Reserve Officers Association of the United States

Statement for the

Senate Committee on Veterans' Affairs

Hearing on
Pending Legislation

June 29, 2016

"Serving Citizen Warriors through Advocacy and Education since 1922."™

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The Reserve Officers Association of the United States (ROA) is a professional association of commissioned, non-commissioned and warrant officers of our nation's seven uniformed services. ROA was founded in 1922 by General of the Armies John "Black Jack" Pershing during the drawdown years following the end of World War I. It was formed as a permanent institution dedicated to national defense, with a goal to inform America regarding the dangers of unpreparedness. Under ROA's 1950 congressional charter, our purpose is to promote the development and execution of policies that will provide adequate national defense. We do so by developing and offering expertise on the use and resourcing of America's Reserve Components.

The association's members include Reserve and Guard Soldiers, Sailors, Marines, Airmen, and Coast Guardsmen who frequently serve on active duty to meet critical needs of the uniformed services. ROA's membership also includes commissioned officers from the United States Public Health Service and the National Oceanic and Atmospheric Administration who often are first responders during national disasters and help prepare for homeland security.

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DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Reserve Officers Association is a member-supported organization. ROA has not received grants, contracts, or subcontracts from the federal government in the past three years. All other activities and services of the associations are accomplished free of any direct federal funding.

STATEMENT

ROA appreciates the opportunity to discuss S 3042, Justice for Servicemembers Act, which is proposed legislation to clarify the scope of procedural rights of members of the uniformed services with respect to their employment and reemployment rights, to improve the enforcement of such employment and reemployment rights, and for other purposes.

The Justice for Servicemembers Act would amend section 4302 by adding a new subsection (c) to the Uniformed Services Employment and Reemployment Rights Act (USERRA), as follows:

> (1)Pursuant to this section and the procedural rights afforded by Subchapter III of this chapter [USERRA], 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 or receipt of any right or benefit of employment.

<u>USERRA</u>

Section 4302 makes it clear that USERRA is a floor and not a ceiling on serevicemember's rights as a person who is serving or has served. USERRA does not supersede or nullify any other law, policy, agreement, practice, or other matter that gives greater or additional rights. 38 U.S.C. 4302(a).

Section 4302(a) of USERRA provides:

> Nothing in this chapter [USERRA] shall supersede, nullify, or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

USERRA does supersede state laws, contracts, policies, agreements, etc. that reduce, limit, or eliminate USERRA rights or that impose additional prerequisites on a servicemember's exercise of those rights. 38 U.S.C. 4302(b).
Section 4302(b) provides:

> This chapter supersedes any State law (including any local law or ordinance) *contract, agreement,* policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites* to the exercise of any such right or the enjoyment of any such benefit.

Despite section 4302(b), both the 5th Circuit and the 6th Circuit have held that USERRA does not override employer---employee agreements that purport to bind employees to submit future disputes about USERRA rights to binding arbitration, in lieu of filing suit or filing a formal complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL---VETS). *See Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672 (5th Cir. 2006) and *Landis v. Pinnacle Eye Care LLC,* 537 F.3d 559 (6th Cir. 2008).

ROA member, and USERRA drafter, Mr. Samuel F. Wright explains, "Employers can make a mockery of USERRA by demanding that individuals agree to binding arbitration as a condition of initial employment or continued employment. S. 3042 is necessary to ensure effective enforcement of USERRA."

Binding Arbitration

Arbitration is defined as, "*The settling of disputes (especially labor disputes) between two parties by an impartial third party, whose decision the contending parties agree to accept. Arbitration is often used to resolve conflict diplomatically to prevent a more serious confrontation*", as defined by dictionary.com. In and of itself this is not a bad thing. There are times when the problem between employee and employer does not rise to the level or complexity requiring court review.

The problem is that binding arbitration takes away the employee's choice to pursue the level of resolution they consider necessary with their employment. If an employee believes his or her case should be reviewed by the courts and he or she is willing to accept the time, cost, and complexity of this legal review that should be the employee's choice. If an employee believes the case is not complicated but believes an independent person or body should settle the dispute, then arbitration should also be a choice.

