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MILITARY RESERVIST-EMPLOYEES' RIGHTS UNDER 38 U.S.C. § 2021(b) (3)—WHAT IS AN INCIDENT OR ADVANTAGE OF EMPLOYMENT?

Employee-reservists are protected from certain disadvantages in their civilian employment by 38 U.S.C. § 2021(b) (3). A recent Supreme Court decision interprets that section as applying only to intentional employer discrimination. Whether the reservist is still entitled to any statutory incidents and advantages of employment depends on how federal courts apply the Supreme Court's test of equality vis-à-vis fellow employees without military obligations. The effects of the Court's restrictive holding may prove adverse to the national defense posture, to the viability of the all-volunteer forces concept, and to other statutory protections afforded employee-reservists.

INTRODUCTION

Workers in the private sector who have military Reserve or National Guard obligations are subject to on-the-job discrimination by their civilian employers, along with inherent disadvantages associated with their military commitments, such as diminished civilian take-home pay. Section 2021(b) (3)¹ of the Vietnam Era Veterans' Readjustment Act of 1974² protects these employees by providing that they be afforded all the benefits of employment that their non-military co-workers enjoy. Since its enactment in 1968, the primary focus of litigation under section 2021(b) (3) has revolved around what constitutes a protected statutory incident

1. See 38 U.S.C. § 2021(b) (3) (1976), which provides:

Any person who [is employed either by the federal or a state government, or by a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces. Section 2021(b) (3) is applicable to both reservists and National Guardsmen. See *infra* note 20 and accompanying text.

2. 38 U.S.C. §§ 2011-2026 (1976).

or advantage of employment. Federal court decisions have included in that category such rights as: paid holidays,³ equal opportunity to work overtime,⁴ and stability in job classification and duties.⁵

The issue of whether a forty-hour work week is a statutory incident or advantage of employment arose in the context of whether an employer is required to take reasonable steps to accommodate a reservist's weekend military duties by changing work schedules. In *West v. Safeway Stores, Inc.*⁶ and *Monroe v. Standard Oil Co.*,⁷ the Fifth and Sixth Circuits concluded under similar facts that a forty-hour work week is an incident or advantage of employment. *West* held that an employer was under a statutory duty to take reasonable steps to make scheduling accommodations for employee-reservists. *Monroe* held, however, that section 2021(b)(3) required only "that reservists be treated equally or neutrally with their fellow employees without military obligations."⁸ No affirmative action was required by the employer. The Sixth Circuit's ruling classified military absences in the same category as personal leaves of absence.

To resolve the conflict between the circuits, the Supreme Court granted *Monroe* certiorari.⁹ In a five to four decision,¹⁰ the Court affirmed the judgment of the Sixth Circuit.¹¹ The majority opin-

3. See, e.g., *Kidder v. Eastern Airlines, Inc.*, 469 F. Supp. 1060 (S.D. Fla. 1978).

4. See, e.g., *Carney v. Cummins Engine Co.*, 602 F.2d 763 (7th Cir. 1979), cert. denied, 444 U.S. 1073 (1980); *Lott v. Goodyear Aerospace Corp.*, 395 F. Supp. 866 (N.D. Ohio 1975). *Contra* *Breeding v. TRW, Inc.*, 477 F. Supp. 1177 (M.D. Tenn. 1979).

5. See, e.g., *Carlson v. New Hampshire Dep't of Safety*, 609 F.2d 1024 (1st Cir. 1979), cert. denied, 446 U.S. 913 (1980).

6. 609 F.2d 147 (5th Cir. 1980).

7. 613 F.2d 641 (6th Cir. 1980), aff'd, 452 U.S. 549 (1981).

8. *Id.* at 646.

9. *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981). Petitioner *Monroe* was a rotational shift employee at respondent's refinery. His work schedule repeatedly conflicted with his weekend Reserve duties. While respondent permitted *Monroe* to exchange work days with other employees on these occasions, it refused to accommodate his schedule when he could find no one with whom to exchange. On those occasions, respondent considered *Monroe* on unpaid leave of absence, and often paid overtime to substitute employees to work his shift. When this occurred, petitioner worked and was paid for less than the customary forty-hour week.

