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The Struggle against Forced Arbitration Continues

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About Sam Wright

1.5—USERRA arbitration
1.8—Relationship between USERRA and other laws/policies

Each year, Congress enacts the National Defense Authorization Act (NDAA) for the current fiscal year.[3] The NDAA authorizes the activities of the Department of Defense (DOD) and the national defense activities of the Department of Energy (nuclear weapons and nuclear power for Navy aircraft carriers and submarines). The NDAA also makes many substantive changes to various titles of the United States Code. On December 20, 2019, President Trump signed the NDAA for Fiscal Year 2020.[4]

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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 1700 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 43 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] The federal fiscal year starts on October 1 and ends of September 30. Fiscal Year 2020 began on October 1, 2019.

[4] Public Law 116-92.

With a bill as lengthy and complex as the NDAA, there will always be one version passed by the House of Representatives and a different version passed by the Senate. When this happens, the usual procedure is a "conference." The House and Senate each appoint conferees, who negotiate line-by-line about the two differing versions and produce a conference committee report that includes a compromise version. When both houses of Congress have passed identical language, the bill is presented to the President for him to sign or veto. This usual procedure was followed in this case.

As I have explained in Law Review 19035 (March 2019) and several other articles, I strenuously object to the use of mandatory binding arbitration in cases arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Submitting one's case to an arbitrator who has an incentive to rule for the employer to get repeat business from that employer is a very poor substitute for submitting one's case to a federal judge appointed by the President with Senate confirmation and a jury of one's peers. Arbitrators are supposed to apply and enforce substantive laws like USERRA, but they frequently misunderstand or intentionally flout those laws, and when that happens there is no remedy because the arbitrator's decisions about law and fact are not reviewed in court. Employees who also serve our country in the National Guard or Reserve should not be forced into mandatory arbitration based on "agreements" that they were forced to sign to get hired in the first place.

The House-passed version of NDAA 2020 included a section (section 545) that would have amended sections 4303 and 4303 of USERRA[5] to add language clarifying that USERRA overrides an agreement by an employee or potential employee to submit future USERRA disputes to binding arbitration. Here is the text of that section:

> ***SEC. 545. CLARIFICATIONS REGARDING SCOPE OF EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES.***
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> (a) *CLARIFICATION REGARDING DEFINITION OF RIGHTS AND BENEFITS.—Section 4303(2) of title 38, United States Code, is amended—*
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> (1) *by inserting "(A)" before "The term"; and*
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> (2) *by adding at the end the following new subparagraph:*
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> "(B) *Any procedural protections or provisions set forth in this chapter shall also be considered a right or benefit subject to the protection of this chapter.*".

[5] 38 U.S.C. 4302, 4303.

(b) *CLARIFICATION REGARDING RELATION TO OTHER LAW AND PLANS FOR AGREEMENTS.—Section 4302 of such title is amended by adding at the end the following:*

"(c) (1) *Pursuant to this section and the procedural rights afforded by subchapter III of this chapter, any agreement to arbitrate a claim under this chapter is unenforceable, unless all parties consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration.*

"(2) *For purposes of this subsection, consent shall not be considered voluntary when a person is required to agree to arbitrate an action, complaint, or claim alleging a violation of this chapter as a condition of future or continued employment, advancement in employment, or receipt of any right or benefit of employment.*"

I am very pleased with the wording of this proposed USERRA amendment. I did not draft this language, but I could not have done better if I had drafted it.

The House-passed version of the NDAA also contained a similar section (section 550H) that would have made unenforceable any contract with a member of the uniformed services, or with the service member and his or her spouse jointly, that provided for the use of binding arbitration to resolve a controversy under the contract and the Servicemembers Civil Relief Act (SCRA). The Senate-passed version contained no similar provisions.

The Conference Committee report stated that "the Senate receded," but it was really the House that receded. The compromise NDAA version passed by both houses and signed by the President eliminated both section 545 and section 550H. In their place, NDAA 2020 included an essentially meaningless provision requiring the Government Accountability Office (GAO) to study the issue and report to the Senate Armed Services Committee (SASC) and the House Armed Services Committee (HASC) by January 2021. Here is the pertinent language of the Conference Committee Report:

> The House amendment contained a provision (section 545) that would amend section 4303 of title 38, United States Code, to render unenforceable any part of a contract or agreement that would mandate the use of arbitration to resolve a claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA), unless all parties consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board. The House amendment also contained a provision that would provide that any contract with a servicemember, or a servicemember and the servicemember's spouse jointly, that provides for the use of arbitration to resolve a controversy under the contract and the Servicemembers Civil Relief Act (SCRA), arbitration may be used only if all parties to the matter consent after such controversy arises.

> The Senate bill contained no similar provisions.
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> The Senate recedes with an amendment that would require the Comptroller General of the United States[6] to conduct a review and, not later than January 31, 2021, submit a report to the Committees on Armed Services of the Senate and House of Representatives regarding the effects of the common commercial and governmental practices of including a mandatory arbitration clause in employment and consumer agreements, on the ability of servicemembers to assert claims under USERRA and the SCRA.
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> The report will: (1) identify each process by which a servicemember may assert a claim under, and secure redress for violations of, USERRA and the SCRA; (2) assess each process identified under prescribed criteria; (3) determine the extent to which each process identified achieved a final disposition favorable to the servicemember; (4) assess general societal trends in the use of mandatory arbitration clauses in employment and consumer agreements; and (5) assess the effects of mandatory arbitration clauses in employment and consumer agreements on military readiness and deployability, as well as on the willingness of employers to employ and consumer service businesses to provide services to servicemembers and their families.[7]

We (the Reserve Officers Association, now doing business as the Reserve Organization of America) are disappointed with this outcome, but we will continue our efforts to preclude forced arbitration in USERRA and SCRA disputes. Please see Law Review 19035 (March 2019) for a detailed discussion of the forced arbitration issue and of our objections to forced arbitration.

Forced arbitration is just one of the clever artifices devised by employers and their attorneys to avoid complying with their obligations to employees and potential employees who have chosen to serve our country in uniform. I call upon employers to comply cheerfully with USERRA and to go above and beyond the requirements of federal law in supporting employees and potential employees who also serve our country in uniform, in the Reserve and National Guard. 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:

[6] The Comptroller General is the head of the Government Accountability Office (GAO), which has been described as the "investigative arm of Congress."
[7] Get citation.

> 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.[8]

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.[9] A century ago, in the context of World War I, the United States Supreme Court upheld the constitutionality of the draft.[10]

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 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.

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

[9] 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).

[10] *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.

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 All-Volunteer Military (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.[11]

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.

Please join or support ROA

This article is one of 1900-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

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

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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