

LAW REVIEW¹ 19006

January 2019

It Is Not Illegal for a Reservist who Is a Lawyer To Represent an Individual with a Claim against the Federal Government

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

[Update on Sam Wright](#)

9.0--Miscellaneous

Q: I am a Lieutenant Commander (O-4) in the Navy Reserve Judge Advocate General's Corps and a member of the Reserve Organization of America.³ I have read with great interest

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 1500 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.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost

several of your “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.

I am a personal injury, plaintiff’s side trial lawyer in private practice, and I specialize in medical malpractice claims. I have heard from a potential client—the wife of an active duty Navy sailor. She has what sounds like a strong malpractice claim against the Federal Government under the Federal Tort Claims Act, and I would like to represent her. My Navy Reserve commanding officer told me that, as a reserve judge advocate, I am precluded from undertaking to represent a person with a claim against the Federal Government, and he cited section 205(a) of title 18 of the United States Code. But in Law Review 13129 (October 2013) you and First Lieutenant Gavriel Swerling⁴ wrote that section 205(a) does not apply to Reserve officers when they are not on active duty. Do you adhere to what you and Lieutenant Swerling wrote more than five years ago?

A: Yes.

Section 205(a) provides:

Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the proper discharge of his official duties—

- (1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim; or
- (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest; shall be subject to the penalties set forth in section 216 of this title.⁵

I invite your commanding officer’s attention to the pertinent language of section 202(a), as follows:

equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more personnel make up almost half of our nation’s pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

⁴ Gavriel Swerling was a law student when he helped me write that article in 2013. He is now an active duty Marine Corps Captain and judge advocate.

⁵ 18 U.S.C. 205(a).

Notwithstanding section 29(c) and (d) of the Act of August 10, 1956, a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is *voluntarily serving* a period of extended active duty *in excess of one hundred and thirty days* shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving *involuntarily* shall be classified as a special Government employee. The terms "officer or employee" and "special Government employee" as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces.⁶

The quoted language from section 202(a) means that section 205(a) [the rule against representing a client with a claim against the United States] does not apply to you on the following kinds of days:

- a. Days when you perform no military duty.
- b. Days when you perform inactive duty training (drills).
- c. Days when you are on active duty *solely for training* (like your Navy Reserve annual training).
- d. Days when you are on *involuntary* active duty (like a mobilization).
- e. Days when you are on *voluntary active duty for a period of fewer than 131 consecutive days*.

It is only when you are on active duty voluntarily for a period of 131 days or more that you are subject to section 205 and some other sections of title 18. This provision is vague, but I urge you to interpret it that you are precluded from day one if you volunteer for a period of active duty of 131 days or more.

I urge you to observe some precautions against conflicts of interest or the appearance of conflicts of interest. First, you should make your Navy Reserve superiors aware of the fact that you are a plaintiff's personal injury lawyer. Some kinds of duties should not be assigned to you because of the potential for conflicts of interest or apparent conflicts of interest.

Second, you should avoid seeking out assignment to one of the handful of Navy Reserve pay billets that involve the defense of Federal Tort Claims Act claims against the Navy. You should develop another area of legal expertise (maybe USERRA) and promote your expertise in that area within the Navy Reserve.

⁶ 18 U.S.C. 202(a) (emphasis supplied).

Third, you must not under any circumstances do work for your private law practice during times when you are performing military duties. I recall that in 1980-81, after I first left active duty, I was assigned to a Navy Reserve unit in Houston, and at least one of the lawyers in the unit brought case files from his private practice and read them at the reserve center during our drills. That bothered me then, and it still bothers me.

Fourth, you should not talk about your private law practice while you are performing your military duties. You need to avoid the appearance that you are using the Navy Reserve to troll for clients.

Almost one million Reserve and National Guard personnel have been called to the colors since the terrorist attacks of 9/11/2001. When I first affiliated with the Navy Reserve in 1980, after I left my initial three years of active duty, the Navy Reserve obligation was pretty much limited to "one weekend per month and two weeks in the summer." That is certainly not the case now. Your being mobilized is more than a theoretical possibility, and you need to be prepared for that contingency, which may happen on short notice. You need to arrange for other attorneys who are not themselves Reserve Component members to take over your cases if you are mobilized. Thank you for your service to our country and for your membership in the Reserve Organization of America.