LAW REVIEW[1] 24040
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Recent Supreme Court Decision May Detract from the Weight To Be Given to the Department of Labor USERRA Regulations.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.6—USERRA and statutes of limitations.
1.7-USERRA Regulations.
10.2—Other Supreme Court decisions.

Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[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 (VRRA—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 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 mailto:swright@roa.org.

***Loper Bright Enterprises v. Raimondo,* 2024 U.S. LEXIS 2882 (June 28, 2024).**

Q: I am a life member of the Reserve Organization of America (ROA),[3] and I recently retired from the Army Reserve as a Colonel. I only recently became aware of the "Law Review" articles available on the ROA website. I regret that I did not know about your articles concerning the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 2007, when I was called to active duty, as an Army Reserve Captain and deployed to Iraq with my Army Reserve unit.

I reported to active duty in January 2008 and returned to my home and civilian job a year later, in January 2009. I have spent my career as a police officer in a major city—let us call it Gotham City. In September 2008, while I was on active duty in Iraq, the Gotham City Police Department (GCPD) conducted a promotion exam, from Patrolman to Sergeant.

I knew about the exam, and I contacted the GCPD by telephone and e-mail, demanding that I be given the opportunity to take the exam. The GCPD said that there were a handful of eligible GCPD Patrolmen on active duty in Iraq at the time and that I could travel to the "Green Zone" in Baghdad to take the exam at the American Embassy.

To take the promotion exam on the same day that it was offered back home in Gotham City, I would have had to travel 400 miles on very dangerous roads. My Army commanding officer denied my request to

[3] The Reserve Officers Association was founded in 1922 and chartered by Congress in 1950. In 2018, our members amended our organization's Constitution, expanding membership eligibility to include enlisted personnel as well as officers. We adopted the "doing business as" name of Reserve Organization of America to emphasize that we represent and seek to recruit as members of our organization service members of all ranks and services, from E-1 to O-10.

leave my unit for a few days to travel to Baghdad to take the 2008 promotion exam. Thus, I missed the opportunity to take the exam.

I left active duty and returned to work at the GCPD in January 2009. I have read and reread your Law Review 15116 (December 2015). I am convinced that I met the five USERRA conditions for reemployment.[4] A few days after I returned to work, I inquired about taking a make-up promotion exam, and the GCPD HR Department told me that make-up exams are not offered.

The next time that the promotion exam, from Patrolman to Sergeant, was offered did not come until September 2013, five years after the exam that I missed while in Iraq. On that exam, I had a near-perfect score—the highest score of any Patrolman taking the exam in September 2013.

I was promoted to Sergeant in the GCPD in January 2014. I contend that I would have been promoted to Sergeant more than four years earlier if I had not been called to active duty in 2008 or if the GCPD had given me the opportunity to take a make-up exam shortly after I returned to work in January 2009.

Recently, while doing research on the Internet, I stumbled upon your Law Review 18106 (October 2018). Reading that article brought to my attention that I had an enforceable legal right to take a make-up exam in 2009, after I returned to work at the GCPD after my year in Iraq. I complained to the GCPD HR Director and to the City Attorney, and I provided a copy of Law Review 18106 to each of them.

[4] I left my GCPD job to report to active duty as ordered. 38 U.S.C. § 4312(a). I gave the GCPD prior oral and written notice as soon as the Army informed me that I was being called to active duty. 38 U.S.C. § 4312(a)(1). I did not exceed the five-year cumulative limit on the duration of my periods of active duty relating to my GCPD employment. 38 U.S.C. § 4312(c). I served honorably, and I did not receive a disqualifying bad discharge from the Army. 38 U.S.C. § 4304. I applied for reemployment immediately after I returned home from Iraq, well within the 90-day deadline. 38 U.S.C. § 4312(e)(1)(D).

The City Attorney read your article and noted that you cite, quote from, and rely upon the Department of Labor (DOL) USERRA Regulation and specifically to the following provision:

> **(b)** If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.[5]

[5] 20 C.F.R. § 1002.193(b).

The City Attorney said that, under a 1984 decision of the United States Supreme Court, a federal agency's interpretation of the statute that it is responsible for enforcing is entitled to special deference in the courts, but that 1984 Supreme Court precedent was very recently overruled by a new Supreme Court decision and that the DOL USERRA Regulation is now "not worth the paper that it is printed on." What do you say about that?

A: It is not correct to say that the DOL USERRA Regulation is "not worth the paper that it is printed on," but it is correct to say that a very recent Supreme Court decision has greatly reduced the deference that courts are required to give to administrative agency interpretations of federal statutes.

In 1984, the Supreme Court held:

> When a court reviews an agency's construction [interpretation] of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its construction of the administrative interpretation. Rather, if the statute is silent or ambiguous, the question for the court is whether the agency's answer is *a permissible construction of the statute*.[6]

Very recently, on 6/28/2024, the Supreme Court expressly overruled the *Chevron* precedent and held:

[6] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-843 (1984) (emphasis supplied).

Congress in 1946 enacted the APA [Administrative Procedure Act] "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *Morton Salt,* 338 U.S. at 644. It was the culmination of a rethinking of the place of administrative agencies in a regime of separate and divided powers." *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670-671 (1986).

In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 [of the APA] directs that "to the extent necessary for decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be … not in accordance with law."

The APA thus codifies the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*[7] that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action (emphasis added)—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering these legal questions.[8]

[7] *Marbury v. Madison,* 5 U.S. 137 (1803).
[88] *Loper Bright Enterprises v. Raimondo,* 2024 U.S. LEXIS 2882 (June 28, 2024).

