

## LAW REVIEW 13119

September 2013

### Reflections on the 12<sup>th</sup> Anniversary of our Generation's Date which Will Live in Infamy

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#### 1.0—USERRA generally

Today we commemorate the 12<sup>th</sup> anniversary of our generation's date which will live in infamy, 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 this dozen years we have avoided another major terrorist attack within our country.<sup>1</sup>

Freedom is not free, and it is not a coincidence that we have avoided repetition of the tragic events of September 11, 2001. Our freedom from annihilation has been bought by the sacrifices of our nation's military personnel. In military operations during the last 12 years, there have been 5,311 killed in action and another 51,480 wounded in action.<sup>2</sup>

The military operations necessitated by the September 11 disaster have had a major impact on the Reserve Components (RC)<sup>3</sup> as well as the Active Component (AC) of our nation's armed forces. The transformation of the "strategic reserve" (available only for World War III) to the "operational reserve" (routinely called for intermediate military operations like Iraq and Afghanistan) has been completed.<sup>4</sup> In the dozen years since 9/11/2001, 882,226 RC personnel have been called to the colors, including more than 300,000 who have been called up more than once.<sup>5</sup>

In the last 12 years, the vast majority of the American people have made no sacrifices (beyond the payment of taxes) to support these necessary military operations. Almost the entire cost

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<sup>1</sup> The most significant exception to this statement is the November 2009 terrorist attack at Fort Hood, which killed 14.

<sup>2</sup> See <http://www.defense.gov/news/casualty.pdf>, checked on September 11, 2013.

<sup>3</sup> Our nation's seven Reserve Components are the Army Reserve, the Army National Guard, the Air Force Reserve, the Air National Guard, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

<sup>4</sup> The transformation began on August 2, 1991, when President George H.W. Bush drew "a line in the sand" and pledged to protect Saudi Arabia and to liberate Kuwait, which had been overrun by Saddam Hussein's Iraq. As part of his forceful military response, President Bush called up RC units, in the first significant RC call-up since the Korean War.

<sup>5</sup> See OASD-RA-(RTM)-Mobilization-Weekly-Report-130910, checked on September 11, 2013.

has been borne by that tiny sliver of our population who serve our country in uniform. Active and RC military personnel account for only  $\frac{3}{4}$  of 1% of our nation's population.

This year also marks the 40<sup>th</sup> anniversary of the end of the draft and the establishment of the All Volunteer Military. The All Volunteer Military has been a great success, and when Representative Charles Rangel of New York introduced legislation to reinstate the draft he could not find a single co-sponsor. 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 we never need to return to the draft.

Having said that let me quickly add that I believe that those who benefit from our nation's liberty should be prepared to stand up and defend that liberty. ROA supports the continuation of required Selective Service registration of young men, and the extension of draft registration to include young women.<sup>6</sup> Requiring young men and women to serve when needed is neither unreasonable nor unconstitutional, and those who do not serve (for whatever reason) should recognize the debt that they owe to those who serve or have served in their place.

In 1783, shortly after our nation achieved independence from Great Britain, General George Washington said, "Each citizen of a free government owes his services to defend it." Here at ROA headquarters, in the treasured Minuteman Memorial Building, those words are inscribed on the pedestal of "The Lexington Minuteman" statue.

Through most of our nation's history, major wars have called for conscription, and the constitutionality of the draft has never been in doubt. Almost a century ago, the Supreme Court unanimously (9-0) upheld the constitutionality of the draft during World War I. *See Selective Draft Law Cases*, 245 U.S. 366 (1918). *See also Perpich v. Department of Defense*, 496 U.S. 334 (1990).

The end of the draft by no means marks the end of our nation's need for military personnel, in the AC and the RC. Congress recognized in 1973 and recognizes today that in the absence of conscription our nation needs to provide incentives and to mitigate disincentives to military service, so that a sufficient quality and quantity of young men and women will volunteer to serve our country in uniform.

Congress has enacted many laws to provide such incentives and to minimize such disincentives. One of the most important laws is the Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted in 1994 to replace with Veterans' Reemployment Rights Act (VRRA), which was enacted in 1940 as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.

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<sup>6</sup> See ROA Resolutions 11-11, 11-14, and 13-3.

Federal, state, local, and private sector employers have complained of the “burdens” that RC call-ups, and the requirements of USERRA, have put on business. All too many employers have sought to shuck their USERRA obligations through various pretexts.

I have little 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 our country in uniform, but the burdens borne by employers pale to insignificance in comparison to the heavy burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who enlist and reenlist, and by their families.

To the nation’s employers, especially those who are complaining, I say the following: Yes, USERRA puts a burden on employers. Congress fully appreciated that burden in 1940, in 1994, and at all other times. We as a nation are not drafting you, nor are we drafting your sons and daughters. You should celebrate those who are serving in your place and in the place of your offspring. When you find citizen service members in your workforce or as job applicants, you should support them cheerfully by going above and beyond the requirements of USERRA.