

FIGHTING FOR THOSE WHO FIGHT FOR US: PROTECTING THE RIGHTS OF SERVICEMEMBERS AND VETERANS

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The American Association for Justice works to preserve the constitutional right to trial by jury and to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others—even when it means taking on the most powerful corporations.

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EXECUTIVE SUMMARY

There are just over two million men and women in the uniformed services of the United States, all of whom, by voluntarily joining, have signaled that they are prepared to risk their lives to defend their country. They do not appear at first blush to be a vulnerable community. Yet their unique situation—predominantly young and financially inexperienced, often relocated or deployed abroad, and sometimes facing inconsistent access to phones and internet—has made them a target for the unscrupulous.

Military bases are frequently surrounded by legions of payday lenders. But it's not just small-scale companies. Billiondollar multinational corporations also target servicemembers, veterans, and their families as a demographic that can be milked for profit. Even as they drape themselves in the American flag, large corporations have fired active duty servicemembers, foreclosed on their family homes, repossessed their cars, scammed their pensions, and even profited from their life insurance policies when they have been killed.

In theory, servicemembers are supposed to be protected by a variety of laws including the Military Lending Act (MLA), the Servicemembers Civil Relief Act (SCRA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA)—but corporations have repeatedly ignored or violated such protections, counting on the fact that few servicemembers will ever be able to hold them accountable.

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And while servicemembers are supposed to be protected by these laws, they are also subject to other legal devices and precedents that place them in particular jeopardy. Corporations use forced arbitration to avoid prohibitions on firing or foreclosing on members of the Reserves and National Guard who are called to active duty. Servicemembers are also uniquely vulnerable to the *Feres* doctrine, an obscure 1950 Supreme Court ruling, which mandates that no servicemember can hold the government accountable for negligence or wrongdoing. The result is those who have sworn an oath to protect and support the Constitution are all too often denied the rights of the very Constitution they seek to defend.

For these men and women who make up America's first line of defense, the civil justice system has frequently proven to be the last line of defense.



PROFITS OVER PEOPLE

TAKING JOBS, PENSIONS, HOMES, AND CARS FROM SERVICEMEMBERS

The typical American military base is surrounded by predatory lenders, rent-to-own stores, pawn shops, and car dealerships that target young men and women, often without good credit. And such greedy behavior isn't limited to smalltime lenders; large corporations, including the likes of JPMorgan Chase, Prudential, and United Airlines, have taken advantage of servicemembers, sometimes on a massive scale.

Predatory Lending

Payday lenders have always seen military bases as easy pickings.¹ One in three servicemembers have resorted to some kind of questionable nonbank borrowing method.² These lenders often wrap their appearance and advertising in officiallooking designs, even going so far as to misuse official government logos.³ The credit they offer is designed to appear straightforward but, in reality, it is full of hidden fees and clauses structured to trigger ever higher interest rates.

In 2014, *ProPublica* and *The Washington Post* highlighted the example of USA Discounters, a rent-to-own retail chain with at least 24 locations based mostly around domestic military bases. USA Discounters advertised in military newspapers, and on TV and radio near bases,

offering guaranteed credit and a seemingly easy way for military families to get otherwise expensive purchases, like major appliances and computers. But the company counted on customers falling behind on their payments, at which point they would arrange to garnish the servicemember's pay. In eight years, the company filed claims against more than 13,000 servicemembers in Virginia courts and seized the pay of more active-duty military than any company in the country.⁴

Servicemembers are uniquely vulnerable to predatory lenders. They are young—44 percent are under 25—and tend to be financially inexperienced.⁵ The basic pay for an enlisted member is less than \$20,000 per year—below the U.S. poverty line for a family of three.⁶ Many of these new recruits are dealing with money, and the financial challenges of life, for the first time. They are forced to relocate often, or are deployed abroad, making it difficult to challenge a lender, and forcing spouses in two-income families to give up their jobs.

IN 2017, FINANCIAL PROBLEMS ACCOUNTED FOR 55 PERCENT OF SECURITY DENIALS— NEARLY FOUR TIMES MORE THAN THE NEXT BIGGEST CATEGORY.

> Such predatory lending not only affects a servicemember's family life but also has implications for national security. In 2006, the Department of Defense reported about 80 percent of security clearance revocations and denials for military personnel were tied to financial issues, prompting lawmakers to address the problem.⁷ In 2007, Congress passed the Military Lending Act (MLA) to curb lenders who were charging scandalously

high interest rates. The MLA has been amended twice (in 2013 and 2015), as lenders found ways around the rules, but despite these legislative protections, lenders continue to trap military families in loans with outrageous interest rates, by packaging financial products in deceptive ways. In 2017, 10 years after the MLA's passage, financial problems accounted for 55 percent of security denials—nearly four times more than the next largest category (personal conduct).⁸

Large corporations have their own dirty tricks. In 2010, military families filed a class action lawsuit against Prudential, after they learned the insurance giant was keeping portions of servicemembers' death benefits. At the time, Prudential provided life insurance to six million servicemembers and veterans and collected nearly \$1 billion annually in premiums. When a policyholder died, Prudential would keep the lump sum



A payday lender near Camp Pendleton in California. (Marine Corps photo)

The Military Lending Act (MLA)

A 2006 Department of Defense report found that predatory lending, "*undermines military readiness, harms the morale of troops and their families, and adds to the cost of fielding an all volunteer fighting force.*"⁹ The report made several recommendations, which eventually led to the 2007 enactment of the MLA. The act capped the interest rate lenders could charge servicemembers at 36 percent. The act initially focused on the kind of payday lending that has ravaged so many military communities, but it has since been amended to include almost all "consumer credit," including vehicle title loans, installment loans, unsecured lines of credit, and finally, as of October 2017, credit cards. The MLA also prohibits banks from requiring lenders to submit to forced arbitration, giving servicemembers a vital protection that other citizens lack.

