STATEMENT OF

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AND AGENCY ACTIONS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

"ACCESS TO JUSTICE FOR THOSE WHO SERVE"

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

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

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

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

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

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

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

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

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

Default Judgments

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

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

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

Definitions of "permanent change of station" and "military orders"

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

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

Orders to move into Government housing

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

Clarification of the existence of private causes of action

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

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

Post-event affirmation of forced arbitration agreements

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

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

Re-financing of pre-service mortgages and student loans

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

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

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

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

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

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

SCRA Enforcement by State Attorneys General

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

USERRA Damages

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

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

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

Respectfully submitted,

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Attachment: Suggested SCRA Technical Amendments and Additions

SUGGESTED SCRA TECHNICAL AMENDMENTS AND ADDITIONS

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

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

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

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

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

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

a. Require that the attorney appointed to represent the absent servicemember make some reasonable effort to locate the servicemember and, at a minimum, run a check through the DoD Defense Manpower Data Center SCRA website and attach a copy of that search results.

b. Require that any information in the hands of the plaintiff concerning the whereabouts or identify of the person for whom the attorney has been appointed be communicated by plaintiff or plaintiff's counsel to the appointed attorney.

c. Amend Section 201(b)(2) to provide that the reasonable fees of the attorney appointed to represent the servicemember shall be taxed as costs of court, unless the creditor seeks relief from such charges from the court

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

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

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

a. Change the title of the section to "Termination of *premises* or motor vehicle leases" *(It currently reads "Termination of residential or motor vehicle leases" but authorizes the termination of leases for both residential purposes and many other purposes. This is going to cause a problem someday.)*

b. Provide that an order to move into base housing (including privatized housing) is a grounds for terminating a lease;

c. Define a "permanent change of station" (subsections (b)(1)(B) and (b)(2)(B)) as the same as the definition found in the Joint Federal Travel Regulations.

d. Move subsection (i) to the end of current Section 101 (50 U.S.C. App. §511), so that those definitions will apply to all sections of the SCRA.

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

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

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

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

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

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

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

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

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

Add a section to provide that:

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

b) If any continuing education courses are required of a servicemember to maintain a license for a trade or profession, the requirement for such continuing education hours shall be extended during any period that the servicemember is entitled to hostile fire pay and for a period of 180 days after the servicemember's entitlement to such hostile fire pay terminates.

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