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Yes, It is Unlawful for an Employer To Discriminate in Promotions. State Agencies Are Not Exempt.

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.7—USERRA applies to state and local governments.
1.2—USERRA forbids discrimination.
1.4—USERRA enforcement.
1.8—Relationship between USERRA and other laws/policies.

[1] I invite the reader's attention to https://roa.org/lawcenter/. You will find more than 2,300 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 44 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. As of 5/1/2026, I have come out of retirement and have affiliated with Maher Legal Services in an "of counsel" role. You can reach me by e-mail at samuel@maherlegalservices.com or by telephone at (708) 468-8155.

Reserve Organization of America

Q: I am the head of a State agency in Richmond, Virginia.[3] We have an important position on our staff that was held for many years by an individual who retired recently. We had many applicants for the vacant position, and two of the internal candidates were very well qualified, and it was a difficult call to choose between them. We had a selection board that interviewed the five finalists for this position, including the two well-qualified internal candidates.

Of the two well-qualified internal candidates, one is an active participant in a Reserve Component of the armed forces, and the other has never served our country in uniform. The chairman of the selection board asked each finalist about military service, and the second candidate answered truthfully that he is a Commander (O-5) in the Coast Guard Reserve (USCGR). The chairman asked him several pointed questions about his USCGR obligations and about the possibility that he could be called to active duty.

The selection board chose the candidate who is not a member of any Reserve Component and has never served our country in uniform. The candidate who is a member of the USCGR complained to me that his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) have been violated because his USCGR service was apparently considered as a negative factor in the selection process.

First a threshold question. Our agency is an arm of the Commonwealth (State), of Virginia, and just ten years ago the Virginia

[3] The factual set-up for this article is based on a real situation, but I have changed several of the facts, including the position of the individual asking the questions, to protect the identity and privacy of the individual who contacted me.

Supreme Court held that agencies of the Virginia government have sovereign immunity and cannot be sued in State court for violating USERRA. *See Clark v. Virginia Department of State Police,* 292 Va. 725, 793 S.E.2d 1 (2016); *cert. denied,* 583 U.S. 1012 (Dec. 4, 2017). I contacted our agency's General Counsel, and he told me about the *Clark* case. He told me that our agency is exempt from enforcement of USERRA and that the unsuccessful applicant has no judicial remedy. What do you say about that?

A: The General Counsel should know, but apparently does not, that in 2022 the United States Supreme Court clearly and unambiguously overruled the *Clark* precedent. I invite your attention to *Torres v. Texas Department of Public Safety,* 597 U.S. 580 (2022). In that case, the Supreme Court held:

> The Constitution vests in Congress the power "[t]o raise and support Armies" and "[t]o provide and maintain a Navy." Art. I, §8, cls. 1, 12-13. Pursuant to that authority, Congress enacted a federal law that gives returning veterans the right to reclaim their prior jobs with state employers and authorizes suit if those employers refuse to accommodate them. See Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U. S. C. §4301 *et seq.* This case asks whether States may invoke sovereign immunity as a legal defense to block such suits.
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> In our view, they cannot. Upon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military. States thus gave up their immunity from congressionally authorized suits pursuant to the "'plan of the Convention,'" as part of "'the structure of the

original Constitution itself.'" *PennEast Pipeline Co.* v. *New Jersey*, 594 U. S. ___, ___, 141 S. Ct. 2244, 210 L. Ed. 2d 624, 641 (2021) (quoting *Alden* v. *Maine*, 527 U. S. 706, 728, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)).

Congress has "broad and sweeping" power "to raise and support armies." *United States* v. *O'Brien*, 391 U. S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). It has long exercised that power to encourage service in the Armed Forces in a variety of ways. *See*, *e.g.*, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 58, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (campus recruiting); *Johnson* v. *Robison*, 415 U. S. 361, 376, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974) (educational benefits).