Going forward, it will be necessary to show a court that the text and legislative history of USERRA, along with the standard rules of statutory interpretation, support the DOL interpretation that the GCPD was required to give you the opportunity to take a make-up promotion exam in 2009 after you returned from active duty. It is no longer correct to say that courts are required to give great deference to the interpretation of USERRA that is set forth in the DOL USERRA Regulation.

Q: What is the real practical difference between *Chevron* and *Loper Bright Enterprises?*

A: Let us say that there are three possible interpretations of a particular provision of the statute that the Automated Widget Commission (AWC) is charged with administering and enforcing, and AWC has chosen one of those three reasonable interpretations. Under *Chevron,* the reviewing court will affirm the AWC's interpretation of the statute so long as the interpretation is reasonable, even if it is not the interpretation that the court would have chosen.

Under *Loper Bright Enterprises,* the reviewing court will apply the *rules of statutory construction* and come up with its own interpretation of the statute at issue. In making that determination, the AWC's interpretation is not irrelevant, but that agency's interpretation is no longer entitled to special deference. Interpeting ambiguous statutes is within the special expertise of courts, not administrative agencies.

Over the course of a millennium, the courts in Great Britain, the United States, Canada, and other common-law countries have come up with elaborate rules for interpreting constitutions, statutes, regulations, contracts, wills, and other legal documents. The leading recent treatise

on this topic was published in 2012.[9] I keep a copy of that book handy in my office and refer to it frequently in composing our "Law Review" articles.

The everyday work of courts, including the United States Supreme Court, is to construe the words that Congress or a State legislature has enacted—to determine the meaning and effect of the statute at issue in the case. The process of *statutory construction* begins with the words that Congress or the Legislature has enacted. If the words are clear and unambiguous (capable of only one reasonable interpretation), there is no room for "liberal construction" or for trying to decipher the "legislative intent" underlying the enactment.

Because of hasty or unprofessional drafting, or because of compromises in the legislative process, there are frequently ambiguities in the words of the statute, and the court must utilize various tools to ascertain what the legislators who drafted and voted for the bill had in mind, or what they would have had in mind if the question before the court had occurred to them during the legislative process.

In at least a dozen cases decided by the Supreme Court in the last century, the Court has held that federal statutes should be liberally construed for the benefit of those who are serving or have served our country in the armed forces.[10]

[9] *Reading Law: The Interpretation of Legal Texts,* by Justice Antonin Scalia and Professor Bryan A. Garner, Thomson/West Publishing Co, 2012.
[10] *See generally* Law Review 24010 (February 2024).

***Boone v. Lightner,* 319 U.S. 561 (1943).[11]**

In a case applying the Soldiers' and Sailors' Civil Relief Act (SSCRA),[12] the Supreme Court wrote: "The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."[13]

***Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946).**

In its first case construing the federal reemployment statute, which was enacted in 1940, the Supreme Court stated:

> 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. *See Boone v. Lightner,* 319 U.S. 561, 575. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate parts of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.[14]

Q: The City Attorney said all of this is moot anyway because my claim accrued more than 15 years ago in January 2009, when I returned to

[11] This is a 1943 decision of the United States Supreme Court. Supreme Court decisions are published (reported) in a series of volumes called *United States Reports.* The citation means that you can find this case in Volume 319 of *United States Reports,* starting one page 561.
[12] In 2003, Congress substantially updated the SSCRA and renamed it the Servicemembers Civil Relief Act (SCRA). *See* Law Review 116 (March 2004).
[13] *Boone,* 319 U.S. at 575.
[14] *Fishgold,* 328 U.S. at 285. *See generally* Law Review 23058 (October 2023) for a detailed discussion of this case.

work after leaving active duty and requested the opportunity to take a make-up promotion exam. The City Attorney said that the statute of limitations has passed and my USERRA claim is time-barred. What do you say about that?

A: USERRA does not have a statute of limitations, and it precludes the application of other statutes of limitations. USERRA provides:

> If any person seeks to file a complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, of a Federal or State court under this chapter [USERRA], *there shall be no limit on the period of time for filing the complaint or claim.*[15]

Q: I will be retiring from the GCPD soon, and we cannot change history. What, if anything, can be done today to make me whole for the effects of the 2009 USERRA violation?

A: The fact that you had the high score on the promotion exam in 2013, when you finally had the opportunity to take it, means that it is highly probable that if you had been given the opportunity to take the exam in 2009, when you should have been given that opportunity, your score would have been sufficient to get you promoted to Sergeant in 2009. You are entitled to back pay for the difference between patrolman pay and Sergeant pay between 2009 and 2013. Most importantly, you are entitled to have your GCPD pension benefits adjusted to what they would have been if the department had obeyed the law in 2009.

But you make an important point about the passage of time. *Serving National Guard and Reserve service members need to read our ROA "Law Review" articles so that they can understand their legal rights and what they need to do to exercise and enforce their rights.*

[15] 38 U.S.C. § 4327(b) (emphasis supplied). This provision was added by Public Law 110-389, Title III, § 311(f)(1), Oct. 10, 2008, 122 Stat. 4163. The effective date of this provision is 10/8/2008. Thus, this "no statute of limitations" rule applies to your claim, which accrued in January 2009.

Please join or support ROA.

This article is one of 2,200-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. We add new articles each month.

ROA is the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve 32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).[16]

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." 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 more than 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

[16] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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 eight[17] 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 https://www.roa.org/page/memberoptions. 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 20002[18]

[17] Congress recently established the United States Space Force as the eighth uniformed service.
[18] You can also contribute on-line at www.roa.org.