

# A Fighting Chance: The Proposed Servicemembers Access to Justice Act & Its Potential Effects on Binding Arbitration Agreements

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## I. INTRODUCTION

As the first decade of the twenty-first century draws to a close, the United States Armed Forces remain embroiled in conflicts overseas, as part of its overall War on Terrorism.<sup>1</sup> As fighting in Iraq draws down, the focus has shifted to the conflict in Afghanistan.<sup>2</sup> This period of continuous battle, following the terrorist attacks of September 11, 2001, is the longest ever faced by the Armed Forces since the creation of an all-volunteer military in 1973.<sup>3</sup> Moreover, in the absence of compulsory conscription, the military

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\* B.A., University of Southern California, 2006; J.D., Pepperdine University School of Law, 2009. I would like to dedicate this article to E. Michael Hardy, U.S. Army (ret.), David E. Hardy, U.S. Air Force (ret.), Jason Hardy, U.S. Army, and Stephen Neil Hyland, U.S. Army.

1. See Peter Baker, *With Pledges to Troops and Iraqis, Obama Details Pullout*, N.Y. TIMES, Feb. 27, 2009, at A6. In a nationally televised address on February 26, 2009, President Barack Obama outlined a plan for a phased withdrawal of combat forces from Iraq, taking place over an eighteen month period. See *id.* The President stated that, "By August 31, 2010, our combat mission in Iraq will end." *Id.* See also Campbell Robertson, *New Rules in Iraq Add Police Work to Troops' Jobs*, N.Y. TIMES, Dec. 30, 2008, at A5.

2. See Helene Cooper, *Putting Stamp of Afghan War, Obama Will Send 17,000 Troops*, N.Y. TIMES, Feb. 17, 2009, at A1. In a move that nearly doubled the number of American soldiers there, President Obama ordered that 17,000 troops be sent to Afghanistan. See *id.* Citing the "deteriorating situation" in the country, the President fulfilled the wishes of American commanders who had requested additional forces to combat the resurgent Taliban. *Id.* See also Elisabeth Bumiller, *Major Push Is Needed to Save Afghanistan, General Says*, N.Y. TIMES, Jan. 9, 2009, at A7; Michael P. Gordon & Thom Shanker, *Plan Would Shift Forces from Iraq to Afghanistan*, N.Y. TIMES, Sept. 4, 2008, at A14.

3. See Thom Shanker, *Army Is Worried by Rising Stress of Return Tours to Iraq*, N.Y. TIMES, Apr. 6, 2008, available at <http://www.nytimes.com/2008/04/06/washington/06military.html>. The length of these wars has led to extended deployments and numerous tours of duty, which have taken their toll on Armed Services members. See *id.* "Among combat troops sent to Iraq for the third or

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has relied to an extraordinary degree on its Reserves and the National Guard to bolster its battlefield ranks.<sup>4</sup> These servicemen and women have faced repeated deployments of up to fifteen months, although Secretary of Defense Robert Gates has taken steps to shorten such disruptive tours of duty.<sup>5</sup>

Such extended stays can cause severe disruption in the civilian lives of these part-time soldiers.<sup>6</sup> More than 400,000 National Guard and Reserves were deployed to Iraq and Afghanistan between September 11, 2001, and November 20, 2007.<sup>7</sup> These men and women come home, often with debilitating injuries or mental disorders, and return to work.<sup>8</sup> In some instances, their employers may be unsympathetic to their wartime experiences, and downgrade or terminate their employment.<sup>9</sup> In anticipation

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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." *Id.*

4. See generally MICHAEL WATERHOUSE & JOANNE O'BRYANT, Congressional Research Service, CRS Report No. RS22451, NATIONAL GUARD PERSONNEL AND DEPLOYMENTS: FACT SHEET (Jan. 17, 2008), available at <http://www.fas.org/sgp/crs/natsec/RS22451.pdf>. As of January 2, 2008, the combined National Guard and Reserves compose twenty-one percent of the U.S. forces in Afghanistan and eleven percent of the forces in Iraq. See *id.* at CRS-4.

5. See William H. McMichael, *Gates Details Plans for Deployment, Dwell Time*, MARINE CORPS TIMES, Jan. 29, 2009, available at [http://www.marinecorpstimes.com/news/2009/01/military\\_gates\\_012709w/](http://www.marinecorpstimes.com/news/2009/01/military_gates_012709w/). In early 2009, Secretary Gates announced a new plan in which Army troops will serve for one year abroad followed by one year back home before any additional deployments may occur. See *id.* This rest period may prove crucial; as Gates noted that while the Iraq War is "winding down . . . there may be hard days ahead for our troops." *Id.* See also Shanker, *supra* note 3.

6. See Bob Deans, *U.S. Reserves Dangerously Overtaxed by Wars in Iraq, Afghanistan, Panel Says*, COX NEWS SERVICE, Feb. 1, 2008, available at [http://www.coxwashington.com/hp/content/reporters/stories/2008/02/01/GUARD\\_GA01\\_COX.html](http://www.coxwashington.com/hp/content/reporters/stories/2008/02/01/GUARD_GA01_COX.html). Whereas the Reserves were sarcastically referred to as "weekend warriors" during the Cold War era, and rarely saw actual service overseas, today they are continuously called on to fill crucial gaps in the slimmed-down post-Cold War military. *Id.* According to Thomas Welke, deputy director of operations at Fort McPherson, "This is the longest period of sustained mobilizations of this high tempo since the Army Reserves was founded one hundred years ago[.]" *Id.*

7. See WATERHOUSE & O'BRYANT, *supra* note 4, at CRS-5.

8. See Marilyn Elias, *Iraq War Takes Unique Toll on National Guard*, USA TODAY, Aug. 20, 2008, available at [http://www.usatoday.com/news/health/2007-08-20-posttraumatic-stress\\_N.htm](http://www.usatoday.com/news/health/2007-08-20-posttraumatic-stress_N.htm). Walter Reed Army Institute of Research studies indicate that National Guard members are six times more likely than active duty servicemembers to suffer from mental illness, induced by financial difficulties resulting from their deployments. See *id.* As one researcher puts it, "[National Guard members] haven't trained as much before going over, their spouses may be more anxious than active-duty military and find it harder to get support in their neighborhoods. . . . There's also the potential for financial difficulties." *Id.*

9. See Stacey Stowe, *After Uniform, White-Collar Blues; Reservists Find Careers Have Been Downsized*, N.Y. TIMES, Oct. 28, 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9B07E6DA1E3FF93BA15753C1A9639C8B63>.