in an interest-bearing account for the family. Prudential earned five to six percent interest on the accumulated sums, but only turned over one percent to families.¹⁰

In 2017, Bank of America agreed to pay \$42 million to settle a class action lawsuit over allegations it had charged thousands of military servicemembers' families excessive interest on certain accounts since Sept. 11, 2001. The bank tried to conceal the charges by sending checks purporting to compensate account holders for poor customer service, a ploy also used by JPMorgan in a similar scheme.¹¹

Likewise, in 2015, CitiMortgage agreed to a \$2.2 million settlement in a class action alleging the bank violated the Servicemembers Civil Relief Act (SCRA) by charging approximately 4,300 servicemembers more than the permitted six percent interest on mortgages, while Capital One admitted it had violated the SCRA with at least 4,000 of its military customers.¹²

Yet even with legislative limits on the amount of interest they could charge, other

mortgage providers found ways around the rules. In September 2017, Ginnie Maethe federal government-owned corporation that guarantees payment on trillions of dollars' worth of mortgage-backed securities-said that it had found lenders were pressuring veterans into repeated and unnecessary refinancing loans-a practice known as churning.¹³ The lenders targeted veterans with misleading marketing that offered refinanced mortgages backed by the Department of Veteran Affairs. These refinances generated fees for the companies while costing homeowners in the long term. In one case, a borrower was convinced to refinance seven times in two years.¹⁴ In April 2018, two of the lenders-NewDay USA and Nations Lending Corp.-were expelled from the Ginnie Mae program.¹⁵

Military Pension Buyout Scams

Daryl Henry, a 20-year Navy veteran, filed a class action lawsuit accusing Structured Investments Co. of duping him and many other veterans into giving the majority of their pensions for one-time sums. Henry traded \$103,000 in pension payments for a lump sum of \$42,131, a rate that would make the transaction illegal if it qualified as a loan. Another veteran, Dr. Louis Kroot, obtained a lump sum at an interest rate equivalent to 30.7 percent, but because the company argued the transaction was not technically a loan, that rate was not listed anywhere in the 25-page agreement. Henry's class action resulted in a \$2.9 million judgment. Structured Investments Co., however, declared bankruptcy, leaving little for the claimants.¹⁶

In 2017, the U.S. military paid out \$58 billion in pension benefits to more than two million veterans.¹⁷ These benefits are frequently targeted by companies that seek to buy the benefits in exchange for lump sums that are often just a fraction of the pension value.

Again, this practice was not limited to small-time lenders. Pensions and benefits have also proved a profitable target for large corporations. In 2014, United Airlines agreed to settle a class action led by pilot James Daniel Tuten, who took military leave to serve in the U.S. Air Force, but then found the airline had shortchanged contributions to his pension while he was serving. The class eventually grew to 1,160 pilots.¹⁸ United eventually agreed to pay over \$6 million to those pilots and agreed to overhaul its pension policies.¹⁹

Liberty Life Assurance Co. similarly agreed to change its ways after it was found to be wrongfully offsetting the disability benefits of veterans with disabilities and keeping portions of the plan benefits for itself.²⁰

Credit Reporting and Identity Theft

More than 145 million people in the United States had their Social Security number, birthdate, email address, driver's license information, and other sensitive personal information stolen in the 2017 Equifax hack. The data breach raises special concerns for servicemembers and veterans, who, according to the Federal Trade Commission (FTC), are twice as likely to be targeted for identity theft as ordinary citizens.²¹

THE DATA BREACH RAISES SPECIAL CONCERNS FOR SERVICEMEMBERS AND VETERANS, WHO, ACCORDING TO THE FEDERAL TRADE COMMISSION (FTC), ARE TWICE AS LIKELY TO BE TARGETED FOR IDENTITY THEFT AS ORDINARY CITIZENS.

Servicemembers frequently move or are deployed abroad, making it harder to learn if they've had their identities stolen or to contest suspected instances of fraud. Internet and phone access can be limited, and the occupation is not amenable to spending hours and days navigating bank phone trees and chasing down credit bureaus. Bad credit caused by fraud can jeopardize a security clearance or, worse, can mislabel a servicemember as a criminal or potential terrorist.²² Debt collectors frequently threaten servicemembers that they will report an unpaid debt to a commanding officer, have the servicemember demoted, or have a security clearance revoked (in fact, debt collectors have no such authority).²³

At one point, payday lending, pension scams, and servicemember debt collection were a focus of attention for the Consumer Financial Protection Bureau (CFPB).²⁴ Since its inception in 2010, the CFPB has handled over 90,000 complaints from servicemembers, veterans, and their families.²⁵ Debt collectors were the number one concern, accounting for 42 percent of all

complaints, more than twice the number of any other problem.²⁶ The agency responded, obtaining \$130 million in relief through enforcement actions.²⁷

SINCE ITS INCEPTION IN 2010, THE CFPB HAS HANDLED OVER 90,000 COMPLAINTS FROM SERVICEMEMBERS, VETERANS, AND THEIR FAMILIES.

However, under the Trump administration, the agency has gone in a different direction. The payday lending industry has contributed over \$13 million to members of Congress

The Servicemembers Civil Relief Act (SCRA)

The SCRA was enacted in 2003 and revised the Soldiers' and Sailors' Civil Relief Act of 1940. It covers all servicemembers, reservists, and members of the National Guard while on active duty, and is intended to ease servicemembers' financial burdens while they are deployed.

The SCRA covers issues such as evictions, vehicle repossessions, installment contracts, credit card interest rates, and more. It delays civil proceedings, such as divorce and child support hearings, until the servicemember can be present. It also affords rights with regards to property and income taxes.²⁸

In the case of mortgages, the SCRA has two main protections: Lenders cannot charge more than six percent interest on a home loan, and they cannot complete a foreclosure while the servicemember is on active duty without a court order.

