

**The Employer Has No Right To Demand  
Documentation for Short Periods of Military Training or Service**

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Update on Sam Wright

- 1.1.1.7—USERRA applies to state and local governments
- 1.1.3.3—USERRA applies to National Guard service
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- 1.3.1.3—Timely application for reemployment
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I have heard from a Specialist (E-4) in the Texas Army National Guard (TXARNG) who has been mistreated by his civilian employer (the Texas Department of Public Safety or TXDPS) and who has been poorly served by the leadership of the TXARNG. In this article, I will call him Mike Jones (not his real name). The purpose of this article is to appeal to the leadership of the TXDPS

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<sup>1</sup> I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1400 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted USERRA (Public Law 103-353) and President Bill Clinton signed it into law 10/13/1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). The Reserve Officers Association (ROA) initiated the "Law Review" column in 1997. I am the author of more than 1200 of the articles.

<sup>2</sup> 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. For six years (2009-15), I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have been dealing with the VRRRA and USERRA for more than 33 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 rewrite of the VRRRA. In February 1991, President George H.W. Bush presented the Webman-Wright draft to Congress as his proposal. The version signed into law by President Clinton in 1994 was 85% the same as the Webman-Wright draft. I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense 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 at Tully Rinckey PLLC, and as SMLC Director. After ROA disestablished the SMLC last year, I returned to Tully Rinckey PLLC, this time in an "of counsel" role. To arrange for a consultation with me or another Tully Rinckey PLLC attorney, please call Ms. JoAnne Perniciaro (the firm's Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

and the TXARNG to undo the injustice that have been done to Jones and to do better going forward for other Reserve Component (RC) members.<sup>3</sup>

Jones enlisted in the TXARNG in 2008 and reported to basic training. He suffered a serious shoulder injury but completed basic training successfully, after which he became a traditional ARNG member. He was called to active duty for almost a year (August 2009 to July 2010) and spent most of that time in Iraq, including combat service. While in Iraq, he suffered additional injuries in the line of duty, including injuries to his hand, his elbow, and his ears (hearing), as well as suffering from Post-Traumatic Stress Disorder (PTSD). After he was released from active duty in July 2010, he found it necessary for three years to seek and to pay for medical care out of his own pocket, because the TXARNG was unable to get its act together and arrange for military medical care, although his injuries were clearly suffered in the line of duty.

Jones was hired by TXDPS in October 2011. His initial TXDPS supervisors were supportive of his National Guard service, but after he changed jobs within TXDPS his new supervisors made it clear that they opposed his National Guard service and found it inconvenient. His civilian job involved significant travel around the huge state of Texas<sup>4</sup> training other TXDPS personnel in the operation and accessing of computerized databases. It is clear that Jones' National Guard obligations inconvenienced his TXDPS supervisors, *but that is not an excuse for violating USERRA*. When Congress enacted the VRRRA in 1940, and when it enacted USERRA in 1994, and at all other times, it recognized that this law puts a burden on civilian employers, supervisors, and co-workers. Congress determined that imposing this burden is necessary and appropriate, so that our nation can defend itself.<sup>5</sup>

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<sup>3</sup> There are seven Reserve Components of the United States armed forces. In order of size, they are the Army National Guard (ARNG), the Army Reserve (USAR), the Air National Guard (ANG), the Air Force Reserve (USAFR), the Navy Reserve (USNR), the Marine Corps Reserve (USMCR), and the Coast Guard Reserve (USCGR). USERRA is necessary and relevant, now more than ever. More than 920,000 RC members have been called to the colors since the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time. RC members make up almost half of the total personnel strength of our nation's five armed forces (Army, Navy, Marine Corps, Air Force, and Coast Guard). As Nathan Richardson and I explained in Law Review 14080 (July 2014), only 25% of young Americans aged 17-24 are eligible for military service. The other 75% are disqualified by medical issues (especially obesity and diabetes), use of illegal drugs or certain prescription medications (including medications prescribed for Attention Deficit Hyperactivity Disorder), felony convictions, educational deficiencies (no high school diploma), and other problems. Only 1% of persons aged 17-24 are both qualified for military service and willing to consider enlisting. The five armed forces need to recruit more than half of that 1% to fill their RC and Active Component (AC) recruiting quotas. Without a law like USERRA, the services would not be able to recruit a sufficient quality and quantity of RC and AC personnel to defend our country. It is most important that USERRA apply to state government employers like TXDPS, because 10% of RC personnel are employed by state governments. Please see Law Review 14047 (April 2014), titled "State and Local Government Employees Need Effective USERRA Protections."

<sup>4</sup> Texas is our nation's second largest state in area, after Alaska, and second largest in population, after California.

