERRA context in which courts speak of the invalidation of ‘additional prerequisites to the exercise’ of a right.” In Lopez, the court held that the USERRA plaintiff’s arbitration agreement provided an impermissible prerequisite because it mandated that before exercising her rights under the USERRA and obtaining the relief to which she is entitled thereunder, as the plaintiff she must participate in an arbitration proceeding.

B. Public Policy Concerns

There are a number of important public policy factors that strongly weigh against mandatory arbitration. Arbitration is not an effective forum in which to satisfy the public policy goals of the USERRA, even when servicemembers are accorded a fair hearing. In Gilmer, the

322. Id. at 1038 (quoting Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).
323. Maher, 463 F. Supp. 2d at 839 (quoting Parsons v. Bedford, 28 U.S. 433, 447 (1830) (“When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment.”)).
326. Suskin & Wimmer, supra note 12.
327. See supra note 12.
328. See Lopez, 382 F. Supp. 2d at 1248.
329. See id. at 273-74.
Supreme Court stressed that a key consideration in evaluating whether arbitration can be enforced is whether a "prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum..."  

The litigation of USERRA claims is paramount to the statute's purpose. Professor Geraldine Moohr argues that the litigation of employment discrimination claims creates several important enforcement mechanisms that are crucial to eliminating workplace discrimination: (1) "judicial decisions ... provide general deterrence of future violations" because such decisions speak with the authority of the state; (2) "the courts develop and refine the law of employment discrimination, establishing precedents, and define a uniform standard"; and (3) "the judicial process educates the community and forms public values, when a law seeks to change public sentiment."

The private nature of arbitration is bad public policy. In contrast to litigation's public nature, arbitration is characterized as a private proceeding. "Papers filed with arbitrators are not part of any public record; proceedings take place in private offices rather than in public courtrooms; and they tend to be less interesting to the media." The arbitration proceedings, shrouded in well-known secrecy, prevent American voters, citizens, and residents from knowing what employers are doing to veteran-employees. The secret arbitrations also prevent Americans from knowing that the government is failing veterans training for a deployment, currently deployed, or returning from the battlefield. Likewise, mandatory arbitrations conceal the fact that Congress is not successfully reaching its goals set out in the USERRA.

There is inherent social value in ensuring that USERRA cases are heard in a federal court that is open to the public. Deterrence of future USERRA violations requires public knowledge of the disputes as well as

330. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991); see also Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 675 (5th Cir. 2006) (noting whether it "is not inconsistent with the important social policies being addressed by federal statutes.")

331. See Moohr, supra note 115, at 400.

332. Id.

333. See id.

334. Id. at 402.

335. Schwartz, Enforcing Small Print to Protect Big Business, supra note 141, at 61.

336. See Bettenhausen, supra note 33, at 276.

337. See id.

338. See Moohr, supra note 115, at 399.

339. See id. at 400.
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their final disposition. \(^{340}\) "The public forum of litigation makes this information available to the parties, to entities similar to the parties, and to the general public." \(^{341}\) Thus, litigation of workplace discrimination claims furthers the public policy goals of the USERRA by generally deterring and educating prospective violators. \(^{342}\) To the veteran-employee, adverse employment decisions based on their military service are undoubtedly a cost of war. \(^{343}\) As such, the trials showcase the realities and costs of war and thus should be made public. The trials convey the power and emotion to affect public opinion about war and, by extension, to influence the outcome of elections. \(^{344}\) By ensuring that the hearings are secret and far removed from public scrutiny, mandatory arbitrations ultimately widen the civilian-military divide. \(^{345}\) The chief reason for this divide is that the public becomes increasingly ignorant of the costs of war as the employers purge veteran employees during wartime. \(^{346}\)

The media could serve as an important public relations tool for veteran employees. Media coverage of USERRA trials allows the public to have a visceral sense of what is happening when veterans deploy to distant battlefields and then experience adverse action at work upon their return, resulting in consequential effects on families and the troops. \(^{347}\) This media coverage allows the public what many veterans and their families experience on a routine basis as a result of their military obligations. \(^{348}\) By denying this opportunity, the civilian-military divide

\(^{340}\) See id. at 431.