10. The composition of the majority and dissent are of special interest in this case. Justice Stewart delivered the majority opinion, in which Justices White, Marshall, Rehnquist, and Stevens joined. Chief Justice Burger wrote the dissenting opinion in which Justices Brennan, Blackmun, and Powell joined.

11. Respondent Standard Oil Company attempted to distinguish *West* and *Monroe* in its brief, on the basis of a collective bargaining agreement in the former case, guaranteeing the right to work a forty-hour week. See Brief for Respondent at 35-38, *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981). The Court, however, made only brief mention of this distinction. See 452 U.S. 549, 565 n.16 (1981). The presence or absence of a contractual guarantee to work a forty-hour week is irrelevant to the issue of what protections are afforded by section 2021(b)(3). Both the

ion concluded that the legislative history of section 2021(b)(3) demonstrated no concern for "the problem of missed work hours, let alone imposed any duty to 'take reasonable steps to accommodate the reservists' in this or any other respect."¹² The majority interpreted section 2021(b)(3) as protecting employee-reservists against only "discriminations like discharge or demotion."¹³

In the aftermath of *Monroe*, the issue remains whether any incident or advantage of employment is now protected under section 2021(b)(3). This Comment will examine the statutory history of military reservists' rights, taking a critical view of the Supreme Court's conclusion that Congress did not intend to accommodate reservists in their civilian employment. The Comment will also illustrate how the Court failed to apply the Sixth Circuit's test that section 2021(b)(3) requires employee-reservists to be treated equally vis-à-vis their non-military co-workers. Finally, the Comment will consider the effects of the Supreme Court's holding on American military posture and national defense.

District Court and the Sixth Circuit in *Monroe* found a forty-hour work week to be a recognized incident of employment, established by the custom and practice at respondent's plant. See 446 F. Supp. at 619; 613 F.2d at 645. The Supreme Court did not refute that finding in its decision. The conclusion that may be drawn from the Supreme Court's holding is that, while most employees at respondent's refinery are customarily entitled to work a forty-hour week, petitioner is not, because of his Reserve obligations. This result is inconsistent with the majority's ruling that reservist and non-military employees are to be treated equally.

Soon after the Court's decision in *Monroe*, the Department of Defense issued a news release purporting to limit the effect of the holding to rotational shift problems. See News Release, Ass't. Sec'y. of Defense, No. 300-81, June 29, 1981. The news release stated that reservists continue to be protected from "discriminatory acts by employers. . . ." *Id.* This statement, however, reflects the issue addressed by this Comment, namely, the continued applicability of section 2021(b)(3) to *inherent* disadvantages associated with a Reserve commitment, i.e., those disadvantages not effectuated by intentional employer misconduct.

If the majority in *Monroe* had wished to base its decision on the lack of a contractual right to work a forty-hour week, or limited its holding to rotational shift employees, the case might have been disposed of summarily. Instead, the Court interpreted section 2021(b)(3) in depth, and did not limit its holding to specific subsets of the reservist-employee population.

12. 452 U.S. 549, 564 (1981).

13. *Id.* at 559.

STATUTORY HISTORY

*Prior to the Enactment of Section 2021(b)(3)*¹⁴

The Selective Training and Service Act of 1940¹⁵ was enacted at the commencement of the nation's first peacetime draft. It established reemployment rights for military personnel for the first time by providing for reinstatement of veterans to civilian employment with prior seniority, status, and pay. The Supreme Court's first decision interpreting these provisions as they applied to veterans stated that "[h]e who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job."¹⁶

In 1951 the name of the Act was changed to the Universal Military Training and Service Act.¹⁷ In order to strengthen the Reserves, Congress added active duty military personnel in training to the protected class. This required employers to grant leaves of absence for periods of active duty for training, such as the annual summer camp.