During the Great Recession, however, banks took heed of neither the MLA or the SCRA. The same institutions that sparked the recession, illegally foreclosed on thousands of servicemembers' homes, then lied about how many military foreclosures they had ordered.²⁹

In 2014, the Government Accountability Office (GAO) found that many banks were still not checking the military status of their mortgage-holders and that as many as 82 percent of SCRA-eligible servicemembers were being charged more than the lawful maximum interest rate.³⁰

since 2010 and spent another \$44 million lobbying over the same period.³¹ In mid-April 2018, the Community Financial Services Association of America (CFSA), the payday lending industry's primary lobbying group, held its annual conference at the Trump National Doral Golf Club. The CFPB has responded by announcing it intends to set consumer interests aside and focus on reducing regulations restricting bank behavior.³² The agency is now considering throwing out its own rule restricting payday lenders from charging sky-high interest rates.³³

Foreclosed Homes, Repossessed Cars

The influence of payday lenders, while entirely malevolent, pales next to the sway held by big banks. Commercial banks have underwritten members of Congress to the tune of \$145 million in direct contributions and an additional \$492 million on federal lobbying since 2010, more than 10 times the amounts pumped in by their payday colleagues.³⁴ And their weapon of choice has been illegal foreclosure.

In 2003, Army Sergeant Jorge Rodriguez bought a home in Del Valle, Texas. He was subsequently deployed to Iraq in 2006 and sent to Iraq for active duty, where he served with distinctions for honorable service. Meanwhile, his mortgage was sold to CitiMortgage, which sold his home in a foreclosure sale while he was deployed. According to the SCRA, lenders are prohibited from selling the homes of activeduty servicemembers without a special court order.

In 2015, CitiMortgage agreed to pay \$38 million to settle a class action alleging the bank unlawfully foreclosed on Rodriguez and other servicemembers' homes. The settlement provided \$116,785 to each military servicemember whose home was



"FORECLOSED"

Banks and other financial institutions received \$700 billion in government bailout money, but illegally foreclosed on thousands of deployed servicemembers at the same time.

foreclosed on while they were on active duty.³⁵

In 2011, JPMorgan Chase agreed to settle a class action lawsuit that accused the bank of overcharging servicemembers for their mortgages and illegally foreclosing on active duty military personnel. Chase eventually admitted that not only had it overcharged an estimated 6,000 servicemembers, it had also illegally foreclosed on the homes of at least 27 military families.³⁶

But this turned out to be just the tip of the iceberg. Bank of America and Morgan Stanley also agreed to settle claims that they wrongfully foreclosed on 178 military families between 2006 and 2009. When regulators pressed the banks for more information, they uncovered an additional 200 military families who had been foreclosed on in 2009 and 2010.³⁷ Citigroup announced it was reexamining 700 potential military foreclosures, and Wells Fargo estimated it might have 900.³⁸

Each of these cases was settled within the civil justice system. As well as delivering financial compensation for the servicemembers, the Chase class action prompted the bank to lower interest rates for active-duty servicemembers to four percent and institute homeownership assistance programs.³⁹ In 2013, Bank of America and Saxon Mortgage Servicing (a subsidiary of Morgan Stanley) agreed to pay \$39 million to 316 servicemembers whose homes were unlawfully foreclosed upon.40 In 2015, Chase, Wells Fargo, Citi Residential, Citibank, GMAC Mortgage, Ally Financial, and BAC Home Loans (formerly Countrywide, and owned by Bank of America) settled allegations of unlawful foreclosures with the Justice Department for \$123 million.⁴¹

Aside from homes, corporations also wrongfully seized deployed servicemembers' cars. In 2017, Wells Fargo's auto lending division—the same unit that charged more than 800,00 customers for auto insurance they didn't need and often didn't know about—admitted it had illegally repossessed more than 860 servicemembers' cars. The bank agreed to repair the servicemembers' credit, and pay back the lost equity plus \$10,000 per case.⁴²

Jobs Taken Away

When Navy reservist Kevin Ziober was mobilized and deployed to Afghanistan in 2012, his civilian employer, BLB Resources, threw him a farewell party with a cake decorated with an American flag and the words, "Best Wishes Kevin."



"BEST WISHES KEVIN"

Kevin Ziober's employer, BLB, presented him with a cake when he was deployed to Afghanistan. A few hours later, they fired him.

Later that afternoon, BLB fired him.

When Ziober returned to the United States in 2014, he sued his former employer for violating the Uniformed Services Employment and Reemployment Rights Act (USERRA). BLB countered by saying Ziober could not take his claim to court because of a forced arbitration clause in his employment contract. Ziober didn't back down and pursued the case to a panel of three judges at the Ninth Circuit. There, Judge Mary Murguia acknowledged that forced arbitration seemed inherently unfair to servicemembers, saying, "*It does seem that both the Supreme Court*

The Uniformed Services Employment and Reemployment Rights Act (USERRA)

In 1940, in the face of likely conscription for WWII, the United States established the right of uniformed servicemembers to return to their civilian jobs after being called to active duty with the Selective Training and Service Act. It was a recognition that a nation that asks servicemembers to defend this country with their lives should protect them from losing their livelihood when coming home. There were a series of revisions over the years—known collectively as the Veterans' Reemployment Rights laws—until the law was revamped by the Uniformed Services Employment and Reemployment Rights Act, or USERRA, in 1994.⁴³

USERRA applies to all employers, regardless of size, and to both full and part-time jobs. Under USERRA, employers must allow service personnel to return to their civilian jobs after their active duty is complete. They must be offered the same seniority, pay, and benefits they would have achieved if they had not been absent. But corporations have discovered a loophole: forced arbitration.

