New Demands on Military Reservists and the Impact on Local Government

by C. Jason Carter



War is expensive. The financial cost of war has influenced the United States from its earliest days. In 1765, the British Parliament passed the Stamp Act[1] to finance the stationing of troops in colonial America. This tax became a leading cause of the American Revolution. The first sales tax in the United States was levied to finance the War of 1812.[2] The first income tax in the United States was levied to finance the Civil War.[3] The financial cost of the United States joining World War I has been estimated to exceed $22.6 billion.[4] During World War II, the United States spent over $341 billion and generated debt that far exceeded the gross national product.[5] Today, the estimated cost of a single deployed soldier in Afghanistan is $1 million for each year of deployment.[6] While this is a large round number, it has proven to be a relatively accurate predictor for the incremental cost of federal outlays related to deployment. In advancing Operations Iraqi and Enduring Freedom, the nation has now spent over $1 trillion.[7]

This enormous expense represents only part of the nation's cost of war: it does not include the cost of lost production from workers who are dislocated from their jobs to the war front, nor does it include the cost of reintegrating these workers back into their jobs after de-mobilization. These burdens are not included in the estimated cost of war because they are not borne by the federal government, but shifted to employers.[8]

The Uniformed Servicemembers Employment and Reemployment Rights Act[9] (USERRA) places significant financial burdens on employers in support of national defense. Local governments are particularly affected because many military reservists serve, simultaneously, as uniformed members of local police and fire departments. Likewise, state laws that mandate military leave for employees of local government are costly.

During the past decade, the military has radically altered the manner in which National Guard and Reserve forces are employed.[10] Such forces were formerly considered the nation's "strategic reserves," but have unexpectedly evolved to become "operational forces." This paradigm shift has exacerbated the financial obligations associated with employing military reservists. The federal government must acknowledge the increased burden local governments carry in employing (and sustaining) de-mobilized military forces. State governments must revisit military leave laws to ensure they reflect today's operational environment.

Pre-USERRA

Throughout history, nations have struggled to deal with reintegrating veterans into society. In the United States, a substantial portion of this burden has been placed on the returning veteran's previous employer, starting in 1940. Prior to entering the war, Congress adopted the Selective Training and Service Act of 1940[11] (STSA) as the legal conduit for generating the nation's military force —a force that eventually exceeded 10 million servicemembers. This mobilization was unprecedented and will not likely be repeated.[12] Senator Elbert Thomas of Utah offered an amendment to the STSA that would require former employers to rehire veterans once they returned from military service, stating,

> ... it is not unreasonable to require the employers of [veterans] to rehire them upon completion of their service, since the lives and property of employers, as well as the lives and property of everyone else in the United States, are defended by such service.[13]

The amended portion of the law was referred to as the Veterans' Reemployments Rights Act (VRRA).[14] The VRRA has been amended several times to meet the changing demands of society and the military. In 1941, VRRA protections were extended to volunteers

as well as draftees;[15] in 1950 and 1955, reemployment rights were extended to protect absences from employment by members of the National Guard and Reserves occasioned by training or service; and in the 1960s, Congress responded to certain employers' abusive tactics by protecting employees from discrimination in employment, promotion, or any incident or advantage of employment based on reserve military service.[17] In 1974, as the nation's military transitioned to an all-volunteer force, Congress made comprehensive amendments to the VRRA which included the new moniker, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA).[18] The VEVRAA was also substantively expanded to apply to state and local governments;[19] previously, veteran reemployment laws were only binding on federal and private employers. Further amendments were made in 1986 to prohibit discrimination in initial hiring.[20]

In 1994, after the United States' first war in the Persian Gulf, the VEVRAA was revisited and renamed the USERRA.[21]

USERRA

The USERRA embodies the burden that employers bear today in accommodating employees who serve in the military. Generally, it prohibits discriminatory hiring and employment practices against veterans, including members of the National Guard or Reserve.[22] It mandates that any person who is absent from a job to serve in the military will be able to get his or her job back when military service is over, and not just the job that was vacated.[23] The USERRA affords "escalator benefits" that calibrate reemployment rights and benefits as if the employee never left the civilian job. Last, it is important to note that an employee claiming rights under USERRA is simply required to show that his or her military service was a "motivating factor" in an adverse employment decision.[24] Beyond this threshold, the employer has the burden of proving that it acted appropriately in order to defend the case.[25]

