

Memorial Day 2022

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

1.0—USERRA generally

7.1—Election officials must get the absentee ballots out in time for service members to vote

On May 30, 2022, the Falls County Historical Commission and American Legion Post 31 put on the 2022 Memorial Day commemoration for Falls County, Texas. I was the keynote speaker. Here is my speech:

“I heard the voice of the Lord saying: “Whom shall I send? And who will go for us? Then said I. Here I am. Send me.”

—Isaiah, chapter 6, verse 8.

Several years before he became our 40th President, Ronald Reagan said:

“Freedom is a fragile thing, and it is never more than a generation away from extinction. ..It must be fought for and defended by each generation.”

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,000 “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 Spouses’ 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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for “other than Sam” articles by other lawyers.

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 45 years, I have collaborated 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 (VRRRA—the 1940 version of the federal reemployment statute) for 38 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 VRRRA 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 VRRRA 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 <mailto:swright@roa.org>.

Who is defending our country in this generation? And who will defend it in the next generation?

The entire United States military establishment—Active, National Guard, and Reserve—amounts to only $\frac{3}{4}$ of 1% of our nation's population. And every one of those service members is a volunteer. Almost half a century ago, in January 1973, Congress abolished the draft and established the All-Volunteer Military.

I fervently hope that our nation never needs to return to the draft. With two generations of volunteers, our nation has the best-motivated, best-led, best-equipped, and strongest military in the world—perhaps in the history of the world. That would likely not be possible with draftees. Just look at the woeful performance of Russian conscripts in Ukraine if you have thought about supporting the reinstatement of conscription in our country.

I favor draft registration, as an insurance policy against an existential threat and another conflict of World War II proportions, but I fervently pray that we will never need to call up those who have registered with Selective Service, as required by law.

In the all-volunteer era, recruiting is a constant challenge, especially since only 1% of the youth population is interested in and qualified for military service.

Of the young men and women in the 17-24 age group, 75% are not qualified for military service because of medical issues (especially obesity and diabetes), the use of illegal drugs or certain prescription medicines (like those prescribed for conditions like attention deficit hyperactivity disorder), criminal convictions, and educational deficiencies (no high school diploma). And only 1% of the young men and women in the age 17-24 cohort are qualified and are willing to consider enlisting in our nation's military. The Army, Navy, Marine Corps, Air Force, and Coast Guard, and the newly-created Space Force, need to recruit more than half of that 1% to meet their recruiting quotas.

And where do we, as a nation, get that $\frac{1}{2}$ of 1%? Rural counties like Falls County, and small towns like Marlin, Lott, and Rosebud, are grossly overrepresented in the United States military, out of all proportion to their tiny share of the total population of our country. Right here in Marlin, you can see the posters showing 12 names and photographs of the sons and daughters of this little town who are currently serving our country in uniform. Just look to your left as you exit this courthouse. As you drive east on Live Oak Street toward Texas 6, you will see those posters on your right and your left.

And what do we owe to those sons and daughters who serve for us in this generation? We owe them a debt that we can never repay, but let us start by letting them know that they are in our thoughts and prayers. Those posters on Live Oak Street are a tangible way of doing this.

In my 71 years, I have been to many small towns and large cities, and I do not recall ever having seen posters like this anywhere else.

And let us go out of our way to keep in touch with these young men and women from Falls County who are serving our country in the armed forces. They are hundreds if not thousands of miles away from home, and they do not have the opportunity to watch central Texas television or listen to central Texas radio. They probably don't have time to read the *Marlin Democrat* or the *Waco Tribune-Herald*. When political candidates and their volunteers canvass door-to-door or by telephone, they do not reach the young men and women who are eligible to vote in this county but who must do so by absentee ballot, if they are to vote at all. I hope that political parties and candidates will keep these young men and women in mind and will reach out to them by mail or e-mail.

For military personnel serving at sea or at overseas duty stations, mail service can be slow and intermittent. All too often, military personnel who have *tried* to vote, and who have made timely applications for absentee ballots, have been unable to cast ballots that really got counted, because local election officials did not get absentee ballots sent out in time for these service personnel to receive, mark, and return them in time for them to be counted.

Since 2009, federal law has required every local election official in our country—and there are more than 7,600 of them—to transmit absentee ballots to military voters (within or outside the United States) by the 45th day preceding any general, primary, runoff, or special election for federal office. Let us ensure that our elections office here in Falls County meets or exceeds this standard.

Some of our county's sons and daughters in uniform will remain on active duty for a full career of 20 years or more, but most will be coming home in four to eight years. Those who left civilian jobs to serve our country in uniform have the legal right to return to those jobs, and to receive seniority and pension credit for their service time, under a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA).

This law was originally enacted 82 years ago, in 1940, and it was substantially updated and improved in 1994 and given its current name. This law applies to almost all employers in this country, including the Federal Government, the states, the political subdivisions of states (local governments), and private employers, regardless of size.

In an important case that has made it all the way to the United States Supreme Court, our state (Texas) has tried to hide behind the hoary doctrine of sovereign immunity ("The King can do no wrong.") to avoid complying with USERRA. The case is *Torres v. Texas Department of Public Safety*. The oral argument was conducted on 3/29/2022, and we expect the Supreme Court to

release its decision any day now, and certainly before the current Supreme Court term ends in late June.

The Reserve Organization of America (ROA), of which I am an elected national officer, filed an amicus curiae (“friend of the court”) brief in the Supreme Court, urging the High Court to take up the *Torres* case. After the Supreme Court granted certiorari (discretionary review) on 12/15/2021, ROA filed a new brief on the merits.

The assertion of sovereign immunity by Texas and many other states is important to ROA because 100,000 National Guard and Reserve part-timers (10% of the Reserve Component force) have civilian jobs working for state agencies. If these 100,000 service members cannot sue when their employers flout USERRA, this law is of little value to them. Without a law like USERRA, and without effective enforcement of that law, it would not be possible for the services to recruit enough soldiers, sailors, airmen, Marines, Coast Guard members, and Space Force Guardians to defend our country.

Of course, most of our country’s sons and daughters who enlisted in our nation’s armed forces did so right out of high school or college, so they do not have pre-service civilian jobs. We need to make sure that they will be able to join the civilian workforce and will not remain permanently behind those of their age cohort who remained at home, enjoying the protection of those who served.

On this Memorial Day, and every day, let us remember those who have served and defended our nation, from the American Revolution to the current day. And let us remember especially those who made the ultimate sacrifice, and their parents, spouses, and children who were left behind.

Saying “thank you for your service” is a good place to start, but we as a nation must do much more than that for those who serve and have served our country in the military. Happy Memorial Day.

End of Memorial Day speech

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This article is one of 2,000-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.

ROA is almost a century old—it was established on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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 eight³ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002⁴

Here is a link to a Military.com article dated 6/10/2022, about the Army's current difficulties in meeting its recruiting quota:

https://www.military.com/daily-news/2022/06/10/army-involuntary-extending-assignments-recruiters-service-scrambles-fill-ranks.html?ESRC=mr_220613.nl

³ Congress recently established the United States Space Force as the 8th uniformed service.

⁴ You can also donate on-line at the ROA website, www.roa.org.