According to Air Force Major Robert Palmer, in 2004 alone the Department of Defense "handled 6,242 cases involving claims of job discrimination, job placement or inadequate pay or

of such shabby treatment of returning veterans, Congress enacted the Uniformed Services Employment and Reemployment Rights of 1994 (USERRA).<sup>10</sup> The USERRA, among other things, provides extremely generous reemployment rights to plaintiffs who have been fired because of their military service, and grants jurisdiction over such cases to the United States District Courts.<sup>11</sup> However, the law was silent on the effect of arbitration provisions in employment contracts.

This ambiguity has been interpreted by two United States Circuit Courts of Appeals as permitting such arbitration agreements, thereby denying many military plaintiffs access to the federal courts.<sup>12</sup> These courts relied on a line of Supreme Court cases involving the Federal Arbitration Act (FAA) that makes clear the Court's strong pro-arbitration stance.<sup>13</sup> Yet, such a construction stands at odds with another line of high court cases involving veterans' employment laws, as well as the Congressional intent behind the USERRA.<sup>14</sup> To rectify this incongruity, in August 2008 a bill was

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vacation . . . ." *Id.* Such employment issues occur even if the reservist is a professional, such as a stock broker or an attorney. *See id.*

10. *See* 38 U.S.C. §§ 4301-4333 (2009). *See generally* Konrad S. Lee, "When Johnny Comes Marching Home Again" Will He Be Welcome at Work?, 35 PEPP. L. REV. 247 (2008), for an excellent overview of the USERRA and its renewed importance due to the increased use of part-time military personnel in the War on Terror.

11. *See* 38 U.S.C. §§ 4316(c), 4316(b)(1), 4323(b)(3) (2008).

12. *See* *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559 (6th Cir. 2008); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006). Numerous commentators have criticized the increased use of pre-dispute employment agreements mandating binding arbitration. *See* Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 291 (2002) ("Increasingly, working Americans face the choice of accepting a mandatory arbitration clause in their employment agreements of having no employment at all."). Such commentators often praise arbitration as useful in commercial and labor disputes, but deem mandatory arbitration provisions in employment contracts as contracts of adhesion "that often amount to a non-negotiable requirement that prospective employees relinquish their rights to redress in a court of law." *Id.* These critics point to the one-sided nature of such contracts, in which employees often do not understand what they are signing and the employer has the opportunity to select an arbitrator who may be, subtly or glaringly, biased in favor of the employer. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1649-50 (2005). *See also* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 146-152 (2006) (arguing that the Supreme Court "reached a high water mark of statutory misinterpretation" when it upheld the arbitrability of employment contracts).

13. *See Garrett*, 449 F.3d at 674 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

14. *See Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 285 (1946), *cited in Alabama Power Co. v. Davis*, 431 U.S. 581, 583 (1977) and *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

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introduced in the United States Senate that clearly states USERRA claims supersede any preexisting arbitration clauses in employment agreements.<sup>15</sup> This bill, known as the Servicemembers Access to Justice Act (SAJA), would restore full access to the federal court system for USERRA plaintiffs.<sup>16</sup>

This paper examines the SAJA and its potential effects on the USERRA. It begins with a survey of the history behind the passage of the USERRA, as well as the FAA. Next, it describes the two federal circuit court decisions that have led to the proposal of the SAJA. A further section explores the SAJA itself. A commentary section follows, expressing disagreement with the court decisions and support for the SAJA, as it restores the privileged status bestowed upon veterans by Congress in the USERRA and its predecessor statutes. Finally, the conclusion looks forward to the passage of this much needed law.

## II. HISTORICAL BACKGROUND

### A. *The FAA*

In the early Twentieth Century, the use of arbitration to resolve legal disputes was often viewed with a jaundiced eye by American courts.<sup>17</sup> This widespread institutional hostility led to the passage of the FAA in 1925.<sup>18</sup> In no uncertain terms, the FAA states that written arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>19</sup> Beginning in the 1980s, the United States Supreme Court began a line of cases that greatly enhanced the force of agreements to arbitrate under the FAA. In the 1985 case *Southland Corp. v. Keating*,<sup>20</sup> the Court held that, under the Supremacy Clause of the Constitution, the FAA superseded any state laws barring the

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15. See S. 3432, 110th Cong. § 3 (2008).

16. See S. 3432, 110th Cong. §§ 1-3 (2008).

17. See *Gilmer*, 500 U.S. at 24 (citations omitted). Julius Cohen, the principal author of the FAA, articulated in a brief to Congress that:

For many centuries there has been established a rule, rooted originally in the jealousy of courts for their jurisdiction, that parties might not, by their agreement, oust the jurisdiction of the courts. This rule was so firmly established that our American courts did not feel themselves free to change the rule . . .

*Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16, 39 (1924) (statement of Julius Cohen).

18. See 9 U.S.C. §§ 1-16 (2009); *Gilmer*, 500 U.S. at 24.

19. 9 U.S.C. § 2 (2009).

20. 465 U.S. 1 (1984).

use of arbitration in contracts drafted under state law.<sup>21</sup> The following year, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>22</sup> the Court upheld the arbitration of statutory claims, reasoning that such agreements do not entail the abdication of substantive rights, but rather the submission to an alternative forum for dispute resolution.<sup>23</sup> The *Mitsubishi* Court also articulated 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 deducible from text or legislative history.”<sup>24</sup> The Court expanded upon *Mitsubishi* in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>25</sup> where the plaintiff had sued his employer under the Age Discrimination in Employment Act (ADEA) and was made to enter arbitration pursuant to a prior agreement.<sup>26</sup> The Court reaffirmed the principle that statutory claims are arbitrable under the FAA, unless the party seeking to avoid arbitration could show that Congress had intended to preclude the waiver of a judicial forum for that particular statute.<sup>27</sup>

In recent years, the Court’s pro-arbitration stance has continued unabated. In *Circuit City Stores, Inc. v. Adams*,<sup>28</sup> it upheld the practice of employers requiring employees to arbitrate all employment discrimination claims.<sup>29</sup> Most recently, in *Hall Street Associates, LLC v. Mattel, Inc.*,<sup>30</sup> the Court denied parties the ability to contract to additional grounds for judicial review of arbitral awards beyond the extremely narrow terms outlined in the text of the FAA.<sup>31</sup> It is this favorable attitude toward arbitration agreements, by both the Supreme Court and the FAA itself, which has largely been used to justify the arbitration of USERRA claims.<sup>32</sup>

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21. *See id.* at 16-17.

22. 473 U.S. 614 (1985).

23. *See id.* at 628.

24. *Id.*

25. 500 U.S. 20 (1991).

26. *See id.* at 23-24.

27. *See id.* at 25-26.

28. 532 U.S. 105 (2001).

29. *See id.* at 123-24.

30. 128 S. Ct. 1396 (U.S. 2008).

31. *See id.* at 1406-08.