\(^{341}\) Id.

\(^{342}\) See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, NOTICE NO. 915.002, supra note 32. The EEOC contends that damages and other relief is an important part of the public record that not only compensates victims of discrimination but also informs the broader community of the costs of discrimination. Id. Additionally, the EEOC argues that “by issuing public decisions and orders, the courts also provide notice of the identity of violators of the law and their conduct.” Id. In effect, “the risks of negative publicity and blemished business reputation can be powerful influences on behavior.” Id.

\(^{343}\) See Belluck, supra note 104.

\(^{344}\) See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, NOTICE NO. 915.002, supra note 32.

\(^{345}\) See Bettenhausen, supra note 33, at 276.

\(^{346}\) See Stuart F. Delery, Acting Assoc. Attorney Gen., Dep’t of Justice, Remarks Delivered at a Servicemembers Town Hall at Fort Stuart (Sept. 1, 2015).

\(^{347}\) See, e.g., Belluck, supra note 104 (providing an example of an USERRA discrimination case covered by the media); David A. Anderson, Freedom of the Press in Wartime, 77 U. COLO. L. REV. 49, 51-52 (2006) (arguing that the media plays a key role in reporting war-related news to the general public); Clay Calvert & Mirelis Torres, Staring Death in the Face During Times of War: When Ethics, Law, and Self-Censorship in the News Media Hide the Morbidity of Authenticity, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 87, 105-07 (2011) (arguing that the media serves as a check on Congressional and executive wartime actions).

\(^{348}\) Belluck, supra note 104.
A corollary to the civilian-military divide is that the mandatory arbitrations simultaneously widen the divide between the military and the judiciary. Unfortunately, an enormous divide exists between the courts and the USERRA’s purpose. Judge Richard Posner has noted that the primary purpose of the USERRA is simply to “encourage people to join the reserves.” Judge Posner explained, “[t]here is little evidence that employers harbor a negative stereotype about military service or that Congress believes they do.” The Fifth Circuit quoted this reasoning in its holding that the USERRA did not provide a cause of action for harassment based on a person’s military status. The Fifth Circuit explained, “we find nothing to indicate that Congress passed USERRA to combat this type of [harassment] discrimination against military members.” However, a compelling question arises. Why would Congress bother passing a statute specifically to protect servicemembers from employment discrimination at all, if no such problem actually exists? Further, the Fifth Circuit shows a profound ignorance of the modern problems faced by veterans in the workplace. Congress and President Obama clearly disagreed with the Fifth Circuit decision and quickly amended the USERRA to ensure that a cause of action for harassment under the USERRA was unequivocal. Nevertheless, these examples demonstrate the exact reason that USERRA claims need to be heard in federal courts rather than confined to arbitration.

Mandatory arbitration also deters military recruitment and retention efforts. President George Washington once remarked, “[t]he willingness with which our young people are likely to serve in any war, no matter
how justified, shall be directly proportional as to how they perceive the veterans of earlier wars were treated and appreciated by their country.”

The USERRA is designed not only to prevent discrimination, but also to protect a federal interest in military recruitment. “The decision to enlist [or continue one’s service] in America’s military is not made in a patriotic vacuum.” Instead, potential recruits and current members will invariably contemplate the cost-benefit analysis of the benefits of service against the costs; this evaluation includes the cost of forgone opportunity for advancement in civilian employment.

Many individuals would decline or terminate their military service in the absence of the USERRA’s protections due to the fear of losing their civilian job, or being inhibited from gaining civilian employment. This is especially troubling considering that the post-Cold War military policy has placed an increased burden on the National Guard and Reservists. The recruitment challenge is comparably worrisome because the protracted conflicts in Iraq and Afghanistan have put prospective recruits on notice that enlistment will likely lead to combat deployment, involving serious risks of injury or death.

Further, military recruiters have struggled in recent years to meet their target recruitment quotas despite relaxed standards and providing unusual incentives for enlistment.