Congress intended USERRA would trump any arbitration clause: The legislative history specifically states, "*It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law*."⁴⁴ For the first few years after its enactment courts interpreted it that way.⁴⁵ However, in 2003, the Fifth Circuit heard the case of Michael Garrett, a reserve officer in the Marines who had been fired by his employer, Circuit City, just as the United States was preparing for combat in Iraq. Circuit City insisted that Garrett's case be held to an arbitration program that it had implemented a year after Garrett's hiring. The Fifth Circuit agreed, holding that, although the legislative history indicated Congress never meant USERRA to be superseded by arbitration, the statute itself had to specifically mention "*mandatory arbitration or the Federal Arbitration Act (FAA)*" for arbitration to be precluded.⁴⁶ Other courts, including the U.S. Supreme Court, have since followed the Fifth Circuit's lead, making it far harder for servicemembers to contest employment terminations that are clearly related to their active duty deployments.



"FIGHTING FOR JUSTICE"

Attorneys Thomas Jarrard and Matthew Crotty, both former veterans themselves, litigate USERRA cases all over the country on behalf of fellow servicemembers. (Rajah Bose)

and our court have suggested that we should construe any ambiguities regarding veterans' reemployment rights and statutes in favor of the veteran."⁴⁷ However, the court decided that because forced arbitration was not specifically mentioned by USERRA, BLB could terminate Ziober.⁴⁸ Spokane, Washington, attorneys Matthew Crotty and Thomas Jarrard met at Gonzaga Law School, where their shared experience as veterans—Crotty was an Airborne Ranger while Jarrard was in the Marine Corps made them natural friends. They noticed the difficulty their comrades in the Reserves and National Guard had finding work. As Crotty describes it:

"They would go in for an interview and reference the National Guard on their resume. And they would be asked, 'Hey, are you getting deployed?' They would say 'yes,' and magically there would be no job offer. I saw that happen time and again, and how that affected the lives of these men and women, who were doing the right thing trying to serve their country, only to have these employers insidiously sweep them aside."⁴⁹

"ALL THESE COMPANIES, THEY LOVE AMERICA, THEY LOVE THE TROOPS, UNTIL THE TROOPS START GOING AWAY, AND IT AFFECTS THEIR BOTTOM LINE." — MATTHEW CROTTY

> Crotty and Jarrard eventually decided to take on these so-called USERRA cases. The law was intended to stop employers from firing mobilized servicemembers and ensure those fighting for their country could return to their jobs.⁵⁰ Yet corporations have repeatedly refused to reemploy servicemembers on their return home. "*All these companies, they love America, they love the troops*," says Crotty, "*until the troops start going away, and it affects their bottom line.*"⁵¹

> Unfortunately, corporations have discovered a secret weapon that can nullify their USERRA obligations to the men and women of America's armed forces — forced arbitration.

Even though the law seems clear over servicemembers' employment rights, an arbitration provision allows a corporation to make its own rules. Forced arbitration requires the employee, including servicemembers, to "agree" to surrender fundamental constitutional rights, often without ever realizing it. Instead, legal disputes are funneled into a secret system designed by the same entities against whom the dispute has arisen.

In forced arbitration, there is no right to go to court, no right to a jury, no right to a written record, no right to discovery, no legal precedents to follow, no opportunity for group actions when it would be too difficult or costly to file a claim alone, no guarantee of an adjudicator with legal expertise, and no appeal. Without such checks and balances, the deck is stacked heavily against consumers. And that's the point. The use of forced arbitration clauses has soared as corporations realize it allows them to circumvent courts and avoid accountability—what some state judges have described as the equivalent of a "**Get Out of Jail Free**" card.⁵²

"I find it ironic that here are these men and women who are going overseas to support and defend the Constitution, only to have that right taken away from them," says Crotty. "If you were to say, 'If you want this job you have to sign away your right to have a gun,' people would be outraged. But so far it's legal to contract your Seventh Amendment rights away."⁵³

Neither Crotty nor Jarrard are ready to give up though. They will be representing Kevin Ziober in his arbitration hearing.



SERVICEMEMBERS AND HEALTH CARE

OPIOIDS, MALPRACTICE, AND THE 1950 CASE THAT ELIMINATES SERVICEMEMBERS' CONSTITUTIONAL RIGHTS

When people join the military, they do so knowing full well that they may be injured or killed in service of their country. However, few realize they may suffer a lifetime of pain not from any injury on the battlefield but from toxic exposure, human experimentation, or medical malpractice. Putting aside the dangers of active duty, the men and women who put their lives at risk for their country frequently face a lifetime of health challenges as a result of their service. Even their health care system offers particular challenges.

The risk of liability has proved an effective deterrent in the civilian world, forcing hospitals and medical providers to focus on patient safety. But unlike civilians, servicemembers are denied their constitutional right to a jury trial when injured or killed by negligence or wrongdoing, because of the *Feres* doctrine—an obscure 1950 Supreme Court precedent that even conservative Justice Antonin Scalia said was "*wrongly decided.*"⁵⁴ It's no coincidence that the Veterans Administration (VA) has been criticized for decades for shortcomings in the care it provides.

The Feres Doctrine and Medical Malpractice

Sailor Dawn Lambert was 19 when she underwent surgery at Portsmouth Naval Hospital for an ectopic pregnancy. Surgeons left three sponges and an X-ray shield inside of her, and the subsequent infection and surgery to remove the objects left her infertile. She receives \$66 per month in disability benefits.⁵⁵

Air Force Staff Sgt. Dean Patrick Witt had appendicitis but was twice misdiagnosed at the base hospital and sent home with antibiotics. Convinced he was seriously ill, Witt returned to the base hospital a third time, but was told he had to wait for his transfer papers to go through before he could be treated. Later that day he dialed 911 and collapsed. The appendectomy should have been routine, but when he had trouble breathing post-surgery, a series of errors by hospital staff left him brain dead. He left behind a wife and two children, all barred from seeking justice in a court of law.⁵⁶

