UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)—BROAD IN PROTECTIONS, INADEQUATE IN SCOPE

Marcel Quinn*

I. INTRODUCTION

In the wake of Operation Iraqi Freedom, it is particularly important to recognize the significance of the military's role in today's society. More specifically, praise and gratitude should be given to those who serve in our nation's military. Soldiers, marines, airmen, and sailors, both active duty and reserve forces alike, must leave their loved ones to fight with honor for the United States military.

A significant number of those who are currently serving in the Middle East are reserve forces. At present, roughly forty percent of the United States military presence in Iraq consists of reserve troops, and that number is expected to increase to fifty percent in the near future. This means that in addition to serving when duty calls, half of U.S. troops in Iraq have civilian lives and careers outside of the military that they must temporarily place on hold while they carry out their military obligations. "The use of noncareer military personnel for active duty assignments has become more prevalent as the United States has both reduced the number of full-time soldiers and increased its military involvement throughout the world." Reservists have been used in every major conflict that has arisen since September 11, 2001, and they continue to play an integral role in today's

* J.D. candidate 2006, University of Pennsylvania Law School. This Comment is dedicated to my husband, Information Systems Technician First Class (Surface Warfare/Naval Parachutist) Sean Quinn, who has completed fifteen years of active duty service in the United States Navy, including a nine-month deployment to the Middle East. Through him, I have learned first hand of both the commitment and sacrifices military personnel make to provide for the national defense. I am proud of his accomplishments, but most of all, I am proud to be his wife.


military. It is important to recognize the sacrifices reservists make in serving the nation, but more importantly, society should strive to minimize the hardships reservists must endure, especially considering the underlying reason for their absence: the protection of our nation. When activated, reserve forces are asked to leave their loved ones and their careers for an unspecified length of time. "Answering the Nation's call to military service [places] significant burdens on both employees and employers . . . . When employees suddenly leave their jobs . . . it is an understatement to say that problems may frequently arise, for both the employee and the employer." In order to promote enlistment in the uniformed services, the Uniformed Services Employment and Reemployment Rights Act (USERRA) guarantees that called-up reservists will have their jobs when they return from military service.

While USERRA provides broad protections to those reservists to whom it applies, its scope is inadequate. USERRA offers no protection to the student reservist who leaves his or her educational career to answer the call to active duty. Once activated, the student is susceptible to losing school credit, tuition, and, worst of all, his or her enrollment in school. Additionally, USERRA does not apply to individuals in the National Guard who are called to active duty by their governors. In these cases, employers are free to terminate the individual's employment without facing any repercussions. With the numerous hardships reservists face in order to serve in the United States military, the minimum the legislature should provide is a guarantee of employment and/or education upon deactivation. USERRA, as currently codified, fails to do so.

II. INTRODUCTION TO UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

With the reserves playing such an integral part in the nation's defense, it is important to give to those individuals who volunteer to be part of the reserves' legal protection against discrimination and other negative repercussions that may result from serving in the military. This protection has come in the form of the Uniformed Services Employment and

3. See Ryan Wedlund, Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights, 30 WM. MITCHELL L. REV. 797, 798-99 (2004) (describing each instance in which large numbers of reservists have been called to active duty since September 11, 2001).


5. See 38 U.S.C. §§ 4301-4333 (2000) (encouraging non-career service in the uniformed services by providing procedures by which non-career servicemen are able to return to their civilian careers with the least possible amount of disruption and of loss of benefits).
Reemployment Rights Act.

USERRA was created to encourage individuals to enlist with the reserves of the United States military by “minimiz[ing] the disruption to the lives of persons performing service in the uniformed services . . . by providing for the prompt reemployment of such persons upon their completion of [military service].”\(^6\) USERRA fulfills its goals through provisions requiring the reemployment of reservists following activation, as well as explicitly prohibiting discrimination based on an individual’s status as a reservist in the military.\(^7\)

A. Brief History of USERRA

While USERRA was enacted in 1994, its legal entitlements are not novel. Reemployment rights have been afforded to reserve forces since 1940, with the creation of the Selective Training and Service Act of 1940\(^8\) during World War II. In fact, many of the key provisions of USERRA are identical to the 1940 statute.

From 1940 until the present, the reemployment statutes have seen relatively few adjustments,\(^9\) and those amendments have taken place during or immediately following a conflict.\(^10\) As the conflict in Iraq continues, the time is ideal to reexamine the provisions of the statute and consider amending them to better reflect the needs of today’s society.

B. Prerequisites for Statute

In order to qualify for USERRA, a reservist must satisfy six prerequisites. If any requirement is not fulfilled, the reservist is susceptible to discrimination and has no right to reemployment once deactivated.

First, the individual must be in a civilian job at the time of his

---

8. Pub. L. No. 783, § 8, 54 Stat. 885, 890–92 (1940) (codified at 50 U.S.C. app. § 308 (1942)) (stipulating that any person who leaves his or her employment in order to perform military training and service shall be restored to that employment without discrimination by his or her employer at the end of such training and service), repealed by Pub. L. No. 759, § 17, 62 Stat. 625 (1948).
10. Id. (demonstrating that the changes in the reemployment statutes have occurred following World War II, the Vietnam conflict, and, most recently, the Cold War).
His position of employment need not meet any special requirements of status or duration, as the statute applies to every employee, including federal and state government workers and all private employees. The individual will have reemployment rights in this civilian job, which the reservist was required to leave because of federal duty, upon completion of his active-duty service.

Second, the employee must give his employer adequate notice of his obligations to the military and his duty to perform full-time active service. There is no requirement that this notice be in writing; in fact, the statute explicitly allows for verbal notice. There are some exceptions to the notice requirement, such as where "notice is precluded by military necessity or . . . the giving of such notice is otherwise impossible or unreasonable."

Third, the employee may not be absent from his position of employment due to his military obligations for a cumulative length of more than five years. After five years, the reemployment rights are no longer applicable. However, the five-year limitation does not apply to the vast majority of military services that reservists are required to perform. One of the most significant exceptions to the five-year limit is the reservists' required training. This includes the "once-a-month drill weekend, two-week annual training period, initial active duty for training . . . [and] retraining." In addition, when the President or Congress orders reservists to active duty because of a war or national emergency, time spent away from their employment does not count toward the five-year limit. Those reservists who are serving in Operation Iraqi Freedom fall under this last exception. While the five-year limit appears to have some bite, the exceptions to the rule tend to swallow the rule itself.

Fourth, the reservist must have been activated to perform "service in the uniformed services." USERRA defines "service in the uniformed services" to include "active duty, active duty for training, initial active duty
for training, inactive duty training, [and] full-time National Guard duty." This definition includes any reservist activation for federal duty. However, it excludes state-funded National Guard duty, which does not fit the definition of "full-time National Guard duty." This void in the statute for the National Guard State Duty will be discussed in Part III.

Fifth, the employee’s service during activation must have been under "honorable conditions." If the reservist receives a dishonorable or other-than-honorable discharge, he falls outside of the scope of USERRA and the employer is free to disallow reemployment upon the reservist’s return.

Sixth, and finally, the reservist is required to report, or submit an application for reemployment, to his employer following deactivation. The reporting or application may be written or verbal and needs to indicate that the employee intends to return to his position of employment with that particular employer. The statute enumerates the time period required for reporting to an employer, which depends on the length of absence that was required for the military service. However, a reservist who fails to comply with USERRA’s time requirements doesn’t lose all USERRA protections. Rather, the employer is justified in disciplining the reservist through means by which that employer treats other unauthorized absences by employees, but not by withholding reemployment.

C. Protections Afforded by USERRA

If a reservist fulfills the six prerequisites for the statute, he falls within the scope of USERRA and is entitled to a variety of protections. USERRA gives reservists several entitlements with respect to reemployment.

One of the touchstone features of USERRA is the “Escalator Principle,” which states that the employee is entitled to “the seniority and

23. Id.
27. See id. (requiring the returning reservist to report back within eight hours if the service was for less than thirty-one days, and requiring the reservist to submit an application for reemployment to his employer within fourteen days if the service was between thirty-one and 180 days, or within ninety days if the service was for 181 days or more).
29. Id.
30. See Wedlund, supra note 3, at 817–18 (describing how the principle came about and was codified in USERRA).
other rights and benefits determined by seniority that the person had on the date of the commencement of service . . . plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.\textsuperscript{31} This principle is primarily used in determining the position to which the employee is entitled upon deactivation, but it is also utilized in assigning other rights and benefits, such as pension plans and bonuses.\textsuperscript{32}

The employee is generally entitled to prompt reinstatement following his return from military service.\textsuperscript{33} However, there are three exceptions to this right. First, an employer is not required to rehire the reservist if "the employer's circumstances have so changed as to make such reemployment impossible or unreasonable."\textsuperscript{34} However, if, in order to rehire the reservist, the employer has to relocate or lay off an additional employee who was hired to fill the reservist's position while the reservist was away, the employer must do so, as this is not considered to be an unreasonable measure under USERRA.\textsuperscript{35} Second, if the reservist returns to employment with a disability, and rehiring that individual would impose an undue hardship on the employer, the employer is excused from rehiring him.\textsuperscript{36} Finally, if the position the reservist occupied was one of a brief, non-recurrent nature such that there was "no reasonable expectation that such employment [would] continue indefinitely or for a significant period"\textsuperscript{37} the reservist is not entitled to reemployment.

If the employer is not able to assert one of the affirmative defenses stated above, he or she must rehire the individual. The position the employee is given depends on the length of time he was absent and the qualifications he possesses when he returns.

If the service was for less than ninety-one days, the employee is entitled to "the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service."\textsuperscript{38} However, there is one limitation to this right: the employee must be qualified to perform the duties required by the position.\textsuperscript{39} In order to facilitate the placement of the employee in the position, the employer must make reasonable efforts to

\begin{itemize}
  \item[31.] 38 U.S.C. § 4316(a).
  \item[32.] 38 U.S.C. § 4316.
  \item[33.] See 38 U.S.C. § 4313(a) (stating that the employee "shall be promptly reemployed in a position of employment").
  \item[34.] 38 U.S.C. § 4312(d)(1)(A).
  \item[35.] Wedlund, supra note 3, at 830.
  \item[37.] 38 U.S.C. § 4312(d)(1)(C).
  \item[38.] 38 U.S.C. § 4313(a)(1)(A).
  \item[39.] See Wedlund, supra note 3, at 825 (discussing 38 U.S.C. § 4313(a)(1)(A)).
\end{itemize}
qualify the employee. 40 If the employer's efforts fail, the employer must place the employee in the position he occupied before he was activated. 41

As for reservists absent for more than ninety days, they are entitled to the position they would have attained had they been continuously employed, "or a position of like seniority, status and pay." 42 If the employee is unqualified for the position after reasonable efforts by the employer to qualify him, he is to be given the position he held before he was activated, or one that is similar. 43

In addition to granting rights of reemployment, USERRA also provides special protection against discrimination towards reservists. Employers are not allowed to discriminate against reservists because of their military service in "employment, reemployment, retention in employment, promotion, or any benefit of employment." 44 In making out a claim of impermissible discrimination by an employer, the reservist need only prove that the discrimination was a motivating factor in the actions taken. 45 Once this is done, the burden of proof shifts to the employer to show that the action would have been taken even without the protected activity. 46

Under this provision, if an employer subsequently fires a reemployed reservist, the employer will have a high burden of proving that the discharge was for cause. One of the effects of the provision is to elevate the employment relationship from one where the employer is free to fire the employee at will, which is the case for the majority of employees not in the military, to one where the employer may only fire the employee for cause.

In addition to providing for reemployment, USERRA also has provisions dealing with health plans, 47 pension plans, 48 and foreign employment. 49 However, these provisions are beyond the scope of this Comment.

40. Id. (discussing 38 U.S.C. § 4313(a)(1)(B)).
44. 38 U.S.C. § 4311(a).
45. 38 U.S.C. § 4311(c)(1).
46. Id.
47. See 38 U.S.C. § 4317 (requiring the employer to reinstate the employee's health plan following reemployment).
49. See 38 U.S.C. § 4319 (stating the applicability of USERRA to various foreign employers).
III. USERRA FAILS TO ADDRESS THE SITUATION OF THE STUDENT-RESERVIST

Perhaps the most unsettling discrepancy of USERRA is its complete failure to address the situation of the student-reservist. "Military reservists are part of an all-volunteer service, composed of men and women from all walks of life." While balancing the requirements of the military service on one hand and their civilian careers, jobs, and families on the other, reservists provide an important function for society. In return for their service, the Government, through USERRA, guarantees that these individuals will have their jobs when they return.

While the guarantee of reemployment addresses the concerns of individuals who were employed when activated, it leaves the student-reservists in a predicament. As a result of serving their country, student-reservists are susceptible to losing college credits, paid tuition, and housing bills, and they are faced with the possibility of returning to their civilian lives without being enrolled in the schools they were required to leave. USERRA, as it only applies to employees and not students, does not offer students adequate legal protection when they are called up from reserve status. Furthermore, no other federal law adequately addresses their situation.

Captain Samuel F. Wright, a former attorney for the Department of Labor, was part of the inter-agency task force created for the purpose of drafting USERRA. He was largely responsible for many of USERRA's provisions. Wright recalls two occasions where he participated "in discussions on the question of whether USERRA should be written to apply to students as well as employees." Neither the Department of Education nor the Veterans' Administration showed any interest in extending the scope of USERRA to students. They did not see a need to do so because, at the time USERRA was drafted in 1987, there had not been any notable instances of the activation of reserves for duty.

51. Id. (explaining the "dual existence" of the military reservist).
52. 38 U.S.C. § 4312.
54. Id.
55. Id.
56. Id.
57. Id.
While the problem of student-reservists being activated may have seemed "hypothetical" in the eyes of the USERRA drafters, in contemporary society it has become a reality. In the year following September 11, 2001, 130,000 reservists were called up to active duty. With Operation Iraqi Freedom, the numbers will continue to rise. Of these reservists, approximately thirty percent are college students. Presently, USERRA is only applicable to two-thirds of reservists (those who are employed when activated). The remaining third, comprised of students, are given no federal entitlements to their education. With the rise in students' participation in the reserves, it should be apparent that there is a need to address their unique situation. If there were ever a need to provide students with legal protections against loss of tuition and credits when activated, that need is particularly serious today. As it stands, if a student is attending college and is called to active duty, there is a distinct possibility that whatever tuition he or she has paid for the semester will not be reimbursed. Often when they return from service, student-reservists will not have the right to return to their original schools. This is a problem that needs to be addressed.

A. Failure of Current Systems to Provide Adequate Remedies

A variety of remedies have been used in an attempt to resolve the discrepancy of treatment between the student-reservist and the employee-reservist. The federal government has responded to the problem by creating the Higher Education Relief Opportunities for Students Act; the Servicemembers Opportunity Colleges have provided mediation between student-reservists and their respective post-secondary schools; a minority of states have enacted positive laws to give students legal rights against their schools; and many colleges have created various policies attempting to mitigate the difficulties placed on the student-reservist.

For a variety of reasons, these attempts to find a solution to the problems faced by student-reservists have proven to be inadequate. After returning from active duty, if a student has lost his tuition and credits and is denied reenrollment, he has no legal remedies unless he lives in a state

58. Id.
59. Wedlund, supra note 3, at 799.
which specifically grants him a legal right. The latter case is unlikely, however, because the vast majority of states have not enacted such laws. With a few exceptions, most student-reservists have no legal cause of action, leaving the possibility of future education at the mercy of the schools they were attending when activated.

1. Higher Education Relief Opportunities for Students Act of 2003

One attempt by Congress to relieve the peril of the student-reservist comes in the form of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES).\(^{63}\) The Act recognizes that students must put their post-secondary education on hold in order to serve their country,\(^{64}\) and it attempts to assist with "their transition into and out of active duty."\(^{65}\) Under HEROES, the Secretary of Education may waive or modify the payment of student loan obligations by reservists called to active duty.\(^{66}\) Furthermore, the law encourages, but does not require, post-secondary educational institutions to provide a full refund or a credit of the portion of the tuition and fees that the student paid prior to his or her service.\(^{67}\) The law also asks the institutions to minimize reapplication requirements in order to facilitate reservists' re-entry into school following their military activation.\(^{68}\)

Although Congress was well intentioned, with the peril of student-reservists in mind, HEROES has failed to adequately address student-reservists' problems. Congress used the words "it is the sense of Congress"\(^{69}\) to precede the suggestion that schools assist student-reservists during the activation/deactivation process, rather than specifically directing the educational institutions to provide the various entitlements. In doing so, Congress created a permissive statute. "[A] 'sense of Congress' is not judicially enforceable."\(^{70}\) Therefore, the statute does not give students any cause of action or legal rights against their schools.

While HEROES could prove to be useful in persuading colleges and universities to expand their policies concerning readmittance of students,\(^{71}\)

64. § 1(b)(5).
65. § 1(b)(6).
66. Wedlund, supra note 3, at 843.
67. Id.
68. Higher Education Relief Opportunities for Students Act § 3(a)(2).
69. See § 3(a) (stating that "[i]t is the sense of Congress that" educational institutions should provide refunds of tuition and ease readmittance for returning student-reservists).
71. Id.
the statute is insufficient. The student-reservists deserve to return to their civilian lives without the stress of persuading their respective schools to refund tuition or readmit them. In its present form, HEROES is inadequate in providing student-reservists the legal entitlements they deserve.

2. Servicemembers Opportunity Colleges

The Servicemembers Opportunity Colleges (SOC) was created to "overcome obstacles encountered by military service members pursuing higher education."\(^{72}\) To date, the consortium is comprised of over 1800 colleges and universities.\(^ {73}\) One of the SOC's primary functions is to provide for arbitration between colleges and reservists concerning the loss of credit and tuition due to military service.\(^ {74}\) The educational institutions that make up the SOC have contractually agreed to follow SOC guidelines, one of which stipulates that they are to minimize the loss of credit due to military activation.\(^ {75}\) However, non-member colleges are under no requirement to refund tuition or provide for readmittance. The SOC enforces member colleges' compliance with their principles and attempts to assert influence over non-member colleges by encouraging them to refund tuition and readmit returning student-reservists.\(^ {76}\)

While the existence of this organization is a step in the right direction, institutions that are not members of the SOC are under no obligation to assist the student-reservists upon deactivation. The SOC is purely contractual in nature, and it has no legal entitlements to enforce against colleges that do not provide for credit and tuition reimbursement. Because of the limitations of the SOC's power, the organization provides unsatisfactory protection for the student-reservists.

3. State Laws

While the majority of states have not passed laws protecting the student-reservists, a few states have enacted laws that legally entitle the student-reservist to a refund of tuition, future credit for paid tuition, or reinstatement of pre-activation class status, so the student may complete his or her unfinished classes.\(^ {77}\) These states give protections similar to those

\(^{72}\) Fernandez, supra note 50, at 865.
\(^{75}\) Id.
\(^{76}\) Fernandez, supra note 50, at 865.
\(^{77}\) Ala. Code § 31-12-3 (LexisNexis 1998); Ark. Code Ann. § 6-61-112 (2003); Fla.
given under USERRA in that they attempt to restore the students to the educational status they had prior to being ordered to military duty. These states have attempted to fill the void of USERRA and offer the student-reservists the protection they deserve.

While the states' intentions in passing these laws were admirable, approximately half of the states' statutes are not sufficient. Florida, New Jersey, South Carolina, and Arkansas all limit the scope of the statutes' applications to public institutions, creating a discrepancy between public and private schools. Because of the statutes' specificity, students enrolled at private institutions are not afforded the legal entitlements under the statute and are susceptible to academic and financial difficulties when activated.

Wisconsin also delegates legal rights based on whether the student was attending a public or private institution, but unlike the aforementioned states, Wisconsin's statute provides greater protection for individuals at private schools. If the student was at a private school, he or she must be reenrolled following deactivation and allowed to complete the unfinished courses. However, if the student attended a public school, the school may choose to reinstate him or her, or merely reimburse the student for his or her tuition. Furthermore, the Wisconsin statute only applies to individuals who are activated for more than thirty days. This limitation severely impairs the student who is activated for less than thirty days during a semester. That student would be left to the good graces of his or her teachers and the school's dean to be allowed to take exams and learn any missed material.

At present, there are many discrepancies within and among different states' laws. Legal entitlements are randomly afforded to students depending on which state they are in, what type of institution they are attending, and the length of their military activation. This differing treatment among students is inherently unfair. There is no reasonable justification for giving legal entitlements to one student and not another based on the location of the school they are attending. As the states have not effectively responded to the problem of the student-reservist, a federal law needs to address this issue to provide a consistent remedy for students.


78. § 1004.07; § 18A:62-4.2; § 59-101-395; § 6-61-112.
79. WIS. STAT. ANN. § 36.11 (West 2002).
80. § 39.48.
81. § 36.11.
82. § 39.48.
called up to active duty.

4. College and Post-Secondary Institutions’ Policies

In light of the lack of statutes affording the student-reservist legal rights following deactivation, a variety of education departments have attempted to influence schools into adopting policies that grant the student tuition reimbursement or credit as well as reenrollment. On January 22, 1996, the American Council on Education circulated to higher education institutions a letter regarding the treatment of student-reservists called into active duty. This letter expressed concern for military students and asked institutions to respond by creating policies that would minimize any difficulties the student faces when activated. Secretary of Defense William Perry sent another letter to each of the state governors asking them to work with their respective educational institutions to ensure that the reserve students receive tuition refunds, partial credit for unfinished courses, and reenrollment rights.

In response to the letters, state governors began actively supervising educational institutions to ensure compliance with Secretary Perry’s requests. Both higher education institutions and state boards of higher education have instituted a variety of policies addressing the issue, stating that voluntary action was preferable to federal intervention. While these policies vary among states, the majority allow for reenrollment and tuition reimbursements or credits. Through these policies, many students who

83. E.g., Sharon M. Samson, Colorado Commission on Higher Education, Policy Revisions to the Tuition & Fees Policy 1 (Oct. 4, 2001), available at http://www.soc.aascu.org/pubfiles/gdmisc/COStatePolicy.pdf (“[T]he proposed addendum requires that each public institution modify their policies to explicitly recognize that normal refund and withdrawal policies may not be appropriate and make provisions for individuals who leave the institution mid-semester to respond to a state or national emergency . . . .”); Memorandum from South Carolina Commission on Higher Education to Eligible Public and Independent Colleges and Universities (Nov. 6, 2001), available at http://www.soc.aascu.org/pubfiles/gdmisc/SCCHEPolicy.pdf [hereinafter Memorandum] (encouraging institutions to offer tuition reimbursements and flexible reenrollment options).
85. Id.
87. Lee, supra note 60.
88. State of Illinois, supra note 84, at 89.
89. See Samson, supra note 83, at 1 (requiring Colorado colleges to continue enrollment and reimburse tuition for student-reservists called to activation); RULES OF THE TENNESSEE HIGHER EDUCATION COMMISSION ch. 1540-1-6 Tuition Refunds for Activated
participate in the reserves are protected against the financial or academic difficulties they would otherwise face.

While the various policies ensure that some students are guaranteed specific rights, other students fall through the cracks in the policies and are susceptible to losing the educational status they had before they were called into active duty. For example, one law school’s academic policy allows for reserve students to take a permissive withdrawal and, following completion of their active duty, guarantees these students readmission. However, this policy also states that an individual who takes a permissive withdrawal only has one year to be readmitted into the law school. This requirement is unwaiveable by the dean or any other school official. Thus, a student-reservist who attends this school, and is activated for more than a year, loses the right to readmittance and must reapply to the school once he or she is deactivated. This is an undue hardship on the student-reservists whose absence is based on service for their country.

Despite the best efforts of the boards of higher education within each state and the post-secondary institutions, some individuals are not guaranteed the protection they deserve. The discrepancies within and among school policies need to be addressed. One reason legislation has not occurred in this area is because of “the cooperation and sensitivity shown by higher education institutions in assisting [student-reservists].” While relying on the good-faith efforts of the schools may have been an idea worthy of hope, this reliance has failed to ensure students active in the reserves the guarantees they deserve. Student-reservists deserve legal entitlements to their education upon the completion of their active duty. It is through legislation that these individuals will receive the protection the educational institutions have failed to provide.

B. Addressing the Need for Legislation

As the current legislation and practices in place are unable to adequately address the needs of the student-reservist, a new federal law

---

Reserve and National Guard Personnel (1991), available at http://www.soc.aascu.org/pubfiles/gdmisc/TNStatePolicy.pdf (calling for tuition refund or credit for reservists without requiring the colleges to offer reenrollment following deactivation); State of Illinois, supra note 84 (asking the Board of Education to implement policies in order to counter the imbalance of rights given to student reservists by the various colleges in Illinois); Memorandum, supra note 83 (encouraging South Carolina schools to provide tuition reimbursements to students called to active duty).

90. Wright, USERRA's Impact on Reservists, supra note 53, at 20.
91. Id.
92. Id.
needs to be created, or existing law needs to be amended, to give student-reservists a guaranteed legal right to the civilian lives they had before they were activated.

USERRA gives broad legal protections to employees called up to service, but fails to address the situation of the student. The attempts by the states and educational institutions to remedy the situation are a step in the right direction; however, in comparison to the rights given to the employee-reservist, these attempts are inadequate. The students and the employees are both giving up portions of their civilian lives to serve their country. "[T]he student is subject to the same sacrifice and peril and is no less committed to service than those who are employed." In return for their service, Congress should give to student-reservists the same broad protections given to employees against any negative repercussions that could result from their military service.

One way to address the issue would be to expand USERRA to provide for guaranteed readmittance of student-reservists following deactivation. If this were done, USERRA would accomplish its stated purposes. The statute would "encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages that civilians face as a result of their service as well as "minimize the disruption to the lives of persons" who serve in the military. Congress could amend USERRA to offer provisions similar to those of reemployment to address readmittance of students.

Another possible remedy is found in the existing statute, The Higher Education Relief Opportunities for Students Act of 2003 (HEROES). By simply amending the law to be mandatory, rather than permissive, Congress could give the student-reservist adequate protection. The optimal solution may be to make the provisions of HEROES mandatory and place them within USERRA. This would not only protect the student-reservist, but it would also further promote the purposes of USERRA. Either way, Congress should address the situation of the student-reservists and provide them with the legal entitlements deserved by those who give up their civilian lives in order to serve their country.

94. Fernandez, supra note 50, at 874.
IV. USERRA FAILS TO PROTECT NATIONAL GUARD RESERVISTS CALLED TO STATE DUTY.

While the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, and Coast Guard Reserve have the sole duty of supplementing their respective active duty military branches, the Army and Air National Guards have duties in addition to their federal obligations. As well as their reservist responsibilities to the federal government, the Army and Air National Guard may be called forward by the state governor to serve State Active Duty in response to natural disasters, civil disturbances, and community support missions. For example, "in an effort to protect citizens of New York and to provide needed assistance in the clean-up efforts at the World Trade Center [after the September 11 terrorist attacks], Governor George Pataki mobilized approximately 6,000 members of the New York State National Guard." While performing these state duties, members of the Army and Air National Guard fall outside the scope of the protections of USERRA.

A. National Guard Members’ Status Under USERRA

In order to qualify for the benefits of USERRA, an individual must "serve in the uniformed services." USERRA defines "uniformed services" as 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 . . . and any other category of persons designated by the President in time of war or national emergency." When members of the National Guard are activated by the state governors to perform state duties, they do not receive the entitlements provided by USERRA. They are not participating in training, nor do they qualify as performing full-time National Guard duty. While USERRA does not define full-time National Guard duty, 10 U.S.C. § 101(d)(5) specifies that such duty means "training or other duty . . . performed by a member of the [National Guard] . . . under section 316, 502, 503, 504, or 505 of title 10.

98. Wedlund, supra note 3, at 831.
99. Id. at 831–32.
101. See 38 U.S.C. § 4311(a) (stating that “[a] person who . . . has an obligation to perform service in a uniformed service” may not be discriminated against); 38 U.S.C. § 4312(a) (entitling individuals to reemployment after absence “by reason of service in the uniformed services”).
The sections enumerated in the statute do not encompass State Active Duty. Section 502(f) is arguably the most applicable of the statutes cited, but it only extends to orders from the Secretary of the Army or the Secretary of the Air Force and not the state governor.

State Activated National Guards do not fall within the inclusionary clause of the definition of Uniformed Services that qualifies "any other category of persons designated by the President in time of war or national emergency," because they are activated by the governor rather than the President. Furthermore, their state activities would not likely fall within "war or national emergency," as they are usually local in nature.

Due to the definition of uniformed services, members of the National Guard are routinely excluded from the protection of USERRA and are therefore susceptible to both employment discrimination and the possibility of losing their employment due to their responsibilities in the Guard.

B. The Failure of States' Attempts to Address the Problem

In response to the failure of USERRA to address these issues, many states have enacted a variety of laws specifically extending provisions similar to USERRA to members of the National Guard during State Active Duty. States are able to do so through § 4302 of USERRA, which grants states the power to provide additional rights and benefits to those enumerated in USERRA.

While many states have utilized the ability to enhance reservists' rights under USERRA, the state laws have proven to be ineffective in a variety of ways.

First, at least one jurisdiction has altogether failed to address the need for anti-discrimination and reemployment statutes protecting members of the National Guard. The District of Columbia has relied on the inadequate protections of USERRA to provide protection to members of the Reserves activated for duty. However, as indicated above, National Guard members are excluded from the broad protections of USERRA when called up for

---

105. See 32 U.S.C. § 502(f) (giving the Secretary of the Army or the Secretary of the Air Force broad discretion to order additional duties).
107. 38 U.S.C. § 4302(a) ("Nothing in this chapter shall . . . diminish any Federal or State law . . . that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.").
State Active Duty.

Second, numerous jurisdictions only apply USERRA-like protections to National Guard Members who work for the public sector, leaving private employers free to discriminate against members of the National Guard. For example, North Dakota only grants reemployment rights to National Guard Members who are "officers and employees of [the] state or of a political subdivision." Additionally, Guam limits the applicability of its re-employment statute to Guardsman who are "employees of the government of Guam." 

Finally, even when states offer reemployment and anti-discrimination statutes to both the public and private sectors, inconsistencies within the scope and application of state laws result in insufficient remedies. For example, a Guardsman left his convenience store job in Oregon when the Governor of Washington called him up to fight forest fires. Upon his release from his firefighter duties, his employer refused to rehire him, claiming that he was not entitled to reemployment because he was called up for state rather than federal duty. His search for relief was less than satisfying. While the State of Washington had laws addressing this issue, because the Guardsman worked in Oregon, he could not avail himself of those laws. Furthermore, the equivalent Oregon law "only applies to a member of the National Guard of [that] State." The state laws systematically failed to provide this member of the National Guard with any form of relief.

As the Washington National Guardsman example illustrates, even where state laws attempt to apply the same protections as USERRA to members of the National Guard, some unfortunate individuals find that their service to our country results in their unemployment because of the absence of a uniform federal law. There is no rational justification for the disparate treatment of individuals of the National Guard as compared to that of similar reserve units.

111. Id.
112. See WASH. REV. CODE ANN. § 73.16.033 (West 2004) ("Any person who is a resident of this state or is employed within this state, and who voluntarily or upon order from competent authority, vacates a position of employment for service in the uniformed services, shall . . . be reemployed.").
113. Wright, USERRA and SSCRA Coverage for National Guard Members, supra note 110.
C. Remedying the Situation

USERRA should be expanded to apply to all members of the reserves who are called to serve, regardless of whether it is for a state or federal duty. This can be done by altering the definition of "uniformed service" in one of three ways. First and most practically, USERRA could explicitly define "full-time National Guard duty" in the statute, rather than forcing individuals to search other statutes to find a workable definition. Active State Duty should be specifically included in this definition. Secondly, 32 U.S.C. § 502(f) could be expanded to include "duty imposed at the discretion of the Governor" along with that of the Secretaries of the Army and Air Force. Lastly, the Governor could be included in the inculpatory provision along with the President in the definition of "uniformed service."114

V. CONCLUSION

While Congress had great intentions in passing USERRA, it failed to give the Act a large enough scope. USERRA offers members of the reserves phenomenal reemployment rights. However, it fails to give student-reservists, who are in the same predicament as employee-reservists, the similar right to reenrollment. USERRA also fails to provide legal entitlements to members of the National Guard called up by their respective state governors for state duty, despite the fact that these National Guard members are sacrificing no less than those called for federal duty. With the importance of the reserves in the United States military, and the recognition of the sacrifices reservists make to serve the country, it is imperative that these individuals be provided with, at a minimum, the right to return to their jobs or schools when they return from duty. Congress needs to address these issues to provide adequate protections for reservists. There is no one more deserving of these legal entitlements than those who serve for their nation in the uniformed services.

114. This last option, however, is least practical, as the powers of the President and governors are vastly different. Furthermore, the phrase "war or national emergency" would have to be amended, which would create additional complexities.