Retention is also negatively impacted. The fear of losing their jobs along with the other costs of deployment has already caused a substantial number of Reserve and Guard forces to leave the military

359. See Suskin & Wimmer, supra note 12.
360. Id.
361. Id.; see also Forte, supra note 101, at 289-90 (discussing the federal interest in military recruitment).
362. See Bugbee, supra note 36, at 282-83.
363. See Suskin & Wimmer, supra note 12; see also Forte, supra note 101, at 293-94.
364. See Suskin & Wimmer, supra note 12.
365. Id. The protracted wars in Iraq and Afghanistan have already had a deleterious impact on the military recruitment and retention efforts for several years. See, e.g., Peter Spiegel, Army Misses Recruiting Target by 7%, L.A. TIMES, June 12, 2007, at A13 (describing recruitment and retention challenges); see also Michael Kilian, Army Study: U.S. Facing Hard Choices, CHI. TRIB., July 12, 2005, at C9 (discussing an Army report that detailed the strain that the concurrent wars in Iraq and Afghanistan placed on the military). In order to bolster recruitment and retention, the military has offered usual financial incentives. See Josh White, Many Take Army’s “Quick Ship” Bonus, WASH. POST, Aug. 27, 2007, at A01 (describing the Army’s offer of a $20,000 bonus to recruits willing to leave for basic training within a month); see also Ann Scott Tyson, Army Guard Refilling Its Ranks, WASH. POST, Mar. 12, 2006, at A01 (discussing a $2,000 bonus offered to Guard members for enlisting new members).
once they return from combat. As a result of modern military policy, inadequately enforced protections can serve as a breaking point for Reservists faced with the multi-pronged challenge of having to balance a possible deployment, maintain or find a civilian career, as well as address family and personal matters. Modern warfare increasingly relies on sophisticated technological operations and intelligence gathering; this means that the modern soldiers are increasingly “white-collar.” If these soldiers leave the military, there will be a significant void with their absence.

Consider the occupations of some of the USERRA mandatory arbitration plaintiffs: an optometrist (Landis); an anesthesiologist (Baudion); and a technological specialist (Garrett). Importantly, there is a serious concern that apathy regarding the difficulties of returning military members will continue to grow and that many civilians considering joining the military will be deterred from such a decision. Likewise, there is a fear that morale and national security will be noticeably damaged because of the plight of these returning servicemembers. USERRA and its predecessor laws were specifically designed to improve morale of servicemembers. The importance of creating an overall climate that encourages service (both recruitment and retention) in the National Guard and Reserves is critical since these forces operate in a very tough environment in which the operational tempo oftentimes involves a combat deployment or preparation for one.

There are other practical problems with mandatory arbitration under the USERRA. Most notably, many USERRA complaints are resolved

366. See Lee, supra note 287 at 250.
367. See id. at 249.
368. Id. at 250-51.
371. See Baudoin v. Mid-Louisiana Anesthesia Consultants, Inc., 306 F. App’x 188, 189 (5th Cir. 2009).
372. See Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 672 (5th Cir. 2006).
373. Lee, supra 287, at 277.
374. Id.
375. See Coffman v. Chugach Support Servs., Inc., 411 F.3d 1231, 1235 (11th Cir. 2005) (noting that USERRA and its predecessor statutes were intended to “bolster the morale of those serving their country”).
376. See Lee, supra 287, at 276.
by the DOL, which conducts investigations and seeks voluntary employer compliance.\footnote{377} If DOL efforts are not successful, the cases are then referred to the Department of Justice.\footnote{378} This triggers a dilemma for these departments: will either department be willing to represent USERRA claimants in informal hearings before privately appointed arbitrators?\footnote{379} It seems highly unlikely that either department would want to get involved in such proceedings.\footnote{380} In addition to compelling legal reasons, the policy and practical consequences reflect important reasons why servicemembers should not be compelled to mandatory arbitration.

V. STRENGTHENING THE USERRA: SOME SUGGESTIONS

There are several recommendations that may help the situation. The first and most obvious solution to mandatory arbitration under the USERRA is a legislative solution to amend the USERRA. Another possible solution is requiring companies that require pre-dispute mandatory arbitration to publicly report the outcomes of such arbitrations and claims to ensure a highly level of transparency. State action should also be considered. This part offers some positive steps to improve the situation.