The preceding paragraph is an exceedingly simplified narrative of laws that are intended to protect those members of society who serve in the military. A better summation is undoubtedly found in *Fishgold v. Sullivan Drydock & Repair Corp.*, the first opinion of the U.S. Supreme Court interpreting the VRRA:

> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.[26]

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State Military Leave Laws

The law is quite clear that the USERRA provides the minimum level of benefits to which military servicemembers are entitled.[27] State and local governments are free to provide additional benefits, but may not encroach on the rights provided by federal law.[28] Most states have created additional rights for servicemembers employed by municipal governments, and most mandate that some amount of paid leave be afforded to employees performing military duty.[29] States exercising this authority normally provide some base amount of leave that varies from 12 to 30 days.[30] The leave is normally awarded on an annual (calendar or fiscal year) basis. Several states also award additional military leave for state service, mobilization, or for responding to some other emergency at the federal or state level.[31] This additional leave is sometimes awarded on an annual basis, but may be on a per-event basis. Recently, there has been a growing trend among states to enact "gap" compensation laws: compensation that makes up for a loss of income due to military employment.[32] These laws create a financial obligation for local governments in support of military operations.

A New Military Environment

The current operational tempo of National Guard and Reserve forces in the United States is unprecedented.[33] In 2008, the Congressional Commission on the National Guard and Reserves completed the most comprehensive review of the nation's military reserves in over 60 years.[34] Those who understood the Commission's findings found them to be alarming: the use of military reservists had increased five-fold between 2001 and 2006.[35] Similar findings clearly supported the Commission's conclusion that the use of our reserve forces was no longer restricted to strategic necessity: "... the National Guard and Reserves have evolved into an essential element of the military's operational force."[36]

The Commission further observed that the expanded use of military reservists was directly related to cost—National Guard and Reserve forces cost the United States government a fraction (about 23% as much) as active duty forces while demobilized.[37] This

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C. Jason Carter is a graduate of the University of Arkansas School of Law and was admitted to the Arkansas Bar in 2000. Jason has exclusively practiced municipal and military law. Appointed as the North Little Rock City Attorney in 2007, Jason was elected to the office in 2008. He is a past President of the City Attorneys Association of the Arkansas Municipal League, and has presented continuing education programs for IMLA, Arkansas Municipal League, Arkansas Bar Association, and the National Guard. His diverse military background includes both combat and service-support career fields. He has over 22 years of total service, including a year-long deployment to Iraq in 2004-2005. Jason continues to serve today as a Major in the Arkansas National Guard's Judge Advocate General Corps. He has received several military awards, including the Army Achievement Medal, the Army Commendation Medal, and the Bronze Star.

led the Commission to conclude that "there is no reasonable alternative to the nation's continuing increased reliance on its reserve components for missions at home and abroad."[38] Simply stated, by avoiding the majority of costs associated with maintaining a military force that is not engaged in operations, the overall cost of war is reduced. In substantial measure, the avoided cost of maintaining the force has been passed on to employers.

The pace of National Guard and Reserve mobilizations (and the associated costs to local government) will continue indefinitely. By all estimations, the future of United States military operations is in stark contrast to history. The future will not be characterized by peace with brief intermittent periods of intense war; rather, it will be characterized by continuous low-intensity war with brief intermittent periods of peace.[39] The enemy will not be hostile nation-states, but non-state actors—primarily terrorists groups—operating within the boundaries of multiple nations.[40] The capabilities of these groups demand that the United States military act preemptively to eliminate the attacks before they occur. The sum of the operational demands that are currently placed on the military are estimated to continue for decades—perhaps longer than a century.[41]

The Law and the New Environment Collide

The obligation of a municipality to provide services does not terminate because its employees are mobilized for military service: streets must still be policed, fires must be extinguished, and utilities continue to be needed. This means hiring replacement personnel to perform the tasks of mobilized employees. Often, these replacements require a substantial investment of training[42] to adequately perform their duties. While replacements are being trained, other employees are required to work overtime to perform the tasks previously carried out by the servicemember. The USERRA requires employers to rehire a servicemember when military duty is completed, and to retrain the employee, if necessary, to perform the tasks of a job that may have changed in their absence.[43] The law is clear that if there is a shortage of available positions, a person hired to replace the returning servicemember should be discharged to make room.[44] Thus, any advantage gained from training replacement personnel is often lost when the servicemember returns.