Staff Sgt. William Barrett, a carpenter in the Air Force, went to a military hospital with a dog bite on his hand. There, doctors mistakenly interpreted signs of trauma from the bite as evidence of a rare cancer. They cut off his forearm and removed a rib, which they also mistakenly deemed cancerous. Then they discovered they had removed the wrong rib, so they removed another. With his carpentry career over, Barrett receives \$1,800 per month from the VA.⁵⁷

Marine Sgt. Carmelo Rodriguez served nearly a decade in the Marine Corps while suffering from skin cancer that was

repeatedly misdiagnosed. At his initial physical, a military physician noted Rodriguez had a melanoma but told the sergeant it was just a wart, despite the fact that it was larger than a hand and filled with pus. For the next eight years, Rodriguez was repeatedly misdiagnosed. By the time he came home and the skin cancer was properly diagnosed, he had lost over 100 pounds. He died holding his young son's hands. Rodriguez was given a military funeral, but because he had technically retired due to illness, the family had to pay for it. Rodriguez's son was given an American flag and 55 percent of his father's benefits.⁵⁸

Naval Cadet Leonce Miller, a recent high school graduate and "plebe" an incoming freshman attending the Plebe Summer orientation program at the United States Naval Academy in Annapolis, Maryland, was injured during a sailing exercise in July 1991. He was hospitalized until November, and subsequently disenrolled from the Naval Academy and honorably discharged from



"RIP CARMELO RODRIGUEZ"

Marine Sgt. Carmelo Rodriguez died from cancer, after repeatedly being misdiagnosed for eight years. His family could seek no accountability because of the *Feres* doctrine.

the U.S. Navy in February for "physical disability not existing prior to entry."⁵⁹ Miller filed an administrative claim with the U.S. Navy but was rejected. He then filed a claim under the Federal Tort Claims Act (FTCA). The Fifth Circuit ruled that Miller counted as an active-duty servicemember and his claim was barred by the *Feres* doctrine, despite the fact that he had only been at the Naval Academy two weeks at the time of the incident and did not qualify for veterans' retirement benefits.

America's military tradition has always held that no servicemember is left behind, but Dawn Lambert, Dean Patrick Witt, William Barrett, and young Leonce Miller are just four examples of servicemembers and veterans barred from justice and left with little or no recourse because of *Feres* when injured or killed by negligent conduct because of *Feres*.

The Feres doctrine originates from Feres v. United States, which combined three federal cases in 1950. Each case involved a noncombatant active-duty servicemember injured or killed through the negligence of others. The Feres case involved a servicemember killed in a fire, but the other two cases were medical malpractice cases -one concerning the wrongful death of a servicemember after negligent treatment by army surgeons and the other involving a surgery in which a 30-inch towel was left inside the servicemember patient.60 The Court's rationale was that servicemembers already have access to VA benefits, and that involving the civilian judiciary in military matters would complicate military discipline and effectiveness.⁶¹ Veterans can hold the VA accountable for negligence and substandard

care through the FTCA. However, the *Feres* doctrine prohibits this if treatment was provided outside of the United States, even if the location was a U.S. base.

THE TWO U.S. CITIZENS WERE HELD IN SOLITARY CONFINEMENT, DENIED COUNSEL, AND TORTURED BY THEIR OWN MILITARY. ERTEL WAS HELD FOR THREE WEEKS, AND VANCE FOR THREE MONTHS. IN 2012, THE SEVENTH CIRCUIT DISMISSED THEIR CLAIM BECAUSE OF *FERES*.

Though the Feres doctrine is often associated with medical malpractice, it actually prohibits lawsuits across a wide range of issues. Feres has even been cited as the justification for preventing U.S. citizens from suing over the torture they experienced at the hands of the U.S. military. In 2006, Donald Vance and Nathan Ertel, who were working as military contractors for Shield Group Security in Iraq, reported possible corruption at the firm-including the funneling of weapons to insurgents-to the FBI. The firm retaliated by accusing the two whistleblowers of being arms dealers themselves, and they were arrested by U.S. military personnel. The two U.S. citizens were held in solitary confinement, denied counsel, and tortured by their own military. Ertel was held for three weeks, and Vance for three months. In 2012, the U.S. Court of Appeals for the Seventh Circuit dismissed their claim because of Feres.⁶²

Feres also covers sexual assault. In September 2011, Kori Cioca, a serving member of the

U.S. Coast Guard, joined with 27 other servicemembers in a federal class action lawsuit alleging the U.S. Department of Defense violated the constitutional rights of servicemembers by failing to prevent rape and sexual assaults and by failing to provide an adequate judicial response to alleged assaults. Cioca was raped in uniform by her Coast Guard supervisor in 2005. During the attack, she was hit so hard her jaw was dislocated. Even after her supervisor confessed, she was ordered to sign a document stating that the sex was consensual, and threatened with courtmartial if she reported the assault. In 2013, the Fourth Circuit ruled that Cioca's claims were blocked by Feres.63

"FERES WAS WRONGLY DECIDED AND HEARTILY DESERVES THE WIDESPREAD, ALMOST UNIVERSAL CRITICISM IT HAS RECEIVED." — JUSTICE ANTONIN SCALIA

Cases like this have drawn widespread criticism of the *Feres* doctrine. Even the conservative Justice Antonin Scalia disapproved of *Feres*, writing in a dissent joined by Justices Brennan, Marshall, and Stevens, that, "*Feres was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.*"⁶⁴

The fact that the doctrine does not apply to servicemembers' families reveals its fundamental injustice. If a military health care provider negligently injures or kills a family member, the family can sue for compensation. But if the same provider negligently injures or kills the servicemember, there is no available cause of action. The lack of any real deterrent to negligent action has resulted in the kind of substandard care long considered unacceptable in the civilian world. Far from saving fallen comrades, the Supreme Court's misguided decision, and Congress' failure to remedy it, routinely leave servicemembers behind in their time of greatest need.