A. Congressional Solution? Congress Should Enact a Bill Similar to the SAJA

In order to resolve the inherent conflict between the FAA and the USERRA, U.S. Senator Robert Casey, Jr., a Democrat from Pennsylvania, introduced the Service Members Access to Justice Act ("SAJA") in the U.S. Senate in 2008.\footnote{381} The SAJA legislation explicitly provides that any USERRA claims supersede arbitration clauses contained in any employment agreements.\footnote{382} Most importantly, the SAJA would provide USERRA plaintiffs with full access to federal

\footnote{378. See id.}
\footnote{379. See id.}
\footnote{380. See id.}
\footnote{381. See Servicemembers Access to Justice Act, S. 3432, 110th Cong. (2008); see also Hardy, supra note 3, at 348.}
\footnote{382. See Hardy, supra note 3, at 344.}
courts to resolve employment discrimination claims.\textsuperscript{383} Interestingly, one of the co-sponsors of the proposed SAJA bill was then-Senator Barack Obama, a Democrat from Illinois.\textsuperscript{384} As a strong supporter of the SAJA legislation, then-Senator Obama unequivocally stated that servicemembers coming back from war “should not have to fight another battle at home for the benefits and rights they deserve.”\textsuperscript{385} The SAJA bill sought to overturn the Garrett case and the cases that followed the Fifth Circuit’s decision.\textsuperscript{386} The SAJA of 2008 specifically contained a section that expressly stated that agreements to arbitrate disputes stemming from USERRA violations would not be enforceable.\textsuperscript{387} Furthermore, the SAJA bill reinforced this point by adding a section to the USERRA that explicitly states that any agreement or provision between a USERRA employee and employer requiring disputes to be resolved by arbitration would not be enforceable.\textsuperscript{388} However, exceptions to the enforceability of agreements to arbitrate are allowed in the event that both employer and employee agree to submit any USERRA claim to arbitration, but only after the dispute arises.\textsuperscript{389} In other words, the parties cannot preemptively agree to arbitrate before a USERRA dispute arises.

The SAJA of 2008 provided enhanced protection for servicemembers in other ways as well.\textsuperscript{390} First, the SAJA bill allowed USERRA plaintiffs the ability to file claims in either federal or state court against certain state government employers.\textsuperscript{391} Second, the SAJA bill provided USERRA plaintiffs with greater remedies such as liquidated and punitive damages.\textsuperscript{392} Third, the legislation allowed for

\begin{itemize}
\item \textsuperscript{383} See id.
\item \textsuperscript{385} Casey, Kennedy, Obama Introduce Bill to Help Servicemembers and Veterans Keep Their Jobs, Bob Casey, U.S. Sen. for Pa. (Aug. 1, 2008), http://www.casey.senate.gov/newsroom/press/release/?id=4a64c2c0-3750-4d1c-b608-82b68b0c8da9 [hereinafter Bob Casey].
\item \textsuperscript{386} Hardy, supra note 3, at 343.
\item \textsuperscript{387} Hardy, supra note 3, at 343-44. (“Specifically, [section] 3 of the SAJA is entitled ‘Unenforceability of Agreements to Arbitrate Disputes Arising under USERRA.’”).
\item \textsuperscript{388} Id.
\item \textsuperscript{389} See id. at 344. The agreement between the parties must be made “knowingly and voluntarily.” Id.
\item \textsuperscript{390} See id.
\item \textsuperscript{391} See id.
\item \textsuperscript{392} See id.
\end{itemize}
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successful USERRA plaintiffs to get mandatory attorney’s fees.\textsuperscript{393} Fourth, the SAJA bill makes it easier for employers to reemploy returning servicemembers upon their return from combat and streamlines injunctive relief to prevent terminations from occurring.\textsuperscript{394} Another notable benefit of the SAJA of 2008 is that the legislation clarifies that the USERRA does not have a statute of limitations.\textsuperscript{395} Finally, SAJA forbids wage discrimination against veterans.\textsuperscript{396} On September 27, 2008, the SAJA bill was introduced to Congress.\textsuperscript{397} Both SAJA of 2008 Senate and House bills died in committee.\textsuperscript{398}