The cycle of mobilization, hiring, training, de-mobilization, and reintegration is expensive. It is one matter for local governments to be expected to bear this expense in response to the infrequent exigency of national strategic demands; it is another matter entirely to expect cities to bear this expense as part of the routine operational function of an active military. Local governments, particularly smaller entities, lack the resources to both maintain services and comply with the law. The point here is that USERRA, in and of itself, is not onerous to local government: when coupled with repetitive and continuous mobilizations of National Guard and Reserve personnel, USERRA does, however, increase the cost of providing local government services. Depending on the proportion of reservist employees, the cost can be substantial.

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Similarly, state laws providing for military leave are themselves not onerous. Laws incentivizing reserve military service through annual leave place no greater burden on local government during mobilization than in times of peace. However, laws that award *additional* leave for mobilization and federal duty are now adding significant expenses to the strained budgets of local government.[45] Additional leave laws that award leave on a per-event basis, rather than annually, pose even greater difficulty, in that they may be invoked multiple times during a given fiscal cycle. These laws were premised on the infrequent mobilization of reservists, which is no longer the case. The recent trend toward gap compensation provides a politically popular alternative to support servicemembers while controlling cost, so long as the compensation is left within the discretion of local governing bodies.[46] An employee with a substantial municipal salary may serve in a military position with substantially less compensation.[47] Cities must be able to manage this financial exposure by capping the duration and amount of gap compensation.

Solutions

The most difficult part of alleviating the burden of laws that protect servicemembers is that ... the laws protect servicemembers. These people leave their friends, families, homes and careers to face hardship and danger for the good of the nation: they *should* receive strong and substantial support from the government.[48] The question is not whether the government should support servicemembers, as undoubtedly, it should; the question is whether federal and state governments have supported local government to ensure affordable continuity of services at the municipal level during periods of repetitive mobilizations. At this juncture, it has not. Federal and state governments have adopted a military policy that increases the cost of providing services at the local level without providing a source of revenue to offset this increase.[49]

The federal government must acknowledge the burden placed on local governments caused by repetitive mobilizations of National Guard and Reserve forces. Cities that employ reservists should be financially assisted during mobilizations for their associated expenses: overtime, training, and retraining expenses during mobilizations. These expenses are now attributable to the overall cost of maintaining the nation's operational military force and should be borne, at least in part, by the federal government.

Senators Mark Pryor (D-AR), Kent Conrad (D-ND), Patrick Leahy (D-VT), and Jon Tester (D-MT) have recently

proposed a remedy to the burden of repetitive deployments. If adopted, Senate Bill 568[50] (the "Strengthening Community Safety Act of 2011") would establish a grant program through which a local government could apply for reimbursement of expenses attributed to its mobilized first responders. The bill's verbiage suggests it is directed toward smaller communities. The grant is only available to communities with greater than a 5% increase in deployment-related expenses,[51] and the maximum grant amount is $100,000.[52] Thus, any qualifying city with a personnel budget for fire and police that exceeds $2,000,000 cannot be fully reimbursed for expenses attributed to mobilized employees. Although the bill, as proposed, does not fully resolve the financial burden of mobilizing employees, it is, however, a pilot program that offers a major step in the right direction, even for larger cities.[53]

State governments must realize that the implementation of reserve forces has changed dramatically. State laws mandating broad additional leave for mobilization must be revisited to determine the cost of such laws to local government. While the recent trend toward gap compensation may provide a less costly alternative to support servicemembers, cities must retain the discretion to manage this support within their budgetary framework. Just as federal laws protecting veterans have been amended to reflect changes in society, states must be vigilant regarding the responsiveness of the legislative framework through which they assist veterans at the state level, when change is demanded by the environment.

Conclusion

Consider the people who join the military as reservists. They wear uniforms. They act with the authority of government. They don't shy away from danger. They act in the same manner as people who serve in police and fire departments at the local government level. There is no doubt that people in society who are attracted to serve in one uniform are likewise attracted to serve in another.[54] For this reason, the streets of Iraq and Afghanistan are routinely patrolled by people who would otherwise be working for their local government.

Our states and nation must adapt to the changing military environment by supporting local government during repetitive mobilizations of reserve forces. Local governments will continue to attract employees who simultaneously serve as military reservists, and these reservists will continue to be mobilized at great expense to local government.

As a nation, we must not be forced to choose between defending foreign cities or our own.