The Congressional Budget Office has estimated that repealing the *Feres* doctrine would cost an average of \$135 million in annual claims, equivalent to approximately 0.02 percent of the Department of Defense's budget.⁶⁵

Opioids

Like the rest of the country, servicemembers and veterans have suffered from a stark rise in opioid use. Servicemembers are far more likely to both be prescribed and to misuse opioids, and veterans, particularly those returning from recent duty, often turn to opioids to help them cope with symptoms of post-traumatic stress disorder.

Pain reliever prescriptions written by military physicians quadrupled between 2001 and 2009—to almost four million.⁶⁶ A *JAMA Internal Medicine* study found rates of chronic pain and opioid use amongst recently deployed servicemembers was far higher than in the general population.⁶⁷ As much as 75 percent of older veterans may suffer from chronic pain, and the fatal overdose rate is nearly double the national average.⁶⁸ However, only one quarter of VA patients addicted to opioids receive medication such as methadone to treat their addiction.⁶⁹

The extreme impact of the opioid epidemic is not just related to the inherent physical toll of military service. According to secret industry documents uncovered by *Newsweek*, Purdue Pharma—the manufacturer of OxyContin—funneled money to the VA to help push the idea that opioids were not The abrupt cutback on the prescription of opioids has had another, even more pernicious, side effect—a rise in heroin and illegal opioid use by veterans.⁷⁵ According

PURDUE PHARMA FUNNELED MONEY TO THE VA TO HELP PUSH THE IDEA THAT OPIOIDS WERE NOT ADDICTIVE. THE COMPANY GAVE \$200,000 TO THE VA PAIN MANAGEMENT TEAM, WHICH EVENTUALLY CONCLUDED OPIATES WERE "RARELY" ADDICTIVE.

addictive. The company gave \$200,000 to the VA pain management team, which eventually concluded opioids were "*rarely*" addictive, and partnered with the agency on subsequent pain management campaigns.⁷⁰ The VA responded by prescribing opioids at far higher rates than the general public.

The tragic impact can be comprehended when seen alongside the devastating veteran suicide rate. Studies show that high doses of opioids are correlated with suicide rates twice as high as low doses.⁷¹ A 2016 study conducted by the VA found 20 veterans committed suicide daily—a rate that is 22 percent higher than civilians—but other estimates suggest veterans may be killing themselves at a rate four times higher than civilians.⁷²

The VA began drastically cutting back on opioid prescription in 2012.⁷³ The VA proudly touts the 41 percent decline in opioid prescriptions in the last five years, even as overdose deaths have only continued to rise.⁷⁴ Critics believe this crackdown swung the pendulum too far and risked leaving veterans in untreated pain.

to the U.S. Centers for Disease Control, individuals who are addicted to prescription painkillers are 40 times more likely to become addicted to heroin.⁷⁶ Because veterans are so much more likely than the general population to be prescribed painkillers, there is no doubt that many who have been cut off medication have turned to illegal drugs. But the problem is hard to quantify. While the VA has touted the reduction in opioids its physicians have prescribed, it has done nothing to track how many veterans have turned to heroin.

The damage done, however, is all too often plain to see, as cases involving heroinaddicted veterans hit the headlines.⁷⁷ The irony is that much of that heroin originates from Afghanistan, where U.S. intervention has unwittingly enabled a surge in opium production. In 2015, 14 years after the start of the Afghanistan war, the country had roughly 780 square miles of opium poppy production—the equivalent of 400,000 football fields—and much of the proceeds were funding Taliban resistance.⁷⁸

Hundreds of states, counties, and cities have filed lawsuits against prescription

drugmakers and distributors in the last few years, with more being filed every week.79 The lawsuits seek monetary damages to help recoup the cost of fighting the epidemic. In addition, shareholder groups have launched their own suits against corporations, with the federal government also considering legal action.⁸⁰ Though on the surface such an industry-wide push for a legal resolution recalls the 1998 tobacco settlement, the opioid litigation faces unique challenges, in part because opioids were approved by the U.S. Food and Drug Administration. However, the weight of litigation has already prompted industry change, and may, in the words of one commentator, "put wind in the sails of agencies and legislatures seeking stronger oversight.^{"81}

The pharmaceutical industry has a different solution to the opioid crisis, which unsurprisingly stands to make them a lot of money. Undeterred by the slow death of its opiate cash cow, Purdue—the company that used the VA to promote the idea that opioids were not addictive—is now pushing "abuse-deterrent" painkillers that, though harder to misuse, are no less addictive. The VA estimates that switching to the new drugs would increase costs tenfold, and result in a \$1.6 billion windfall for opiate manufacturers.⁸²





"POPPY PATROL"

U.S. Marine Corps Cpl. Mark Hickok patrols through a field during a clearing mission in Marja in Afghanistan's Helmand province in April 2011. (U.S. Marine Corps.)

TOXIC EXPOSURE

ASBESTOS, AGENT ORANGE, BURN PITS, AND HUMAN EXPERIMENTATION

As if military service were not risky enough, servicemembers and veterans are at far greater risk for developing cancer than ordinary civilians, due to the multiple chemicals and carcinogens to which they are exposed. Hundreds of thousands of military beneficiaries suffer from a broad array of cancers.

Asbestos

Mesothelioma is a rare and malignant form of cancer caused by asbestos exposure. It is a particularly devastating form of cancer the five-year survival rate for mesothelioma caught in its earliest stages is just 16 percent, while late-stage rates are less than one percent.⁸³

Servicemembers and veterans face serious risks for developing asbestos-related diseases than other people because of the historical presence of asbestos in buildings, ships, and combat situations to which they have been exposed during their service.

Asbestos was frequently used by every branch of the U.S. military because of its fire-retardant qualities, in everything from brake linings to entire buildings. Nowhere was it more used, however, than in the U.S. Navy. Prior to 1980, Navy ships were filled with asbestos meant to protect any area or component that risked fire or heat. Archived instruction manuals show asbestos featured in all manner of products—including pipecladding, ceiling tiles, electrical switches, turbines, gaskets, and boilers—without mention of the need for protective clothing in its handling.