In 2012, two separate bills were introduced that would render arbitration clauses invalid in USERRA cases and guarantee military members the right to have their cases heard in federal court: the Servicemember Employment Protection Act of 2012\textsuperscript{399} and the SAJA of 2012.\textsuperscript{400} The two bills were essentially carbon copies of the SAJA of 2008.\textsuperscript{401} Again, both bills stalled in committee.\textsuperscript{402} A likely chief reason for Congressional inaction on this issue is that pro-arbitration Republicans are generally categorically opposed to any efforts that could possibly chip away at the nation’s ardent pro-arbitration position.\textsuperscript{403}

Despite Congressional inaction, there is still some optimism based on recent veterans protection improvements. Congress amended the Servicemembers Civil Relief Act (SCRA)\textsuperscript{404} and the Injunctive Relief

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\begin{itemize}
  \item \textsuperscript{393} Id.
  \item \textsuperscript{394} Id.
  \item \textsuperscript{395} Id. at 344-45.
  \item \textsuperscript{396} Id. at 345.
  \item \textsuperscript{397} See H.R. 7178, 110th Cong. (2008).
  \item \textsuperscript{399} See S. 3236, 112th Cong. (2011).
  \item \textsuperscript{400} See S. 3233, 112th Cong. (2011).
  \item \textsuperscript{403} See 2008 Republican Platform, AM. PRESIDENCY PROJECT 1, 28 (2008), http://www.presidency.ucsb.edu/papers_pdf/78545.pdf (criticizing Democrats and trial lawyers that seek to “weaken lower-cost dispute resolution alternatives such as mediation and arbitration in order to put more cases into court.”).
  \item \textsuperscript{404} See SCRA-Legislative History of the Servicemembers Civil Relief Act, SCRA, https://www.servicememberscivilreliefact.com/blog/scra-legislative-history/ (last visited Apr. 23, 2017).
\end{itemize}
for Veterans Act of 2008.\textsuperscript{405} In 2011, Congress enacted the Vow to Hire Heroes Act of 2011,\textsuperscript{406} which amended the USERRA to include hostile work environment as a cause of action under the statute.\textsuperscript{407} The Improving SCRA, the USERRA Protections Act of 2008, and the Vow to Hire Heroes Act evince a desire and willingness on the part of some members in Congress to further the protections of the USERRA.\textsuperscript{408} In a similar vein, there is a willingness by some states to further limit mandatory arbitration in other related areas.\textsuperscript{409} Congress has tried to be responsive to these outcries for limitation on arbitration; in 2009, Senator Al Franken introduced an amendment to the 2010 Department of Defense ("DoD") appropriations bill prohibiting the use of appropriated funds for DoD contractors that require employees to resolve certain claims in arbitration.\textsuperscript{410} Former President Obama signed the amendment into law on December 19, 2009.\textsuperscript{411} Furthermore, President Obama was a co-sponsor of the SAJA bill,\textsuperscript{412} which certainly demonstrates executive willingness.

Ultimately, a legislative amendment would be the best way to

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\textsuperscript{409} See Margot Roosevelt, Navy Reservist Wants a Day in Court, Not Arbitration, THE ORANGE COUNTY REGISTER (June 5, 2015), http://cqrcengage.com/navyleague/app/document/14129898;jsessionid=1718xs2id6w621183e83ryw3 8sj.

\textsuperscript{410} Cynthia Dizikes, Senate Passes Franken Amendment Aimed at Defense Contractors, MINNPOST (Oct. 6, 2009), https://www.minnpost.com/politics-policy/2009/10/senate-passes-franken-amendment-aimed-defense-contractors (listing sexual assault, assault and battery, intentional infliction of emotional distress, and negligent hiring, retention and supervision as claims that required arbitration).