Notes

1. *Duties in American Colonies Act 1765*; 5 George III, c. 12.
2. Jefferson successfully abolished all direct internal taxes in 1802. However, several excise taxes were re-enacted in 1813 as war measures. *See* http://www.tax.org/Museum/1777-1815.htm.
3. Informally known as the "Revenue Act of 1861," the levy was formally referenced as Act of August 5, 1861, Chap. XLV, 12 Stat. 292.
4. Ernest L. Bogart, Direct and Indirect Costs of the Great World War (2d ed. 1920).
5. This figure was used by President Truman on March 12, 1947, in announcing the Truman Doctrine to illustrate the American investment in freedom and world peace. Note that most theorists estimate actual expenditures in the $250B to $275B range.
6. For a discussion of the much-publicized "one million dollars per soldier per year" statement made by President Obama, see Christopher Drew, *High Costs Weigh on Troop Debate for Afghan War,* The New York Times, Nov. 14, 2009, available at http://www.nytimes.com/2009/11/15/us/politics/15cost.html?hp.
7. The website of the National Priorities Project at http://www.costofwar.com has a running total of the total cost of wars since 2001.
8. Some tax theorists consider these burdens to be a form of financial conscription that compels sacrifice in furtherance of the war effort. For more information, see Joseph J. Thorndike, *Sacrifice and Self Indulgence on the Home Front*, December 3, 2009, available through http://www.taxhistory.org.
9. P.L. 103-353, 108 Stat. 3149, as amended, mostly codified at 38 U.S.C. §§ 4301-4333 (West 2011).
10. *Transforming the National Guard and Reserves into a 21st Century Operational Force*, Final Report to Congress and the Secretary of Defense (U.S. Commission on the National Guard and Reserves, 2008), 51-54 (hereinafter "Operational Force Report").
11. Pub. L. No. 54-783, § 8, 54 Stat. 885, 890 (1940). Also known as the *Burk-Wadsworth Act*, the STSA was the first peacetime conscription law in U.S. history.
12. While military end-strength during World War II peaked at just over 10 million servicemembers during 1945, the total number of persons serving in the United States military during the war exceeded 17 million. According to the 1940 census, the total number of males in the United States between the ages of 18 and 55 was approximately 35 million. Mobilization at this level is generally considered "total war."
13. Lieb v. Georgia-Pac. Co., 925 F.2d 240, 246 (8th Cir. 1991) (quoting the remarks of Sen. Thomas in 96 Cong. Rec. 10573).
14. Veterans' Reemployment Rights Act, 38 U.S.C. §§ 2021-27. USERRA replaced the VRRA on Oct. 13, 1994.
15. Enacted as sec. 7 of the Service Extension Act of 1941, Pub. L. 77-213, 55 Stat. 626, 627 (1941).
16. Reserve Forces Act of 1955, Pub. L. 84-305, 69 Stat. 598, 602 (1955).
17. Pub. L. 86-632, 74 Stat. 467 (1960) and Pub. L. 90-491, 82 Stat. 790 (1968).
18. Pub. L. 93-508, 88 Stat. 1593 (codified as amended at 38 U.S.C. §§ 2021, *et seq.*) (West 2011).
19. Act of Dec. 3, 1974, Pub. L. No. 93-508, 88 Stat. 1594 (1974) (codified at 38 U.S.C. §§ 2021-26 (1976)).
20. Veterans' Benefits Improvement and Health Care Authorization Act of 1986, Pub. L. 99-576, 100 Stat. 3248, 3279 (1986).
21. 38 U.S.C. § 4301, *et seq.* (West 2011).
22. 38 U.S.C. § 4311 (West 2011).
23. 38 U.S.C. § 4312, 4313, 4316 (West 2011).
24. 38 U.S.C. § 4311(c) (West 2011). The term "motivating factor" means that if the employer was asked, at the moment of decision, what its reasons were and if it gave a truthful response, one of those reasons would be the employee's military position or related obligations. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).
25. Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

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available at http://www.state.nj.us/health/documents/medical_marijuana_proposal.pdf.
36. Me. Rev. Stat. Ann. tit. 22 §558-C (West 2011).
37. Ken Hibl, *Agenda Report re: Ordinance 2010-009*, City of Clare, MI (Nov. 10, 2010) at http://tinyurl.com/3av4u93 (last visited May 09, 2011), citing *White Paper on Marijuana Dispensaries*, California Police Chiefs Association's Task Force on Marijuana Dispensaries, 2009.
38. *White Paper*, *supra* note 37, available at http://tinyurl.com/42u74qh (last visited May 09, 2011).
39. Sonu Munshi, *Peoria City Council approves medical-marijuana regulations*, The Arizona Republic, Feb. 17, 2011.
40. A recipe for marijuana-laced brownies appears in the Alice B. Toklas Cook Book (1954).
41. On April 5, 2011, the City Council approved Text Amendment (TXT10-04) Medical Marijuana Ordinance, including changes to the home occupation provision.
42. The City of Los Angeles has a highly detailed ordinance which may prompt your thinking on what to include—see Article 5.1, Medical Marijuana Collective, at http://tinyurl.com/2dvuvv (last visited May 09, 2011). ML

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26. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946).
27. 38 U.S.C. § 4302 (West 2011).
28. 20 C.F.R.§ 1002.7 (2005).
29. Thirty-seven states have enacted laws mandating military leave for local government employees.
30. For example, Kansas mandates 12 days of annual leave; West Virginia mandates 30 days of annual leave.
31. Arkansas, Florida, Georgia, North Dakota, Pennsylvania, South Carolina, Tennessee, and West Virginia mandate some form of paid military leave for municipal employees in *addition* to regular annual leave.
32. Connecticut, Delaware, Illinois, Nebraska, and Ohio mandate additional compensation ("gap" pay) for municipal employees who incur a loss of income based upon military service.
33. "The current reliance on the reserve components as an operational force, however, is something entirely new, unforeseen, and unplanned." *Operational Force Report*, *supra* note 10 at 51.
34. *Id.* at 1.
35. In FY 2001, the National Guard and Reserve performed 12.7 million man-days of service; in FY 2006, the number had increased to 61.3 million man-days.
36. *Operational Force Report*, *supra* note 10 at 5.
37. *Id.* at 67.
38. *Id.* at 5.
39. U.S. Dept. of Defense, *Quadrennial Defense Review Report* (Feb. 6, 2006), iv, available at http://www.defense.gov/qdr/report/report20060203.pdf (last visited May 09, 2011).
40. *Id.*
41. *New World Coming: American Security in the 21st Century: Major Themes and Implications*, The Phase I Report on the Emerging Global Security Environment (U.S. Commission on National Security/21st Century, 1999), 3,4.
42. In my home state of Arkansas, police officers are required to take 12 weeks (480 hours) of training to meet certification requirements.
43. 38 U.S.C. § 4312 (West 2011).
44. Nichols v. Dep't of Veterans Affairs, 11 F.3d 160 (Fed. Cir. 1993).
45. An audit of the 2008 fiscal year of the City of North Little Rock, Arkansas showed outlays exceeding $48,000 for *additional* military leave of mobilized employees.
46. Ohio has developed an interesting statute that provides up to $500 of monthly gap compensation for mobilized municipal employees, unless the municipality affirmatively opts to pay a greater amount. Ohio Rev. Code Ann. § 5923.05 (West 2011).
47. In my military experience, I have crossed paths with many professionals and executives who choose to serve in lower enlisted ranks because of the camaraderie of friends and their personal commitment to assume more dangerous missions. While I have always respected their dedication, their choice could result in excessive liability for gap compensation, absent limitations.
48. The mission statement of the United States Department of Veterans Affairs quotes a phrase from the closing paragraph of President Abraham Lincoln's second inaugural address: "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, *to care for him who shall have borne the battle and for his widow and his orphan*, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations."
49. It should be mentioned that the wars in Iraq and Afghanistan are distinctive in that they are the only wars conducted in history while federal taxes were *reduced*.
50. S. 568, 112th Cong. (1st Sess. 2011).
51. *Id.* at § 2(a) (proposed sec. 2401(a)(2)).
52. *Id.* at § 2(a) (proposed sec. 2401(b)(3)).
53. Funding for S. 568 is capped at $5,000,000. *Id.* at § 2(a) (proposed sec. 401(e)). Further, the title of S. 568 identifies it as a pilot program.
54. Noting the military advantage of employing National Guard and Reserve servicemembers with civilian skills, the Commission on the National Guard and Reserves stated, "... [t]he complementary value of their military and civilian skills ... add significant value to the nation ... Reservists are city planners, power plant operators, waterworks directors, computer specialists, fire chiefs, and police chiefs." *Operational Force Report, supra* note 10 at 70. ML

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heart palpitations. She reports a family history of heart problems. Mom died at age 43. Placed on aspirin regime."). Employers should preempt overly detailed doctor's notes and include the "safe harbor" language in their employee handbook. The language should be included in any section that covers sick leave, FMLA, fitness-for-duty, light duty, short-

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