

LAW REVIEW¹ 18066

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America Will Be the Land of the Free only so long as it Remains the Home of the Brave

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[Update on Sam Wright](#)

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Like much of America, I enjoyed watching the 2018 Major League Baseball (MLB) All-Star Game on television (Fox), but as far as I am concerned the highlight of the evening came 25-15 minutes before the first pitch, when MLB honored 30 of the 72 living Medal of Honor (MOH) recipients, in a moving ceremony described by the American Legion as follows:

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "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 Spouse Protection Act (USFSPA), 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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 of the articles.

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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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. You can reach me by e-mail at SWright@roa.org.

As former American Legion Baseball players were [among the game's greats](#) participating in the 2018 Major League Baseball All-Star Week events in Washington, D.C., MLB showed tremendous support for the military.

Prior to the start of the All-Star Game on July 17, [30 Medal of Honor recipients](#) were honored on the field in front of a sellout crowd and a national television audience. Five of the recipients have notable connections to American Legion Baseball.

The first pitch was thrown out by Medal of Honor recipient [James McCoughan](#), a 35-year Legion Baseball coach, a 24-year member of American Legion Post 49 in South Haven, Mich., and Post 49's second vice commander. Prior to McCoughan's moment, the Medal of Honor recipient names were read and the heroes received thunderous applause from a grateful crowd as the collection of All-Stars rushed to meet them.

Four of the Medal of Honor recipients recognized have been honored guests at the American Legion World Series in Shelby, N.C.

Donald "Doc" Ballard was a guest in Shelby last year before [addressing](#) The American Legion's national convention in Reno, Nev.

Shelby's 2016 guest, [James A. Taylor](#), was an American Legion Baseball player for Arcata, Calif., Post 274 before entering the service. He is now a lifetime member of Post 274 and uses his medal to [inspire young people](#).

[Michael J. Fitzmaurice](#) was an honored guest of the 2015 American Legion World Series and the Legionnaire's name [adorns a South Dakota veterans home](#) with capacity for 100 veterans.

Walter "Joe" Marm, who attended the American Legion World Series in 2013, [shared his story](#) with The American Legion.

"Bringing in Medal of Honor recipients each year to Shelby is so important," said Daniel Dellinger, past national commander of The American Legion, who attended the week's festivities with American Legion Baseball national staff. "It gives the players something to look up to. Those gentlemen who are the recipients of the Medal of Honor are important role models and this year, with James McCoughan coming in with experience with American Legion Baseball, I think is just phenomenal."

The All-Star pregame ceremony was just part of an overwhelming tribute to military over the course of the week. The week started with the first-ever Armed Services Classic, a softball tournament featuring all five branches. The Air Force took a 9-2 victory over the Army in the title game to lift the trophy, but Army Staff Sgt. Jacob Hensal went on to win the Armed Forces Home Run Derby.

Prior to the Home Run Derby on Monday, 45 members of the Air Force District of Washington were told they were going to a watch party, only to find themselves on the field being celebrated by the crowd.

The pregame ceremony also featured the Navy honoring America with a garrison flag in the outfield and a flyover.

During the Home Run Derby, over \$1 million was raised for military charities in an event won by American Legion Baseball alum Bryce Harper, who was decked out in American flag attire with his American flag bat.

The All-Star Game pre-game reception was hosted at the Navy Yard and pregame festivities included another flyover.

During the All-Star Game, Air Force Sgt. Cole Condiff was reunited with his surprised pregnant wife and daughter for the first time in six months.

“Baseball helps create leadership qualities and what Major League Baseball is doing here is just fantastic,” Dellinger said. “It is a great opportunity to work with Major League Baseball as we continue to push our children and youth programs, with baseball, and hopefully here soon, softball. Whatever we can do to engage the young men and women in bat and ball sports.”

“It has just been a phenomenal week,” Dellinger continued. “Major League Baseball has done everything possible to highlight the military and it is great.”³

The MOH recipients, living and dead, have set a high standard for serving and protecting our country during World War II, the Korean War, the Vietnam War, and the military operations that were necessitated by the terrorist attacks of 9/11/2001. But who will defend our country in the next generation? “Also, I heard the voice of the Lord saying: Whom shall I send, and who will go for us? Then said I. Here am I. Send me.”⁴

Long before he was President, Ronald Reagan said:

Freedom is never more than one generation away from extinction. We didn’t pass it to our children in the bloodstream. It must be fought for, protected, and handed on for

³ <https://www.legion.org/baseball/242471/major-league-baseball-honors-military-during-all-star-week>.

⁴ King James Bible, *Isaiah*, Chapter 6, Verse 8. *Isaiah* is the 23rd book of the *Old Testament*. See also Law Review 16057 (June 2016).

them to do the same, or one day we will spend our sunset years telling our children and our children's children what it was once like in the United States where men were free.⁵

In Law Review 17055 (June 2017), I wrote:

As we celebrate Memorial Day and Independence Day, let us remember that were it not for the sacrifices of military personnel, from the American Revolution to the Global War on Terrorism, none of us would enjoy the blessings of liberty. 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.⁶

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.⁷ A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.⁸

Almost two generations ago, in 1973, Congress abolished the draft and established the All-Volunteer Military (AVM). 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), the Servicemembers Civil Relief Act (SCRA), and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), I want to remind those folks that our government is not drafting you, nor is it drafting your children and grandchildren. Yes, these three 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

⁵ Future President Ronald Reagan, Address to the Annual Meeting of the Phoenix Chamber of Commerce, 3/30/1961.

⁶ Published in *The Writings of George Washington* (1938), edited by John C. Fitzpatrick, Volume 26, page 289.

⁷ 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).

⁸ *Arver v. United States*, 245 U.S. 366 (1918). The citation means that you can find this decision in Volume 245 of *United States Reports*, starting on page 366.

population who volunteer to serve in uniform, in the Active Component (AC) or the Reserve Component (RC).

As we approach the 16th 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 decade and a half 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 of American military personnel, AC and 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.

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 16 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, more than 44 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. 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. Maintaining the AVM requires that we provide incentives and minimize disincentives to serve among the young men and women who are qualified for military service.

I have written:

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 All-Volunteer Military, recruiting is a constant challenge. Despite our country's current 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 medicine 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 military service (especially service in the Reserve or National Guard) will make them unemployable in civilian life. There is a compelling government interest in the enforcement of USERRA.⁹

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.

⁹ Law Review 14080 (July 2014) (footnotes omitted). Nathan Richardson was my co-author on Law Review 14080.

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.

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.