32. *See Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 561-62 (6th Cir. 2008); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 674-76 (5th Cir. 2006).

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B. *The USERRA*

In the modern era, the United States has consistently passed legislation to help ensure the fair treatment of its returning service men and women, in large part to exorcise the grim specter of the Bonus March of 1932, wherein an army of unemployed World War I veterans was savagely beaten and broken up by the government.<sup>33</sup> Congress passed the USERRA in 1994, in the wake of the 1991 Persian Gulf War.<sup>34</sup> The act was essentially a substantial redrafting of the Vietnam Era Veterans Readjustment Assistance Act of 1974, popularly known as the Veterans Reemployment Rights Act (VRRRA).<sup>35</sup> The VRRRA, in turn, was based on the Selective Training and Service Act of 1940.<sup>36</sup>

According to its text, the USERRA is meant:

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services.<sup>37</sup>

In order to vindicate these rights, a USERRA plaintiff may avail themselves to two options.<sup>38</sup> First, the plaintiff may file a complaint with the Secretary of Labor for referral to the Attorney General for prosecution.<sup>39</sup> Second, the plaintiff may directly file a civil action.<sup>40</sup> The USERRA expressly grants jurisdiction over claims against private employers to the

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33. See Lee, *supra* note 10, at 252-54 (summarizing the history of veterans' reemployment rights). The Bonus March occurred when veterans of the First World War descended on Washington, D.C. in an attempt to force Congress to pass legislation allowing for the immediate redemption of bonds issued to them in 1924, but which were irredeemable until 1945. See generally PAUL DICKSON & THOMAS B. ALLEN, *THE BONUS ARMY: AN AMERICAN EPIC* (2004). President Herbert Hoover, distressed by the constant presence of over ten thousand disheveled veterans camping on the National Mall, ordered Army Chief of Staff Douglas MacArthur to drive them out. See *id.* at 228-31. The veterans were forcibly removed by Army troops wielding rifles, machine guns, pistols, and riding in tanks. See *id.* This horrific spectacle shocked the nation, and led to a surge of veterans' benefits legislation, so that by 1943, over 243 such bills were pending before Congress. See *id.* at 269.

34. See 38 U.S.C. § 4301 (2008).

35. See *Rogers v. City of San Antonio*, 392 F.3d 758, 764-65 (5th Cir. 2004) (providing an extensive survey of the USERRA's predecessor statutes).

36. See *id.* at 765-67.

37. § 4301.

38. See §§ 4322-4323.

39. See § 4323(a)(1).

40. See § 4323(a)(2).

United States District Courts, whether brought by individuals or by the United States on their behalf.<sup>41</sup> Available remedies include equitable relief, lost wages and benefits, and, if the employer is willfully noncompliant, liquidated damages equivalent to any award for lost wages and benefits.<sup>42</sup> Courts also have discretion to award reasonable attorney's fees and court costs to successful plaintiffs.<sup>43</sup>

The USERRA establishes broad protections for veterans and those that aid them in their claims. Section 4311(a) of the USERRA prohibits an employer from denying a servicemember retention in their job on the basis of their military service.<sup>44</sup> Section 4302(a) provides that the USERRA is only the baseline for reemployment rights, and does not prevent the states from enacting more sweeping protections.<sup>45</sup> However, the USERRA also makes clear that it trumps any state law, contract, or other device that reduces the rights guaranteed by the USERRA.<sup>46</sup> Of most relevance to this paper is § 4302(b) of the USERRA, which provides that the statute:

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.<sup>47</sup>

One commentator has noted that the USERRA is “unique among anti-discrimination statutes and strongly favors the USERRA plaintiff.”<sup>48</sup> For instance, the threshold for the USERRA plaintiff to establish a prima facie case is extremely low, and, once established, both the burden of persuasion and the burden of production shift to the defendant.<sup>49</sup>

The legislative history behind the USERRA lends credence to the contention that any ambiguities within its text are to be construed in favor of the plaintiff service member. Specifically, the House Committee Report states that § 4302(b) provides a general preemption against conflicting state laws or employment agreements that reduce the rights protected by the

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41. See § 4323(b)(1).

42. See § 4323(d)-(e).

43. See § 4323(h)(2).

44. See § 4302(a).

45. See § 4302(a).

46. See § 4302(b).

47. § 4302(b).

48. Sharon M. Erwin, *When the Troops Come Home: Returning Reservists, Employers, and the Law*, 19 HEALTH LAW. 1, 9 (2007).

49. See *id.*

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USERRA.<sup>50</sup> The Report goes on to state that if a person protected by the USERRA enters arbitration, “any arbitration decision shall not be binding as a matter of law.”<sup>51</sup> The House Committee notes that while a USERRA plaintiff may waive those rights already in existence, such a waiver must be “clear, convincing, specific, unequivocal, and not under duress.”<sup>52</sup> Moreover, the Report warns that “an express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void.”<sup>53</sup>

The increased deployment of Reserve National Guard units to Iraq and Afghanistan has led to an urgent need for straightforward explanations on the workings of USERRA for both protected employees and their employers. Between fiscal years 2004 and 2006 alone, 16,000 formal and informal USERRA claims were reported.<sup>54</sup> On January 18, 2006, the Department of Labor, after collaboration with the Department of Defense, issued its final Regulations interpreting USERRA for civilian employers of service members.<sup>55</sup> In their preamble, the Regulations cite Supreme Court precedent that calls for the liberal construction for veterans’ reemployment laws.<sup>56</sup> The Regulations go on to presage “that this interpretive maxim shall apply with full force and effect in construing USERRA and these regulations.”<sup>57</sup>

### C. *Supreme Court Precedent Dealing with Veterans Employment Legislation*

As noted previously, the USERRA is a successor statute to the VVRA and the Selective Service and Training Act of 1940.<sup>58</sup> The Supreme Court has a history of construing such statutes in favor of the veteran plaintiff. For instance, in *Fishgold v. Sullivan Drydock & Repair Corp.*,<sup>59</sup> the Court considered the intent behind the Selective Training and Service Act.<sup>60</sup>

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50. See H.R. REP. NO. 103-65(I) (1994), reprinted in 1994 U.S.C.C.A.N. 2449, 2453.

51. *Id.*

52. *Id.*

53. *Id.*

54. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, Military Personnel, Additional Actions Needed to Improve Oversight of Reserve Employment Issues, GAO-07-259 at 2(2007) [hereinafter GAO Report].

55. See 20 C.F.R. §§ 1002.1-1002.314 (2006).

56. See 70 Fed. Reg. 75246 (2005).

57. *Id.*

58. See *supra* notes 35-36 and accompanying text.

59. 328 U.S. 275 (1946).

