

## **Reserve Components Are a Repository of Cyber and other Critical Skills**

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Update on Sam Wright

### **1.0—USERRA generally**

The prestigious nonprofit RAND Corporation has conservatively estimated that 100,000 Army Reserve and Army National Guard soldiers have cyber expertise.<sup>3</sup> There are likely a similar number of cyber experts in the other five Reserve Components,<sup>4</sup> and cyber expertise is just one of many important skill sets needed by the United States military.

This points to an important strength of the Reserve Components. These components have personnel who have important knowledge and skill sets, gained from civilian education and employment, that cannot be readily replicated in the Active Component of the armed forces. The number of Reserve Component personnel is almost equal to the number of Active Component personnel serving full-time, so the Reserve Components account for almost half of our nation's available pool of trained military personnel. Almost one million Reserve

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1700 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 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. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 34 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.

<sup>3</sup> See <https://www.rand.org/blog/2017/04/reservists-and-the-national-guard-offer-untapped-resources.html>. The article is by Isaac R. Porche III and Brian D. Wisniewski.

<sup>4</sup> The other five Reserve Components are the Air Force Reserve, the Air National Guard, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

Component service members have been called to the colors since 9/11/2001, the “date which will live in infamy” for our time.

Because they are only paid for the days when they serve or train, Reserve Component personnel are a great deal for the taxpayer. The days when Reserve Component service was generally limited to “one weekend per month and two weeks in the summer” are gone, and probably gone forever. Under a law called the Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>5</sup> Reserve Component personnel have the right to time off from their civilian jobs (federal, state, local, or private sector) for voluntary or involuntary military service or training, and USERRA protects those personnel from discrimination in initial employment, retention in employment, and promotions and benefits of employment. Without a law like USERRA, the services would not be able to recruit and retain a sufficient quality and quantity of personnel to defend our country.<sup>6</sup>

As the Reserve Components have transformed from a “strategic reserve” (available only for World War III, which thankfully never happened) to an “operational reserve” (routinely called upon for intermediate military operations like Iraq and Afghanistan), the burdens on civilian employers have no doubt increased. But the burdens on employers are tiny as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who serve our country in uniform, and by their families. Congress was fully aware of the burden on employers in 1940 (when it first enacted the federal reemployment statute), in 1994 (when it enacted USERRA as a long-overdue rewrite of the 1940 statute), and at all other relevant times. Congress decided that the burden on employers is justified by our nation’s need to defend itself.

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted USERRA<sup>7</sup> in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).<sup>8</sup> The STSA is the law that led to the drafting of more than ten million young men (including my late father) for World War II.

During the congressional debates on the STSA, Senator Elbert Thomas of Utah conceived of the idea of requiring civilian employers to reemploy those who were called to the colors, and he

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<sup>5</sup> USERRA is codified in title 38 of the United States Code, sections 4301 through 4335, 38 U.S.C. 4301-35.

<sup>6</sup> Please see Law Review 14080 (July 2014).

<sup>7</sup> Public Law 103-353, 108 Stat. 3162. The citation means that USERRA was the 353<sup>rd</sup> Public Law enacted during the 103<sup>rd</sup> Congress (1993-94), and you can find this law, in the form that it was enacted in 1994, in Volume 108 of *Statutes at Large*, starting on page 3162. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. 4301-35). USERRA has been amended several times since it was enacted in 1994. As I shall explain further below, a 1998 amendment is especially pertinent to your case.

<sup>8</sup> Public Law 76-783, 54 Stat. 885.

offered an amendment to require such reemployment. He explained the rationale for his amendment as follows:

It is not unreasonable to require the employers of such men [those who will be drafted under the law we are considering today] to rehire them upon the completion of their service, since the lives and property of employers, as well as the lives and property of everyone else in this country, are defended by such service.<sup>9</sup>

Senator Thomas' eloquent argument persuaded his colleagues in the Senate, and later in the House, and the original VRRA was included in the STSA as it was signed into law by President Franklin D. Roosevelt in 1940. As originally enacted, the VRRA only applied to draftees, but just one year later, as part of the Service Extension Act of 1941,<sup>10</sup> Congress expanded the VRRA to make it apply to voluntary enlistees as well as draftees.

The federal reemployment statute has been on the books for 77 years and is part of the fabric of our society. There have been 16 Supreme Court decisions under the VRRA and one (so far) under USERRA.<sup>11</sup> In its first VRRA case, the Supreme Court established the principle of liberal construction of this vital law. In the majority opinion, written by Justice William O. Douglas, the Court held: "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."<sup>12</sup> Justice Douglas' eloquent words about the members of my father's generation (the so-called "Greatest Generation") who fought World War II apply equally to their children, grandchildren, and great-grandchildren who are fighting the Global War on Terrorism today, in the aftermath of the terrorist attacks of September 11, 2001, the "date which will live in infamy" for our time.

It is important, now more than ever, that Reserve Component personnel and their civilian employers are aware of their rights and responsibilities under the federal reemployment statute, USERRA. On our website ([www.roa.org/lawcenter](http://www.roa.org/lawcenter)) you can find more than 1700 "Law Review" articles about military-relevant laws, and more than 1000 of them are about USERRA and related laws. We also have a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

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<sup>9</sup> 96 Cong. Rec. 10573. Senator Thomas' eloquent statement is quoted in *Leib v. Georgia Pacific Corp.*, 925 F.2d 240, 246 (8<sup>th</sup> Cir. 1991).

<sup>10</sup> Public Law 77-213, 55 Stat. 626, 627.

<sup>11</sup> Please see Category 10.1 in our Law Review Subject Index. You will find a case note about each of these 17 Supreme Court decisions.

<sup>12</sup> *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

For six years (June 2009 through May 2015), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA.<sup>13</sup> My paid ROA employment ended two years ago, but I have continued that work as a volunteer. I am available by e-mail at [samwright50@yahoo.com](mailto:samwright50@yahoo.com). I will provide, at no charge, up to one hour of consultation about USERRA or other military-relevant laws, and if you need more than that I am available at a reasonable rate.

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<sup>13</sup> Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC.