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“OTHER THAN HONORABLE” DISCRIMINATION

Marcy L. Karin[†]

ABSTRACT

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is the most comprehensive federal civil rights law that exists related to the workplace. Its goal is to help people who serve in the military reintegrate back into civilian work and remain attached to the workforce. It does so by offering a mix of anti-discrimination protection and labor standards. Despite the promise of robust reemployment rights and post-service assistance, Congress has excluded people with a certain “character of service,” including those with “other than honorable” separations, from these protections. This statutory exclusion has a disparate impact on people with service-connected disabilities, servicemembers who have experienced military sexual trauma, and troops with caregiving responsibilities. This Article proposes an end to this discriminatory exclusion along with a way to improve USERRA’s accommodation rights. In so doing, the Article explores how this exclusion contravenes the original congressional intent. It also situates the proposal in an over seventy-five-year history of expanding the law after every major conflict on fairness grounds to reflect the military reality of the time. Finally, the Article counters some anticipated critiques of the proposal and places it within a growing series of military supportive movements (such as the emergence of veterans courts and changes to the way post-traumatic stress disorder, traumatic brain injury, and military sexual trauma are handled) as well as ongoing employment-law efforts (like calls to ban the box).

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INTRODUCTION

Samuel Earl Tootle served in the Navy for fourteen years.¹ During that time, he separated from the military three times under honorable conditions.² His "fourth and final discharge," however, was the result of a court martial conviction, and deemed dishonorable.³ Years later, Mr. Tootle quit a civilian job with the Department of Veterans Affairs, one day before he believed he would have been fired for failing to disclose his dishonorable discharge.⁴ On July 11, 2012, Mr. Tootle alleged that his separation from work was due to the employer's discrimination

1. Tootle v. Merit Sys. Prot. Bd., 559 F. App'x 998, 998 (Fed. Cir. 2014).

2. *Id.* at 998–99.

3. *Id.* at 999.

4. *Id.*

against his military service in a claim brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁵

Enacted in 1994, USERRA was meant to address this very situation. The law's goal was to help servicemembers with the process of reintegrating into civilian life after military service, as well as to help them remain attached to the workforce once reemployed.⁶ USERRA is the latest iteration of a law that has been around since 1940 to ensure that those who protect our country are not left behind when they return.⁷ In theory, the unique mix of protections found in USERRA combines to create a comprehensive civil rights law that responds to a unique government need to encourage service and support those who have chosen to do so.⁸ In reality, however, after every war, stories surface about how some servicemembers cannot return to work despite the protections that Congress envisioned. Mr. Tootle's experience is just one such story. In his case, the court found that he did not have standing to proceed as he did not have the correct character of service.⁹ Relying on a provision of USERRA that excludes people with "bad" military separations from utilizing the law's protections, the court dismissed his case.¹⁰ His one "bad" discharge took away his right to coverage under USERRA, despite his years of honorable service and three prior honorable separations.

This denial of legal protections based on a bad "character of service" designation is an unnecessary form of congressional discrimination. It is also one that has become increasingly problematic during the three Gulf War-Era II conflicts: Operation Enduring

5. *Id.*

6. Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, sec. 2, § 4301, 108 Stat. 3149, 3150 (codified at 38 U.S.C. §§ 4301-4331 (2012)).

7. S.J. Res. 286, 76th Cong. (1940); *see infra* note 27 (discussing the law's inception).

8. *See, e.g.*, John Marshall Law School, *Video 2.2: Employment Rights and Policy Changes*, YOUTUBE (July 18, 2013), <https://www.youtube.com/watch?v=7VoXbwn1VUU> [<https://perma.cc/3ZFL-KYHR>] (labeling USERRA as comprehensive civil rights legislation).

9. *Tootle v. Merit Sys. Prot. Bd.*, 559 F. App'x 998, 1001 (Fed. Cir. 2014) (citing 38 U.S.C. § 4304(2)); *see also* *Adams v. Penn Lines Servs., Inc.*, 620 F. Supp. 2d 835, 839 (N.D. Ohio 2009) (holding that honorable discharge is necessary for protection under USERRA); *Whisnant v. U.S. Postal Serv.*, 83 M.S.P.B. 588, at ¶¶ 3-4 (1999) (same).

10. *Tootle*, 559 F. App'x at 1001; *see also* 5 EMP. COORD. EMPLOYMENT PRACTICES § 21:15 (2016), Westlaw (protection limited to those honorably discharged).

Freedom (OEF),¹¹ Operation Iraqi Freedom (OIF),¹² and Operation New Dawn (OND).¹³ These conflicts have seen a historic number of activations and demobilizations, including the deployment of over 2.1-million servicemembers.¹⁴ They also have included the largest number of Reserve Component (RC) members to be called up for federal service due to changing operational tempos and national-security needs, with one third of those deployed being part-time citizen RC members.¹⁵ During these conflicts, most RC members have been activated for multiple tours of active duty, requiring them to leave civilian work, reintegrate back to a non-military employer, and then leave and reintegrate again.¹⁶ This cycle of leaving and returning to the civilian workforce has been experienced by huge numbers of troops—both regular active duty and RC members. Indeed, according to the Department of Veterans Affairs, from 2014 to 2020, one million servicemembers will join the 2.3-million people who have already transitioned from military service to civilian life since the Gulf War-Era II began.¹⁷ Similarly, the Joint Chiefs of Staff estimate that about 250,000

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11. OEF began on October 7, 2001, and has not yet ended. U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-676, VETERANS AFFAIRS: BETTER UNDERSTANDING NEEDED TO ENHANCE SERVICES TO VETERANS RE-ADJUSTING TO CIVILIAN LIFE 5 n.10 (2014) [hereinafter GAO-14-676].
 12. OIF ran from March 19, 2003 to August 31, 2010. *Id.*
 13. OND ran from September 1, 2010 through December 15, 2011. *Id.*
 14. *Id.* at 5.
 15. *Id.*; see 10 U.S.C. § 10101(a) (2012) (defining reserve components of the armed forces as the Army National Guard, the Air National Guard, and the Army, Navy, Marine, Air Force, and Coast Guard Reserves). Reservists are under Federal control. See 10 U.S.C. § 12301 (2012) (giving the Secretary authority over members of active and reserve components of the military). The National Guard, which consists of the Army and Air National Guards, may be called upon by the President to serve in the same positions as active duty regular forces. See 10 U.S.C. § 10103 (2012) (giving Congress authority to order members of the reserves to active duty as necessary for a balanced force).
 16. See *Department of Defense Authorization for Appropriations for Fiscal Year 2012 and the Future Years Defense Program: Hearing Before the S. Comm. on Armed Services*, 112th Cong. 96 (2011) (statement of Col. Steven P. Stonebridge, Director of Government Relations, Military Officers Association of America) ("There is no precedent in American history for this [post-9/11] sustained reliance on citizen-soldiers . . ."). Effective January 2007, the DOD limits RC mobilizations to under a year; there are no limits to the number of times someone may be deployed. U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-790R, MILITARY PERSONNEL: DOD NEEDS DATA TO DETERMINE IF ACTIVE DUTY SERVICE HAS AN IMPACT ON THE ABILITY OF GUARD AND RESERVISTS TO MAINTAIN THEIR CIVILIAN PROFESSIONAL LICENSES OR CERTIFICATES 1 (2008) [hereinafter GAO-08-790R].
 17. GAO-14-676, *supra* note 11, at 1.

servicemembers will separate from the military each year from 2015 to 2020.¹⁸ Some of these separated men and women will come back to the jobs they had before answering the call to serve; others will be looking for new employment. When they do, civilian employers are asked to shoulder some of the responsibility of military service by making jobs available to (re)employ the country's service personnel. If employers fail to do so, former military personnel become detached from the civilian workforce and the corresponding economic security and transition assistance that employment offers. This is exactly why USERRA was enacted.

Yet, the experiences of servicemembers during Gulf War-Era II have exposed some cracks with USERRA. Despite the military's promise to help and congressional protection for some, reintegration to civilian life has proved difficult for many, and the unemployment rate for Gulf War-Era II veterans has consistently been higher than both the national average and the numbers for other veterans.¹⁹ Of course, after fifteen years of war and a recession, providing economic stability to transitioning servicemembers is critical. This is especially so for a group of troops who have been categorically denied USERRA coverage, and by extension, access to some of the promised enticements to and benefits of military service.

This group of forgotten troops includes a large number of people who have received "other than honorable" separations from the military. As explained below, these separations have disproportionately impacted people with service-connected injuries like post-traumatic stress disorder and traumatic brain injury, servicemembers who have experienced military sexual trauma, and people with caregiving responsibilities. These troops unnecessarily have been denied access to USERRA's protection and reintegration assistance; the time has come to fix this.

As described below, there is an unusual history of bipartisan, bicameral work to amend USERRA in response to the changing military needs of the time. There is also a history of expanding the law to provide consistency amongst types of service and servicemembers, as well as to ensure that wounded warriors may access the law's protections. Historically, Congress acts after coverage cracks have been exposed. Accordingly, this Article surfaces another crack that has been exposed during Gulf War-Era II—the discriminatory treatment of a class of

18. OFF. OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, ENABLING COLLABORATIVE SUPPORT TO REINTEGRATE THE MILITARY FAMILY 4 (2014).

19. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-16-0611, NEWS RELEASE: EMPLOYMENT SITUATION OF VETERANS—2015 (2016), <https://www.bls.gov/news.release/pdf/vet.pdf> [<https://perma.cc/FS6X-4KYK>] (reporting that unemployment rates for Gulf War-Era II veterans in 2014 and 2015 were higher than the rates for all veterans and nonveterans).

servicemembers with other than honorable separations. This Article then offers a proposal to fix this crack by amending USERRA to include this group of forgotten troops and give teeth to a requirement that employers work to qualify returning servicemembers for post-service, civilian positions. Part I of this Article explains this history and offers an overview of USERRA's core protections. Part II contains the stories of these forgotten troops, stemming from the explosion of RC and other servicemembers who have returned to civilian workplaces during the Gulf War-Era II conflicts. It also contains the proposal to amend USERRA in response to the experiences contained in the stories. Finally, Part III predicts some critiques of the proposal, which are then countered by situating the proposal in the broader context of ongoing employment law and military supportive movements.

I. USERRA'S PROMISE AND CORE PROVISIONS

The increase and ultimate drawdown of troops during Gulf War-Era II is not the first time that America has been faced with a large-scale reintegration of former servicemembers to civilian life after a period of military conflict. During World War I, for example, men who left to serve in the military were promised that their civilian jobs would be held for them.²⁰ Yet, servicemembers who returned home from war could not get their jobs back. Younger men who had not answered the call to serve had pushed the military personnel out of worksites across the country.²¹ At the same time, jobs had disappeared in the lead up to the depression. The civilian workforce simply could not absorb the number of troops returning in such a fast demobilization. The ensuing reintegration process was difficult, and a significant period of veterans' unemployment ensued.²² After watching this generation of servicemembers return from war to unemployment, Congress wanted to act. The intent was to make sure members of the military, especially those that were "forcibly taken out of industry," had the right to return to work in the future.²³ Post-service employment was a morale issue for the military and transformed into a moral imperative for Congress.

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20. See Andrew P. Sparks, *From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act*, 61 HASTINGS L.J. 773, 776 (2010) (noting that there was "[w]idespread apprehension" that such a large scale demobilization "would create profound economic disturbances").
 21. 86 CONG. REC. 10,346 (1940) (statement of Rep. Van Zandt).
 22. Thomas R. Haggard, *Veterans' Reemployment Rights and the "Escalator Principal"*, 51 B.U. L. REV. 539, 539 (1971).
 23. *Selective Compulsory Military Training and Service: Hearing on H.R. 10132 Before the H. Comm. on Military Affairs*, 76th Cong. 118 (1940) (statement of Rep. Thomason) (expressing a hope that this would correct the problem experienced after World War I).

Part of this imperative came from the recognition that the United States needed to have a steady stream of available servicemembers should another war break out. In addition, the country needed to be able to take care of those servicemembers when hostilities ceased.²⁴ This created a structural mismatch between the needs of the country to call up a full force of military personnel in the name of national defense, and the reality that those people were displaced from the civilian workforce when they served and were often forgotten when they returned, especially if they came home with a disability. As a result, employment for veterans became “a national responsibility,”²⁵ and Congress believed that the right to reemployment after service “would play a significant part in lessening economic maladjustments” that “inevitably accompany” a national military.²⁶

This responsibility led to a 1940 congressional resolution to address the needs of the country to preserve a unified national defense with a strong military that could fluctuate in size depending on current events.²⁷ This resolution provided people who were drafted into service with a right to return to work at a public or private employer with the benefits and status of employment they would have had but for the service.²⁸ The hope was that this would ensure men for the military and curb unemployment of those men after service. A few months later, the Selective Training and Service Act codified the resolution as part of the measure that created the draft that authorized men to be involuntarily called into service in preparation for World War II.²⁹ A year later, coverage under the law was expanded to provide the same reemployment rights to everyone that entered active service. This time,

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24. Matt Crotty, *The Uniformed Services Employment and Reemployment Rights Act and Washington State's Veteran's Affairs Statute: Still Short on Protecting Reservists from Hiring Discrimination*, 43 GONZ. L. REV. 169, 173 (2007).
 25. U.S. GEN. ACCOUNTING OFF., GAO/HEHS-98-240R, VETERANS' EMPLOYMENT AND TRAINING SERVICE: ASSESSMENT OF THE FISCAL YEAR 1999 PERFORMANCE PLAN 1 (1998).
 26. 86 CONG. REC. 9,977 (1940) (statement of Sen. Thomas).
 27. S.J. Res. 286, 76th Cong., 54 Stat. 858 (1940); *see also* S. REP. NO. 76-2002, at 7 (1940) (“The purpose of this measure is the protection of the United States. To insure the independence and the freedom of the people[,] . . . it provides that immediate measures shall be taken to mobilize a large portion of the Nation's military strength.”).
 28. S.J. Res. 286.
 29. Selective Training and Service Act of 1940, Pub. L. No. 76-783, sec. 8, 54 Stat. 885, 890.

people who volunteered for service were granted corresponding reemployment rights.³⁰

Through each of these expansions, the goal has remained constant: national security.³¹ Indeed, in the twenty-seven iterations of this law over the seventy-five years since the original resolution,³² Congress has consistently tried to meet that goal by protecting people who were conscripted into service, and, later, to encourage people to sign up for or stay in military service to keep the country safe. The law became even more important—particularly to “part-time” RC members—after the military switched to a Total Force policy in 1973. Before this time, if the country went to war, the RC forces were viewed only as supplement

30. Service Extension Act of 1941, Pub. L. No. 77-213, sec. 7, 55 Stat. 626, 627; H.R. REP. NO. 77-1117, at 6 (1941).

31. USERRA was authorized under the War Powers Act. See Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999, 1018 (2004) (exploring the impact of the war powers authorization on a former USERRA exclusion that prevented state employees from suing state employers).

32. S.J. Res. 286; 54 Stat. 885; 55 Stat. 626, 626–28; Selective Training and Service Act of 1940 Amendment, Pub. L. No. 78-473, 58 Stat. 798 (1944); Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604; Universal Military Training and Service Act Amendments, Pub. L. No. 82-51, 65 Stat. 75 (1951); Universal Military Training and Service Act Amendment, Pub. L. No. 84-665, 70 Stat. 509 (1956); Universal Military Training and Service Act Amendment, Pub. L. No. 86-632, 74 Stat. 467 (1960); Universal Military Training and Service Act Amendment, Pub. L. No. 87-391, 75 Stat. 821 (1961); Universal Military Training and Service Act Amendment, Pub. L. No. 90-491, 82 Stat. 790 (1968); Vietnam Era Veterans’ Readjustment Assistance Act (VRAA) of 1974, Pub. L. 93-508, sec. 404, § 2021, 88 Stat. 1578, 1594; Act of May 14, 1976, Pub. L. No. 94-286, sec. 2, § 2024, 90 Stat. 517, 518; Veterans’ Education and Employment Assistance Act of 1976 (VEEAA), Pub. L. No. 94-502, secs. 605, 608, §§ 2003, 2021, 2024, 90 Stat. 2383, 2405; Veterans’ Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, sec. 511, § 2024, 94 Stat. 2171, 2207; Act of Oct. 12, 1982, Pub. L. No. 97-295, sec. 4, 96 Stat. 1287, 1310; Veterans’ Benefits Improvement and Health-Care Authorization Act of 1986, Pub. L. No. 99-576, sec. 331, § 2021(b)(3), 100 Stat. 3248, 3279; Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, secs. 339–340, §§ 2027, 2021(a), 105 Stat. 75, 91–92; Veterans’ Benefits Act of 1992, Pub. L. No. 102-568, sec. 506(a), §§ 2021–2027, 106 Stat. 4320, 4340; USERRA, Pub. L. No. 103-353, 108 Stat. 3149 (1994); Veterans’ Benefits Improvements Act of 1996, Pub. L. No. 104-275, 110 Stat. 3322; Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315; Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419, 114 Stat. 1822; Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, 118 Stat. 3598; Veterans’ Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145; Veterans’ Benefits Act of 2010, Pub. L. No. 111-275, 124 Stat. 2864; Act of Nov. 21, 2011, Pub. L. No. 112-56, 125 Stat. 711; National Defense Authorization Act for Fiscal Year 2012 (NDAA FY 2012), Pub. L. No. 112-81, 125 Stat. 1298 (2011).

to be used sparingly.³³ The traditional obligations for RC members remained relatively stable: one weekend a month for drill and two weeks a year for annual training, with maybe one mobilization during the course of one's career.³⁴ In fact, less than one percent of the forces that were deployed during the Vietnam War were in the RC.³⁵ The overwhelming majority of RC members only served the minimum; and the draft was used very sparingly to augment active duty strength as needed.

In 1973, however, the draft era ended and the Total Force policy authorized the augmentation of enlisted and officer ranks of the Army, Navy (including the Marine Corps), and Air Force with the civilian RC part-timers.³⁶ Under the Total Force policy and Department of Defense (DOD) Directive 1200.17, the RC was given increasing responsibility in every aspect of national security. It transitioned into an operational force in reserve rather than a strategic one of last resort.³⁷ Under these policies, the RC trained longer and participated in additional (and longer) deployments.³⁸ The goal was to have an integrated volunteer-based system of troops under which the RC were frequently used on missions.³⁹ Over time, this policy became even more critical as the

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33. U.S. GEN. ACCOUNTING OFF., GAO-02-608, RESERVE FORCES: DOD ACTIONS NEEDED TO BETTER MANAGE RELATIONS BETWEEN RESERVISTS AND THEIR EMPLOYERS 5 (2002) [hereinafter GAO-02-608].
 34. Daniel J. Bugbee, *Employers Beware: Violating USERRA Through Improper Pre-Employment Inquiries*, 12 CHAP. L. REV. 279, 287 (2008); SUSAN M. GATES ET AL., RAND CORP., SUPPORTING EMPLOYERS IN THE RESERVE OPERATIONAL FORCES ERA: ARE CHANGES NEEDED TO RESERVISTS' EMPLOYMENT RIGHTS LEGISLATION, POLICIES, OR PROGRAMS? 1 (2013).
 35. GAO-14-676, *supra* note 11, at 5 (reporting that only 0.4% of the servicemembers deployed during Vietnam were in the RC).
 36. 10 U.S.C. § 10102 (2012) (contains the RC's statutory purpose); ASSISTANT SEC'Y OF DEF. FOR RESERVE AFFAIRS, DOD 1215.15-H, THE RESERVE COMPONENTS OF THE UNITED STATES ARMED FORCES 2 (1996); U.S. GOV'T. ACCOUNTABILITY OFF., GAO-07-259, MILITARY PERSONNEL: ADDITIONAL ACTIONS NEEDED TO IMPROVE OVERSIGHT OF RESERVE EMPLOYMENT ISSUES 9 (2007).
 37. H.R. REP. NO. 103-65, at 18–19 (1993); S. REP. NO. 103-158, at 39 (1993); DEP'T OF DEF., DIRECTIVE 1200.17, MANAGING THE RESERVE COMPONENTS AS AN OPERATIONAL FORCE (2008); GATES ET AL., *supra* note 34, at 1.
 38. H.R. REP. NO. 103-65, at 18–19; S. REP. NO. 103-158, at 39; *see* Bugbee, *supra* note 34, at 285–89; GATES ET AL., *supra* note 34, at 1.
 39. Universal Military Training and Service Act Amendment, Pub. L. No. 90-491, 82 Stat. 790 (1968); Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights: The Uniformed Services Employment and Reemployments Rights Act and Minnesota's Military Leave Laws*, 30 WM. MITCHELL L. REV. 797, 803 (2004).

congressionally authorized strength numbers for enlisted and officer ranks were reduced, and the overall military budget diminished.⁴⁰ As a result, the use of the RC in the modern force structure has significantly expanded over the years, and "no significant operation" today is done without it.⁴¹

The first time the Total Force policy really came into play was during the Gulf War-Era I. During Operation Desert Storm in 1990–1991, between 200,000 and 225,000 RC members were deployed.⁴² This represented about sixteen percent of the total forces deployed during the era, a much larger percentage of total troops than in prior conflicts.⁴³ In addition to the RC, most of the regular forces enlisted and officers who were activated left full-time civilian employment at the time of their orders to active duty.⁴⁴ In response to the experiences of these large numbers of activated servicemembers, Congress rewrote the law governing employment protections at work for this community.

With this 1994 rewrite, Congress both reaffirmed the law's national security purpose and clarified it further by breaking into three components. First, Congress hoped "to encourage noncareer service" in the military "by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service."⁴⁵ Second, USERRA was meant "to minimize the disruption to the lives of persons performing service . . . by providing for the prompt reemployment of such persons upon their completion of such service"⁴⁶ Third,

40. Brian Clauss & Marcy Karin, 1-2 SERVICEMEMBER AND VETERANS RIGHTS § 2.01[1] (2016), LexisNexis ("As defense budgets continue to be cut, [the RC] will carry more of the burden because they are the most cost-effective personnel in the Armed Forces.").

41. GAO-02-608, *supra* note 33, at 5.

42. Konrad S. Lee et al., *Emerging Limitations of the Uniformed Services Employment and Reemployment Act*, 55 LOY. L. REV. 23, 25 (2009) (citing Stephen M. Duncan, *Gulf War Was a Test of Reserve Components and They Passed*, in THE U.S. NAVAL WAR COLL., DESERT SHIELD/DESERT STORM EMPLOYMENT OR RESERVE COMPONENT: EXTRACTS OF LESSONS LEARNED 21, 21 (1991)); Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 A.F. L. REV. 287, 294 (2007).

43. GAO-14-676, *supra* note 11, at 5. The RC was about forty-five percent of the Total Forces available for deployment. *Legislation Relating to Reemployment Rights, Educational Assistance, and the U.S. Court of Veterans Appeals: Hearing Before S. Comm. on Veterans' Affairs*, 102nd Cong. 151 (1991) (statement of Sen. Alan Cranston).

44. *Hearing Before S. Comm. on Veterans' Affairs*, *supra* note 43 (about eighty-six percent of enlisted and ninety percent of officers who deployed had full time jobs when they received their orders).

45. USERRA, Pub. L. No. 103-353, § 4301, 108 Stat. 3149, 3150 (1994).

46. *Id.*

USERRA was designed "to prohibit discrimination against persons because of their service in the uniformed services."⁴⁷ Thus, USERRA (and its predecessors) recognized the need to balance the national security purpose with the needs of our servicemembers to reintegrate into civilian work after service is complete, despite any corresponding disruptions that civilian employers may face by a fluctuating military strength.⁴⁸

As the military moved from a draft-based to volunteer militia, and especially under the Total Force policy, "encourag[ing] noncareer service" became the most important goal.⁴⁹ As others have observed, the military has "struggled to meet recruitment goals" after the changing operational tempo under the Total Force policy, and trouble with work "associated with the transition into and out of part-time military service may be contributing to the problem."⁵⁰ USERRA was a direct response to the experiences with this new normal of operational tempo, and it was created "explicitly to induce citizens to enlist in the national reserve"⁵¹ and "address the new realities of [the] military [strength] policy."⁵² Today's new reality is that America needs people to serve, and more than that, to volunteer to do so. The belief is that people will not do so—or will not volunteer to reenlist—unless their pre-service, full-time jobs are protected and reintegration into civilian life is smooth.⁵³ Thus, this "assurance of clearcut and unqualified rights to reemployment without penalty . . . [for t]hose who answer the call to their Nation's colors" is critical.⁵⁴ Further, recruitment and

47. *Id.*

48. See Stephen D. Tandle, *Military Service and Private Pension Plan Benefits: An Analysis of Veterans' Reemployment Rights*, 58 CHI.-KENT. L. REV. 167, 167 (1981) (observing that reemployment rights were included in 1940 "to prevent widespread unemployment like that which had followed World War I").

49. Lee et al., *supra* note 42, at 24.

50. *Id.* at 25.

51. Anita Silvers & Leslie Pickering Francis, *A New Start on the Road Not Taken: Driving with Lane to Head Off Disability-Based Denials of Rights*, 23 WASH. U. J.L. & POL'Y 33, 87 (2007) (citing USERRA § 4301(a)(1)).

52. Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859, 868 (2002) (observing that prior legislation was "geared toward employment protection of the conscription based force management policies").

53. Samuel F. Wright, *Is Injunctive Relief Available in a USERRA Case?*, SERV. MEMBERS L. CTR.: L. REV. 200 (Oct. 2005), https://www.servicemembers-lawcenter.org/LAW_REVIEW_200.html [<https://perma.cc/58HN-H9CQ>].

54. *Legislation Relating to Reemployment Rights, Educational Assistance, and the U.S. Court of Veterans Appeals: Hearing Before the S. Comm. on*

continuation of service in the RC in particular will be impacted if people "lack confidence that their USERRA rights will be respected or enforced . . .".⁵⁵ Thus, in 1994, USERRA codified a unique mix of protections for eligible employees and applicants who choose to serve in the military and need to step away from civilian responsibilities to complete that service.⁵⁶

These rights govern virtually all employers, public or private, regardless of size or location (here or abroad).⁵⁷ In so doing, Congress transferred some of the costs of taking care of those people that do sign up to serve the country to the employer community. As a result, covered employers are subject to a mix of obligations that offer eligible employees a protection from discrimination based on military status, an anti-retaliation provision, and three unique labor standards that offer a right to reemployment without penalty due to service.⁵⁸ Each of these core provisions is described below.

A. *USERRA's Protections from Discrimination and Retaliation*

USERRA contains unique anti-discrimination protections. Under 38 U.S.C. § 4311, employers may not discriminate against certain people in the "initial employment, reemployment, retention in employment, promotion, or a benefit of employment . . . [on the basis of that] membership, application for membership, service, application for service, or [service] obligation."⁵⁹ Generally, eligibility for these protections applies to "any person employed by an employer" who voluntarily or involuntarily "is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to

Veterans Affairs, 102nd Cong. 10 (1991) (statement of Stuart E. Schiffer, Deputy Assistant Att'y Gen., Civil Division, Department of Justice).

55. S. REP. NO. 110-449, at 24 (2008).

56. USERRA, Pub. L. No. 103-353, 108 Stat. 3149 (1994).

57. *See id.* § 4303(4) (defining "employer" to include private persons, institutions, and organizations; the federal government; and state governments); 20 C.F.R. § 1002.34 (2016) (explaining that USERRA covers employers in the United States and certain foreign employers). There are some federal agencies that work on national defense that are exempt.

58. *See* Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 CATH. L. REV. 329 (2014) (describing the difference between labor standards and anti-discrimination protections). USERRA also provides the ability to continue health-care benefits for up to two years after leaving for active duty. *See* USERRA § 4317(a) (describing these health-care benefit protections); 20 C.F.R. § 1002.164 (2016) (same); *see also* USERRA § 4318(a)(2)(A) (describing other protections related to benefits that must be afforded); 20 C.F.R. §§ 1002.259–1002.260 (2016) (same).

59. USERRA § 4311(a); 20 C.F.R. §§ 1002.18–1002.19 (2016).

perform service in a uniformed service"⁶⁰ Moreover, unlike other federal employment laws, USERRA does not have an employee threshold number that triggers coverage or contain a length of service requirement. In practice, this means that everyone in the protected class is covered, and should be free from workplace discrimination on the basis of military obligations.

This was not always the case, however. The anti-discrimination protection evolved piecemeal over time to complement the reemployment rights discussed in the next Section. The first three versions of the law were silent as to discrimination. Beginning with the fourth iteration of the law, in 1951, employers were required to retroactively grant a leave of absence to someone who applied for, but was "rejected" by the military.⁶¹ Although this protection was phrased as an affirmative standard that employers had to do (reemploy rejected military applicants), the underlying goal was to ensure that employers would not discriminate against someone who would have served had he been able to do so.⁶² Given this, Congress believed that solely being a member of the class of workers that was rejected from service should not be the basis of an adverse employment action.

A few years later, stories of RC members experiencing discrimination on the basis of their regular weekend drill and summer training duty began to surface.⁶³ This negative press impacted the military's ability to convince people separating from regular active duty to transition into the RC.⁶⁴ In response, Congress amended the law in 1968 to protect RC members from discrimination "because of any obligation as a member of a reserve component."⁶⁵ In 1980, another

60. USERRA §§ 4303(3), 4311(a). The Public Health Security and Bioterrorism Response Act of 2002 included certain disaster response work (including service in the Public Health Service commissioned corps and authorized training for such work) as "service in the uniformed services." Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, sec. 102, § 2811(e)(3)(A), 116 Stat. 594, 602; *see* USERRA § 4303(13) (defining "service in the uniformed services"); *Other Workplace Standards: Reemployment and Nondiscrimination Rights for Uniformed Services Members*, EMPLOYMENT LAW GUIDE, U.S. DEP'T OF LABOR (Sept. 2009), <https://webapps.dol.gov/elaws/elg/userra.htm> [<https://perma.cc/DX7F-5PNM>] (describing USERRA coverage and the inclusion of work under the Public Health Security and Bioterrorism Act of 2002 as "service in the uniformed services").

61. Universal Military Training and Service Act Amendments, Pub. L. No. 82-51, sec. 1, § 9(g)(3), 65 Stat. 75, 86-87 (1951).

62. S. REP. NO. 82-117, at 70 (1951).

63. Crotty, *supra* note 24, at 175.

64. *Id.*

65. Universal Military Training and Service Act Amendment, Pub. L. No. 90-491, § 9(c)(3), 82 Stat. 790, 790 (1968); S. REP. NO. 90-1477, at 2 (1968).

amendment prevented employers from basing a hiring decision on one's status of being a RC member.⁶⁶ Then, in 1986, Congress expanded the provision again to protect applicants from all workplace discrimination on the basis of one's status of being a RC member or because of any obligation that flows from that status.⁶⁷ Congress observed that protection against discrimination in hiring was needed as a corollary to the right to reemployment for those who did not have a job before service, but "who need[ed] jobs [now]."⁶⁸

Then, with USERRA in 1994, an explicit, expanded discrimination provision was enacted. Specifically, Congress expanded the discrimination protection beyond membership in only the RC to anyone applying for, being, or who previously was a part of uniformed service—and Congress applied that anti-discrimination protection without regard to the actual performance of service.⁶⁹ Subsequent expansions of the law clarified that employers may be liable for the failure to provide equal pay due to military status and for a hostile work environment.⁷⁰

Further, USERRA includes an anti-retaliation provision. Under this provision, employers may not retaliate against a person who enforces a USERRA right, testifies, or otherwise assists in an investigation.⁷¹ USERRA offers this protection from retaliation to someone

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66. Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, sec. 511, § 2024, 94 Stat. 2171, 2207.
67. Veterans' Benefits Improvement and Health-Care Authorization Act of 1986, Pub. L. No. 99-576, sec. 331, § 2021(b)(3), 100 Stat. 3248, 3279.
68. *See Vietnam Veterans' Readjustment: Hearing Before the S. Comm. on Veterans' Affairs*, 96th Cong. 1494-95 (1980) (statement of Dennis R. Wyant, Deputy Assistant Secretary of Labor for Veterans' Employment) (explaining that the goal of this proposal was to make sure that RC members "who need jobs" were protected in hiring decisions in the same way that the reinstatement provision protected returning RC members).
69. 140 CONG. REC. 24,425 (1994).
70. Act of Nov. 21, 2011, Pub. L. No. 112-56, sec. 251, § 4303(2), 125 Stat. 711, 729; *see also* 157 CONG. REC. 17,568 (2011) (observing that the compromise agreement adopts the House language clarifying the existence of hostile work environment claims). In 2011, the Fifth Circuit issued the first circuit court opinion on whether USERRA authorized a hostile work environment claim. The court decided that a right to be free from workplace harassment on the basis of military service was not a "benefit of employment." *Carder v. Cont'l Airlines Inc.*, 636 F.3d 172, 178-83 (5th Cir. 2011). The DOL suggested that Congress fix this in its annual report and Congress did so. *See* U.S. DEP'T OF LABOR, UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA) FISCAL YEAR 2010 ANNUAL REPORT TO CONGRESS 18-19 (2011) (containing the recommendation); VOW to Hire Heroes Act of 2011, Pub. L. No. 112-56, sec. 251, § 4303(2), 125 Stat. 711, 729 (containing the legislative fix).
71. Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4311(b) (2012); 20 C.F.R. § 1002.19 (2016).

regardless of whether the employee has any past or current military connection, and irrespective of the character of service of anyone who did serve.⁷²

B. USERRA's Labor Standards

Although the discrimination protections described in the last Section currently underlie about half of the USERRA claims that are brought today, the heart of the law remains its three labor standards.⁷³ The first labor standard derives from the original 1940 resolution and provides a federal right to job-protected leave for military service.⁷⁴ The second standard was created to give strength to the first by ensuring that returning servicemembers would not be fired, except for cause, for a period of time tied to the length of their service.⁷⁵ The third standard requires employers to take reasonable efforts to help someone return to work.⁷⁶ The rest of this Section elaborates on these standards.

The first labor standard is the right to reemployment at an escalator position for up to five years (or longer). It derives from two elements of the original 1940 resolution. The first required private employers to “restore [any person who leaves a position other than a temporary one] to such position or to a position of like seniority, status and pay unless the employer’s circumstances have so changed as to make it impossible or unreasonable to do so.”⁷⁷ The second required that “[a]ny person who is restored to [such] a position . . . shall be so restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged from such

72. USERRA § 4311(b).

73. U.S. DEP’T OF LABOR, USERRA FY 2014 ANNUAL REPORT TO CONGRESS 13 (2015), https://www.dol.gov/vets/programs/userra/USERRA_Annual_FY2014.pdf [<https://perma.cc/Q3Y9-3X25>].

74. USERRA § 4312.

75. *Id.* § 4316(c)(1)–(2).

76. *Id.* § 4313(a)(3).

77. S.J. Res. 286, 76th Cong., § 3(b) (1940). This affirmative defense was designed to be a “very limited exception.” H.R. REP. NO. 103-65, at 25 (1993). It is available only when “a useless job” would need to be created or if there was a reduction in the force “that reasonably would have included the veteran.” *Id.* at 25 (quoting *Davis v. Halifax Cty. Sch. Sys.*, 508 F. Supp. 966, 968 (E.D.N.C. 1981) (“[I]t [is also not] a sufficient excuse that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of application.”)); *see also* S. REP. NO. 103-158, at 46–54 (1993) (discussing the requirements of the affirmative defense). Impossibility and unreasonableness remain affirmative defenses to reemployment today; the employer retains the burden of proof for these. USERRA § 4312(d)(1)(A) (2012); 20 C.F.R. § 1002.139(a) (2016); *see also* Forte, *supra* note 42, at 313 (observing that these defenses are to be “narrowly construed”).

position without cause within one year after such restoration."⁷⁸ These requirements remain the central elements of the law, although they also have evolved over the years.

Today, a qualified servicemember has the right to return to his or her pre-service job as adjusted by the escalator position. As first articulated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.*,⁷⁹ the escalator position is "the precise point he would have occupied had he kept his position continuously during the war."⁸⁰ The Court later restated the principle in *Oakley v. Louisville & Nashville R. Co.*⁸¹ as the right to be restored "to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment."⁸² In 1948, Congress adopted this concept. In this early version, a returning servicemember was granted the right to return to work at the job the person would be at but for service, with reasonable certainty, provided he was able to perform the relevant duties.⁸³

In 1948, Congress also created an exception for servicemembers who could not perform the relevant duties of an escalator position because of a disability obtained during service.⁸⁴ In that situation, if the person was not able to return to the escalator position, he was given a right to return to the nearest similar position for which he could perform the duties.⁸⁵ This provision was expanded in 1974 to all returning personnel; it was no longer just for those with a service-connected disability.⁸⁶ Today, all covered employees retain the right to return to the escalator position, and if he or she is no longer qualified for that position, the servicemember must be returned to his or her pre-service position or, if not qualified for that, the nearest approximation of the escalator or pre-service position (in that order) for which the person is or can become

78. S.J. Res. 286, § 3(c).

79. 328 U.S. 275 (1946).

80. *Id.* at 284–85; *see also* *Trailmobile Co. v. Whirls*, 331 U.S. 40 (1947) (affirming the escalator position principle).

81. 338 U.S. 278, 283 (1949).

82. *Id.* at 283.

83. Selective Service Act of 1948, Pub. L. No. 80-759, §§ 9(b)(A)(i), 9(b)(B)(i), 62 Stat. 604, 614–15.

84. *Id.* §§ 9(b)(A)(ii), 9(b)(B)(ii).

85. *Id.*

86. VRAA, Pub. L. No. 93-508, sec. 404, § 2021, 88 Stat. 1578, 1594–96 (1974).

qualified.⁸⁷ If someone is not able to return to the escalator job, the alternative position must have similar seniority, status, and pay.⁸⁸

In addition to the right to work at one's escalator position (or the closest one for which the person is qualified), he or she must be reemployed with the rights and benefits based on seniority and length of service that the employee would have had with "reasonable certainty" but for the absence.⁸⁹ According to the legislative history, this means that the person must have been very likely to receive the right or benefit.⁹⁰ Further, there may not be any loss of seniority when someone is reemployed.⁹¹ This includes within-grade increases, promotions, tenure, retirement, annual leave accrual, accrued vacation, severance pay, and similar benefits.⁹² For these seniority-related benefits, the person must be treated as if he or she never left.

With respect to non-seniority benefits, such as life insurance and bonuses, the person must be granted whatever is given to similarly situated employees on non-military leave. If different benefits are given to various types of leave, the person must be given the most favorable treatment among the options.⁹³ In 1975, the Supreme Court held that a benefit that is granted as compensation for work performed, including the accumulation of leave if it is tied to hours worked, is not related to seniority status.⁹⁴

In addition to the right to reemployment at an escalator position with all accrued benefits, USERRA created a rare statutory exception to employment-at-will with its second labor standard. Generally, under the doctrine of at-will employment, a person may be hired or fired by

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87. USERRA, 38 U.S.C. § 4313 (2012); 20 C.F.R. §§ 1002.196–1002.197 (2016).
88. USERRA § 4313. Status generally refers to rank, advancement opportunities, responsibilities, work conditions, location, and shift assignment. H.R. REP. NO. 103-65, at 31 (1994) (further observing that "[s]ince seniority and pay are easily determined, the critical factor for determining equivalency is status").
89. USERRA § 4312.
90. H.R. REP. NO. 103-65, at 31 (1993) ("The Committee intends to affirm the interpretation of 'reasonable certainty' as 'a high probability', which has sometimes been expressed in percentages . . . [such as examples where courts found that eighty-six and ninety percent met the required level of certainty]." (citations omitted)).
91. Selective Service Act of 1948, Pub. L. No. 80-759, § 9(b), 62 Stat. 604, 615.
92. Universal Military Training and Service Act Amendment, Pub. L. No. 87-391, sec. 3, § 9(g)(4), 75 Stat. 821, 821 (1961).
93. USERRA § 4316(b); 20 C.F.R. § 1002.150 (2016).
94. GATES ET AL., *supra* note 34, at 16 (citing *Foster v. Dravo Corp.*, 420 U.S. 92, 99–100 (1975)).

an employer for any or no reason.⁹⁵ By contrast, under USERRA, a returning servicemember must be given a period of time after reemployment to readjust, during which he or she only may be fired for cause. Essentially, if someone has engaged in covered military duty for at least thirty days, he or she is entitled to a period of time back at work (either 180 days or a year depending on the length of service) where termination is only possible for cause.⁹⁶ Cause has been defined as something that is "reasonable under the circumstances, not arbitrary, and . . . that the servicemember was on notice would constitute grounds for discharge."⁹⁷ The employer bears the burden of proving that a discharge during the relevant time frame is for cause.⁹⁸

This second labor standard (the exception to at-will employment) gives teeth to the first (the reemployment requirement). Preventing someone from being terminated without cause allows the returning servicemember to have a chance to fully reintegrate, relearn civilian skills, and have some economic stability after separating from service.⁹⁹ It prevents employers from "perfunctory and meaningless reinstatement"¹⁰⁰ that would allow employers to fire a servicemember a day after he or she was reemployed.¹⁰¹ Put differently, it "guard[s]

95. James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235, 235 (2007) (observing that at-will employment has prevailed "in forty-nine states [the exception being Montana] and the District of Columbia" for over 100 years).

96. USERRA § 4316(c)(1)–(2).

97. John F. Beasley Jr. & Marisa Anne Pagnattaro, *Reemployment Rights for Noncareer Members of the Uniformed Services: Federal and State Law Protections*, 20 LAB. LAW. 155, 164 (2004).

98. 20 C.F.R. § 1002.248 (2016).

99. See G. H. Fischer, Annotation, *Re-employment of Discharged Servicemen*, 29 AM. L. REP. 2d 1279, § 4 (1953) ("It has been very aptly stated that the act was designed to provide for the rehabilitation of the returning veteran so that he might be equipped to enter a highly competitive world of job finding without the handicap of a long absence from work, as well as to provide for his financial stability . . .").

100. 139 CONG. REC. 27,141 (1993) (statement of Sen. Rockefeller).

101. See 86 CONG. REC. 10,445 (1940) (statement of Rep. O'Toole) ("Mr. Chairman, . . . [we need to] prevent an employer from reemploying a man for 1 day or 1 week and then dismissing him and saying that he had complied with the law. [We also need to prevent] . . . the various districts [from making] . . . different decisions, some saying that 1 day is a sufficient compliance, some saying 2 weeks, and some 1 week, and we will have a different law in every section of the country. To avoid this, and to make up for the sacrifice these men have made and to penalize those employers who would like to disobey the law, I think we should make it compulsory with the employer to take these men back for a period of 6 months, and if they are taken back for 6 months, in 99 cases out of 100 they will be there for good.").

against a bad faith or pro forma reinstatement¹⁰² and prevents a servicemember from being penalized “by reason of his [or her] absence.”¹⁰³

USERRA’s third labor standard involves reasonable accommodations. In 1991, after the enactment of the Americans with Disabilities Act (ADA),¹⁰⁴ the law was changed to require employers to provide reasonable accommodations to assist people who develop a service-related injury or have an injury that is aggravated by service to requalify for work at the appropriate escalator or pre-service position.¹⁰⁵ In an effort to more closely resemble the reasonable accommodation provisions found in other disability laws, Congress included “improved reemployment rights for disabled veterans” by declaring that “a person shall be considered qualified to perform the duties of an employment position if such person, with or without reasonable accommodation, can perform the essential functions of the position.”¹⁰⁶ The new provision also created an affirmative duty on employers to provide reasonable accommodations unless doing so would impose an “undue hardship” on operations.¹⁰⁷

The 1991 law also created an accommodation plus requirement. Under this provision, employers must make “reasonable efforts” to reemploy someone at his or her escalator position and to help them requalify for their pre-service job or to perform the duties of the next closest position.¹⁰⁸ Thus, the law imposed an affirmative obligation on employers to take steps to (re)train someone to become qualified for the post-service job in the escalator position regardless of whether someone has a disability. With the accommodation plus provision, USERRA goes much further than traditional accommodation doctrine

102. H.R. REP. NO. 103-65, at 35 (1993).

103. Fischer, *supra* note 99, § 4.

104. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).

105. USERRA, 38 U.S.C. § 4313(a)(3) (2012).

106. Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, sec. 339, § 2027, 105 Stat. 75, 91–92 (“[T]he terms ‘reasonable accommodation’ and ‘undue hardship’ have the meanings given such terms in [the ADA] (42 U.S.C. §§ 12111 (9) and (10)).”); *see also* 1 DEFENSE OF EQUAL EMPLOYMENT CLAIMS § 8:14 (2016), Westlaw (explaining that the USERRA version of this provision was drafted to respond to “a controversy [that] arose [under VRAA] regarding whether an employer’s duty to accommodate leave for military service was subject to any reasonableness requirement or exception for undue hardship”).

107. Secs. 339–340, 105 Stat. at 91–92.

108. *Id.*; *see* USERRA § 4313(a)(4) (current language of the requirement).

by affirmatively requiring employers to help someone become qualified for the job.¹⁰⁹

Accordingly, while a person must be qualified for the civilian job to which he or she returns, USERRA requires an employer to make "reasonable efforts" to qualify someone for that position.¹¹⁰ In addition, the cost of such efforts is imposed on the employer.¹¹¹ In determining whether the employer has met its obligation, courts will view the facts through the lens of *Fishgold*, in which the Court held that the labor standards for this community should be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need."¹¹² Nonetheless, despite liberal construction, the person still must be qualified for the job under either of USERRA's accommodation standards. If a person is not qualified, even after an employer's reasonable efforts, he or she must be reemployed in a position of equivalent seniority, status, and pay to the escalator position (provided the person is qualified or able to become qualified to perform the job's essential functions with the employer's reasonable efforts).¹¹³ If this is not possible, the employer must employ the person in the closest approximate position that the person is qualified for, which may be higher or lower, as determined on a case-by-case basis.¹¹⁴

There is no question that USERRA and its predecessors have helped countless servicemembers reintegrate into civilian employment over the years with these reemployment protections. Unlike the discrimination and retaliation provisions described above, however, the labor standards are not accessible to everyone who otherwise belongs to the protected class. Rather, access to these labor standards is granted

109. See *Understanding Your Employment Rights Under the Americans with Disabilities Act (ADA): A Guide for Veterans*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/publications/ada_veterans.cfm [<https://perma.cc/3F4F-HNAH>] (last visited Oct. 24, 2016) ("Under USERRA, employers must make 'reasonable efforts' to help a veteran who is returning to employment to become qualified to perform the duties of the position . . ."); James Schmeling, *Veterans, Disability, and Employment*, 31 GPSOLO 28, 29 (2014) (noting that USERRA requires employers to "assist veterans in their reemployment to become qualified for their former job or other jobs"); Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1109–10 (2010) (demonstrating how "USERRA expressly move[d]" beyond the ADA, by requiring employers to help an employee qualify for a job); Beasley Jr. & Pagnattaro, *supra* note 97, at 168 (providing examples of situations that would qualify as causes of action under one but not the other of these laws).

110. USERRA § 4313(a)(1)(B).

111. 20 C.F.R. § 1002.198(b) (2016).

112. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

113. USERRA § 4313(a).

114. *Id.*; 20 C.F.R. § 1002.225 (2016).

for uniformed servicemembers only if five conditions are met.¹¹⁵ First, the person must have left a civilian employer.¹¹⁶ Second, the servicemember must have given appropriate notice of the call to service unless military necessity prevented such notice from being provided.¹¹⁷ Third, the person must be absent for no more than five years of cumulative time.¹¹⁸ Fourth, the servicemember must return to the civilian employer in a timely manner.¹¹⁹ Finally, the person must be separated from service with honorable or general conditions, i.e., they must have the right character of service.¹²⁰ This last requirement has the unintended consequence of excluding a large segment of Gulf War-Era II servicemembers who have a service-connected injury, who have experienced military sexual trauma, or who have caregiving responsibilities. The next Part explains how and offers a proposal to amend USERRA's labor standards to live up to the law's intent.

115. See USERRA §§ 4304, 4312.

116. See *id.* § 4312(a)(3) (reemployment with an employer); *id.* § 4303(4) (definition of employer).

117. *Id.* § 4303(8) (defining notice); *id.* § 4312(a)(1) (stating that advance notice of need for military leave is required for reemployment). Notice is not necessary if it would be impossible or unreasonable to give it under the circumstances. *Id.* § 4312(b).

118. *Id.* § 4312(a)(2). In practice, coverage is often extended for much longer than five years as various types of service common during Gulf War-Era II do not count toward the cap. *Id.* § 4312(c). For example, active duty that is extended involuntarily is excluded. *Id.* § 4312(c)(4). See *Full Committee Consideration of H.R. 11,509, to Amend and Clarify the Reemployment Provisions of the Universal Military Training and Service Act, and for Other Purposes: Hearing Before the H. Armed Services Comm.*, 76th Cong. 5 (1966) (noting this protection was added "during the Berlin crisis"). Annual training, regular drill, and presidential activations are similarly excluded. USERRA § 4312(c)(3)–(4); 140 CONG. REC. 24,421 (1994) (joint explanatory statement) (listing seven extensions to the cap in service).

119. See USERRA § 4312(e)(1). In 1940, people had forty days to reapply. S.J. Res. No. 286, 76th Cong. § 3 (1940). Four years later, the requirement to provide notice within forty days was changed to ninety days. Selective Training and Service Act of 1940 Amendment, Pub. L. No. 78-473, 58 Stat. 798 (1944). Today, timely notice depends on how long the person was in uniformed service. USERRA § 4312(e) (containing different time frames for service under 31 days, from more than 30 days to less than 181 days, and for more than 180 days).

120. USERRA § 4304.

II. FIXING THE BROKEN PROMISE OF USERRA FOR SERVICEMEMBERS WITH "OTHER THAN HONORABLE" SEPARATIONS

The discrimination protection and rights to labor standards described in Part I are couched in national security and an accompanying promise that a person's uniformed service in the military will not harm his or her ability to engage in post-service civilian work. Over the years, as military and workplace needs have changed, the law has evolved to live up to this promise by covering more servicemembers, seeking fairness and uniform application of the guaranteed protections, bolstering the effectiveness of existing protections, and studying the application of the law for oversight purposes including improving effective enforcement and informing future calls for reform. The time has come to revisit the law again to "eliminat[e] or minimiz[e] the disadvantages to civilian careers and employment which can result from such service; and] . . . provid[e] for the prompt re-employment . . . [upon] completion of such service"¹²¹ for people who have separated from the military with other than honorable (OTH) conditions.

Accordingly, this Article offers a two-part proposal to amend USERRA to help it live up to its stated goals. First, it recommends eliminating the OTH coverage exclusion located in 38 U.S.C. § 3404(b). Second, it recommends improving the accommodation provisions for this population (and others) by extending the time frame by which employers must make reasonable efforts to qualify someone for a position past the day of reemployment. Instead of ending at the moment of reemployment, this Part of the proposal suggests that the time frame for this labor standard mirror the one found in the cause protection standard. In so doing, the Article offers a way to improve USERRA so it does not become just another way the country fails to live up to the promise of supporting those who volunteer to serve.

A. *Removing the Exclusion of People with OTH Separations Based on Gulf War-Era II Experiences*

As noted in Part I, USERRA generally has a broad coverage threshold. There are no exclusions for small businesses or part-time or seasonal workers; nor are there minimum employee threshold or hours-worked requirements as there are for other federal employment laws.¹²² Rather, USERRA applies to any person who serves in a uniformed

121. *Id.* § 4301.

122. *See, e.g.*, 29 U.S.C. § 2611(2)(A)(ii) (2012) (requiring someone to have worked for 1250 hours in the past twelve months to be covered under the FMLA); 42 U.S.C. § 12111(5)(A) (2012) (covering only employers with at least fifteen employees under the ADA).

service.¹²³ While broad, this coverage is not unfettered. “Uniformed service” is a term of law, and Congress has defined it to include most—but not all—military personnel in the Total Forces.¹²⁴ Indeed, only some types and characters of service are covered for certain protections. This contravenes the national security goal and stated purpose of USERRA.

As a preliminary matter, USERRA does offer some type of coverage to everyone applying to enter, currently in, or having already participated in uniformed service.¹²⁵ For example, the anti-discrimination and anti-retaliation provisions apply to people falling into all of those categories.¹²⁶ This is not true for all of USERRA’s protections, however, as the law conditions a servicemember’s “entitlement to the benefits” of the labor standards on a certain character of service.¹²⁷ Specifically, the labor standards terminate with: (1) a dishonorable or bad conduct discharge; (2) an other than honorable conditions (OTH) separation; (3) a dismissal by court-martial or presidential order in a time of war;¹²⁸ or (4) a dropping of a commissioned officer from the rolls.¹²⁹ The second exclusion of people with OTH separations is particularly problematic in light of the experiences of Gulf War-Era II veterans. It is also contrary to USERRA’s long history of encouraging military service, of fairness, and of supporting people dealing with service-connected disabilities.

123. USERRA § 4312(a) (“[A]ny person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits.”); *id.* § 4303(3) (defining “employee” as “any person employed by an employer”).

124. *Id.* § 4303(16) (“The term ‘uniformed services’ means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.”).

125. *Id.* § 4311(a).

126. *Id.* § 4311(a)–(b).

127. *Id.* § 4304.

128. The text references a dismissal per 10 U.S.C. § 1161(a), which covers commissioned officers dismissed by (1) “sentence of a general court-martial; (2) in commutation of a sentence of a general court-martial; or (3) in time of war, by order of the President.” USERRA § 4304.

129. The text refers to people dropped from the rolls under 10 U.S.C. § 1161(b), which drops commissioned officers who have been AWOL for at least three months; sentenced by a court martial by a final sentence of more than six months; or been found guilty and sentenced to confinement by a non-military court. USERRA § 4304.

1. An Overview of OTH Separations

At the end of military service, all living personnel are either punitively discharged or administratively separated from service.¹³⁰ Punitive discharges are the result of a court martial and are categorized as either dishonorable or bad conduct.¹³¹ All other discharges are the result of an administrative separation process. Through this process, someone may obtain an honorable, general under honorable conditions (general), OTH, or entry-level separation (ELS).¹³² Generally, OTH is a type of involuntary administrative separation that is meant to designate military service below an acceptable level.¹³³

130. The designation is included on someone's DD-214, the form used to capture one's character of service at the time of separation. *DD Form 214, Discharge Papers and Separation Documents*, NATIONAL ARCHIVES <https://www.archives.gov/st-louis/military-personnel/dd-214.html> [<https://perma.cc/9PW6-EY84>] (last visited Oct. 25, 2016).

Servicemembers have fifteen years to apply for a discharge upgrade to receive a better separation status. *See* 10 U.S.C. § 1553 (2012) (stating that review of discharge or dismissal must be made within fifteen years); DEP'T OF DEFENSE, INSTRUCTION 1332.28, DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS (2004) (restating this requirement); DEP'T OF DEFENSE FORM 293, APPLICATION FOR THE REVIEW OF DISCHARGE FROM THE ARMED FORCES OF THE UNITED STATES (2015) (same). Upgrades have a low success rate. *See* MICHAEL ETTLINGER & DAVID F. ADDLESTONE, *MILITARY DISCHARGE UPGRADING AND INTRODUCTION TO VETERANS ADMINISTRATION LAW: A PRACTICE MANUAL* ¶ 26.3.4.1 (2d ed. 1990) ("The VA favorably adjudicates only about ten percent of these cases.").

An upgraded discharge may entitle someone to USERRA protections retroactively, but it does not alleviate the need for the person to have timely reapplied for their job upon return. H.R. REP. NO. 103-65, at 37 (1993). Thus, with respect to USERRA, the upgrade only matters if it is done with enough time for the person to timely reapply for their job and if it is granted retroactively to the date of discharge as opposed to for benefits going forward from the date of the upgrade. H.R. REP. NO. 103-65, at 37.

131. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b)(8) (2012).

132. The punitive discharges, OTH, and ELS are sometimes referred to as "bad papers." ELS is only given to someone who is separating within the first six months of military service. David P. Price, *Getting Fired by the Military (And What You Can Do About It)*, N.J. LAW., June 2007, at 21, 22-23.

133. The Secretary of Defense has the power to issue regulations; each service branch has been authorized by the Secretary to promulgate its own standards for OTH separations. For examples of the standards each branch has promulgated, see U.S. DEP'T OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN (2015) [hereinafter AFI 36-3208]; U.S. DEP'T OF THE ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (2011); U.S. DEP'T OF HOMELAND SEC., U.S. COAST GUARD, COMDTINST M1000.4, MILITARY SEPARATIONS (2016); U.S. MARINE CORPS, MCO P1900.16F, SEPARATION AND

While involuntary, OTH separations are discretionary, and administrative separation is virtually guaranteed for some forms of misconduct.¹³⁴ This includes certain types of egregious misconduct or illegal drug abuse, while other types of misconduct and activity are truly on a discretionary basis.¹³⁵ Unfortunately, there is no clear, uniform definition of what misconduct will result in an OTH discharge, and each military branch has separate guidance.¹³⁶ For example, the Air Force authorizes an OTH separation for “a pattern of behavior or one or more acts or omissions that constitute a significant departure from the conduct expected of airmen.”¹³⁷ By comparison, the Coast Guard authorizes OTH “for misconduct, security reasons or good of the Service.”¹³⁸ While the guidance for each branch contains examples of what constitutes things like a “significant departure” from standards, the reality is that it generally remains at the discretion of command on a case-by-case basis.¹³⁹

RETIREMENT MANUAL (2013); U.S. DEP’T OF THE NAVY, NAVAL MILITARY PERSONNEL MANUAL, art. 1900-1999 (2002).

134. Price, *supra* note 132, at 23–24 (providing an overview of the discharge review process).
135. *See, e.g.*, U.S. MARINE CORPS, MCO P1900.16, SEPARATION AND RETIREMENT MANUAL 1-15 (2013) (“Confirmed illegal drug use requires mandatory administrative separation processing.”); Price, *supra* note 132, at 22–23 (“An OTH is most often issued for misconduct . . . [such as] drug abuse.”); John W. Brooker, Evan R. Seamone & Leslie C. Rogall, *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 18 (2012) (“Historically and modernly, the military’s reliance on and deference to command discretion has produced inconsistent punishments.”). Until the Don’t Ask Don’t Tell Repeal Act of 2010, concealing one’s homosexuality, lying about prior acts, or committing same-sex acts during service could have led to a mandatory OTH. *See, e.g.*, U.S. DEP’T OF THE ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (2011) (requiring all references to activity and prior concealment of homosexuality from the Army’s administrative separation regulation); *see generally* Karen Moulding et al., 1 SEXUAL ORIENTATION AND THE LAW § 8:19 (2016), Westlaw (discussing some historic military policies on homosexuality).
136. *See* 20 C.F.R. § 1002.136 (2016) (“The branch of service in which the employee performs the tour of duty determines the characterization of service.”).
137. U.S. DEP’T OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN 22 (2004); *see* U.S. DEP’T OF THE NAVY, NAVAL MILITARY PERSONNEL MANUAL, art. 1910-304 (2008) (using substantially the same language as the Air Force).
138. U.S. DEP’T OF HOMELAND SECURITY, U.S. COAST GUARD, COMDTINST M1000.4, MILITARY SEPARATIONS 1-62 (2015).
139. Brooker et al., *supra* note 135, at 18 (“[T]here are no precise military standards dictating when these characterizations will result or for what types

These definitions—combined with an inconsistent application of them at the discretion of command—have resulted in a striking number of people receiving OTH separations during the recent conflicts. From October 2000 to September 2005, about six percent of separations, or a little over 55,000 people, separated from the military with an OTH designation.¹⁴⁰ Another 20,000 people received OTH discharges from 2005 to 2012.¹⁴¹ These are conservative figures, as some have estimated that over 100,000 OTH separations have occurred during the Gulf War-Era II.¹⁴²

Obtaining an OTH characterization of service has a devastating impact on someone's ability to successfully reintegrate into civilian life. An OTH separation may deny that person access to military health care, eliminate education benefits, remove access to military pensions, and force a person to forego a myriad of other benefits that were once promised to them.¹⁴³ Importantly, an OTH separation significantly

of offenses. Historically and modernly, the military's reliance on and deference to command discretion has produced inconsistent punishments. Troops may be punished harshly with an OTH . . . in one battalion for the same misconduct that garners a counseling statement or corrective training 50 yards away in a different battalion on the same installation."); see Charles P. Sandel, Comment, *Other-Than-Honorable Military Administrative Discharges: Time for Confrontation*, 21 SAN DIEGO L. REV. 839, 855 (1984) ("It is difficult to detect or protect against [command influence or abuse of discretion] within the existing discharge process.").

140. During this time, 945,596 people separated from the military. U.S. VETERANS' DISABILITY BENEFITS COMM., HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 93 tbl.5.1 (2007) (25.2% of all people who separated from the military during this time frame possess discharges that disqualify them from USERRA's labor standards) [hereinafter HONORING THE CALL TO DUTY].
141. Hal Bernton, *Troubled Veterans Left Without Health-Care Benefits*, SEATTLE TIMES (Aug. 11, 2012, 8:00 PM), <https://www.seattletimes.com/seattle-news/troubled-veterans-left-without-health-care-benefits/> [<https://perma.cc/SUR5-FGUG>].
142. Marisa Peñaloza & Quil Lawrence, *Other-Than-Honorable Discharge Burdens Like a Scarlett Letter*, NAT'L PUB. RADIO (Dec. 9, 2013, 6:00 AM), <https://www.npr.org/2013/12/09/249342610/other-than-honorable-discharge-burdens-like-a-scarlet-letter> [<https://perma.cc/PA7C-C6RZ>].
143. See, e.g., 38 U.S.C. § 5303 (2012) (denying certain benefits based on OTH separation); Peter Slavin, *The Cruellest Discrimination: Vets with Bad Paper Discharges*, 14 BUS. & SOC. REV. 25, 27–28 (1975) (providing examples of people who have had trouble finding work after bad papers, and further describing that the stigma associated with bad papers makes finding employment difficult, has a disproportionate effect on minority servicemembers, and makes it "harder, if not impossible, to obtain" other life necessities); Charles E. Lance, *A Criminal Punitive Discharge—An Effective Punishment?*, 79 MIL. L. REV. 1, 20–21 (1978) (listing over twenty federal benefits that are denied to someone with a dishonorable discharge).

impacts employment opportunities as well. It makes reenlistment in the military impossible¹⁴⁴ and attaches a strong stigma on the person that follows them to the civilian workplace.¹⁴⁵ This stigma may result in a failure to be hired, or having an additional hurdle of "bad papers" to overcome.¹⁴⁶ These bad papers are the death knell for some, as certain employers blacklist veterans that have them.¹⁴⁷ Consequently, these "discarded troops" are forced to return to civilian life with "severe handicaps related to their discharge characterizations that prevent successful reintegration."¹⁴⁸

Not surprisingly, studies have shown that these discarded troops run into trouble reintegrating. They "have a higher incidence of unemployment, violent behavior, alcohol and drug abuse, family problems and homelessness than other veterans."¹⁴⁹ As a result, bad papers have been called "a life sentence" or a "ticket to America's underclass [and] a bar to leaving it."¹⁵⁰ Thus, through the discharge process, the military removes access to some of the very protections to civilian employment

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144. 10 U.S.C. §§ 508(a), 3258, 8258. *See, e.g.*, U.S. DEP'T OF THE ARMY, REG. 601-210, ACTIVE AND RESERVE COMPONENTS ENLISTMENT PROGRAM 4-4(d), 4-23(n) (2013) (OTH is a non-waivable disqualifying separation that prevents reenlistment in the RC.).
145. *See* Stephen Losey, *Military Must Do Right by Wrongly-Discharged Sexual Assault Victims, Advocates Say*, AIR FORCE TIMES (May 19, 2016, 5:53 PM), <https://www.airforcetimes.com/articles/military-must-do-right-by-wrongly-discharged-sexual-assault-victims-advocates-say> [<https://perma.cc/VM4M-QBTN>] (observing that 85% of separations are honorable, "meaning anything else stands out to potential employers"); Slavin, *supra* note 143, at 27-38; *Browning v. Gen. Motors Corp., Fisher Body Div.*, 387 F. Supp. 985 (S.D. Ohio 1974).
146. Slavin, *supra* note 143, at 27 (observing that many businesses "count their discharges against such veterans, or refuse to hire them entirely").
147. *Id.* at 29.
148. Evan R. Seamone, *Dismantling America's Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, 37 NOVA L. REV. 479, 503-04 (2013); Gregg Zoroya, *Troubled Troops in No-Win Plight*, USA TODAY (Nov. 2, 2006, 8:39 AM), https://usatoday30.usatoday.com/news/nation/2006-11-01-troubled-troops_x.htm [<https://perma.cc/XM32-S256>]; LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION 160 (1978).
149. Maxine Waters & Jonathan Shay, *Heal the 'Bad Paper' Veterans*, N.Y. TIMES (Jul. 30, 1994), <https://www.nytimes.com/1994/07/30/opinion/heal-the-bad-paper-veterans.html> [<https://perma.cc/EJ6L-U9YR>]; Zoroya, *supra* note 148 (describing positions of Marine Corps defense attorneys who have witnessed the downward spiral faced by their discharged clients with untreated mental health conditions).
150. Brooker et al., *supra* note 135, at 12 (citations omitted).

that are meant to encourage people to serve in the first place and are at the heart of the principle underlying the creation of USERRA. This is because one's character of service designation is the key to accessing benefits post-separation, which end up being a critical component to whether one is able to successfully transition to civilian life.

A particularly troubling aspect of this discharge designation process and impact of bad papers on reintegration has surfaced from the Gulf War-Era II separated veterans: many can trace the underlying misconduct to an injury sustained during service, a response to military sexual trauma, or the impact of service on caregiving responsibilities. The experiences of these groups of veterans are explored in the following Sections.

2. Service-Connected Injuries and OTH Separations

A large number of people who have served during Gulf War-Era II obtained OTH separations as a result of conduct undertaken in connection with service-related injuries.¹⁵¹ The precise number of OTH separations that directly stem from conduct associated with service-connected injuries is unknown. But there is strong evidence tying some of the signature injuries of the recent conflicts, like post-traumatic stress disorder (PTSD)¹⁵² and traumatic brain injury (TBI),¹⁵³ to misconduct

151. Although the problem is particularly acute during Gulf War-Era II, it is not unique only to this period. During Vietnam, over 560,000 veterans received OTH separations "for such offenses as being absent without leave, using or selling drugs or assaulting their superiors." Waters & Shay, *supra* note 149. Further, just under half of those veterans—estimates place it at 250,000—suffered from PTSD (which had not yet been classified in the DSM). *Id.*

152. PTSD stems "from a significant threatening event that leads to specific types of responses based on unwanted reminders of the real trauma or attempts to avoid similar trauma from happening again." Brooker et al., *supra* note 135, at 251–52. The VA claims that eleven to twenty percent of OIF and OEF veterans experience PTSD. National Center for PTSD, *How Common Is PTSD?*, U.S. DEP'T OF VETERANS AFFAIRS, <https://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp> [<https://perma.cc/V9M5-F52L>] (last visited Oct. 27, 2016) [hereinafter *How Common Is PTSD?*].

153. TBI is the result of bodily impact that damages the brain. "Based on the nature of the trauma . . . , physiological responses can influence the brain's processing of information and the ability to regulate emotion. In some cases, TBI impairs judgment to the point where a person perceives nonexistent threats or lacks the ability to express rage, shock or grief in a socially acceptable manner." Brooker et al., *supra* note 135, at 252. From 2000 to mid-2016, 352,619 servicemembers were diagnosed with TBI. Defense and Veterans Brain Injury Center, *DoD Worldwide Numbers for TBI*, DEFENSE CENTERS OF EXCELLENCE <https://dvbic.dcoe.mil/dod-worldwide-numbers-tbi> [<https://perma.cc/V557-3KTD>] (last visited Oct. 27, 2016).

and involuntary OTH separations.¹⁵⁴ For example, a 2010 study of Marines deployed in OEF and OIF found that someone with a PTSD diagnosis was "11.1 times more likely" to receive an OTH separation.¹⁵⁵ In addition, approximately 31,000 OTH separations from fiscal years 2001 to 2010 involved someone with a personality or adjustment disorder.¹⁵⁶ Like described for PTSD below, these disorders are "characterized by individuals' inflexible [and] socially inappropriate behaviors across diverse situations," and have led to some of the misconduct underlying this type of discharge.¹⁵⁷ Indeed, an "inescapable connection" between service-connected injuries and criminal behavior has been documented.¹⁵⁸

This is not surprising when the signature injuries are unpacked. Among other things, PTSD and TBI impact judgment and one's ability to address stress.¹⁵⁹ They may cause dissociative episodes (a period of time when a person experiences a flashback that causes him to think he is back in the environment where the original trauma occurred) or

154. See Daniel Reidenberg & Natasha Shaikh, *Making Posttraumatic Stress Disorder a Priority: Saving Veterans from Suicide*, 37 NOVA L. REV. 523, 538 (citing Bernton, *supra* note 141) ("[W]hen PTSD is left untreated, it leads to the soldiers misbehaving, ultimately and inevitably resulting in an OTH discharge."); Proposed Second Amended Complaint at 10, ¶ 37, *Shepherd v. McHugh*, No. 3:11-cv-00641, (D. Conn. Dec. 3, 2012) (stating that servicemembers were discharged because of misconduct that was symptomatic of undiagnosed PTSD); Price, *supra* note 132 ("There is a rebuttable presumption that any medical condition is incurred incident to service."). "Too many service members receive an [OTH] discharge for reasons related to PTS or TBI. Since 2000, service members have reported 138,197 PTS cases and 333,169 TBI cases with many more cases unreported. These troops are sometimes viewed as liabilities instead of being treated appropriately." *Governor O'Malley's Plan for Veterans and Military Families*, O'MALLEY FOR PRESIDENT (Nov. 9, 2015) (citations omitted), <https://martinomalley.com/policy/veterans/> [https://perma.cc/FBY9-8ULX].

155. Brooker et al., *supra* note 135, at 256 (quoting Robyn M. Highfill-McRoy et al., *Psychiatric Diagnoses and Punishment for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, 10 BMC PSYCHIATRY 1, 6 (2010)); Reidenberg & Shaikh, *supra* note 154, at 538.

156. MELISSA ADER ET AL., VETERANS LEGAL SERVS. CLINIC, JEROME N. FRANK LEGAL SERVS. ORG. AT YALE LAW SCHOOL, CASTING TROOPS ASIDE: THE UNITED STATES MILITARY'S ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM 2-3 (2012), https://www.law.yale.edu/system/files/documents/pdf/Clinics/VLSC_CastingTroopsAside.pdf [https://perma.cc/7R7K-HR38].

157. *Id.*

158. Vanessa Baehr-Jones, *A "Catch-22" for Mentally-Ill Military Defendants: Plea-Bargaining Away Mental Health Benefits*, 204 MIL. L. REV. 51, 51 (2010).

159. Brooker et al., *supra* note 135, at 251.

violent sleep-state acts (where someone does something during a “vivid nightmare” while sleeping or immediately after being awoken).¹⁶⁰ Other behavior tied to these injuries includes thrill-seeking (where someone seeks the adrenaline rush they used to have in combat by engaging in dangerous activity), self-punishment (someone acts in hopes of being punished because he believes he deserves to suffer as a result of a traumatic event in which he feels that he should have saved or prevented an injury to another during war), and revenge acts (someone acts because they felt exploited by the military during combat).¹⁶¹ The conditions also cause a decrease in one’s ability to perform a job, which has caused servicemembers to fail to appear at work, to be late with their work, and to have outbursts while at work.¹⁶² This behavior is sometimes mistaken as laziness or a lack of motivation, when it actually may be caused by the inability to “concentrate or cognitively organize information.”¹⁶³ Even though PTSD is often untreated, sometimes treatment itself may cause problems, particularly during a time of change in one’s medication or dosage. Some drugs or combinations of prescription medication have induced adverse reactions.¹⁶⁴

These behavioral impacts of combat-related PTSD, TBI, and other conditions have been connected to a wide range of actions that have been categorized as misconduct leading to an OTH separation.¹⁶⁵ These behaviors include problems performing one’s job, drug and alcohol use (often undertaken as a form of self-medication),¹⁶⁶ shirking of responsibilities or lashing out at colleagues, taking of unauthorized

160. *Id.* at 253, 255 (citations omitted).

161. *Id.* at 253–55.

162. *Id.* at 255.

163. *Id.*

164. *Id.*

165. *See, e.g.*, Amanda Carpenter, *Military Misconduct May Be Sign of PTSD*, WASH. TIMES (Jan. 12, 2010), <https://www.washingtontimes.com/news/2010/jan/12/misconduct-may-be-symptom-of-stress-disorder/> [<https://perma.cc/4TCC-LE3D>] (citing a sober warning, in 2007, by mental health professionals within the DOD that “[t]he service may be discharging soldiers for misconduct when in fact they are merely displaying symptoms of [PTSD].”); Thomas J. Hetchler Jr. & Aaron E. Cook, *Other-Than-Honorable Military Discharge: Ramifications and Remedies*, MICH. B.J., Feb. 2015, at 30, 32 (2015) (“In many cases, the very conduct that led to the [OTH] discharge was directly related to stress disorder and brain injuries incurred during combat.”).

166. Self-medication is a “very common response” to PTSD in an effort to sleep or relax. Brooker et al., *supra* note 135, at 253; *see* Bernton, *supra* note 141 (quoting a San-Francisco-based legal services provider who estimates that it has helped hundreds of veterans who received OTH separations for one-time drug use).

leaves, going AWOL, desertion, or "impulsive" or "explosive rages" on others, all of which have been the conduct underlying OTH separations.¹⁶⁷

Take the hypothetical case of Sergeant Jane Smith, a member of the RC who was diagnosed with PTSD. Smith was honorably discharged from a deployment to Iraq. Later, she failed a urinalysis test due to marijuana use while she was in drill status. The positive drug test led to an OTH separation.¹⁶⁸ This experience is not limited to hypotheticals. Even a one-time use of marijuana may result in an OTH separation. Smith's experience is also not unique with respect to the receipt of multiple separations from the military, only one of which may be on bad papers. Many servicemembers receive multiple separations from the military, only one of which may be on bad papers.¹⁶⁹ As the *Tootle* case described in the introduction demonstrates,¹⁷⁰ a bad discharge, even after a series of good ones, still makes someone ineligible for USERRA's labor standards.

Stories from the field also illustrate that a number of servicemembers have trouble and commit the OTH qualifying misconduct only after returning to the states. For example, Chris Packley was a decorated Marine marksman who had flashbacks of a friend dying in Fallujah.¹⁷¹ Packley also received an OTH separation after smoking marijuana, which he did to deal with the images in his flashbacks.¹⁷² This type of self-medicating after returning from deployment is common. Unfortunately, so is the receipt of an OTH as a result of activity related to self-medication.

Staff Sergeant Eric James is another example of someone who self-medicated after returning home. James served two tours of duty in Iraq

167. Seamone, *supra* note 148, at 495–96 (citing *Viewpoints on Veterans Affairs and Related Issues: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans' Affairs*, 103rd Cong. 15 (1994) (testimony of Jonathan Shay, M.D., Ph.D.)); Bernton, *supra* note 141; Brooker et al., *supra* note 135, at 255.

168. Jeremy R. Bedford, *Eligibility for VA Disability Compensation and Health Care Benefits for Army National Guardsmen Discharged with an Other than Honorable Discharge*, ARMY LAW., July 2014, at 36, 36.

169. HONORING THE CALL TO DUTY, *supra* note 140, at 90.

170. *Tootle v. Merit Sys. Prot. Bd.*, 559 F. App'x 998, 998–99, 1002 (Fed. Cir. 2014); *see also* *Whisnant v. U.S. Postal Serv.*, 83 M.S.P.B. 588, at ¶ 3 (1999) ("The appellant's discharge from the uniformed service under other than honorable conditions terminated his right to benefits under USERRA . . .").

171. Zoroya, *supra* note 148.

172. *Id.*

as an Army sniper.¹⁷³ He was diagnosed with a mental health disorder and a TBI caused by being in a Humvee that flipped over in an attack.¹⁷⁴ He was caught drunk driving in 2011.¹⁷⁵ An NPR investigation uncovered that, before this incident, James was told that "his experiences in Iraq were not too traumatic," and his calls for help to military therapists related to depression and suicide were ignored.¹⁷⁶ The Army mistreated his service-connected medical condition when he returned home, yet he was separated with an OTH for this misconduct.¹⁷⁷ Thankfully for James, the Army later removed the OTH discharge.¹⁷⁸ Most are not that lucky.

For example, Marine Sergeant Ryan Birrell was a drill instructor after he returned home from a second tour of duty where he received a Bronze Star with a combat heroism designation.¹⁷⁹ After he returned to the States, Birrell was diagnosed with PTSD, "abused alcohol and methamphetamine," and left his post without permission.¹⁸⁰ For a period of time after this, he lived in Tijuana, even though he was experiencing homelessness there, because the "streets [there] were kind of like being in Iraq."¹⁸¹ Birrell received an OTH separation for being AWOL.¹⁸²

Other than Staff Sergeant James, if his discharge was upgraded with enough time for him to meet the timely notice requirement, none of these people—some of whom had citations for great service—are eligible for USERRA's labor standards. These stories illustrate some of the problems with tying rights and benefits to the classification given when one separates from service. This connection has been characterized as a military misconduct catch-22.¹⁸³ The military acknowledges that PTSD, TBI, and other conditions are the root cause of certain misconduct, but then discharges members for that same

173. Daniel Zwerdling, *Missed Treatment: Soldiers with Mental Health Issues Dismissed for 'Misconduct,'* NAT'L PUB. RADIO (Oct. 28, 2015, 3:53 PM), <https://www.npr.org/2015/10/28/451146230/missed-treatment-soldiers-with-mental-health-issues-dismissed-for-misconduct> [https://perma.cc/JC2H-RD8H].

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* (noting that the Army later gave James a medical retirement).

179. Zoroya, *supra* note 148.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

misconduct.¹⁸⁴ This military misconduct catch-22 makes reemployment and full reintegration into civilian life even harder.¹⁸⁵ It also contravenes the very intent behind USERRA's labor standards.

3. Military Sexual Trauma and OTH Separations

OTH separations also disproportionately impact servicemembers who have experienced military sexual trauma (MST). MST is the umbrella term used to capture both sexual assault and sexual harassment that occurs during military service.¹⁸⁶ It is a widely recognized problem in the military, especially for female servicemembers. Approximately fifteen percent of women that have served during Gulf War-Era II screened positive for MST at the VA.¹⁸⁷ The overall numbers are even greater. Twenty-three percent of female servicemembers reported experiencing sexual assault in the military; another fifty-five percent of women reported experiencing sexual harassment of some form.¹⁸⁸ Both types of MST may lead to PTSD and the associated symptoms, actions, and experiences with OTH separations that were described in the last Section.¹⁸⁹ In fact, one study reports that about a third of women who served during Gulf War-Era II who have been diagnosed with PTSD also experienced MST.¹⁹⁰ Moreover, MST itself, regardless of whether the servicemember has also been diagnosed with PTSD, has led to post-

184. Seamone, *supra* note 148, at 489 (citation omitted); Zoroya, *supra* note 148; BASKIR & STRAUSS, *supra* note 148.

185. See STACEY-RAE SIMCOX, LETICIA Y. FLOREX & MARK D. MATTHEWS, 1-8 SERVICEMEMBER AND VETERANS RIGHTS § 8.03 (2016), LexisNexis (discussing the difficulty veterans with PTSD and TBI have with reintegration).

186. Kelly H. Koo & Shira Maguen, *Military Sexual Trauma and Mental Health Diagnoses in Female Veterans Returning from Afghanistan and Iraq: Barriers and Facilitators to Veterans Affairs Care*, 25 HASTINGS WOMEN'S L.J. 27, 29 (2014).

187. *Id.* at 37. Reported MST rates are increasing. See, e.g., BRITTANY L. SALSBERG, SERV. WOMEN'S ACTION NETWORK, MILITARY SEXUAL TRAUMA: THE FACTS 1-2 (n.d.) (citing U.S. DEP'T OF DEFENSE, FISCAL YEAR 2009 ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (2010)) (reporting an 11% increase in MST from FY 2008 to FY 2009).

188. Thirty-eight percent of men also reported experiencing sexual harassment in the military. *How Common Is PTSD?*, *supra* note 152. NAT'L DEF. RESEARCH INST., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY 9 (2014) (calculating the figure at one in twenty women experiencing sexual assault in the last year during service).

189. *How Common Is PTSD?*, *supra* note 152. See *Survivors Write In*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/survivors-write-i/> [<https://perma.cc/N8JS-8KAA>] (last visited Dec. 27, 2016) (sharing the experiences of MST survivors in their own words).

190. Koo & Maguen, *supra* note 186, at 30.

discharge reintegration problems, including the use of alcohol and drugs.¹⁹¹

Take for example the case of a Marine who went AWOL after being raped. She was given an OTH separation for her absence.¹⁹² Or someone who agrees to accept an OTH separation so she no longer has to interact with her perpetrator or his supporters who are all on orders in the same geographic area.¹⁹³ Or Nicole Curdt, a Damage Control Firearm Apprentice in the Navy, who received an OTH for reporting a sexual assault and sexual harassment at the hands of her supervisor.¹⁹⁴ The experiences of servicemembers like Curdt, who received OTH discharges as a form of retaliation for reporting MST, recently garnished some national attention. In response, Congress created a new crime under the Uniform Code of Military Justice for a supervisor who retaliates against someone who reports MST.¹⁹⁵ But the reality is that neither the creation of this new crime nor the attention that MST has received recently changes the fact that OTH separations are sometimes given to people as retaliation for reporting—or as a result of how the woman responds to her experiences with—MST.

191. *Id.* at 30–31.

192. Bernton, *supra* note 141. After this Article was submitted for publication, Human Rights Campaign published a comprehensive report sharing information from interviews with 270 MST survivors and offering insights into shared experiences, including the impact of bad papers on this community, among other things. HUMAN RIGHTS WATCH, BOOTED: LACK OF RECOURSE FOR WRONGFULLY DISCHARGED US MILITARY RAPE SURVIVORS (2016), https://www.hrw.org/sites/default/files/report_pdf/us0516_militaryweb_1.pdf [<https://perma.cc/AKD6-ZLBE>].

193. *Thread: VA Refusing to Help MST Victim Because of a OTH Discharge*, VETERANS BENEFITS NETWORK (Apr. 6, 2011, 11:59 AM) <https://vets.yuku.com/topic/56590/va-refusing-to-help-mst-victim-because-of-a-oth-discharge#.vklk1k6rrsn> [<https://perma.cc/D2LH-QELD>] (“I chose to take any discharge I could get just to get away from the abuse. If I had stayed I would have been continually forced to sleep, shower, and use the ‘head’ with my attackers and the idea of going through this for another 6 months scared me beyond belief. I couldn’t understand why this was happening to me. So finally I was off the ship.” (veteran on online forum describing his experience)).

194. First Amended Complaint ¶¶ 124–25, *Cioca et al. v. Rumsfeld et al.*, No. 1:11cv00151 (E.D. Va. Sept. 6, 2011); Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 737 (2013).

195. NDAA for Fiscal Year 2014, Pub. L. 113-66, § 1709, 127 Stat. 672, 962 (2013); Annalee Grant, *Retaliation Against Crime Victims Now a Criminal Offense*, U.S. ARMY (Aug. 8, 2014), https://www.army.mil/article/131471/Retaliation_against_crime_victims_now_a_criminal_offense [<https://perma.cc/3ETP-4NBM>].

These stories reflect another group of servicemembers who are excluded from USERRA's protection because of the OTH character of service designation.

4. Caregiving and OTH Separations

During Gulf War-Era II, caregivers whose arrangements are impacted by military service have surfaced as another group that has been categorically denied USERRA coverage as a result of the OTH exclusion. Families do not disappear when someone volunteers to serve. Many servicemembers have familial responsibilities that continue during active duty. Over half of servicemembers care for dependents.¹⁹⁶ Forty-two percent of servicemembers care for children, and 6.4 percent are single servicemembers.¹⁹⁷ To put this in context, in 2009, the Army had 85,000 single soldiers with dependents, and these numbers are rising.¹⁹⁸

The military's move to increased reliance on the RC, which is an older force and has more members who are parents and single parents, compounds problems with caregiving responsibilities.¹⁹⁹ In addition, the number of women serving, the type of service authorized, and the number of women separating from the military have all significantly increased during this era.²⁰⁰ Over time, this group of servicemembers

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196. SHELLEY MACDERMID WADSWORTH & KENONA SOUTHWELL, *MILITARY FAMILY RESEARCH INST. AT PURDUE UNIV., MILITARY FAMILIES: EXTREME WORK AND EXTREME 'WORK-FAMILY'* 4 (2010), http://workplaceflexibility.org/images/uploads/program_papers/wadsworth_-_military_families.pdf [<https://perma.cc/GD77-U2HF>].
197. U.S. DEP'T OF DEF., *DEMOGRAPHICS 2014: PROFILE OF THE MILITARY COMMUNITY* vi (2014), <http://download.militaryonesource.mil/12038/MOS/Reports/2014-Demographics-Report.pdf> [<https://perma.cc/H32W-S2HR>] [hereinafter *DEMOGRAPHICS 2014*].
198. Nancy Mullane, *Soldier Mom Arrested After Refusing to Deploy*, *NAT'L PUB. RADIO: AROUND THE NATION* (Nov. 19, 2009, 6:00 AM), <https://www.npr.org/templates/story/story.php?storyId=120562850> [<https://perma.cc/K9N6-3TYZ>].
199. *DEMOGRAPHICS 2014*, *supra* note 197, at vi (noting that 9.2% of RC members are single parents compared to less than 5% of active duty members); MICHAEL L. SHEA, *NAVIGATING LEGAL ISSUES FOR MILITARY VETERANS, LEADING LAWYERS ON ARGUING DISABILITY, PENSION, AND OTHER CLAIMS BEFORE THE VA: UNDERSTANDING THE LEGAL NEEDS OF VETERANS, ACTIVE DUTY MILITARY, AND RESERVISTS 1* (2013), Westlaw.
200. *See* OFFICE OF THE ASSISTANT SEC'Y OF DEF. FOR READINESS & FORCE MGMT., *DEFENSE MANPOWER REQUIREMENTS REPORT: FISCAL YEAR 2015*, at 69–100 (2014) (tables showing active duty military demographics); Koo & Maguen, *supra* note 186, at 27–28 (observing that twelve percent of the servicemembers activated in Iraq and Afghanistan were women and that the number of women who have separated from service in the past twenty years has doubled). The Combat Exclusion Policy was rescinded in 2013. At the time, branches were provided the opportunity to make the case for

will likely increase as women, who are disproportionately the primary or only caregiver, are increasingly integrated into military life.²⁰¹ The reality is that caregiving, particularly dependent care arrangements, must change during deployments and service. These changes may be particularly stressful, and issues may arise pre-, during, and/or post-deployment.

Take for example the case of Specialist Alexis Hutchinson, a single mom who was given an OTH separation when she missed her flight for a one-year deployment to Afghanistan.²⁰² Hutchinson could not find someone to care for her ten-month-old son before that flight as her arranged caregiver changed her mind only a few days prior.²⁰³ She was left with the choice of placing her child in foster care and fulfilling her orders to deploy or risking penalty for caring for her child and disobeying her orders.²⁰⁴ She choose the latter.

The military tries to prevent servicemembers from being placed in the situation where they have to make this choice. The national security reality, however, is that all servicemembers—regardless of whether someone is on active duty or in the RC—“must be ready to deploy throughout the world on short notice and be able to fully execute their military duties.”²⁰⁵ This mission often conflicts with a caregiver’s obligations to family members. As a result, in recognition that caregiving may be impacted by service, the military requires single and dual military caregivers to create and maintain a family care plan that

continuing to exclude women from certain military positions. No exceptions were allowed after review, and as of January 1, 2016, all “remaining occupations and positions [were opened] to women.” Ash Carter, *Remarks on the Women-in-Service Review*, U.S. DEP’T OF DEF. (Dec. 3, 2015), <http://www.defense.gov/News/Speeches/Speech-View/Article/632495/remarks-on-the-women-in-service-review> [https://perma.cc/RTX4-CBDS].

201. See Cheryl Pellerin, *Carter Opens All Military Occupations, Positions to Women*, U.S. DEP’T OF DEF. (Dec. 3, 2015), <https://www.defense.gov/News-Article-View/Article/632536/carter-opens-all-military-occupations-positions-to-women> [https://perma.cc/W5JW-XY8C].

202. James Dao, *Single Mother Is Spared Court-Martial*, N.Y. TIMES (Feb. 11, 2010), <https://www.nytimes.com/2010/02/12/us/12awolmom.html> [https://perma.cc/C4LE-D9BA].

203. *Id.*; WADSWORTH & SOUTHWELL, *supra* note 196, at 2.

204. Nicole Allen, *How Well Does the Military Treat Single Mothers?*, THE ATLANTIC (Feb. 12, 2010), <https://www.theatlantic.com/politics/archive/2010/02/how-well-does-the-military-treat-single-mothers/346662/> [https://perma.cc/AEC4-NP89].

205. VETERANS FOR AMERICA, THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE 392 (2d ed. 2008), <https://www.nvlsp.org/images/products/survivalguide.pdf> [https://perma.cc/LC93-EZGJ].

identifies who will care for loved ones when service must come first.²⁰⁶ Such a plan must cover who will care for any dependent(s) for which the servicemember is responsible should deployment or other orders require it.²⁰⁷ Failing to create such a plan—or to update an existing plan if options change—may result in “disciplinary or administrative action” up to separation.²⁰⁸ Any potential disciplinary action related to the failure to update or utilize the plan would be at the discretion of a person’s supervisor.²⁰⁹ Generally, this type of failure to fulfil one’s military obligations “because of parenthood” getting in the way of mission readiness leads to an honorable separation.²¹⁰ But as Hutchinson’s case demonstrated, things sometimes happen despite the existence of a family care plan and the best of intentions, and an OTH may result instead of an honorable separation.²¹¹

When caregiving arrangements fail, the servicemember also may apply for a hardship discharge or emergency leave to deal with the personal emergency.²¹² But this also is at the discretion of command. Stories have surfaced where that type of discharge or leave was denied, and people were later given an OTH separation when the person went AWOL to deal with the emergency. For example, a divorced National Guard mother was deployed to Iraq and returned to the states with the permission of her supervisors to deal with a custody situation in which her daughter was placed in danger by her ex-husband.²¹³ When custody

206. U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE INSTRUCTION 1342.19, FAMILY CARE PLANS (2010), <https://www.dtic.mil/whs/directives/corres/pdf/134219p.pdf> [<https://perma.cc/4U79-QB8J>].

207. VETERANS FOR AMERICA, *supra* note 205, at 510–12. For each branch’s requirements, see U.S. DEP’T OF THE ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS 6-1-6-11 (2011); U.S. DEP’T OF THE NAVY, NAVAL MILITARY PERSONNEL MANUAL, art. 1910-124 (2015); U.S. MARINE CORPS, FAMILY CARE PLANS, MCO 1740.13A (1993); U.S. DEP’T OF THE AIR FORCE, FAMILY CARE PLANS, AFI 36-2908 (2014).

208. DEPARTMENT OF DEFENSE INSTRUCTION 1342.19, *supra* note 206, at 2.

209. *Id.*; *see, e.g.*, U.S. DEP’T OF THE AIR FORCE, AFI 36-2908, FAMILY CARE PLANS (2014) (stating that the commander or first sergeant is responsible to take disciplinary action according to AFI 36-3208).

210. U.S. DEP’T OF THE NAVY, NAVAL MILITARY PERSONNEL MANUAL, art. 1910-124 (2015).

211. Mullane, *supra* note 198.

212. Servicemembers may apply for an administrative separation based on a “hardship.” *See* U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE INSTRUCTION 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS 10 (2014).

213. Amy Engeler, *Deployed Military Parents: Choosing Custody or Duty*, SFGATE (July 16, 2009, 4:00 AM), <https://www.sfgate.com/magazine/>

could not be resolved during the length of her approved leave, the woman decided not to return to her unit in Iraq.²¹⁴ Shortly after this, she was charged with desertion.²¹⁵ After some media attention, she received an honorable discharge.²¹⁶ But again, not everyone has been so lucky. For example, a single father who was a Specialist in the Army claimed that he was given the choice to leave his four-year-old with a stranger and show up to his shift while his involuntary separation for parenthood was being processed or be dishonorably discharged for disobeying a supervisor's order to report to work.²¹⁷

There are also a number of discharge upgrade cases where the former servicemember argued that the military denied a hardship discharge, and the person caring for a family member ended up receiving an OTH separation. For example, someone who went AWOL to care for his father with a disability and mother who had been injured had received an OTH separation. His attempts to upgrade the discharge were denied.²¹⁸

Similarly, a pregnant servicemember may ask for a discharge, which would generally be deemed honorable.²¹⁹ But the military has the option of refusing to separate the person from service if it is in "the best interest" of the military to retain the person.²²⁰ Further, command retains control over the type of separation that is initiated and stories have surfaced of discharges related to pregnancy and associated post-pregnancy conditions such as post-partum depression.²²¹ In addition, there was a period of time when the commander of the military's forces in northern Iraq instituted a policy that banned pregnancy and

article/Deployed-Military-Parents-Choosing-Custody-or-2479433.php
[<https://perma.cc/TW4S-WCJ5>].

214. *Id.*

215. *Id.*

216. *Id.*

217. *Thread: Seperation [sic] Under Family Care Plan*, ARMY STUDY GUIDE (June 17, 2012, 3:39 PM), <https://community.armystudyguide.com/groupee/forums/a/tpc/f/6871093521/m/8607063126> [<https://perma.cc/U2PM-F8N8>] (comments of a servicemember on a forum).

218. *See* ABCSA No. AR20100009594, <https://boards.law.af.mil/ARMY/BCMR/CY2010/20100009594.txt> [<https://perma.cc/4YZZ-VP7W>].

219. THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE, *supra* note 205, at 391.

220. DEPARTMENT OF DEFENSE INSTRUCTION 1332.14, *supra* note 212, at 11.

221. THE AMERICAN VETERANS AND SERVICEMEMBERS SURVIVAL GUIDE, *supra* note 205, at 390–92.

punished servicemembers with a court-martial if the policy was violated.²²²

These stories demonstrate that caregiving, in all of its forms, may lead to OTH separations at the discretion of command despite the directive dictating honorable discharges for this purpose. All of these military caregivers currently are denied access to USERRA's labor standards.

5. Excluding People with OTH Separations Ignores USERRA's Purpose and is Inconsistent with a History of Inclusion and Fairness Amongst Types of Service.

Other calls to expand USERRA's coverage have been made over the years.²²³ Based on the experiences with OTH separations during the

222. See Max Fisher, *Military Pregnancy Ban: What's the Point*, THE WIRE (Dec. 22, 2009, 3:41 PM), <https://www.thewire.com/politics/2009/12/military-pregnancy-ban-what-s-the-point/26035/> [<https://perma.cc/US8Q-X29S>] (commenting on the futility of such a policy); *U.S. Military Drops Ban on Soldiers Getting Pregnant*, CNN (Dec. 25, 2009, 8:55 AM), <https://www.cnn.com/2009/WORLD/meast/12/25/iraq.us.soldiers.pregnant/> [<https://perma.cc/P7JS-XNYU>] (describing the end to the ban).

223. The most common call seeks to expand the definition of "uniformed service" to include active duty service pursuant to state orders. Under USERRA § 4313(a), reemployment rights only attach if the leave is needed for "service in the uniformed services." USERRA, 38 U.S.C. § 4313(a) (2012). The relevant definition for this phrase excludes state service obligations. *Id.* § 4303(13). While all states have a law that protects the reemployment of members of the National Guard in some fashion, the majority of those laws only cover service performed in that state. Sam Wright, *State Law Protections for National Guard Members on State Active Duty*, SERV. MEMBERS L. CTR.: L. REV. 15032, (Apr. 2015), <https://www.servicemembers-lawcenter.org/uploads/15032-LR.pdf> [<https://perma.cc/LW4V-PB4T>]; Email from Sam Wright to Col. Blomquist (June 6, 2015) (on file with author) (noting that thirty-two states have this problematic loophole). This creates a problem when members of the National Guard are mobilized to respond to a problem in a different state. While outside the scope of this Article, it makes sense for USERRA to be amended to cover this cross-state service. Regardless of who authorizes the service, it is being conducted in pursuit of the safety and security of the country. Other proposals include calls to expand the definition to protect the self-employed, address occupational memberships and licenses, and to cover student servicemembers. See, e.g., Wedlund, *supra* note 39, at 842-44 (discussing several areas that lack USERRA protection and what some states have done to close these gaps); Marcel Quinn, *Uniformed Services Employment and Reemployment Rights Act (USERRA)—Broad in Protections, Inadequate in Scope*, 8 U. PA. J. LAB. & EMP. L. 237 (2005) (exploring the failures of USERRA to cover students and state calls to duty); GAO-08-790R, *supra* note 16, at 4 ("Neither DOD nor the services have been collecting the necessary data to track and monitor what impact active duty service may have on reservists' ability to maintain civilian professional licenses and certifications."). Further, while it is also outside the scope of this Article, the author will propose coverage for military families who may be subject to

Gulf War-Era II described above, this Article goes further by seeking an elimination of one of the character of service exclusions. Specifically, it proposes to remove 38 U.S.C. § 3404(b) in its entirety.

As is, this exclusion contradicts the purpose underlying the law. It chills people from volunteering for service by conditioning the right to access USERRA's labor standards on a specific type of service. The major problem with this is that the type of discharge is not known at the time of entry. Rather, the designation (and thus, exclusion from coverage) comes only after service. Thus, the very people that the country wants to encourage to serve with promises of workforce protections will not know that those protections will not be available to them until after service—of course, neither will their employer.

This reality of timing is the very reason that one of USERRA's predecessors was amended to offer labor standards to people who applied for, but were ultimately rejected from, service.²²⁴ An issue arose about whether someone who left to take a military entry examination (a test to determine one's physical fitness for service), but was ultimately rejected by the military, should be entitled to job reinstatement. As a result, USERRA was amended to clarify that people who were asked to engage in pre-service examinations were entitled to job protection, regardless of whether they ultimately were accepted into service or rejected by the military. The right to job-protection was extended from the time of examination through the decision on whether someone will be inducted into service. This recognized the reality that volunteers for service would not know whether they would be rejected from service at the time they leave work.²²⁵ The same logic holds true for OTH separations.

In addition to helping USERRA live up to its statutory purpose, the proposal would follow a long history of amending the law to provide fairness amongst types of service and to fix inconsistencies in coverage. One need only look to the changing coverage for length and type of service over the years for an example. Originally, only people who were conscripted into active duty service in the regular Armed Forces were given the benefit of reemployment rights in 1940. Coverage was expanded to people who volunteered for active duty later that year.²²⁶ In 1948, RC members were given reemployment rights for up to three

adverse employment actions by employers because of an association with someone in uniformed service in a future article.

224. See USERRA, 38 U.S.C. § 4303(13) (2012) (defining "service in the uniformed services" to include "a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty").

225. Universal Military Training and Service Act, Pub. L. No. 87-391, 75 Stat. 821, 822 (1961).

226. Service Extension Act of 1941, Pub. L. No. 77-213, § 7, 55 Stat. 626, 627.

years of active duty.²²⁷ This was expanded to four years of protection in 1951 during the Korean War.²²⁸ A fifth year of protection later was authorized in 1968 if and only if that extra service was "at the request and for the convenience of the Federal Government."²²⁹ Finally, in recognition of the difficulty in administering the law with some of these nuances and in response to fairness concerns of having different amounts of service protected for different groups of servicemembers, protection for up to five years was universally granted with USERRA in 1994.²³⁰

Congress also eliminated an inconsistency that previously gave different types of servicemembers varying lengths of time to apply to return to work after a service-connected injury. At one point, some RC members with injuries were not given any extension of time to reapply to return to work; others were given a six-month grace period after a service-related hospitalization, and regular members of the Armed Forces were given a yearlong grace period. This "inconsistent treatment" was problematic for Congress, which acted to provide the same protection for anyone who was injured during training or active duty.²³¹

Further, Congress has repeatedly acted to amend the law after disparities surfaced between protections given to different members of the RC for the same type and length of service. For example, during 1960, Congress changed the law to fix inconsistent protections based solely on length and type of service for RC members. Previously, a

227. Selective Service Act of 1948, Pub. L. No. 80-759, § 9(b)(B)(ii), 62 Stat. 604, 614–15; S. REP. NO. 80-1268, at 17 (1948).

228. Universal Military Training and Service Act Amendments, Pub. L. No. 82-51, § 9(g), 65 Stat. 75, 85 (1951) (changing earlier text that offered reemployment only for someone's first enlistment); H.R. REP. NO. 87-1082, at 2 (1961) ("This group would acquire reemployment rights based on a period of service equal to the amount of time they may be involuntarily recalled to active duty and those involuntarily extended would have their status fully clarified to assure them similar reemployment rights protection."); S. REP. NO. 82-117, at 4–5 (1951) (demonstrating that Congress was acting to improve RC coverage in response to the Korean War).

229. Universal Military Training and Service Act Amendment, Pub. L. No. 90-491, § 9(g), 82 Stat. 790, 790 (1968).

230. See ROCCO J. MAFFEI, THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT, I AM BEING MOBILIZED, WHAT ABOUT MY CIVILIAN JOB? 4 (n.d.); Eric Rosoff, Note, *Disparate Treatment of Disparate Treatment: Harmonizing Title VII Pretext and Mixed-Motive Jury Instruction Causation Standards in Light of Staub v. Memorial Hospital*, 35 CARDOZO L. REV. 2079, 2106 (2014) ("Congress designed the provision to provide the same employment protections enjoyed by regular veterans to those serving as reservists.").

231. H.R. REP. NO. 86-1263, at 2 (1960).

member of the National Guard had “inferior” rights to those of a reservist performing the same training duty. The law was amended to “give equal treatment for the same training.”²³² The goal was “to eliminate certain inequities and inconsistencies” by providing all RC personnel “with identical reemployment rights.”²³³ Another example of Congress meeting this goal includes the expansion to cover the Coast Guard and Public Health Service Reserve Components for the first time in USERRA.²³⁴ This history bolsters the claim that Congress consistently corrects coverage exclusions on fairness grounds once problems surface.²³⁵ Removing the OTH exclusion offers Congress another opportunity to do so.

B. Extending the Reasonable Efforts Requirements to Match the Length of Time for Which Cause Protection is Granted.

In addition to expanding coverage to those with OTH separations, this proposal suggests that the reemployment and continued economic security of servicemembers could be improved by extending the length of the accommodation provisions. Currently, an employer’s obligations to provide reasonable accommodations and accommodations plus end the moment someone is reinstated. This is because the requirements for employers to make reasonable efforts to help qualify someone for his or her escalator (or closest equivalent) position are found in 38 U.S.C. § 4313(a)—the reemployment section of the law. Once someone has

232. *Id.*; see also *Consideration of H.R. 5040, to Amend and Clarify the Reemployment Provisions of the Universal Military Training and Service Act, and for Other Purposes: Hearing Before the H. Comm. on Armed Services Subcomm. No. 1, 86th Cong. 2641 (1960)* [hereinafter *Hearings on Consideration of H.R. 5040*] (statement of Hugh Bradley, Director of Bureau of Reemployment Rights, Dep’t of Labor) (noting the inferior rights for members of the National Guard with respect to the initial period of active duty for training).

233. *Hearings on Consideration of H.R. 5040, supra* note 232, at 2639 (statement of Paul J. Kilday, Chairman, S. Subcomm. No. 1).

234. See Statement on Signing the Uniformed Services Employment and Reemployment Rights Act of 1994, 2 PUB. PAPERS 1746, 1747 (Oct. 13, 1994) (President Clinton noted that the Act “extends coverage for the first time to the Coast Guard and Public Health Service Reserve Components”).

235. See, e.g., S. REP. NO. 86-1672, at 4-5 (1960) (letter from James T. O’Connell, Acting Sec’y of Labor, to Hon. Carl Vinson, Chairman, H.R. Comm. on Armed Services) (“One realistic purpose of this bill, therefore, is to give these comparable groups comparable reemployment rights.”); H.R. REP. NO. 103-65, at 23 (1993) (“Under current law, entitlements and eligibility criteria for reemployment rights differ based upon categories of military training or duty. It is the Committee’s view that those distinctions are no longer appropriate for reemployment rights purposes and only lead to confusion and anomalous results in some cases . . .”).

been reemployed, the obligation ends under that section as the employer's responsibilities have been fulfilled.

The proposal would tie these responsibilities to the requirements in the labor standard related to the exception for at-will employment.²³⁶ Under the proposal, employers would need to make affirmative, reasonable efforts for six months or one year depending on the length of someone's service. The same reason underlying the cause protection—providing teeth to the reemployment protection—applies to the need for accommodations. The underlying logic is the same; it makes no sense to require employers to provide accommodations to help someone (re)qualify for a job, and then allow the person to become unqualified for the reemployment position the next day after the employer's duty has been satisfied.

Although this would impose an additional burden on employers, the burden is not unfettered. Employers would still be able to rely on the existing affirmative defenses. If making reasonable efforts after reinstatement would impose an undue hardship on the employer, the employer would not have to do so.²³⁷ In addition to the undue hardship defense, employers would be protected if anyone with an OTH separation committed a crime after returning to work that could also constitute cause for termination.²³⁸ These protections for employers offer a balance of the employer's needs with the reality of the experiences of those with service connected injuries returning to work, like the experiences described by the forgotten Gulf War-Era II troops in the preceding sections.

In addition to respecting the needs of various parties, this proposal bolsters USERRA's consistent and long-standing role as a model in workplace protections for returning servicemembers with disabilities.²³⁹ From early on in the law's history, Congress expressed concern about the needs of servicemembers returning to civilian employment with service-connected injuries or impairments that were exacerbated by service. Special protections have been created and consistently expanded to address new needs as they surfaced. For example,

236. See USERRA, 38 U.S.C. § 4316(b)(6) (2012) ("The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.").

237. See *id.* § 4312(d)(1)(B) ("An employer is not required to reemploy a person under this chapter if . . . such employment would impose an undue hardship on the employer.").

238. See *id.* § 4316(c) (requiring that a "person who is reemployed by an employer . . . shall not be discharged except for cause").

239. See generally Waterstone, *supra* note 109 (providing an excellent exploration of the intersection of USERRA and the ADA, as well as situating the experiences of veterans with disabilities in the context of the larger disability movement).

beginning in 1944, servicemembers who were hospitalized after military discharge were given additional time after the end of hospitalization to notify their civilian employer that they intended to return to work.²⁴⁰

Further, USERRA already demonstrates a desire for USERRA to be a model, expansive law to protect service-connected injuries (including PTSD and TBI). This is evidenced in Congress' willingness to go beyond the provisions of the ADA in USERRA. Specifically, USERRA protections cover a much broader category of illnesses and injuries. USERRA covers any injury incurred or aggravated during service; it does not require employees to meet a three-prong test of what constitutes a disability as is required under the ADA.²⁴¹ This means that transitory and short duration, non-chronic impairments are covered under USERRA even though they are excluded from the definition of disability under the ADA as amended by the ADA Amendments Act.²⁴² The only requirement is that the injury relate to service. Under USERRA, returning servicemembers with these impairments also are entitled to reemployment in alternative positions if qualified and, if no such position is available, sick leave or light duty

240. Selective Training and Service Act of 1940 Amendment, Pub. L. No. 78-473, 58 Stat. 798 (1944). The 1944 law provided for a one-year extension after hospitalization. *Id.* This period was later expanded to the current two year timeframe for someone to apply for reemployment. USERRA § 4312(e)(2)(A) ("Except as provided in subparagraph (B), such period of recovery may not exceed two years."); *see also* 20 C.F.R. § 1002.116 (2016) ("This period may not exceed two years from the date of the completion of service . . ."); Beasley, Jr. & Pagnattaro, *supra* note 97, at 159-60 (describing USERRA's special provision for servicemembers with disabilities). There was an attempt to reduce the time frame back to one year during the debate over USERRA. The attempt failed, and USERRA clarified that the timeframe to provide notice of intent to return begins to run on the date of discharge from hospitalization, not from the date of separation from service. 140 CONG. REC. 24,426 (1994) (joint explanatory statement). Further, the "two-year period would be extended by the minimum time required to accommodate the circumstance beyond the individual's control which makes reporting within the time limit impossible or unreasonable." *Id.*

241. *See* 42 U.S.C. § 12102(1) (2012) ("The term disability means . . . (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such impairment.").

242. *See* 42 U.S.C. § 12102(3)(B) (2012) (excluding transitory and minor impairments that last less than six months from the ADA's definition of disability); *see also* Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1, 20 (2013) (noting that the ADA's disability definition "does not cover employees who are treated adversely based on a 'transitory and minor' impairment").

assignments must be provided until the person is recovered.²⁴³ Taken together, this means that someone has a right to another job if a disability cannot be accommodated under USERRA. These options are not easily obtained under the ADA. Given this background, it is inconsistent to offer accommodations related to reemployment for service-connected trauma only to some, and not all, members who experience it.

Further, as noted in Part I, USERRA also goes beyond the ADA by affirmatively requiring employers to help servicemembers become qualified for their escalator positions.²⁴⁴ The legislative history makes clear that Congress was thinking about technological advances and the training that would be needed to update those skills when someone returns.²⁴⁵ This retraining concept is also at the heart of the provision that prevents employers from discharging returned servicemembers except for cause for a period of time.²⁴⁶ It exhibits an understanding that the time “away from a job may cause an employee’s skills to become rusty.”²⁴⁷ This training requirement allows returning workers to “refresh their skills” and obtain “training on new equipment installed in their absence” in advance of any determination that the person is not qualified for the position.²⁴⁸ It reflects that “rapidly changing technology in the workplace may require that employees be given a significant period of time to learn how the job has changed.”²⁴⁹ Given this legislative history and the similar concepts underlying both the accommodation and cause labor standards, it makes sense to tie them to the same time frame.

In sum, it is inconsistent for Congress to offer expansive disability and retraining provisions, but fail to address the impact of service-connected trauma and other injuries on conduct underlying OTH separations that would help people adjust to living with these injuries in civilian workplaces. Without this change, the military misconduct

243. See 20 C.F.R. § 1002.226 (2016) (“The employer must make reasonable efforts to help the employee to become qualified to perform the duties of this position.”).

244. See USERRA, 38 U.S.C. § 4303(10) (2012) (requiring an employer to take “actions, including training provided by an employer, that do not place an undue hardship on the employer”).

245. 137 CONG. REC. 7067 (1991); H.R. REP. NO. 103-65, at 31 (1993) (statement of Rep. G.V. Montgomery).

246. 139 CONG. REC. 27,139 (1993) (statement of Sen. Rockefeller).

247. *Id.* at 27,141-42.

248. *Id.* at 27,142.

249. *Id.*; see also S. REP. NO. 102-16, at 13 (1991) (“This provision would ensure that servicemembers who, by reason of absence while serving on active duty, missed opportunities to acquire new skills necessary to meet the changing requirements of their previous jobs would be given a reasonable amount of time and assistance from their employers in order to become requalified.”).

catch-22 reappears. Thus, this proposal would give this coverage strength, and increase holistic support to veterans with service-connected injuries to help them actually readjust to civilian work and stay connected to the workforce over time.

III. ANTICIPATING CRITIQUES AND SITUATING THE PROPOSAL IN LARGER MOVEMENTS

Some might criticize the proposal outlined in the last Part as disrespectful to those who have served “honorably” and as unrealistic because it involves Congressional action. As explained below, both critiques fail.

A. *Including People with OTH Separations Does Not Disrespect Other Servicemembers*

This proposal may engender some of the same critiques that other proposals to extend the benefits of service to people with OTH separations have received, mainly that “granting such benefits would disrespect the vast majority of service members who go to war and complete their service honorably.”²⁵⁰ This critique, however, ignores the reality of the experiences of some of the people who obtain OTH separations, the underlying statutory purpose of USERRA, and the fairness concerns articulated above.

Since the first workplace protection for this community was enacted in 1940, the country has learned a number of lessons about war and workplaces. The military has learned about the impact of service-connected disabilities, and the experiences of modern warfare are different than they were back then. Advances in military gear and medicine have changed the face of warfare and large numbers of military personnel who would have died in conflict seventy-five years ago are coming back with service-connected injuries instead. A law that was enacted for a draft-based service in a different era no longer flies. Instead, if the country wants to encourage people to enlist or stay on after an initial period of service is complete, the promise that the country will take care of them, particularly if one gets wounded, is paramount. Access to these protections is needed to make sure that the promise of supporting people who serve is not a false one.²⁵¹

250. Bernton, *supra* note 141.

251. *See, e.g.*, Samuel F. Wright, *USERRA Applies to Hiring Hall Situations*, *SERV. MEMBERS L. CTR.: L. REV.* 183 (July–Aug. 2005), https://www.servicemembers-lawcenter.org/LAW_REVIEW_183.html [<https://perma.cc/N9KW-C8TC>] (urging a general contractors’ trade association to honor veterans’ reemployment rights under USERRA).

1. Other Civil Laws that Support the Military Community Do Not Exclude People with OTH Separations.

As noted above, there are a number of supports that are taken away from people who receive an OTH separation.²⁵² Not all supports, however, are automatically removed with this type of separation. Rather, a growing number of legal protections applicable to reintegration efforts in all components of civilian life remain.

First, this proposal is consistent with other employment laws that support the reintegration of veterans into the civilian workforce. For example, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) requires government contractors to take affirmative action to increase workforce attachment for certain groups of veterans.²⁵³ VEVRAA defines a veteran as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."²⁵⁴ While it excludes punitive discharges from coverage, VEVRAA is silent as to OTH separations. The Article's proposal would provide consistency between USERRA and VEVRAA with respect to protecting the post-service employment opportunities of veterans with OTH separation.

Second, the proposal also comports with laws that offer civilian support to military personnel outside of the employment context regardless of one's character of service. For example, another law that provides expansive civil protections to those in uniformed service is the Servicemembers Civil Relief Act (SCRA).²⁵⁵ Similar to USERRA's purpose, the SCRA is meant "to provide for, strengthen, and expedite the national defense . . . [by] enabl[ing servicemembers] to devote their entire energy to the defense needs of the Nation."²⁵⁶ The law essentially puts judicial, administrative, and transactional proceedings on hold during a period of military service if that proceeding or event would "adversely affect the civil rights of servicemembers during their military

252. See *supra* notes 143–148 and accompanying text.

253. Pub. L. No. 92-540, 86 Stat. 1074 (1972) (codified as amended in scattered sections of 38 U.S.C.).

254. 38 U.S.C. § 101(2) (2012); see also 41 C.F.R. § 60-300.2(cc) (2015) ("Veteran means a person who served in the active military, naval, or air service of the United States, and who was discharged or released therefrom under conditions other than dishonorable.").

255. 50 U.S.C. app. § 501 (2012). The SCRA represents another law Congress is willing to amend on a regular basis that stems from an earlier time period. See, e.g., Soldiers' and Sailors' Civil Relief Act, Pub. L. No. 65-103, 40 Stat. 440 (1918) (an example of a similar law Congress has amended on a regular basis); MICHAEL D. SCHAG, SERVICEMEMBER AND VETERANS RIGHTS § 3.02 (2016), Westlaw (observing that the Soldiers' and Sailors' Civil Relief Act was amended thirteen times from 1918 to 2003).

256. 50 U.S.C. app. § 502(1).

service."²⁵⁷ A "period of military service" ends when the person "is released from military service or dies while in military service."²⁵⁸ There is no condition of service imposed on the type of release.

Moreover, some of the SCRA's protections extend after service,²⁵⁹ and would be available to people with OTH separations. For example, the SCRA provides servicemembers ninety days from the date of separation to file a dispute of a default judgment that was issued during active duty or within sixty days thereafter.²⁶⁰ Another provision gives members a ninety-day grace period to enforce their rights or bring the SCRA to the attention of the adjudicator.²⁶¹ While members who are AWOL or in deserter status are not afforded these or other SCRA protections,²⁶² there is no exclusion based on an OTH separation. Further, at least one court has held that servicemembers who have committed misconduct or crimes under the military code are still entitled to SCRA protections, even if they are being confined (e.g., conduct that will result in a punitive discharge as opposed to the administrative OTH separation) as the imprisonment is service-connected.²⁶³ Finally, an argument for consistency with the SCRA makes sense given the long-standing Supreme Court precedent interpreting a prior version of the SCRA in the same way that early versions of USERRA were interpreted.²⁶⁴ Mainly, the Court has held that both laws are to be given liberal construction in favor of people who "drop their own affairs to take up the burdens of the nation."²⁶⁵

257. *Id.* § 502(2).

258. *Id.* § 511(3) (emphasis added).

259. *See, e.g.*, *Lowe v. United States*, 79 Fed. Cl. 218, 225 (2007) (noting that the SCRA tolls servicemembers' statutes of limitations for civil liability during their periods of military service.); *Walters v. Nadell*, 751 N.W.2d 431, 439 (Mich. 2008) (finding the tolling provision of the SCRA "mandatory, but not self-executing").

260. 50 U.S.C. app. § 521(g).

261. *Id.* § 522; *see also* SCHAG, *supra* note 255, § 3.03 (citing *Lowe*, 79 Fed. Cl. at 227) ("[T]he Court of Federal Claims . . . held that a servicemember who is confined during a period of service is considered on 'active duty' and subject to the protections of SCRA.").

262. SCHAG, *supra* note 255, § 3.03 (citing *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996)).

263. *See, e.g.*, *Lowe*, 79 Fed. Cl. at 227 ("It can hardly be said that those service members subject to that system—even when tried, convicted, and incarcerated under military law—are not engaging in activities that are 'service-connected.'").

264. *Compare* *Boone v. Lightner*, 319 U.S. 561 (1943) (interpreting the SCRA), *with* *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946) (interpreting early version of USERRA).

265. *Boone*, 319 U.S. at 575; *Fishgold*, 328 U.S. at 285.

Third, the proposal is consistent with the recent (and growing) trend to allow misconduct and criminal activity committed by former servicemembers to be heard by a special, therapeutic-focused veterans treatment court. These courts specialize in working with veterans with drug problems, substance abuse, or service-connected mental illnesses.²⁶⁶ These courts recognize that society and its systems need to acknowledge that certain criminal activity is impacted by or manifests from self-medication in response to or as symptoms of service-connected disabilities.²⁶⁷ In the five years after the first of these courts appeared in 2008 in Buffalo, NY, over 150 others were created.²⁶⁸ Each has its own modality with respect to subject matter and eligibility, but all are built on the premise that service-related issues have an impact on the criminal justice system and an alternative model may be needed to combat this reality.²⁶⁹ Most of these courts do not exclude people with OTH separations from participating. Rather, these courts recognize that service may have created a pattern of misconduct in which someone feels stuck in a hole. These courts offer a rope out of that hole. So, too, could workforce attachment and USERRA protections.

Amending USERRA to recognize the impact that service may have on someone is consistent with other workplace, civil and criminal laws, and systems that offer military supportive protections without excluding members with OTH separations.

2. Other Workplace Laws Do Not Deny Coverage Automatically Based on Prior Misconduct.

This proposal is also consistent with a growing movement not to deny workplace protections based on prior criminal activity or records

266. Jayme M. Cassidy, *Suddenly Discharged the Combat Continues: Eliminating the Legal Services Gap to Ensure Veterans' Success After Leaving Military Service*, 45 U. MEM. L. REV. 837, 877 (2015).

267. See Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 2 (2011) ("Recognizing that these wounded warriors experience symptoms that often manifest in criminal conduct, this justice system incorporates advanced 'problem-solving' strategies in its sentencing practices.").

268. Robert T. Russell, *Veterans Treatment Courts Developing Throughout the Nation*, in FUTURE TRENDS IN STATE COURTS 2009, 130, 130 (Carol R. Flango et al. eds., 2009); JIM MCGUIRE ET AL., AN INVENTORY OF VA INVOLVEMENT IN VETERANS COURTS, DOCKETS AND TRACKS 4-5 (Feb. 7, 2013), https://www.justiceforvets.org/sites/default/files/gallery/An%20Inventory%20of%20VA%20involvement%20in%20Veterans%20Courts_1.pdf [https://perma.cc/5DCV-SK7C].

269. See generally JAYME CASSIDY & KRISTINE A. HUSKEY, SERVICEMEMBER AND VETERANS RIGHTS § 10.01 (2016), Westlaw (providing an overview of veterans treatment courts, which now number over 350).

of any such activity. This movement includes efforts to create employment discrimination laws that “ban the box.”²⁷⁰ “Ban the box” refers to the checkbox on employment applications asking if an applicant has ever been convicted of a crime. Currently, there is no federal statutory requirement to ban the box. Nonetheless, people have successfully brought cases alleging that this practice is illegal under Title VII of the Civil Rights Act of 1964.²⁷¹ The theory is that a prospective employer’s decision not to hire someone on the sole basis of a prior conviction (i.e., the person checked the box) causes a disparate impact based on race or national origin. For example, the use of criminal records to deny employment was held to be discrimination under the disparate impact theory when an employer refused to hire someone based on prior convictions, as it disproportionately disadvantaged minority applicants who had more arrest and conviction rates than their non-minority counterparts.²⁷² These cases do not find that “the box” can never be used; rather, they require that it be a bona fide occupational qualification to ask about criminal history.²⁷³

Although there is no per se violation of Title VII if an employer uses criminal history to make an employment decision, the Equal Employment Opportunity Commission (EEOC) has long taken the position that the use of criminal history questions may be unlawful race or national origin discrimination under either the disparate treatment or disparate impact theory. After numerous hearings on the subject, most recently in 2008 and 2011,²⁷⁴ the EEOC updated its existing enforcement guidance on the subject in 2012.²⁷⁵ Of relevance to USERRA’s statutory OTH exclusion, the EEOC’s updated guidance confirms that not all use of criminal history is illegal; rather, employers with a job-

270. See Neal Miller, *Criminal Convictions, “Off-Duty Misconduct,” and Federal Employment: The Need for Better Definition of the Basis for Disciplinary Action*, 39 AM. U. L. REV. 869, 897–901 (1990) (contains a helpful discussion of this movement).

271. 42 U.S.C. § 2000e-17 (2012).

272. See, e.g., *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 632 (9th Cir. 1972) (observing a reliance on evidence that minorities were twice as likely to be arrested and convicted nationally).

273. Miller, *supra* note 270, at 897–98.

274. Meeting Transcript Regarding Use of Criminal Convictions in Employment Records, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 26, 2011), <https://www.eeoc.gov/eeoc/meetings/7-26-11/transcript.cfm> [<https://perma.cc/A3L5-RP67>].

275. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [<https://perma.cc/JC3G-BUAD>].

related reason that is consistent with business necessity may ask questions to screen out individuals with a criminal record and avoid liability.²⁷⁶ Others may not, however, and an across the board ban without a reason is problematic.

The EEOC guidance will not be the last word on the federal level. In fact, on November 2, 2015, President Obama announced a series of executive actions aimed at banning the box for hiring purposes.²⁷⁷ Specifically, federal agencies were instructed to delay inquiries into criminal history until later in the hiring process for most federal jobs. The goal is to ensure that qualified applicants are not rejected before they are referred to a hiring manager.²⁷⁸ In addition, there are ban the box proposals pending in Congress. The Fair Chance to Compete for Jobs Act of 2015, for example, is a bipartisan criminal justice reform bill that was introduced to create a legislative ban against asking about criminal records for jobs with the federal government and federal contractors until after the receipt of a conditional offer.²⁷⁹

This federal movement bubbles up from the local and state level. Twenty-four states and over one-hundred cities and counties have enacted ban the box laws.²⁸⁰ Some apply only to public sector workforces; but a growing number apply to public or private employers. For instance, the Illinois Job Opportunities for Qualified Applicants Act prohibits an employer from asking about or looking into an applicant's criminal history until it first determines that he is qualified for the position and notifies him that he has been selected for an interview or until the employer makes a conditional offer of employment.²⁸¹

By analogy, it is time to ban the OTH box. A handful of states already prohibit discrimination based on military discharge or character of service for many of these same reasons. For example, Illinois protects from discrimination because of military status or "unfavorable

276. *Id.* at 11.

277. *Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated*, THE WHITE HOUSE (Nov. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation> [<https://perma.cc/5DMW-XQUE>].

278. *Id.*

279. Fair Chance Act, S. 2021, 114th Cong. (2015).

280. MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (2016), <https://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> [<https://perma.cc/B67Z-QTQB>]. All but one of the state laws has been enacted since 2010. *Id.*

281. 820 ILL. COMP. STAT. 75/15 (West 2016).

discharge from military service in connection with employment.”²⁸² Wisconsin bans employment action from being taken based on either OTH separations or any criminal punishment imposed by the military unless “the circumstances of the discharge or separation substantially relate to the circumstances of the [employer’s] particular job.”²⁸³ Given the experiences of the Gulf War-Era II veterans with OTH separations, it is time to build on this movement on the federal level and remove this exclusion from USERRA’s labor standards.

B. New Employment Legislation Is Feasible

Another critique of this proposal would likely be that any legislation relating to the workplace is simply not politically feasible in the current climate. Numerous scholars have justifiably called attention to the reality that new, expansive workplace protections are not likely to be enacted anytime soon.²⁸⁴ The 114th Congress was at a political stalemate on most issues, and proposals to expand employment law have mostly laid dormant on the federal level for over a decade.²⁸⁵ This does not mean that proposals have not been introduced, of course. A plethora of primarily Democratic bills have been dropped to improve conditions for working families and create new labor standards and discrimination protections. These include bills to raise the minimum wage, increase pay transparency, create paid sick and safe days, offer wage replacement to people on job-protected leave, assist with gaining access to control and predictability over scheduling, confirm that reasonable accommodations are available for pregnant and breastfeeding workers, and ensure that LGBT workers are covered by anti-discrimination law.²⁸⁶ None have come close to becoming law through Congress. Similarly, Republican-sponsored proposals, such as allowing compensatory time off in lieu of overtime in the private sector,

282. 775 ILL. COMP. STAT. 5/1-102(A) (West 2016).

283. WIS. STAT. §§ 111.32(3), 111.322, 111.335 (2016) (“Conviction record includes . . . information indicating that an individual has been less than honorably discharged, or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled pursuant to any law enforcement or military authority.”).

284. See, e.g., Rona Kaufman Kitchen, *Off-Balance: Obama and the Work-Family Agenda*, 16 EMP. RTS. & EMP. POL’Y J. 211, 282–83 (2012) (“Today, there is no serious congressional support to adopt expensive work-family legislation . . .”).

285. Cf. Chai R. Feldblum, *Policy Challenges and Opportunities for Workplace Flexibility: The State of Play*, in WORK-LIFE POLICIES 251 (Ann C. Crouter & Alan Booth eds., 2009) (tracing this stalemate through the 2008 presidential election).

286. Cf. H.R. Res. 506, 114th Cong. (2015) (outlining the current Democratic agenda for legislation to support working families).

have gone nowhere.²⁸⁷ Simply put, politics currently makes the creation of most new employment laws all but impossible.

This is a fair critique given the political climate. That said, there have been a handful of exceptions where new employment legislation has been created. These exceptions generally offer a small segment of the workforce a protection to encourage them to make a choice the government wants them to make. For example, in 2010, Congress gave special protections to non-exempt workingwomen who choose to express milk to children under the age of one at work.²⁸⁸ The goal was to encourage breastfeeding and increase the rate of its use among low-income mothers for public health purposes.²⁸⁹ Similar types of workplace-based laws (ones to encourage private behavior that does not directly relate to the workplace) have also been popping up on the state and local levels. For example, there are a number of laws that offer labor standards to victims of domestic violence and sexual assault to address the aftermaths of crime, regardless of whether any of the criminal activity took place at work.²⁹⁰ There is even a state law that protects employees from any workplace-based consequence of complying with an emergency evacuation order.²⁹¹ These types of laws have become the new normal of employment law, and they are particularly plentiful when it comes to dealing with the military population.

There are also a number of laws that protect workers from being penalized at work as a result of being conscripted into a different type of public service: serving on a jury.²⁹² The government needs people to

287. *See, e.g.*, Working Families Flexibility Act of 2015, S. 233, 113th Cong. (2015).

288. 29 U.S.C. § 207(r) (2012).

289. *See* Karin & Runge, *supra* note 58, at 344–52 (citing 29 U.S.C. § 207(r)) (exploring the requirements to offer some workers time off to express milk and a location other than a bathroom).

290. *See, e.g.*, Victims' Economic Security and Safety Act, 820 ILL. COMP. STAT. § 180/15(1), (3) (2015) (“[P]rohibiting employers from discriminating against any employee who is a victim of domestic or sexual violence or any employee who has a family or household member who is a victim of domestic or sexual violence, in a manner that accommodates the legitimate interests of employers and protects the safety of all persons in the workplace.”).

291. *See* TEX. LAB. CODE ANN. § 22.002–22.003 (West 2015) (providing discrimination protection and reinstatement rights to someone who left work pursuant to a public evacuation order).

292. *See, e.g.*, 28 U.S.C. § 1875(a) (2012) (“No employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee’s jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States.”); ARIZ. REV. STAT. § 21-236(B)–(C) (2013) (Arizona state law that prevents

serve on juries, and so service in the form of jury duty is compelled. At the same time, the government tries to minimize the impact jury service has on continued employment and on employers in a way that also ensures that the needs of our judiciary system are met. Similarly, the government requires a certain amount of job protection to allow citizens time off from work to participate in the election process and vote.²⁹³ These laws do not compel "honorable" service as a juror or voter to utilize the job protections and return to work at one's pre-service position.

This value of promoting choice is particularly true when it comes to encouraging people to join (or stay in) the military, as well as to support those who make this choice. In fact, as described above, this is the very concept that underlies USERRA and all of its predecessors. The reality is that no politician wants to publicly stand against our servicemembers, veterans, or military families to deny them assistance. Indeed, as the author has explored in a series of articles, supporting the military community at work is one of the few areas where Congress has broken through the partisan deadlock in the past.²⁹⁴ For example, immediately after the Family Medical Leave Act (FMLA) was enacted in 1993,²⁹⁵ there were calls to expand its coverage and protections.²⁹⁶ Despite these calls, the FMLA's substantive provisions have been amended only twice. First, in 2008, when Congress created two types

employers from preventing an employee from participating as a juror and requiring reinstatement).

293. *See, e.g.*, ARIZ. REV. STAT. § 16-402(A) (2013) (forbidding employers from instituting any penalty or deducting the usual salary of employees who are absent for the purpose of voting).

294. *See* Marcy L. Karin & Katie Onachila, *The Military's Workplace Flexibility Framework*, 3 AM. U. LAB. & EMP. L.F. 153 (2013) (discussing some of the wide-ranging workplace protections afforded to servicemembers and the rest of the military community and offering a framework to contextualize these unique protections); Marcy Karin, *Time Off for Military Families: An Emerging Case Study in a Time of War . . . and the Tipping Point for Future Laws Supporting Work-Life Balance?*, 33 RUTGERS L. REC. 46 (2009) (noting that employment protections for servicemembers, veterans with service-connected disabilities, and military caregivers have received strong bipartisan support).

295. 29 U.S.C. §§ 2601–2654 (2012).

296. *See, e.g.*, Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, a New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327 (2014) (exploring various proposals for reform before offering one of her own); Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 789–90, 835–50 (2010) (contextualizing these proposals from an anti-essentialist perspective); Robin R. Runge, *Redefining Leave from Work*, 19 GEO. J. ON POVERTY L. & POL'Y 445, 480–82 (2012) (exploring the political feasibility of additional FMLA expansions).

of protections for military families by requiring some employers to provide unpaid job-protected leave for up to: (1) twelve weeks to address a qualifying exigency related to a RC member's federal call to active duty or such service; and (2) twenty-six weeks for caregiving of a covered servicemember who obtains or aggravates a serious injury or illness during such service.²⁹⁷ Second, in 2010, when Congress expanded those protections to offer coverage to families of the regular Armed Forces and clarify that care for veterans is covered.²⁹⁸ More recently, on November 5, 2015, President Obama signed bipartisan legislation to provide veterans with service-connected disabilities who are hired by the federal government an advance of paid sick leave to attend medical appointments (rather than need to wait for it to accrue like other new hires).²⁹⁹ As these laws show, at a time when there is Congressional gridlock on almost everything, supporting servicemembers with successful reintegration efforts back into civilian life may offer a path to bipartisanship and an exception to the general impasse.

In fact, the potential bipartisan nature of legislation to support our troops and military families extends beyond the workplace context, including covering other areas where wounded warriors or MST reforms have been needed. For example, in 2015, the bipartisan Clay Hunt Suicide Prevention for American Veterans Act was enacted to improve mental health services for veterans with PTSD in an effort to decrease the rate of suicide in this group.³⁰⁰ The bipartisan Veterans Traumatic Brain Injury Care Improvement Act was enacted in 2014 to improve assisted living services for veterans with traumatic brain injury.³⁰¹ Recent laws have also addressed MST in a bipartisan and bicameral manner.³⁰² Further, other proposals relevant to this population of

297. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585, 122 Stat. 3, 128-32 (2008); *see generally* Karin, *supra* note 294 (discussing this FMLA expansion).

298. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 565, 123 Stat. 2190, 2309-12 (2009); *see* Marcy Karin, *Military Families and Workplace Flexibility: The National Defense Authorization Act for Fiscal Year 2010*, WORK AND FAMILY RESEARCHERS NETWORK (Nov. 3, 2009, 2:46 PM), <https://workfamily.sas.upenn.edu/content/military-families-and-workplace-flexibility-national-defense-authorization-act-fiscal-year-2> [<https://perma.cc/47L2-L5DM>]. The FMLA was also expanded to employees of airline flight crews that had previously been excluded due to the way this industry calculated hours worked. Airline Flight Crew Technical Corrections Act, Pub. L. No. 111-119, 123 Stat. 3476 (2009).

299. Wounded Warriors Federal Leave Act of 2015, Pub. L. 114-75, 129 Stat. 640 (2015).

300. Pub. L. No. 114-2, 129 Stat. 30 (2015).

301. Pub. L. No. 113-257, 128 Stat. 2924 (2014).

302. For example, the Coast Guard STRONG Act was introduced simultaneously in both the House (H.R. 2059, 113th Cong. (2013)) and

servicemembers have passed at least one House of Congress in the 114th Congress so far. For example, the Ruth Moore Act of 2015 passed the House on July 27, 2015 and would make it easier for survivors of military sexual trauma who have experienced mental and/or physical disabilities to receive VA benefits.³⁰³ Moreover, additional proposals for reform in response to MST outside of the workplace are pending.³⁰⁴ Any of these, especially the annual National Defense Authorization Act, which regularly contains workplace protections for the military, could serve as a moving vehicle on which the proposal to amend USERRA outlined in the last Section could be attached.

Thus, even though the likelihood of other workplace protections is non-existent at this time, the opportunity for this proposal is different. It has to be viewed in light of the long history of expanding USERRA to reflect the experiences of servicemembers during and after each war cohort. Other feasibility factors include the politics of supporting the military community generally (and wounded warriors in particular), along with the attention given to addressing MST recently. With an all-volunteer force, serving in our military is a choice that Congress still wants (and needs) people to make. An amendment to USERRA that helps people make that choice—particularly given these disparate impacts on vulnerable populations that are already receiving significant political attention—would not be dead in the water.

CONCLUSION

In 1996, Preston Taylor, Jr., the Assistant Secretary of Labor for the Department of Labor's Veterans Employment Training Services testified to Congress that "USERRA was years in the making, with careful review along the way by many interested parties. However, it seems that no matter how much attention is paid to drafting, implementation always surfaces a number of previously unnoticed items in

Senate (S. 1050, 113th Cong. (2013)) by bipartisan groups of sponsors. It became law as part of the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, sec. 1712, § 673(b), 127 Stat. 671, 963 (2013) (offering MST victims an expedited review of any requests to be transferred to a new location away from an alleged assailant). The Defense Sexual Trauma Response Oversight and Good Governance Act was introduced by a bipartisan group of sponsors in the House (H.R. 1529, 112th Cong. (2011)). A modified version became law as part of the NDAA FY 2012, Pub. L. No. 112-81, §§ 581–586, 125 Stat. 1298, 1430–36 (2011) (providing, among other things, MST victims access to legal counsel and confidentiality when speaking with a victim advocate).

303. Ruth Moore Act of 2015, H.R. 1607, 114th Cong. (2015).

304. *See, e.g.*, Military Sexual Assault Victims Empowerment (SAVE) Act, H.R. 1603, 114th Cong. (2015) (improves the ability of MST victims to seek non-VA medical care).

need of legislative adjustment."³⁰⁵ After fifteen years of conflict in the Gulf War-Era II, building on the lessons of the last seventy-five years, the time has come to adjust USERRA once again. While USERRA started as a personnel policy to offer a benefit of service to those drafted for World War II, it evolved into a method to encourage private behavior that the government needed to happen after we moved to an all-volunteer force. Over the years, as Assistant Secretary Taylor observed, the law has been expanded to fix mistakes, respond to the needs of servicemembers, and ensure uniformity amongst types of service. The Article makes the case that this work is not done yet.

Amending USERRA via the proposal described in this Article could go a long way to address the discriminatory impact of the military misconduct catch-22 on members with OTH separations. It will counter the disproportionate impact the existing law has on servicemembers with disabilities, who experience MST, or who have caregiving responsibilities. It will do this by assisting with economic security and the stability of obtaining at least a year of employment to help with reintegration back into civilian life. It will offer the promise of reintegrating to civilian work without loss of status, position, or benefits, which will help the military with morale, future enlistment, and the financial costs that the military (and country at large) would have to absorb from dealing with a generation of unemployed, returned veterans experiencing trauma.

USERRA was enacted to be a benefit of enlistment and a way for the military to take care of its own for life with help from the employer community. This proposal will prevent it from becoming another example of how some members feel betrayed by the country they volunteered to protect. It is time to end Congress's "other than honorable" discrimination.

305. *Legislation Relating to Compensation COLA, Court of Veterans Appeals, and Other Matters: Hearing Before the S. Comm. on Veterans' Affairs*, 104th Cong., 143-44 (1996) (statement of the Hon. Preston M. Taylor Jr., Assistant Secretary for Veterans' Employment and Training, Department of Labor).