Since before the United States' entry into World War II, Congress has sought, in particular, to smooth volunteers' reentry into civilian life by recognizing veterans' "right to return to civilian employment without adverse effect on …career progress" in the federal work force and private employment. H. R. Rep. No. 105-448, p. 2 (1998); see Selective Training and Service Act of 1940, §§8(b)(A)-(B), (e), 54 Stat. 890, 891 (damages remedy against private employers).

The Vietnam War prompted Congress to extend these protections to employment by States. Amidst political opposition to the war, "some State and local jurisdictions ha[d] demonstrated a reluctance, and even an unwillingness, to reemploy" returning servicemembers. S. Rep. No. 93-907, p. 110 (1974). So, Congress authorized private damages suits against States to ensure that "veterans who [had] previously held jobs as schoolteachers,

policemen, firemen, and other State, county, and city employees" would not be denied their old jobs as reprisal for their service. *Ibid.* The statute at issue, USERRA, embodies these protections today.[4]

As a result of *Torres,* State courts in Texas, Virginia, and the other 48 States are now required to hear and adjudicate USERRA claims against State agencies as employers, without regard to State law or State claims of sovereign immunity. This is exceedingly important because many National Guard and Reserve part-timers have civilian jobs working for State agencies.[5]

Q: But Clark appealed to the United States Supreme Court and the high court turned him down cold. What gives?

A: It is not correct to say that the United States Supreme Court considered Clark's appeal and affirmed the decision of the Virginia Supreme Court. The United States Supreme Court simply denied Clark's application for certiorari (turned down Clark's request to hear and consider the case).

In our nation's courts, the final appellate step is to apply to the United States Supreme Court for a writ of certiorari. Certiorari is granted only if four or more of the nine Justices vote for certiorari at a conference where hundreds of cases are considered and certiorari is granted in

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[4] *Torres v. Texas Department of Public Safety,* 597 U.S. 580, 584-85 (2022). *See also* Law Review 24054 (November 2024).

[5] *See* https://www.bing.com/search?q=What+percentage+of+Reserve+and+National+Guard+service+members+have+civilian+jobs+working+for+state+governments%3F&form=ANNTH1&refig=1c6482a2e80049eaa7141d7869324718&pc=HCTS.

only a handful of cases. The Supreme Court denies certiorari in about 99% of the cases where it is sought. When the Supreme Court denied Clark's application for certiorari, that meant that the *Clark* case was final. It did not mean that the United States Supreme Court agreed with the decision of the Virginia Supreme Court.

Four years later, LeRoy Torres applied for certiorari in his USERRA case against the Texas Department of Public Safety. The United States Supreme Court unambiguously overruled the State high court decisions like *Clark v. Virginia Department of State Police.*

Q: Okay, let us assume that USERRA is binding on the Commonwealth of Virginia and this agency. What does USERRA provide for this issue?

A: Section 4311 of USERRA provides:

> **(a)**
> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, **promotion,** or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
> **(b)**
> An employer may not discriminate in employment against or take any adverse employment action or other retaliatory action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection

with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c)

An employer shall be considered to have engaged in actions prohibited—

(1)

under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is **a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service**; or

(2)

under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

> **(d)**
> The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[6]

If the unsuccessful applicant proves that his USCGR service was **a motivating factor** in the agency's decision not to select him for the promotion, the burden of proof shifts to the agency to prove (not just say) that this person would not have been selected even if he had not been a member of a Reserve Component of the armed forces. Because you have acknowledged that there was no real difference between the qualifications of this applicant and those of the successful applicant, it is most unlikely that the agency will be able to prove that affirmative defense.

The fact that the unsuccessful applicant was asked about his military service is sufficient proof to establish that his USCGR service was at least a motivating factor in the decision to select another candidate. If this applicant's military service had been irrelevant, he would not have been asked about it.