Mesothelioma takes a long time to develop, with latency periods ranging from 20 to 40



Levels of Risk for Asbestos Exposure on U.S. Naval Vessels

"ASBESTOS SHIPS"

Asbestos was particularly prevalent on U.S. Navy ships, which used the material for pipe-cladding, ceiling tiles, electric switches, turbines, gaskets, boilers, and more. (Asbestos.com)

years. Despite this long gestation period, the risk of developing cancer does not decline after exposure to asbestos stops. Today, those suffering from mesothelioma may date their service as far back as the Korean or Vietnam Wars.



Archived military instruction manuals make frequent mention of the use of asbestos, often without protective gear.

Making matters even more challenging, the U.S. Chamber of Commerce has spent years pushing legislation that would force veterans to give their currently protected personal information to defense attorneys and bankruptcy courts. The legislation would provide an advantage to corporate defendants, allowing them to both reduce payments and tie sick veterans up in court for years.⁸⁴

Burn Pits

Thousands of military personnel and private contractors were sickened by toxins from 250 open-air burn pits used by the U.S. military in Iraq and Afghanistan, then denied proper treatment. Nearly 140,000 servicemembers have registered on the VA's Burn Pit Registry, suffering from an array of illnesses, including cancer, respiratory problems, and blood disorders.⁸⁵ Yet the registry has done little to help those sickened, and has been criticized by the National Academy of Medicine as "fundamentally unsuitable for addressing the question of whether burn pit exposures have caused health problems."⁸⁶

Burning industrial waste can release carcinogenic chemicals into the air. Former Vice President Joe Biden has even suggested that proximity to burn pits may have been responsible for the fatal brain cancer of his son, U.S. Army Captain Joseph R. "Beau" Biden, who served in Iraq and died shortly after in 2015.⁸⁷ The VA, however, has continued to rely on a 2011 Institute of Medicine report suggesting there is little evidence of long-term respiratory health effects.⁸⁸

In 2017, a judge in the U.S. Department of Labor's Office for Workers' Compensation Programs held that sickened private contractors should receive health care coverage for the ongoing illnesses by their employers and the employers' insurer. AIG, the insurer for the firm Kellogg, Brown, and Root, had previously denied claims arising from the burn pits.⁸⁹ In 2018, a second U.S. Department of Labor decision found that another private contractor, Veronica Landry, had contracted lung disease from proximity to burn pits.⁹⁰ Despite these rulings favoring private contractors, veterans remain in wait. Veterans groups have pushed for burn pit exposure to qualify as a "presumptive" service-connected disability—as Agent Orange has been for Vietnam veterans



"BURN PIT BULLDOZER" In Iraq a soldier uses a bulldozer to push waste items deep into a burn pit. (Abel Trevino/U.S. Army)

and radiation exposure has been for those involved in nuclear testing or those POWs held in Nagasaki and Hiroshima. But instead the cases have been delayed and denied.

Agent Orange

Agent Orange and other herbicides were used to clear jungle canopy around U.S. bases during the Vietnam War. Agent Orange—manufactured primarily bv Monsanto and Dow Chemical-contained the contaminant dioxin, a highly toxic pollutant linked to a wide array of cancers, birth defects, and other illnesses. It was sprayed in vast quantities and at 20 times the manufacturers' recommended concentration, and destroyed over five million acres-24 percent of southern Vietnam-much of which remains affected half a century later.⁹¹ An estimated 650,000 Vietnamese suffer from herbicide-related conditions, and another 500,000 have died.92

The U.S. government stopped spraying herbicides in 1971 and eventually destroyed all remaining Agent Orange stockpiles in

1978. But Vietnam veterans reported serious health problems when returning from the war. The Selected Cancers Cooperative Study Group showed that veterans of the Vietnam War had a 50 percent increase in the risk of Hodgkin's disease as compared to subjects who had not served in Vietnam.⁹³

In 1984, seven companies involved in the manufacturing of Agent Orange agreed to settle a class action lawsuit filed by Vietnam veterans for \$180 million.⁹⁴ The settlement did not cover those who had yet to get sick.

In 1988, Captain Elmo Zumwalt III., a U.S. Navy patrol boat captain, who had served in Vietnam in an area regularly



"AGENT ORANGE CROPDUSTING"

U.S. Fairchild UC-123B *Provider* aircraft cropdusting in Vietnam during Operation Ranch Hand which lasted from 1962 to 1971. (U.S. Air Force)

sprayed with herbicide, died from cancer. Believing Agent Orange was the cause, his father, Admiral Elmo Zumwalt Jr.—the former commander of the U.S. Navy in Vietnam—sought to uncover the truth about the herbicide. Two years later, he had found evidence that Agent Orange was linked to 28 life-threatening conditions, and that 4.2 million soldiers had been exposed.⁹⁵

Two decades after Agent Orange had been banned, Congress passed the Agent

Orange Act of 1991, which directed the National Academy of Sciences (NAS) to study the impact of the use of the herbicide during the conflict. The most recent NAS report describes a whole host of health problems associated with the chemicals, particularly soft-tissue sarcoma, Hodgkin's and non-Hodgkin's lymphoma, and chronic lymphocytic leukemia.⁹⁶

Other studies suggest the effects are even worse: NAS decided that birth defects in veterans' children were not provable, but



"AGENT ORANGE MAP"

Areas sprayed by herbicides in Vietnam. An additional 260,000 gallons were dumped in aborted missions, because U.S. military regulations required spray planes to return to base empty.⁹⁷ (U.S. Army)

an investigation by *ProPublica* and *The Virginian-Pilot* found that veterans who directly handled or were sprayed with Agent Orange were more than one third more likely to have a child with birth defects than those who had not been exposed.⁹⁸

VETERANS WHO DIRECTLY HANDLED OR WERE SPRAYED WITH AGENT ORANGE WERE MORE THAN ONE THIRD MORE LIKELY TO HAVE A CHILD WITH BIRTH DEFECTS THAN THOSE WHO HAD NOT BEEN EXPOSED.