What is not right is when employees do not have a choice on resolution of future employment issues based on a boiler plate provision in an agreement he or she was required to sign as a condition of employment; especially as these decisions affect his or her ability to provide for their family.

The Bill of Rights includes the right to “life, liberty and the pursuit of happiness”. In the decision of S. 3042, we should be reminded that liberty requires that no one can rule citizens without consent--each of us, whether as individuals or as companies, should respect the equal rights of others.

Reserve Component Participation

During the present war, nearly a million Guard and Reserve members have been mobilized, proving essential to the war effort. The reliance of the nation on its Reserve Components will not diminish.

Since September 11, 2001, more than 900,000 members of our reserve components – the National Guard and Reserves of our Army, Navy, Air Force, Marines and Coast Guard – have served in support of the war on terrorism. According to DoD more than 10,000 Guard and Reserve members were casualties in that fight. https://www.dmdc.osd.mil/dcas/pages/report_sum_comp.xhtml

Guard and Reserve Title 10 Contingency Support

Unique SSAN Activations as of: June 21, 2016

		change from last week
Currently Activated:	**28,279**	(+1495)
Deactivated Since 9/11:	**900,207**	
Total:	**928,486**	

Reserve Component	* Current Involuntary Activations	change from last week	** Current Voluntary Activations	change from last week	Total Currently Activated	change from last week	***Total Deactivated Since 9/11	***Total Activated Since 9/11
ARNG	7,821	(+305)	424	(-29)	8,245	(+876)	382,164	390,409
USAR	7,861	(+210)	832	(+14)	8,693	(+224)	218,820	227,513
USNR	2,679	(-9)	156	(-3)	2,835	(-12)	55,453	58,288
USMCR	319	(-9)	700	(+0)	1,019	(-9)	62,508	63,527
ANG	3,350	(-106)	1,601	(+17)	4,951	(-89)	103,092	108,043
USAFR	1,391	(-87)	802	(+33)	2,193	(-54)	69,922	72,115
USCGR	228	(+0)	115	(+0)	343	(+0)	8,248	8,591
TOTAL	**23,649**	(+904)	**4,630**	(+32)	**28,279**	(+936)	**900,207**	**928,486**

Notes:
*** Includes members placed on Active Duty under 10 USC Sections 688, 12301(a), 12302 and 12304**
**** Includes members placed on Active Duty under 10 USC 12301(d) and members categorized as unknown in CTS statute co**
***** Includes members who were activated for Operation Noble Eagle, Operation Enduring Freedom, Operation Iraqi Freedom,**
Operation New Dawn, Operation Inherent Resolve and Operation Freedom Sentinel

DRS# 21800
Source: Active Service File
Produced by the Defense Manpower Data Center

"War is a national challenge, and, for our part, we cannot execute without the Guard and the Reserve," said Army Chief of Staff Gen. Mark Milley. "You can't talk to a general or admiral for more than five minutes without hearing a variation on that theme," according to ROA Executive Director, Jeff Phillips.

The chart below shows that the Guard and Reserve have been used in increasingly higher amounts per year. While usage is dropping it will not go down to previous peacetime levels because threats to the nation and world have increased.

Usage of the Reserve Components

Fiscal Year	Man-Days Per Year
1986-1989	1 million
1996-2001	13 million
2002	41.3 million
2005	68.3 million
2012	25.8 million

Data from the Office of the Assistant Secretary of Defense for Reserve Affairs (OASD/RA).

The reserves are now considered “operational.” They are used continually, like the active force. In the late 1980s, usage of the reserves was 1 million man-days per year; it is now about 25 million man-days.

Guard and Reserve members will continue to face employment issues as they support increased operational levels. They should not be penalized for serving their nation by being forced into binding arbitration.

CONCLUSION

The Reserve Officers Association supports the enactment of S. 3042 which would make clear that the individual servicemember cannot be forced to submit his or her USERRA complaint to binding arbitration. The matter of using arbitration or not should remain the employee’s option. The choice should be made when a dispute has arisen--not 10 years earlier when the servicemember is hired or rehired.