As I have explained in Law Review 16044 (May 2016) and several other articles, *The USERRA Manual,* by Kathryn Piscitelli and Edward Still, is the definitive reference on USERRA and USERRA caselaw. In their book, Ms. Piscitelli and Mr. Still write: "USERRA does not prohibit employers from asking applicants about their military service or obligations. Nevertheless, such inquiries potentially may be evidence of discrimination."[7]

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[6] 38 U.S.C. § 4311 (emphasis supplied).
[7] *The USERRA Manual,* Thomson Reuters, § 7:4, page 293 (2025 edition).

In a case involving an Air Force Reserve officer who applied for and was interviewed for a Township Director position but not invited back for a second interview, the United States Court of Appeals for the 3rd Circuit[8] held:

> Murphy joined the Air Force in 1997 and served on active duty until 2002. Since 2002, Murphy has served in the Active Reserves and currently holds the rank of Major. In June 2009, Murphy applied for the position of Township Manager for Radnor. After Murphy submitted his application materials, he received a phone call from Radnor's then Interim Township Manager, John Granger ("Granger"), asking Murphy to come in for an interview before Radnor's Board of Commissioners ("Board"). Seven other applicants were selected for a first-round interview. …
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> The interview was conducted on July 22, 2009 before four members of Radnor's Board: Masterson, John Fisher ("Fisher"), Enrique Hervada ("Hervada"), and Harry Mahoney ("Mahoney"). Granger was also present. The interview lasted approximately 45 minutes, during which Masterson spent ten minutes questioning Murphy on his military obligations, including how many days he was absent during his previous employment due to his military duties and how Radnor would be affected by any future military obligations. Murphy contends that Masterson also specifically asked him how many days he would be absent due to future military obligations. Murphy responded that he would be absent approximately 35 days per year. In response to these questions,

[8] The 3rd Circuit is the intermediate federal appellate court that sits in Philadelphia and hears appeals from district courts in Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands.

Murphy offered to go on inactive reserves in order to secure the job.

This line of questioning ended after Granger became concerned about the legality of these questions and intervened. Following Granger's interruption, the commissioners turned to other topics of discussion, including how Murphy's past military experience and civilian employment suited him for the position of Township Manager.

On July 27, 2009, Granger spoke to Murphy on the phone, informing him that he was not being asked to return for a second-round interview. Although Granger does not remember the contents of the conversation, Murphy contends Granger told him that, while Murphy was in the Board's top four choices, the Board was not going to invite him back for a second-round interview. Murphy also maintains Granger specifically told him that the Board had "serious reservations about [his] ongoing military obligation." (App. 173.) None of the other applicants interviewed or offered a second-round interview have a military background or current military obligations.

Murphy subsequently filed suit against Radnor, alleging violations of USERRA and PMAA [the Pennsylvania law on military service and civilian employment]. Following discovery, the District Court granted summary judgment in favor of Radnor. *Murphy v. Radnor Twp.*, 904 F. Supp. 2d 498 (E.D. Pa. 2012). The District Court held that, although Murphy had met his burden in proving that his military obligations were a motivating factor in Radnor's decision not to hire him, Radnor "presented evidence of numerous

> legitimate non-discriminatory reasons, other than [Murphy's] military obligations" sufficient to overcome the claims. *Id* at 515. Specifically, the District Court concluded that Murphy could not withstand the summary judgment motion because Radnor "adduced sufficient evidence from which no reasonable jury could find that its reasons for not hiring Murphy were invalid." *Id.* at 514. Murphy timely appealed.
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> We believe that the District Court erred by requiring Radnor to show that no reasonable jury could find its reasons for not hiring Murphy as invalid. This is not the standard required under USERRA. Instead, **USERRA requires that Radnor show a legitimate reason for not hiring Murphy that is "so compelling" and "so meagerly contested" that there is no genuine dispute that Murphy would not have been hired regardless of his future military obligations. We do not believe Radnor has met the USERRA standard as a genuine dispute of fact exists on whether Radnor would have hired Murphy absent his future military commitments.**[9]

Three years later, in an officially published decision, the 3rd Circuit held:

> The question presented is straightforward: in a failure-to-promote discrimination suit under USERRA, must a plaintiff plead and prove that he or she was objectively qualified for the position sought? The answer, we find, is equally straightforward: no.