60. See *id.* at 280-84.

Concerning the purpose of the Act, the Court determined that “[the veteran] who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.”<sup>61</sup> The *Fishgold* Court stated it would apply a liberal construction of the statute, in favor of the veteran.<sup>62</sup> Indeed, rather than view each section of the Act in isolation, the Court would “construe the separate provisions of the Act 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.”<sup>63</sup> In reaching its conclusion, the Court gleaned Congressional intent from the legislative history.<sup>64</sup>

The Court has continued to apply the *Fishgold* maxim of liberal construction when dealing with veterans’ re-employment statutes. Decades later, in *Alabama Power Co. v. Davis*,<sup>65</sup> the Supreme Court was tasked with interpreting the Military Selective Service Act of 1967, the successor statute to the 1940 law.<sup>66</sup> The Court found that Congress intended to make veterans’ return to civilian life as seamless as possible by guaranteeing them the same jobs they had held prior to their call to service.<sup>67</sup> Again, the Court stated that such statutes were to be liberally construed to the veteran’s benefit.<sup>68</sup>

In *King v. St. Vincent’s Hospital*,<sup>69</sup> the issue was whether a provision of the VVRA implicitly limited the length of military service which guaranteed the service member a right to their civilian employment.<sup>70</sup> The Court was able to reach a conclusion in the veteran’s favor based on the text of the VVRA.<sup>71</sup> However, the Court noted that even if the statute had not been

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61. *Id.* at 284.

62. *See id.* at 285.

63. *Id.* Considering the case was decided in 1946, in the wake of the Second World War, it is perhaps unsurprising that the Court should employ an analysis so deferential to the veteran. *See id.* at 275. *Fishgold* was thus the genesis of the interpretative maxim mentioned in the preamble to the final regulations interpreting the USERRA. *See* 70 Fed. Reg. 75246.

64. *See Fishgold*, 328 U.S. at 289-90.

65. 431 U.S. 581 (1977).

66. *See id.* at 583-84.

67. *See id.* at 583.

68. *See id.* at 584. Although the plaintiff in *Davis* was a World War II veteran, this case was crucial in continuing *Fishgold*’s interpretive maxim into the Vietnam era. *See id.* at 582.

69. 502 U.S. 215 (1991).

70. *See id.* at 216.

71. *See id.* at 220-21.

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clear, “we would ultimately read the provision in [the veteran’s] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.”<sup>72</sup> From the Second World War until the present day, the United States Supreme Court has read veterans’ reemployment rights statutes in the light most favorable to the veteran.

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

#### A. *Garret v. Circuit City Stores*

The question over the interplay between the USERRA and the FAA has wormed its way through the court system in recent years. There has been no consensus at the district court level, with several district courts finding that mandatory arbitration provisions in employment agreements may not be enforced as to USERRA claims, and other courts finding the opposite.<sup>73</sup> In *Garrett v. Circuit City Stores, Inc.*,<sup>74</sup> the United States Court of Appeals for the Fifth Circuit became the first appellate court to address whether USERRA precludes the enforcement of individual arbitration agreements.<sup>75</sup> Garrett, a marine reservist, had been employed by Circuit City since 1994.<sup>76</sup> In 1995, “Circuit City adopted its ‘Associate Issue Resolution Program,’ a company-wide procedure for resolving employment disputes.”<sup>77</sup> The program would resolve termination disputes through final and binding arbitration, enforceable through the FAA.<sup>78</sup> Garrett sent written acknowledgment of his receipt of an information packet on the program, and

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72. *Id.* at 221 n.9 (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). Notably, the Court articulated that it presumed when Congress passed the veteran’s statute, it was aware of the *Fishgold* interpretive maxim. *Id.* (citing *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991)). There is little doubt that the Court would likewise hold similarly concerning the congressional intent behind the USERRA.

73. *See Breletic v. CACI, Inc.*, 413 F. Supp. 2d 1329, 1338 (N.D. Ga. 2006) (holding USERRA preempted the employment contract at issue, and that the waiver of plaintiff’s right to a judicial forum was unenforceable because said waiver was not “clear, convincing, specific and unequivocal”); *Lopez v. Dillard’s, Inc.*, 382 F. Supp. 2d 1245, 1248 (D. Kan. 2005) (holding that the arbitration agreement was an impermissible additional prerequisite to plaintiff’s exercise of USERRA rights); *but see Kitts v. Menards, Inc.*, 519 F. Supp. 2d 837, 844 (N.D. Ind. 2007) (holding USERRA claims are arbitrable).

74. 449 F.3d 672 (2006).

75. *See id.* at 673.

76. *See id.* at 674.

77. *Id.*

78. *See id.*

did not opt out of the arbitration provision within the thirty-day timeframe he was apportioned.<sup>79</sup>

Between December 2002 and March 2003, as the United States was preparing for operations in Iraq, Garrett claimed he had been subjected to undue criticism from his supervisors.<sup>80</sup> Garrett's employment with Circuit City was terminated in March 2003, the same month the Iraq War began, and he alleged this firing was solely because of his military reservist status.<sup>81</sup> He sued Circuit City under the USERRA in federal court, and Circuit City moved to compel arbitration, as per its agreement with Garrett.<sup>82</sup> Garrett argued that § 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.<sup>83</sup> Specifically, Garrett contended that a service member's right to sue in federal court was a "right or benefit provided by" the USERRA.<sup>84</sup>

The district court agreed, and denied Circuit City's motion to compel arbitration.<sup>85</sup> Circuit City appealed the court's order to the Fifth Circuit.<sup>86</sup> The Fifth Circuit, in an opinion by Chief Judge Edith Jones, reversed the district court, and held that USERRA claims are subject to arbitration under the FAA.<sup>87</sup> In reaching its conclusion, the circuit court relied primarily on the Supreme Court's FAA jurisprudence and its attendant pro-arbitration stance.<sup>88</sup> It placed the burden on Garrett to demonstrate Congressional intent to preclude the arbitration of USERRA claims.<sup>89</sup> The Fifth Circuit Court was unconvinced.<sup>90</sup> Applying a textualist approach, the court determined that because the language of the statute did not limit jurisdiction exclusively to the district courts, there was no intent to prohibit an arbitral forum.<sup>91</sup> The

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79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.* at 676.

85. *See id.* at 674.

86. *See id.*

87. *See id.* at 673.

88. *See id.* at 674-76.

89. *Id.* at 674 (Under *Gilmer*, "Garrett bears the burden to prove that Congress intended to preclude a waiver of a judicial forum for USERRA claims.").

90. *See id.* at 678-79.

91. *See id.* ("Congress took no specific steps in USERRA, beyond creating and protecting substantive rights, that could preclude arbitration.").

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court distinguished substantive and procedural rights and determined that access to a judicial forum was not a substantive right protected by the USERRA.<sup>92</sup> Rather, it found that the agreement to arbitrate was merely a forum selection clause because the enumerated substantive rights guaranteed by the USERRA are enforceable through arbitration.<sup>93</sup> To support its reasoning, the court likened USERRA to other antidiscrimination statutes, such as those designed to protect the elderly.<sup>94</sup>

In keeping with its textualist analysis, the court gave short shrift to Garrett's argument that the legislative history of the USERRA supports the view that Congress intended to prohibit binding arbitration.<sup>95</sup> It dismissed a section of the House Committee Report directly addressing arbitration as a "snippet of legislative history" not binding to the court's decision.<sup>96</sup> The court determined that Congress meant only to preclude the limiting of USERRA's substantive rights through collective bargaining agreements.<sup>97</sup> In doing so, the Fifth Circuit distinguished between collective bargaining arbitration agreements, which are not subject to arbitration, and "individually executed pre-dispute arbitration agreements," which are subject to arbitration.<sup>98</sup> Thus, the court determined that there was no barrier to the enforcement of an arbitration agreement between individual employees and their employer.<sup>99</sup>

The Fifth Circuit found no inherent conflict between arbitration and the USERRA because the arbitrator would be "bound to apply the applicable law" and allow for certain procedural safeguards.<sup>100</sup> The court was not convinced that Garrett had shown an arbitrator would deny him a fair opportunity to present his claims.<sup>101</sup> Finally, it rejected Garrett's public policy argument that allowing for arbitration would go against USERRA's purpose of protecting soldiers and, in turn, national security.<sup>102</sup> The Fifth

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92. *See id.*

93. *See id.* at 678 ("An agreement to arbitrate under the FAA is effectively a forum selection clause . . . not a waiver of substantive statutory protections and benefits.").

94. *See id.* at 679.

95. *See id.* (pointing to precedent emphasizing the primacy of the text "because only the text of the law has been passed by Congress, not the often-contrived history.").

96. *Id.*

97. *See id.* at 680.

98. *See id.*

99. *See id.*

100. *See id.* at 681 (emphasizing that the arbitration would include "procedures for discovery, subpoenas, and presentation of evidence, to be followed by a written award from the Arbitrator.").

101. *See id.*

102. *See id.* ("Although we agree that the interests USERRA protects are important, it is wrong to infer that the servicemembers' substantive rights are not fairly and adequately protected by arbitration proceedings under the FAA.").

Circuit stated that the “enforcement of employment arbitration agreements does not disserve or impair the protections guaranteed by USERRA.”<sup>103</sup> To support this conclusion, the court likened the USERRA to statutes such as the “Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933,” all of which are subject to arbitration under Supreme Court precedent.<sup>104</sup>

*B. Landis v. Pinnacle Eye Care, LLC*

The next federal appellate court to address this issue was the United States Court of Appeals for the Sixth Circuit. In *Landis v. Pinnacle Eye Care, LLC*,<sup>105</sup> Landis had worked as an optometrist for the defendant since 1995.<sup>106</sup> At the beginning of his employment, Landis signed an employment agreement which contained a provision to arbitrate any controversy, dispute, or disagreement relating to his employment.<sup>107</sup> In 1999, Landis signed an identical employment agreement containing the same arbitration clause.<sup>108</sup> In April 2004, he was deployed to Afghanistan due to his membership in the Indiana National Guard.<sup>109</sup> Landis claimed that prior to his deployment overseas he had negotiated that his patients were to be cared for by additional optometrists hired by the defendant.<sup>110</sup> He alleged that upon his return, his employer did not honor these terms, demoted him, and threatened that if he continued his involvement with the military, his employment would be at risk.<sup>111</sup> Landis filed a USERRA claim in district court alleging employment discrimination based on his military service.<sup>112</sup> The district court granted the employer’s motion to stay and held that USERRA did not preempt the arbitration clause of Landis’s employment agreement. Accordingly, the district court ordered the matter to arbitration.<sup>113</sup>

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103. *See id.*

104. *See id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

105. 537 F.3d 559 (2008).

106. *See id.* at 560.

107. *See id.* There was no issue as to the validity of the arbitration agreement.

108. *See id.*

109. *See id.*

110. *See id.* at 560-61.

111. *See id.* at 561.

112. *See id.*

113. *See id.*

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Landis appealed to the Sixth Circuit, which framed the issue as whether the dispute was arbitrable.<sup>114</sup> First, the court affirmed the district court's finding that Landis' claims were subject to the arbitration clause of his employment agreement.<sup>115</sup> Next, the Sixth Circuit turned to the arbitrability of USERRA claims in general.<sup>116</sup> After noting that the Supreme Court has allowed for the arbitration of other statutory claims, the court went on to adopt the Fifth Circuit's reasoning in *Garrett* completely.<sup>117</sup> The Sixth Circuit favorably cited *Garrett's* reasoning in determining that: (1) USERRA lacked Congressional intent to preclude arbitration; (2) the legislative history of USERRA does not prevent the arbitration of claims brought under it; and (3) "there is no inherent conflict between arbitration and USERRA's underlying structure and purposes."<sup>118</sup>

The Sixth Circuit recognized the lack of consensus among the district courts of the remaining circuits, but refused to follow those cases that found the USERRA prohibited arbitration.<sup>119</sup> This was because the court found "no ambiguity in the text of USERRA regarding preemption of arbitration agreements."<sup>120</sup> Additionally, it faulted a district court opinion that had defined arbitration as a "prerequisite" to the application of substantive rights in contravention of the Supreme Court's decision in *Gilmer*.<sup>121</sup> The *Garrett* decision was deemed proper persuasive authority, and the court therefore held USERRA claims to be arbitrable.<sup>122</sup>

Judge R. Guy Cole delivered a separate concurring opinion.<sup>123</sup> Although agreeing with the majority's outcome, he admitted it was a "close case."<sup>124</sup> Judge Cole "[wrote] separately only to acknowledge the odd result this holding produces and to encourage Congress, when the issue comes up again, to be a bit more clear."<sup>125</sup> Examining the language of § 4302(b) of the

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114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.* at 561-62. In an act of extraordinary deference, the Sixth Circuit directly quotes large blocks of *Garrett* in its decision, essentially crediting the Fifth Circuit for its reasoning. *See id.*

118. *Id.* at 562-63.

119. *See id.* at 563.

120. *Id.*

121. *See id.*

122. *See id.* With this decision, the only two circuit courts to address the issue had now determined that the national policy favoring arbitration trumped the ability of returning servicemembers to litigate their employment claims in federal court. *See id.*

123. *See id.* at 564 (Cole, J., concurring).