The VA now offers Vietnam veterans health exams to check for Agent Orange exposure. However, since 2002, the VA has excluded 90,000 veterans from the so-called "Blue Water Navy"—servicemembers who served on ships that operated in Vietnam's close coastal waters. These ships sucked in water potentially contaminated by herbicide run-off, and distilled it—a process that would have concentrated toxins—for use in showers, laundry, food preparation, and even drinking water.⁹⁹

In 2015, the U.S. Court of Appeals for Veterans Claims determined that there was no rationale for excluding the Blue Water veterans and ordered the VA to reevaluate its decision. In 2017, however, the VA doubled down on its decision, and this time the Federal Circuit agreed, leaving 90,000 veterans to die without the benefits their comrades who stepped foot on land are granted.

Veterans advocacy groups have asked the court to reconsider that decision.¹⁰⁰ As for the manufacturers of Agent Orange, despite the mounting evidence of long-term harm far beyond what was known decades ago, they maintain that their 1984 settlement precludes any further claims against them.¹⁰¹

Human Experimentation

Between 1922 and 1975, the U.S. government tested hundreds of drugs, chemicals. and biological agentsincluding mustard gas, Sarin, phosgene gas, Thorazine, LSD, PCP, and the powerful nerve agent VX-on as many as 100,000 military servicemembers.¹⁰² The subjects volunteered for the tests but were not told what they would be exposed to, and were often induced with the promise of time off and other benefits.¹⁰³ During World War II alone, around 60,000 servicemembers were deliberately exposed to mustard gas, some 4,000 at extreme levels, to investigate its effects.104

In 1953, the military introduced its first official policies on human experimentation and required that subjects provide informed consent. Still, many volunteers thought they were testing battle gear, when in fact they were being pumped full of experimental blister agents or massive doses of hallucinogens.¹⁰⁵

Mark Needle, a physician at the Army's Edgewood, Md., chemical weapon testing facility in the 1960s, later told the *New Yorker*,

"There was no humanity in it. There was no morality in it. If anything happened to the volunteers, we could say, 'You were offered an out,' but then we were also telling them, 'Listen, this is the Army, and we are at war.' Our view was that this was a terrible thing to do to these kids, because who the hell knew what could happen?"¹⁰⁶

OUR VIEW WAS THAT THIS WAS A TERRIBLE THING TO DO TO THESE KIDS, BECAUSE WHO THE HELL KNEW WHAT COULD HAPPEN?" — DR. MARK NEEDLE

The military says it ended human experimentation in 1975. That same year, the Army's chief of medical research admitted they had not tracked the subjects' health after the experiments.¹⁰⁷ In the 1980s, the NAS decided that the subjects had suffered no long-term harm, with the exception of those exposed to large doses of mustard gas. In 2004, the NAS admitted

that the experiments could have led to post-traumatic stress disorder.¹⁰⁸

In 2009, veterans joined forces to file a class action lawsuit to find out what they had been exposed to—many substances were only known by code names, and in some cases the subjects were given drugs so powerful they later had no memory of the tests—and to force the military to provide them with ongoing health care. The lawsuit sought no money because the government was immune from such a demand.¹⁰⁹

The Army initially refused to provide health care, arguing that the veterans already had access to VA care, but in 2015, the Ninth Circuit ruled that the Army had a duty to both reveal what subjects were exposed to and provide them with ongoing care.¹¹⁰

The 60,000 WWII troops who were mustard-gassed remained under an oath of secrecy until the 1990s, at which time the VA promised to seek them out and compensate them. But the VA only attempted to



"MUSTARD GASSED-VETERANS"

Photographs of human test subjects after being exposed to nitrogen mustard and lewisite agents in World War II experiments conducted at the Naval Research Laboratory in Washington, D.C. (Naval Research Laboratory)

contact 610 of the men over the next two decades and routinely denied claims from qualified veterans. It was not until 2017 that the Arla Harrell Act—introduced by Sen. Claire McCaskill and named for the

last living Missouri veteran exposed to the experiments—was enacted, forcing the VA to make it easier for the veterans to receive compensation.¹¹¹





"WAITING IN LINE FOR MUSTARD GAS"

Troops waiting in line to be mustard-gassed. Some 4,000 soldiers were exposed to extreme levels of the toxin. Many were not aware what they were being exposed to. (United States Library of Congress)

CONCLUSION

28

"Leave no one behind," has long been a fundamental pillar of American military tradition. Yet those who would risk their lives for a fallen comrade are regularly left behind by corporations that target them as exploitable and by a government that regards them as unworthy of constitutional protection.

Despite the surface-level corporate patriotism on show during "Memorial Day Sales!" or Super Bowl Sunday, companies large and small have frequently found ways to take advantage of servicemembers, through scams and frauds, and by bypassing laws like SCRA and USERRA through forced arbitration.

THE ATTORNEYS THAT TAKE THESE CASES DO SO BECAUSE DEFENDING THOSE WHO DEFEND US IS THE RIGHT THING TO DO.

> Meanwhile, the government does not even need a ruse like forced arbitration, when it can invalidate constitutional rights through the 1950 *Feres* precedent. Generations of

lawmakers over 33 successive Congresses have failed to restore to servicemembers the fundamental rights enjoyed by other citizens.

To be sure, there is little profit for those few attorneys who choose to represent servicemembers and veterans. Returning a home to a family, or a job to a servicemember, or seeking justice for a servicemember injured or killed by negligence, does not offer a big payday. The lawyers that take these cases do so because defending those who defend us is the right thing to do.

Plaintiffs' attorneys, many of whom are veterans themselves, stand for servicemembers and veterans in cases both big and small in the belief that no American should be left behind.



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