[9] *Murphy v. Radnor Township,* 542 Fed. Appx. 173, 174-175 (3d Cir. 2013) (emphasis supplied).

Congress enacted USERRA in 1994 to, *inter alia*, "encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." To this end, USERRA prohibits the "deni[al] [of] initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of [a person's] membership, application for membership, performance of service, application for service, or obligation [in a uniformed service]." When plaintiffs allege discrimination as a violation of USERRA, courts apply a two-step burden shifting framework adapted from *NLRB v. Transportation Management Corp.*:

[A]n employee making a USERRA claim of discrimination [] bear[s] the initial burden of showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating factor" in the adverse employment action. If this requirement is met, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason.

The Port Authority seeks to alter this framework by importing an additional requirement from other anti-discrimination statutes. According to the Port Authority, USERRA plaintiffs must sustain their initial burden by demonstrating two facts by a preponderance of the evidence: (1) that they were objectively qualified for the position sought, and (2) that their military service was "a substantial or motivating factor" in the adverse employment action. In this case, for example, the Port Authority

claims that Carroll was physically incapable of performing a sergeant's duties due to his injuries and was therefore unqualified for the position. Under the Port Authority's proposed framework, Carroll could not meet his initial burden under USERRA—even if he could show that his military service was "a substantial or motivating factor"—because he could not demonstrate that he was objectively qualified for the promotion to sergeant.

Carroll, on the other hand, contends that a plaintiff's objective qualifications are only relevant to the USERRA analysis *after* a plaintiff meets his or her initial burden. Once a plaintiff has shown that his or her military service was "a substantial or motivating factor" in the adverse employment action, Carroll argues, the employer may then advance non-discriminatory reasons—which may include a lack of qualifications—to show that the employer would have taken the adverse action anyway. In other words, Carroll asserts that a plaintiff's objective qualifications are certainly relevant, but they are an affirmative defense to be advanced by the employer, not an additional hurdle to be cleared by USERRA plaintiffs.

We find Carroll's reading more persuasive. The statute is clear that an employer violates USERRA if a plaintiff's "membership . . . in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." All courts of appeals interpreting USERRA have recognized this unambiguous language and held that a plaintiff meets his or her initial burden simply by showing that military service was "a substantial or motivating factor" in the adverse employment action. Indeed, this

Court has so held on more than one occasion, albeit in non-precedential opinions.
The clear implication of these uniform holdings is that plaintiffs need *not* plead or prove that they are objectively qualified in order to meet their initial burden under USERRA. Instead, it is incumbent on employers to raise a plaintiff's lack of qualifications at the second step of our USERRA framework: an employer may argue, for example, that it would have taken the same employment actions absent a plaintiff's military service because he or she lacked the necessary qualifications for the position in question. This construction not only comports with the plain text of USERRA and holdings of courts of appeals, but also affects Congress's intent to "clarify, simplify, and, where necessary, strengthen the [previous] veterans' employment and reemployment rights provisions."

The Port Authority's reliance on other anti-discrimination statutes does not alter our conclusion. For example, the Port Authority places much weight on the uncontroversial proposition that Title VII of the Civil Rights Act, the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA") have all been interpreted, under the *McDonnell Douglas* framework, to require an initial showing that the plaintiff is objectively qualified for the position sought. But the *Transportation Management* framework set forth above, rather than the *McDonnell Douglas* framework, has been consistently applied to analyze USERRA claims. The Port Authority has not identified any case in which a plaintiff failed to meet his or her initial burden under the *Transportation Management* framework by failing to plead and prove objective qualifications.