124. *Id.* Judge Cole, while admitting the conflict he felt in making his decision, in the end also reaches a conclusion rooted in the text of the USERRA at the expense of any additional interpretive aids.

125. *Id.*

USERRA, Judge Cole pondered over its use of the phrase “additional prerequisites” in the list of items that USERRA supersedes.<sup>126</sup> He found that it was only meant to prohibit requiring arbitration as a prerequisite to filing a USERRA claim in federal court.<sup>127</sup> Thus, it would be appropriate for an employee to completely waive his right to sue in federal court, but inappropriate for the same employee to enter into an employment agreement that compels arbitration prior to the filing of a USERRA claim in federal court.<sup>128</sup> Finding that such a result would be “incongruous[,]” Judge Cole criticizes the poor drafting of this section.<sup>129</sup> He avers that:

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.<sup>130</sup>

Finally, Judge Cole admonishes Congress to use “language that is unmistakably clear” if it intends to prohibit arbitration, because of the reality that an ever-increasing number of employers are including arbitration provisions as boilerplate in their employment contracts.<sup>131</sup>

#### IV. THE PROPOSED SERVICEMEMBERS ACCESS TO JUSTICE ACT

On August 1, 2008, the proposed SAJA was introduced in the United States Senate by Senator Robert Casey, Jr. of Pennsylvania, and co-sponsored by Senator Edward Kennedy of Massachusetts and then-Senator Barack Obama of Illinois.<sup>132</sup> The bill, as currently written, would effectively overturn *Garrett* and *Landis*. Specifically, § 3 of the SAJA is entitled “Unenforceability of Agreements to Arbitrate Disputes Arising under USERRA,” and would add § 4327 to the USERRA.<sup>133</sup> Section 4327(a) of

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126. *See id.*

127. *See id.* A literal reading of the section could conceivably have such an absurd effect, but Judge Cole does not attempt any alternative construction of the text.

128. *See id.* Judge Cole seems to ignore the logical intent behind the section by focusing on its allegedly confounding prose.

129. *See id.*

130. *Id.* at 564-65. Judge Cole, though sympathetic to the petitioner’s situation, does not mention the interpretive maxim of *Fishgold* anywhere in his concurrence.

131. *See id.* at 565. As shall be discussed below, Judge Cole’s admonition may prove to be prophetic, although it arrived too late in the day to have influenced Congress directly.

132. *See* S. 3432, 110th Cong. §§ 1-9 (2008).

133. *See* § 3.

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the amended USERRA would provide, “Notwithstanding any other provision of law, any clause of any agreement between an employer and an employee that requires arbitration of a dispute under this chapter shall not be enforceable.”<sup>134</sup> Exceptions are allowed if both parties knowingly and voluntarily agree to submit a USERRA claim to arbitration *after* the dispute arises and if § 4327(a) would interfere with any rights granted through a valid collective bargaining agreement.<sup>135</sup> The SAJA also makes unequivocally clear that the validity or enforceability of any agreement to arbitrate shall be determined by a court, and not an arbitrator.<sup>136</sup> In keeping with the strong pro-plaintiff posture of the USERRA, the provisions of the SAJA are retroactive and “shall apply with respect to all contracts and agreements between an employer and an employee in force before, on, or after the date of the enactment of this section.”<sup>137</sup> Furthermore, as currently written, the SAJA shall apply to all USERRA actions or complaints pending on or after the date of its enactment.<sup>138</sup>

Beyond the provision precluding arbitration, the SAJA would also allow for: (1) individuals to bring USERRA claims against certain state government employers in either state or federal court;<sup>139</sup> (2) enhanced remedies for USERRA plaintiffs, such as minimum liquidated damages for willful violations and punitive damages for violations committed with malice;<sup>140</sup> (3) mandatory attorney fee awards for successful USERRA plaintiffs;<sup>141</sup> and (4) easier injunctive relief to prevent firings and make employers reemploy returning veterans quickly.<sup>142</sup> In addition, the SAJA

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134. *Id.* This language would seem to fit the “unmistakably clear” standard that Judge Cole asked for in his *Landis* concurrence. *See Landis*, 537 F.3d at 565.

135. *See* § 3. Such a section would permit a veteran to submit to binding arbitration only after he or she is fully aware of the consequences of such a decision. *See id.*

136. *See id.* This illustrates that, whether based in fact or not, many plaintiffs find a judge to be a more impartial decision-maker than an arbitrator. *See, e.g.,* Matthew T. Ballenger, *The Price of Justice: The Role of Cost Allocation in the Employment Arbitration Fairness Analysis*, 18 LAB. LAW. 485, 497 (2003) (contrasting the very strict guidelines for judicial bias with the more nebulous and inconsistent standards applied to arbitrators).

137. § 3. This clear, concise language should ease all doubt as to the SAJA’s applicability. *See id.* The retroactive nature should be especially comforting to those veterans who may have withheld bringing USERRA claims for fear of being thwarted by the adverse precedents of *Garrett* and *Landis*.

138. *See id.* While it is too late for the plaintiffs in *Landis* and *Garrett*, the SAJA will prove invaluable to the multitude of Reserves and National Guard who attempt to return to civilian life after their tour of duty.

139. *See* § 2.

140. *See* § 4.

141. *See* § 5.

142. *See* § 9.

clarifies that the USERRA has no statute of limitations,<sup>143</sup> that it prohibits wage discrimination against service members,<sup>144</sup> and adds a definition for “successor in interest.”<sup>145</sup>

During the introduction of the bill, its Democratic sponsors urged its passage.<sup>146</sup> “Our brave men and women serving our country already sacrifice time away from their families, jobs and their lives. The least we can do is help ensure that when they return their jobs will be waiting for them,” said Senator Casey.<sup>147</sup> Senator Obama remarked that, “[o]ur returning service members and veterans should not have to fight another battle at home for the benefits and rights they deserve.”<sup>148</sup> Both senators noted that the SAJA was the least the United States Government could do for the men and women who had answered the call to service.<sup>149</sup>

On September 27, 2008, an identical SAJA bill was introduced in the United States House of Representatives by Representatives Artur Davis of Alabama, Jason Altmire of Pennsylvania, and Timothy Walz of Minnesota.<sup>150</sup> Congressman Davis, who had introduced a similar bill in 2007, hailed the SAJA.<sup>151</sup> “The Servicemembers Access to Justice Act will ensure that our servicemembers are not treated as second-class citizens when they seek to protect their civilian jobs and benefits as the law requires,” Davis said.<sup>152</sup> Representative Altmire similarly thanked the three senators for “moving us one step closer to ensuring America’s heroes have the support they deserve when they return home.”<sup>153</sup>

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143. *See* § 7.