<sup>5</sup> Please see Law Review 15093 (October 2015). The article is titled "Having a National Guard Member as an Employee Is a Pain, but you Can Handle it."

During the 2014-15 time period, Jones performed inactive duty training (drills) at a National Guard camp in San Antonio, 113 miles from his home and civilian job in Austin, the state capital. His drills at the National Guard camp were not always limited to Saturday and Sunday, so there were conflicts between his National Guard obligations and the obligations of his civilian job. In addition to his traditional drills at the National Guard camp, he was also assigned to perform additional drills for appointments with civilian medical providers in his home community, for medical treatment necessitated by the injuries he received in Iraq in 2009-10 and at basic training in 2008.

Despite Jones' repeated requests, his TXARNG unit in San Antonio was unable to provide Jones with timely and accurate documentation of his short military service periods in the 2014-15 time period, so that he could meet the documentation demands of his civilian employer, TXDPS. As I shall explain in detail below, *the civilian employer has no right to demand documentation for short military service periods* (periods of fewer than 31 days at a time).

As I have explained in Law Review 15116 (December 2015) and many other articles, an individual must meet five simple conditions to have the right to reemployment under USERRA:

- a. Must have left a civilian job (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services, as defined by USERRA.
- b. Must have given the employer prior oral or written *notice*.
- c. Must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>6</sup>
- e. After release from the period of service, must have been timely in reporting back to work or applying for reemployment.<sup>7</sup>

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<sup>6</sup> Under section 4304 of USERRA, 38 U.S.C. 4304, a disqualifying bad discharge would include only a bad conduct discharge (BCD) or dishonorable discharge (DD), which can be awarded by a court martial as part of the sentence for a conviction of a very serious military criminal offense, or an administrative discharge characterized by the service as "other than honorable," or being dismissed or dropped from the rolls of the uniformed service. Jones has served honorably, including combat service in Iraq, and he certainly has not received one of these disqualifying bad discharges. Indeed, Jones has not been discharged at all. He is still serving in the TXARNG and is currently on active duty, at least until late May of this year.

<sup>7</sup> After a period of service of fewer than 31 days, like a drill weekend or a traditional two-week annual training tour, the person must *report for work* "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation of the person from the place of that service to the person's residence." 38 U.S.C. 4312(e)(1)(A)(i). After a period of service of 31-180 days, the person must *apply for reemployment* within 14 days after the date of release from the period of service. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, the person must apply for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D).

USERRA establishes these five conditions that the returning service member must meet to have the right to reemployment in the pre-service civilian job. Under the doctrine of *expressio unius est exclusio alterius*<sup>8</sup> neither the civilian employer nor the court has the authority to establish additional prerequisites that the returning service member must meet to have the right to reemployment.

Section 4302(b) of USERRA makes clear that USERRA supersedes and overrides state laws, employer policies, and other matters that purport to limit USERRA rights:

This chapter [USERRA] *supersedes any State law* (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites* to the exercise of any such right or the receipt of any such benefit.<sup>9</sup>

The United States Constitution provides:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>10</sup>

Jones met the five USERRA conditions for reemployment for each of his short and long periods of service. He gave his employer (TXDPS) prior *notice* each time he needed to miss work for service, and that is all that he was required to do. He was not required to seek or obtain the employer's permission to miss work for uniformed service, and the employer did not get a veto.<sup>11</sup> He was not required to provide any documentation to the civilian employer when giving notice of an impending period of uniformed service.<sup>12</sup>

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<sup>8</sup> That phrase is Latin for "to express one is to exclude all the others." With regard to the application of this doctrine to USERRA, I invite the reader's attention to *Petty v. Metro Government of Nashville-Davidson County*, 538 F.3d 431 (6<sup>th</sup> Cir. 2008), *cert. denied*, 556 U.S. 1165 (2009). I discuss *Petty* and the *expressio unius* doctrine in detail in Law Review 0864 (December 2008) and Law Review 1275 (August 2012).

<sup>9</sup> 38 U.S.C. 4302(b) (emphasis supplied).

<sup>10</sup> United States Constitution, Article VI, Clause 2, commonly called the "Supremacy Clause." Yes, it is capitalized just this way, in the style of the late 18<sup>th</sup> Century. The Supremacy Clause means that a federal statute like USERRA supersedes and overrides a Texas statute or even the Texas Constitution. State officials in Texas and other states of the former Confederacy sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

<sup>11</sup> See 20 C.F.R. 1002.87.

<sup>12</sup> Please see Law Review 91 (September 2003).

When *applying for reemployment, after a period of service of 31 days or more*, the returning service member must provide documentation upon the employer's request, but the service member is only required to provide documentation that is already in existence and that is readily available to the service member. *There is no documentation requirement whatsoever when reporting back to work after a period of service that lasted fewer than 31 days.*

Section 4312(f) sets forth the documentation requirement as follows:

(f)(1) A person *who submits an application for reemployment* in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that—

(A) the person's application [for reemployment] is timely;

(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c) [This refers to the five-year limit.]; and

(C) the person's entitlement to benefits under this chapter has not been terminated pursuant to section 4304. [This refers to the person having received one of the disqualifying bad discharges from the military, like a Bad Conduct Discharge or an Other Than Honorable Discharge.]

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary [of Labor] shall satisfy the documentation requirements in such paragraph.

(3)(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) *shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer.* If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of such person and the provision of any rights or benefits afforded the person under this chapter.

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

(4) *An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.*<sup>13</sup>

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<sup>13</sup> 38 U.S.C. 4312(f) (emphasis supplied).

Section 4331 of USERRA<sup>14</sup> gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed USERRA Regulations, for notice and comment, in the *Federal Register* in September 2004. After considering the comments received and making a few adjustments, DOL published the final USERRA Regulations in the *Federal Register* in December 2005. The DOL USERRA Regulations are codified in Title 20 of the Code of Federal Regulations, Part 1002.<sup>15</sup>

One section of the DOL USERRA Regulations strongly supports my position that TXDPS had no right to demand that Jones provide documentation after periods of uniformed service that lasted for fewer than 31 days. That section is as follows:

**Is the employee required to submit documentation to the employer in connection with the application for reemployment?**

*Yes, if the period of service exceeded 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:*

- (a) The reemployment application is timely;
- (b) The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at section 1002.103); and
- (c) The employee's separation or dismissal from service was not disqualifying.<sup>16</sup>

Two more sections of the DOL USERRA Regulations address the documentation requirement, as follows:

**Is the employer required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?**

*Yes. The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation.* If the employee is reemployed after an absence from employment for more than 90 days, the employer may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.<sup>17</sup>

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<sup>14</sup> 38 U.S.C. 4331.

<sup>15</sup> 20 C.F.R. Part 1002.

<sup>16</sup> 20 C.F.R. 1002.121 (bold question in original, emphasis by italics supplied).

<sup>17</sup> 20 C.F.R. 1002.122 (bold question in original, emphasis by italics supplied).

**What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than 30 days?**

- (a) Documents that satisfy the requirements of USERRA include the following:
- (1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;
  - (2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;
  - (3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
  - (4) Certificate of completion from military training school;
  - (5) Discharge certificate showing character of service; and
  - (6) Copy of extracts from payroll documents showing periods of service;
  - (7) Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.<sup>18</sup>
- (b) The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.<sup>19</sup>

Like many civilian employers, TXDPS has an inflated idea of the paperwork that the RC member typically receives for drill weekends and other short tours of military training or duty. For many years, I drilled in the Navy Reserve. I received no written orders or other documentation for my weekend drills, except in those rare instances when I was required to travel to a place other than the normal drill location and the Navy was providing me with the transportation and lodging. Section 4312(f) does not require the RC member to provide documentation to his or her civilian employer for short military tours because such documentation simply does not exist in most cases.

It is clear beyond any cavil that TXDPS had no right to demand that Jones provide documentation to TXDPS after short military service periods, like drill weekends and special drill periods for medical care necessitated by his injuries in Iraq. Because his TXARNG unit in San Antonio was unable or unwilling to provide timely and accurate documentation as demanded by his employer, Jones in one case made a correction (as to the date) of a military document provided by his Guard unit. For this so-called “forgery,” Jones has been threatened with firing by TXDPS. *Disciplining Jones for this so-called “forgery” is unlawful because the employer had no right to demand this documentation in the first place.*

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<sup>18</sup> Please see Law Review 100 (December 2003) concerning USERRA protection for persons who leave civilian jobs to perform NDMS service.

<sup>19</sup> 20 C.F.R. 1002.123 (bold question in original).

After failing for many years to meet its obligations to Jones, by providing him military medical care for his injuries in the line of duty, the TXARNG finally figured out a way to put him on active duty for medical treatment for 56 days, from August 5 to September 30, 2015. The TXARNG assured Jones that he would be kept on active duty long enough to get all the medical treatment that he needs, but at the end of Fiscal Year 2015 (September 30) they ran out of money and ended his active duty.

After a few days, it became clear to Jones that his active duty would not be extended, and he applied for reemployment with TXDPS on October 13, 2015.<sup>20</sup> The TXDPS personnel office told Jones that he would not be reinstated to his civilian job unless and until he provided documentation concerning his August-September active duty period. Despite his best efforts to obtain such documentation from the TXARNG, Jones did not have any such documentation. Under these circumstances TXDPS had a legal duty to reemploy Jones *while awaiting the documentation*. As a result of this USERRA violation, Jones was unemployed between September 30, when he left active duty, and January 29, 2016, when he entered a new active duty period.