> …The case will be remanded to the District Court for further proceedings consistent with this Opinion.[10]

In summary, the unsuccessful applicant has amply demonstrated that his USCGR obligations were, at a minimum, **a motivating factor in the university's decision to deny him this promotion. The burden of proof will shift to the agency to prove, as an affirmative defense, that this applicant would not have been selected anyway for lawful reasons unrelated to his military service and obligations. It is most unlikely that the agency will be able to prove that affirmative defense. The agency should settle this case now.**

Q: We have an agency to run, and this is an important position in the day-to-day operation of the agency. Why should we have to put up with the inconvenience and hassle of accommodating an employee in this position who is frequently away from work for military training and service?

A: It has now been 53 years since Congress abolished the draft and established the All-Volunteer Military (AVM) in 1973. Those who are considering enlistment today have never faced the prospect of being drafted, and neither have their parents. No one has been drafted by our country since the grandparents or great-grandparents of today's service members were of military age.

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[10] *Carroll v. Delaware River Port Authority,* 843 F.3d 129, 130-133 (3rd Cir. 2016). *See also Hobbs v. United States DOL Office of the Solicitor,* 2025 U.S. Dist. LEXIS 102871 (D.N.J. May 30, 2025); *Patti v. Ibarrando,* 2023 U.S. Dist. LEXIS 133824 (D.N.J. Aug. 1, 2023); *Young v. Gloucester County Sheriff's Department,* 2023 U.S. Dist. LEXIS 43468 (D.N.J. March 15, 2023); *Monaghan v. County of Gloucester,* 599 F. Supp. 3d 196 (D.N.J. 2022); *Dzuryachko v. Teva Pharmaceuticals USA, Inc.,* 2022 U.S. Dist. LEXIS 49299 (E.D. Pa. March 21, 2022).

Relying exclusively on volunteers, our nation has the best-motivated, best-led, best-equipped, and most effective military in the world, and perhaps in the history of the world. I hope that it is never necessary for our country to reinstate the draft.

Defending our country in a dangerous world, without relying on compulsion to fill the ranks, means that our nation must maximize the incentives and minimize the disincentives to military service in the Active Component, the Reserve, and the National Guard.

Most of the 2,000 articles in our "Law Review" series[11] address laws that seek to minimize the disincentives to service. The Uniformed Services Employment and Reemployment Rights Act (USERRA) addresses the concerns of the service member or potential service member that he or she will lose out on civilian job opportunities because of service to our country in uniform. The Servicemembers Civil Relief Act (SCRA) addresses the concerns of the service member that he or she will lose the opportunity to be heard in a civil or administrative proceeding back home because he or she is serving in uniform hundreds or thousands of miles away or that he or she will have to continue paying rent for an apartment that is no longer needed because he or she has enlisted or has been called to active duty.

I invite the reader's attention to Law Review 14080 (July 2014), by Nathan Richardson[12] and myself. In that article we wrote:

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[11] Please see footnote 1.

[12] At the time (summer 2014), Nathan Richardson was a law student and an unpaid summer intern at the Service Members Law Center, of which I was the Director. For several years before he started law school, Nathan was a junior officer on active duty in the Army, and he served in both Iraq and Afghanistan. Nathan is now a lawyer in New York City.

Without a law like USERRA, it would not be possible for the services to recruit and retain the necessary quality and quantity of young men and women needed to defend our country in the armed forces. In the All-Volunteer Military recruiting is a constant challenge. Despite our country's current [2014] economic difficulties and the military's recent reductions in force, recruiting remains a challenge for the Army Reserve—the only component that has been unable to meet its recruiting quota for Fiscal Year 2014.

Recruiting difficulties will likely increase in the next few years as the economy improves and the youth unemployment rate drops, meaning that young men and women will have more civilian opportunities competing for their interest. Recent studies show that more than 75% of young men and women in the 17-24 age group are not qualified for military service, because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (including medicines for conditions like attention deficit hyperactivity disorder), felony convictions, cosmetic issues, or educational deficiencies (no high school diploma).