\textsuperscript{412} See BOB CASEY, supra note 385.
address the application problem because courts have varied so much in their interpretations of mandatory arbitration under the USERRA. A legislative amendment would be a way for Congress to implement a uniform rule across the board, thus making a strongly pro-veteran statement during a time of war.

B. Tax Relief and Incentives for Employers

Another Congressional solution to consider is to provide employers with some sort of business tax credit for losses or expenses directly caused by servicemembers’ military obligations and reemployment. This solution would allow employers to mitigate their losses by providing tax relief, thereby providing employers with some economic incentive and generating goodwill among employers to willingly comply with the USERRA. Compared to the specific USERRA amendment solution discussed earlier, this solution would certainly be more palatable to ardent pro-arbitration Republicans.

C. Required Data Reporting

Another solution which could create needed transparency would be that Congress can require companies that have mandatory pre-dispute arbitration to report annually and provide public data concerning USERRA arbitration claims and outcomes. Data regarding arbitrations and outcomes can be specifically provided to the DOL, the agency responsible for employment issues. There is great value in making the data publicly available so that federal agencies such as the EEOC and watchdogs can monitor patterns of employment discrimination against veterans. Certainly veterans’ advocacy groups would be interested in this information as well. Equally importantly, publicly available information may dissuade veterans from seeking employment with a particular employer if the veteran is aware that a significant number of arbitration claims have been filed against a

413. See Hardy, supra note 3, at 342.
414. See Forte, supra note 101, at 341.
415. Id. at 291 (“Without such initiatives, the protections of USERRA may be inadequate to address the needs of the military member, the burdens of the civilian employer, and the realities of the modern labor market.”).
417. Id. (noting that the DOL is responsible for employment issues).
418. See id. at 1775-76.
particular company, regardless of any particular arbitral outcome.\textsuperscript{419}

\textbf{D. State Action}

Another course of action to consider is for individual states to pass their own additional and supplemental laws to provide further protection for veterans. The USERRA sets the minimum for protections for military members and preempts state laws that offer less.\textsuperscript{420} Accordingly, the USERRA does not preclude states or employers from granting greater protections or rights.\textsuperscript{421} Most states already have some measures in place that are markedly similar to the USERRA but they vary considerably from state to state.\textsuperscript{422}

State laws may prove to be especially important for National Guard members who regularly deploy to combat and also take part in state emergencies, disaster relief, and law enforcement missions.\textsuperscript{423} However, state action is likely limited in specifically addressing the problem of mandatory arbitrations since state efforts to prevent mandatory arbitration would likely violate the FAA.\textsuperscript{424} Nevertheless, any federal solutions must account for corresponding state action.

\textbf{VI. CONCLUSION}

The conflict in Afghanistan is expected to continue for some time and President Donald Trump’s foreign and military policies remain uncertain. Even though military operations have theoretically ended in Iraq, U.S. soldiers are still deployed there and hundreds of advisors have been sent to Iraq to combat the rise of the Islamic State of Iraq and Syria ("ISIS").\textsuperscript{425} This vexing background combined with the poor economic...
times will surely continue to encumber servicemembers and employers alike. As such, the number of USERRA actions is not likely to abate.

Congressional legislation presents the most promising solution. Action by Congress specifically and unequivocally stating that employment agreements for disputes arising under the USERRA are not subject to mandatory and binding arbitration can settle this issue once and for all. Significantly, a specific Congressional amendment changing the language of the USERRA could remove any uncertainty for courts to apply USERRA in a way that puts servicemembers at a disadvantage. 426 Additionally, Congress could require companies that have mandatory pre-dispute arbitration report annually and provide public data concerning USERRA arbitration claims and outcomes in order to provide greater transparency. State action should also be seriously considered whereby states pass their own additional and supplemental laws to provide enhanced protection for veterans.

This Article has argued that veteran employees should not be compelled to enter mandatory arbitration. The courts, not arbitrators, should hear employment discrimination claims under the USERRA. As the old adage “everyone deserves their day in court” goes, this is particularly true for combat veterans deploying to and returning from war.


426. See Hardy, supra note 3, at 342 (explaining that there is a lack of consensus among district courts regarding the text of USERRA).