Jones' new orders were scheduled to expire on March 29, but at the last moment the orders were extended again, this time until May 29. It is likely that his orders will be extended yet again, because he still needs a great deal of medical care for his Iraq injuries. If it becomes clear that Jones will not likely recover sufficiently to be "fit for duty," he will be processed for a military disability retirement. That process usually takes many months and sometimes years.

I call upon TXDPS Director Steven C. McGraw to do the following:

- a. Back off the threat to fire Jones.
- b. Reassure Jones that he will be reemployed when he completes his current period of active duty.
- c. Compensate Jones for the pay that he lost during the interim between September 30, when he left active duty, and January 29, when he entered his current active duty period. He lost this pay *because TXDPS violated USERRA*.
- d. Recommit TXDPS to full compliance with USERRA and to support, over and above the requirements of USERRA, for RC members who are employed by TXDPS or who apply for such employment.
- e. Establish a *mandatory* training class on USERRA for TXDPS supervisors and personnel officials.<sup>21</sup>

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<sup>20</sup> His application for reemployment was timely under 38 U.S.C. 4312(e)(1)(C) because he made it within 14 days after he was released from active duty on September 30.

<sup>21</sup> I volunteer to teach the class.



I call upon Major General John F. Nichols, ANG, the Adjutant General of Texas, to do the following:

- a. *Get personally involved* in advocating for the USERRA rights of Specialist Jones and all other ARNG and ANG members in Texas, as well as Texas members of the other five Reserve Components.
- b. Call upon Director McGraw in person and implore him to come into full compliance with USERRA with respect to Specialist Jones and other RC members who are employed by TXDPS or who apply for such employment.
- c. Establish or reestablish procedures whereby ARNG and ANG members receive timely and accurate documentation of their military training and service, in order to minimize problems with their civilian employers.
- d. Establish a procedure whereby Texas employers can receive telephonic or e-mail reassurance that ARNG and ANG members really did perform military duty or training on days when they claim to have done so.
- e. Establish periodic and effective training for ARNG and ANG members concerning their rights and obligations under USERRA.<sup>22</sup>

On his website, General Nichols has some beautiful words about “putting people first.” I invite the reader’s attention to his “Strategic Goals” and especially the first Strategic Goal, as follows:

**Put People First—Invest in Human Capital**

Put people first, with no exceptions! Our human capital is the single most valuable resource we have. It is incumbent on each one of us to train, coach, mentor, and guide the next generation of strong, ethical leaders. This can only be accomplished if we develop or sustain programs focused on developing resilient, mentally, physically, and spiritually healthy service members and families. This is the only way we, as an organization, will endure in this environment of uncertainty.<sup>23</sup>

Many surveys have shown that “problems with my civilian employer” and “problems with my spouse” are the principal reasons cited by persons who choose not to reenlist in the Reserve Components, or why eligible persons who may be interested choose not to join in the first place. General Nichols, I most respectfully submit that the five steps that I have proposed are an important part of “putting people first” and that those steps need to start with the personal involvement of the Adjutant General himself.

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<sup>22</sup> Such training should start with training the trainers. In March 2014, I taught a four-hour Continuing Legal Education (CLE) session for more than 100 ARNG and ANG judge advocates at Fort Indiantown Gap, Pennsylvania. I volunteer to teach a similar CLE for RC judge advocates here in Texas. In January 2016, I relocated from DC to a small town near Austin.

<sup>23</sup> See <https://tmd.texas.gov/office-of-the-adutant-general> (bold print in original).

In a speech to the House of Commons on August 20, 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, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few.

I most respectfully submit that Winston Churchill's paean to the airmen of the Royal Air Force in the Battle of Britain applies equally to the tiny band of brothers and sisters who have served our country in uniform since September 11, 2001.<sup>24</sup> By their prowess and their devotion, these RC and AC personnel have prevented a recurrence of the events of that terrible Tuesday morning almost 15 years ago.

The 99% of the American people who are not serving and have not served our country in uniform since September 11, 2001 need to show their gratitude to the 1% who serve, in tangible ways. That tangible gratitude should extend to the RC service members and veterans that the 99% encounter in their civilian work places, as employees or coworkers. That tangible gratitude should start with USERRA compliance, cheerfully and without carping.

I most respectfully submit that General Nichols needs to take this message to Director McGraw, personally, forcefully, and eloquently.

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<sup>24</sup> Only about 1% of the American people have served our country in uniform since the "date which will live in infamy" for our time.