Less than half of one percent of America's population has participated in military service of any kind since the September 11 attacks. A mere 1% of young men and women between the ages of 17 and 24 are interested in military service and possess the necessary qualifications. The services will need to recruit a very high percentage of that 1%. As a nation, we cannot afford to lose any qualified and interested candidates based on their concerns that their military service (especially service in the Reserve or

> National Guard) will make them unemployable in civilian life. There definitely is a compelling interest in the enforcement of USERRA.

As Nathan Richardson and I predicted in 2014, the services (and especially the Army) have suffered from recruiting shortfalls and the services suffered great recruiting difficulties during the Biden Administration. The recruiting situation has improved since Donald Trump returned to the White House on 1/20/2025, but the improvement may be temporary.

While I am very glad that Congress abolished the draft 53 years ago, I also think that conscription is constitutional, justified, and necessary when our nation is unable to recruit enough volunteers. In a letter to Alexander Hamilton dated May 2, 1783, General George Washington wrote:

> It may be laid down as a primary position, and the basis of our system, that every citizen of a free government owes not only a proportion of his property but even of his personal services to the defence of it, and consequently that the Citizens of America (with a few legal and official exemptions) from 18 to 50 Years of Age should be borne on the Militia Rolls, provided with uniform Arms, and so far accustomed to the use of them that the Total strength of the Country might be called upon at Short Notice on any very interesting Emergency.[13]

[13] Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.

Reserve Organization of America

Throughout our nation's history, when the survival of liberty has been at issue, our nation has defended itself by calling up State militia forces (known as the National Guard since the early 20th Century) and by drafting young men into military service.[14] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[15]

No one is required to serve in our country's military, but someone must defend this country. When I hear folks complain about the "burdens" imposed by laws like the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these laws impose burdens on some members of our society, but those burdens are tiny in comparison to the far greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by that tiny sliver of our country's population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

As we approach the 25th anniversary of the "date which will live in infamy" for our time, when 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 Americans, let us all be thankful that in that period we have avoided another major terrorist attack within our country. Freedom is not free, and it is not a coincidence that we have avoided a repetition of the tragic events of 9/11/2001. The strenuous efforts and heroic sacrifices

[14] No one has been drafted by our country since 1973, but under current law young men are required to register in the Selective Service System when they reach the age of 18. In Resolution 13-03, ROA has proposed that Congress amend the law to require women as well as men to register. Please see Law Review 15028 (March 2015).
[15] *Arver v. United States,* 245 U.S. 366 (1918).

of American military personnel, Active Component (AC) and Reserve Component (RC), have protected us all.

In a Memorial Day speech at Arlington National Cemetery on May 30, 2016, the Chairman of the Joint Chiefs of Staff (General Joseph Dunford, USMC) said:

> Some [of those we honor today] supported the birth of the revolution; more recently, others have answered the call to confront terrorism. Along the way, more than one million Americans have given the last full measure [of devotion]. Over 100,000 in World War I. Over 400,000 in World War II. Almost 40,000 in Korea. Over 58,000 in Vietnam. And over 5,000 have been killed in action since 9/11. Today is a reminder of the real cost of freedom, the real cost of security, and that's the human cost.

In a speech to the House of Commons on 8/21/1940, Prime Minister Winston Churchill said:

> The gratitude of every home in our island, in our Empire, and indeed throughout the world except in the abodes of the guilty goes out to the British airmen who, undaunted by odds, unweakened in their constant challenge and mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the course of human conflict was so much owed by so many to so few.

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Churchill's paean to the Royal Air Force in the Battle of Britain applies equally to America's military personnel, AC and RC, who have protected us from a repetition of 9/11/2001, by their prowess and their devotion.