144. *See* § 8.

145. *See* § 6.

146. *See* Press Release, Senator Robert E. Casey, Jr., Casey, Kennedy, Obama Introduce Bill to Help Servicemembers and Veterans Keep Their Jobs (Aug. 1, 2008), *available at* <http://casey.senate.gov/newsroom/press/release/?id=4a64c2c0-3750-4d1c-b608-82b68bcc8da9>.

147. *Id.*

148. *Id.*

149. *See id.*

150. *See* H.R. 7178, 110th Cong. §§ 1-9 (2008).

151. *See* Press Release, Congressman Artur Davis, Congressman Davis Applauds Senators for Their Fight to Protect Veterans’ Jobs at Home (Aug. 5, 2008), *available at* [http://www.house.gov/apps/list/press/al07\\_davis/rajasaja.html](http://www.house.gov/apps/list/press/al07_davis/rajasaja.html).

152. *Id.*

153. *Id.*

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#### IV. COMMENT

The SAJA is a welcome piece of legislation that, if passed, would effectively overturn the narrowly-reasoned *Garrett* and *Landis* decisions and restore the overarching congressional intent behind the USERRA: to protect the employment rights of members of the uniformed services. The United States has a moral obligation to repay its veterans for their service, and the SAJA is keeping in line with a long history of legislation benefiting veterans exclusively.<sup>154</sup> The United States Department of Veterans Affairs has provided for a host of benefits to servicemembers, such as lifetime pensions for disabled veterans, affordable healthcare, and low-cost life insurance.<sup>155</sup> The 1944 Servicemen's Readjustment Act,<sup>156</sup> or G.I. Bill of Rights, and its successor statutes have provided generous educational benefits for successive generations of veterans.<sup>157</sup> The Veterans' Preference Act and its successor statutes required the federal government to favor military veterans when filling employment vacancies.<sup>158</sup> Immigration law allows military personnel to take advantage of an expedited naturalization process to gain United States citizenship.<sup>159</sup> Such laws, as well as the USERRA and its

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154. See S. 3432, 110th Cong. §§ 1-3(2008).

155. See Department of Veterans Affairs, VA History in Brief, <http://www1.va.gov/opa/feature/history/docs/histbrf.pdf>. The United States Department of Veterans Affairs is the second largest federal agency after the Department of Defense. See *id.* It was created in 1930 to oversee all government programs concerning veterans and was elevated to a cabinet level department in 1988 under President Ronald Reagan. See *id.*; Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988).

156. See Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1944).

157. The G.I. Bill provided generous educational benefits for veterans, a job counseling and work placement program, as well as a guaranteed loan program for small businesses to stimulate entrepreneurship among veterans. See Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284, at 287-93. Numerous successor statutes have also been deemed "G.I. Bills." See, e.g., Veterans Readjustment Assistance Act of 1953, Pub. L. No. 83-163, 67 Stat. 230 (the Korean G.I. Bill).

158. See Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387 (1944) (codified as amended in scattered sections of 5 U.S.C.). For an incisive survey and examination of veterans' preference statutes, please see Brian Torresi, Comment, *Operation Rewarding Sacrifice: A Proposal to Amend the Definition of "Veteran" in Title 5 to Fully Effectuate the Purposes of Veterans' Preference*, 110 PENN. ST. L. REV. 209, 211-22 (2005).

159. See 8 U.S.C. § 1439 (2008). In recent years Congress has greatly eased naturalization requirements for military servicemembers, so that they need only serve one year before becoming eligible for naturalization. See § 1439(a). This law also allowed National Guard and Reserve members to be eligible for naturalization after one year. See § 1440(a). Military applicants are no longer charged fees in the naturalization process. See § 1439(b)(4). In contrast, persons not in the military must generally meet a five year residency requirement before becoming eligible for naturalization. See § 1427(a). For an enlightening review of the past and present role of the immigrant in the U.S. Armed Services, please see Craig R. Shagin, *Deporting Private Ryan: The*

predecessor statutes discussed *supra*, indicate a strong tradition of Congress passing legislation providing benefits unique to the service member.<sup>160</sup> This legislative tradition, as well as the Supreme Court's maxim of liberal construction of veteran's employment statutes, demonstrates that the USERRA should never have been placed on the same footing as other federal laws, or even other antidiscrimination statutes, that have been permitted to proceed through arbitration under the FAA.<sup>161</sup>

The practice of binding mandatory arbitration agreements has come under intense criticism in recent years.<sup>162</sup> A controversial 2007 report by the consumer advocacy group Public Citizen found that the use of binding mandatory arbitration in credit card agreements very much disadvantaged the consumer, as such arbitrations featured biased decision-makers, lacked due process safeguards, and were shrouded in secrecy.<sup>163</sup> Indeed, in his concurrence in *Landis*, Judge Cole admitted that courts had "moved beyond the yesteryears of skepticism, mistrust, and even hostility toward arbitration agreements[.]"<sup>164</sup> yet he intimated that he believed Congress never intended for USERRA claims to be submitted to "binding, coercive arbitration[.]"<sup>165</sup> Judge Cole's dicta bears resemblance to one commentator's criticism of the reasoning behind *Garrett*, writing that submission to binding, coercive arbitration agreements is most certainly not what the drafters of the USERRA intended as they strove to formulate protections for the uniformed

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*Less than Honorable Condition of the Noncitizen in the United States Armed Forces*, 17 WIDENER L. REV. 245 (2007).

160. See *supra* notes 35-37 and accompanying text.

161. See *supra* notes 59-72 and accompanying text. The legislative history indicates the Congressional intent that the USERRA be "broadly construed and strictly enforced[.]" H.R. Rep. No. 103-65, at 23 (1993).

162. See Feingold, *supra* note 12, at 298 ("[I]t is time for a broader prohibition of mandatory, binding arbitration in settings where bargaining power is inherently unequal, or at least unequal in almost all cases. Congress should consider whether it should ban mandatory, binding arbitration agreements from all consumer and employment settings.").

163. See generally JOHN O'DONNELL, PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS (2007). The report stated that "in a sample of nearly 19,300 California cases decided by one arbitration firm, consumers prevailed in 4 percent of the cases, while companies prevailed in 94 percent." *Id.* at 4. Public Citizen's report has been met with vociferous criticism from certain quarters. See, e.g., Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, DISP. RESOL. MAG., Fall 2008, at 30, 31-34 (2008) (rebutting Public Citizen's conclusions with several other studies showing that the net result of consumer arbitration is a positive one).

164. *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 565 (2008).

165. *Id.* at 564.

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services.<sup>166</sup> It is disheartening that Judge Cole chose to ignore his instinct that Congress did not intend to allow for the arbitration of USERRA claims.