In the last 25 years, most of the American people have made no sacrifices (beyond the payment of taxes) in support of necessary military operations. The entire U.S. military establishment, AC and RC, amounts to just 0.75% of the U.S. population. This tiny sliver of the population bears almost all the cost of defending our country.

On January 27, 1973, 53 years ago, Congress abolished the draft and established the AVM. The AVM has been a great success, and when Representative Charles Rangel of New York introduced a bill to reinstate the draft, he could not find a single co-sponsor.

Those who benefit from our nation's liberty should be prepared to make sacrifices to defend it. In the AVM era, no one is required to serve our nation in uniform, but our nation needs military personnel, now more than ever. Requiring employers to reemploy those who volunteer to serve is a small sacrifice to ask employers to make. All too many employers complain about the "burdens" imposed on employers by the military service of employees, and all too many employers seek to shuck those burdens through clever artifices.

I have no patience with the carping of employers. Yes, our nation's need to defend itself puts burdens on the employers of those who volunteer to serve, but the burdens borne by employers are tiny as compared to the heavy burdens (sometimes the ultimate sacrifice) borne by those who volunteer to serve, and by their families.

Reserve Organization of America

To the nation's employers, especially those who complain, I say the following: Yes, USERRA puts burdens on employers. Congress fully appreciated those burdens in 1940 (when it originally enacted the reemployment statute), in 1994 (when it enacted USERRA as an update of and improvement on the 1940 statute), and at all other relevant times. We as a nation are not drafting you, nor are we drafting your children and grandchildren.

You should celebrate those who serve in your place and in the place of your offspring. When you find citizen service members in your workforce or among job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those who serve our country in uniform?

A: As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. This firm has a great team, headed by attorneys John Maher and Kevin Mikolashek, both of whom have served as Army judge advocates for many years. These attorneys and this firm have a great record, and I am proud to join their team.

Here is a link to the Maher Legal Services website:

https://www.lawyersdefendingwarriors.com/about.

Reserve Organization of America

Join the Organization That Fights for You.

This article is one of more than 2,000 "Law Review" articles available at https://roa.org/lawcenter/ — a free legal resource that the Reserve Organization of America (ROA) has built and maintained since 1997, adding new articles every month.

ROA is the only national military organization dedicated exclusively to America's reserve components — all eight of them. From the 6,179 members of the Coast Guard Reserve to the 329,705 soldiers of the Army National Guard, ROA exists to serve the nearly 773,000 men and women who answer the call while maintaining civilian lives. No other organization does what we do for the people we serve.

Our roots run deep. On October 2, 1922, veterans of the Great War gathered at Washington's historic Willard Hotel — at the invitation of General of the Armies John J. Pershing — to build something lasting. One of the junior officers in that room was Captain Harry S. Truman, who, as President, signed ROA's congressional charter in 1950. That charter gives us a clear mission: advocate for policies that ensure adequate national security. For more than a century, we've made the case that America's Reserve Components and National Guard are among the most cost-effective pillars of our national defense.

Beyond this library of legal resources, ROA files amicus curiae ("friend of the court") briefs in the Supreme Court and federal courts, and actively educates service members, military spouses, attorneys, employers, legislators, and others about the legal rights of those who serve — and how to enforce them. We provide this information to all

service members, regardless of membership. But it's ROA members — through their dues and contributions — who make it possible.

Your membership makes the mission possible.

If you are currently serving, or have ever served, in any of America's eight uniformed services, you are eligible to join ROA — and membership starts at just $20 for a full year, or $450 for life. Officers and enlisted personnel alike qualify, whether your service was in the Active Component, the National Guard, or the Reserve. ROA has also recently expanded eligibility to include ancestors and lineal descendants of past or present service members, so families can stand with those who serve. Join online at https://members.roa.org/join/person/mbrtype.html?action=join or call 800-809-9448.

If you are not eligible for membership but believe in this mission, your financial contribution directly funds this resource and the advocacy work that protects those who serve. Donations may be mailed to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002