The reasoning behind *Garrett* and *Landis* majorities represents the flaws of applying a myopic “textualist” reading to statutes in that they reached a result that was harmful to the very class the USERRA had been intended to protect: uniformed service members.<sup>167</sup> In her construction of USERRA in *Garrett*, Judge Jones followed a conservative line of Supreme Court jurisprudence that places primacy in the text of any given statute, at the expense of legislative history and agency regulations.<sup>168</sup> By focusing on the Supreme Court’s body of FAA case law, the Fifth Circuit curiously omitted any discussion of the Supreme Court’s long-standing maxim calling for the liberal construction of veteran’s benefits statutes in favor of the veteran.<sup>169</sup> Indeed, by viewing the facts of the case through the narrow prism of the FAA, the Fifth Circuit chose not to rely on the Supreme Court jurisprudence on veteran’s benefits, which would have provided a powerful counterweight to the majority’s reasoning.<sup>170</sup> While the Supreme Court has allowed for the arbitration of antidiscrimination claims under the Age Discrimination in Employment Act and Title VII, the classes of persons protected by these statutes, such as the elderly or members of a certain sex or race, are much broader than the specific class of service members protected by the USERRA.<sup>171</sup> RICO and securities claims can also be readily distinguished

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166. *See id.* at 564-65.

167. See Jonathon T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006), for a discussion of the merits and pitfalls of a textualist approach to statutory construction. The author comments that modern textualism has veered into a dogmatic corridor, and that “by rushing to find clarity and thereby excluding consideration of statutory purposes, aggressive textualism may undermine one of textualism’s principal benefits—its purported ability to cabin judicial discretion, thereby rendering judges more faithful to the laws actually enacted by Congress, and less likely to impose their own policy preferences.” *Id.* at 50.

168. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (“The best evidence of . . . purpose is the statutory text adopted by both Houses of Congress and submitted to the President.”). *See also* Jerry L. Mashaw, *Textualism, Constitutionalism and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 843-44 (1991) (arguing against the use of legislative history because “continuous and constant referral to legislative history tends to engage the Court in the interpretation of texts—committee reports or the utterances of various senators and representatives—that have never been enacted by both Houses of Congress or presented to the President.”).

169. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 285 (1946).

170. *See supra* notes 59-72 and accompanying text.

171. *Compare* 29 U.S.C. §§ 621-34 (2008) (creating laws to protect employees from discrimination based on age) *and* 42 U.S.C. §§ 2000e1-17 (2008) (creating laws to protect employees from discrimination based on race, color, religion, sex, or national origin) *with* 38 U.S.C.

for USERRA claims, as the former are statutes of general applicability, while the latter are available only to qualified service members.<sup>172</sup>

In its adoption of *Garrett's* reasoning to reach its holding, *Landis* essentially permitted a close reading of the letter of the law to obfuscate the spirit of the law.<sup>173</sup> Judge Cole, to his credit, at least acknowledged the unsavory result such a close reading would produce: a constriction of the service member's right to fully litigate his or her USERRA claim.<sup>174</sup> After *Garrett* was handed down, Captain Samuel F. Wright, one of the USERRA's original drafters, harshly criticized its result, stating that "this 5th Circuit decision, if allowed to stand, could gut the effective enforcement of USERRA."<sup>175</sup> Several other commentators have criticized the reasoning behind *Garrett*.<sup>176</sup> In a more recent article, Captain Wright referred to *Landis* as a "major setback" in the effort to reverse *Garrett*, concluding that "[i]f we are to overturn *Garrett*, it is likely to be through a statutory amendment, not case law development."<sup>177</sup>

Through the introduction of the SAJA, the Senate has, unconsciously, answered Judge Cole's call for clearer language on the issue of the arbitrability of USERRA claims. The unequivocal language of § 3 of the proposed amendment would leave no room for future courts to construe the USERRA in a way which favors the defendant employer.<sup>178</sup> Arbitration is still available should the plaintiff choose that route, but the decision shall be up to the veteran, and only after the claim has arisen.<sup>179</sup> The SAJA will do away with the prospective waiver of one's right to a judicial forum endorsed by *Garrett* and *Landis*.

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§§ 4301-4333 (2008) (creating laws to protect persons from discrimination based on their service in the armed forces).

172. See, e.g., 18 U.S.C. §§ 1961-1968 (2008) (permitting a private civil cause of action under RICO by any person harmed by the acts of a racketeer).

173. See *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 561-63 (2008).

174. See *id.* at 564-65 (Cole, J., concurring).

175. Captain Samuel F. Wright, *Mandatory Arbitration Mandate: Court Ruling Sets Back USERRA Enforcement*, July/Aug. 2006, [http://www.roa.org/site/PageServer?pagename=law\\_review\\_0619](http://www.roa.org/site/PageServer?pagename=law_review_0619) (last visited Jan. 10, 2010).

176. See Erwin, *supra* note 48, at 12; Laura Bettenhausen, Note, *The FAA and the USERRA: Pro-Arbitration Policies Can Undermine Federal Protection of Military Personnel*, 2007 J. DISP. RESOL. 267, 281-82 (2007) (commenting that the Fifth Circuit in *Garrett* did not adhere "to the main purpose of the USERRA: to protect the employment rights of members of the armed forces.>").

177. Captain Samuel F. Wright, *Proposed Servicemembers Access to Justice Act*, Oct. 2008, [http://www.roa.org/site/PageServer?pagename=law\\_review\\_0847](http://www.roa.org/site/PageServer?pagename=law_review_0847) (last visited Jan. 10, 2010).

178. See S. 3432, 110th Cong. § 3 (2008).

179. See *id.*

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## V. CONCLUSION

This law could not have been introduced at a more crucial time. The Iraq conflict is expected to continue for some time into the Obama presidency, and the Afghanistan war is planned to escalate exponentially.<sup>180</sup> The number of USERRA actions is therefore not likely to abate. The likelihood of the SAJA's passage is high for several reasons, not the least of which is that one of its co-sponsors has been elected President of the United States.<sup>181</sup> Senator Kennedy is perhaps one of the most influential and successful members of either house and his involvement with the SAJA bodes well for its success. Finally, both the House and Senate bills are sponsored by Democrats, who have gained a substantial congressional majority in the 2008 elections. There are thus few foreseeable obstacles preventing the swift passage of SAJA, other than, perhaps, the glut of economic legislation that is planned for 2009. The men and women who put their lives and careers on the line to serve their nation deserve unrestricted access to that nation's federal courts. The SAJA is a sensible piece of legislation that, rather than overreaching, merely restores the original intent behind the passage of the USERRA.

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180. *See supra* notes 1-2 and accompanying text.

181. *See* Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 5, 2008, at A1.