Two additional amendments strengthened reservists' reemployment protection. The Reserve Forces Act of 1955¹⁸ provided that volunteer reservists on active duty for training for periods of greater than three months' duration were entitled to essentially the same reemployment rights as inductees. The Act was again amended in 1960¹⁹ to equalize Reserve and National Guard reemployment rights.²⁰ Additionally, reemployment rights were extended to reservists training for periods of less than ninety days per year. Civilian employers were required to grant such reservists leaves of absence, and to restore them to their positions with "such seniority, status, pay and vacation as [they would have had if they had not been absent for such training]."²¹ In 1967 the Act was renamed the Military Selective Service Act.²²

14. A brief survey of veterans' reemployment rights history precedes the discussion of the statutory history of reservists' employment rights. The protection afforded these two groups is congruous in many respects.

15. Pub. L. No. 783, 54 Stat. 885 (1940) (formerly codified at 50 U.S.C. app. § 308).

16. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946).

17. Pub. L. No. 51, § 1(a), 65 Stat. 75, 86-87 (1951).

18. Pub. L. No. 305, § 262(f), 69 Stat. 598, 602 (1955).

19. Pub. L. No. 86-632, § 9, 74 Stat. 467 (1960).

20. *See* 38 U.S.C. § 2024(f) (1976).

21. 38 U.S.C. § 2024(d) (1976).

22. Pub. L. No. 90-40, § 1(1), 81 Stat. 100 (1967). Service members' rights were codified at 50 U.S.C. app. §§ 451-473 (current version at 38 U.S.C. §§ 2011-2026 (1976)).

Legislative History of Section 2021(b)(3)

Military reemployment rights were originally designed to ensure that a returning serviceman would return to essentially the same job that he left, and be afforded prior status and pay. The reemployment rights enacted to protect reservists and guardsmen were fashioned from existing statutory language protecting veterans returning from a single, lengthy absence of several months or years; however, this level of protection, as reflected in 38 U.S.C. § 2024(d), was not adequate to meet reservists' needs. Reservists' and guardsmen's civilian jobs are not normally in jeopardy upon their return from military service because of the short-term nature of their military obligations. Reservists, however, do encounter ongoing disadvantages in their daily civilian worklife. This results from the repetitive nature of their military commitments—a problem not encountered by veterans who normally leave their civilian employment only once. For example, opportunities for advancement and even general perquisites may be adversely affected by the reservists' obligation to be absent from the workplace several times each year. To strengthen existing reemployment protection for reservists, the Department of Labor proposed legislation to the 89th Congress that later became section 2021(b)(3).²³

At the congressional hearings, the subcommittee chairman of the House Armed Services Committee described the proposal as “clearly establish[ing] the intent of Congress that employees with Reserve obligations . . . not be denied retention in [civilian] employment, or other incident or advantage of employment because of such Reserve status.”²⁴

A Labor Department spokesman read a statement to the House subcommittee that described section 2021(b)(3) as “designed to enable reservists and guardsmen . . . to retain their employment and to enjoy all of the employment opportunities and benefits accorded to their co-workers who do not have military training obli-

23. See *Proposed Amendment and Clarification of the Reemployment Provisions of the Universal Military Training and Service Act, and for other Purposes: Hearing on H.R. 11509 Before the House Armed Services Committee*, 89th Cong., 2d Sess. 48 (1966). An in-depth review of key language in the legislative history of section 2021(b)(3) follows in the text and is crucial to this Comment's analysis.

24. *Subcomm. No. 3 Consideration of H.R. 11509 to Amend and Clarify the Reemployment Provisions of the Universal Military Training and Service Act, and for other Purposes*, 89th Cong., 2d Sess. 47 (1966) (remarks of Hon. Melvin Price).

gations.”²⁵ With respect to an employer’s obligation to an employee-reservist, the spokesman stated that employers “have a moral obligation to see that their economic well-being is disrupted to the minimum extent possible.”²⁶

The only other witness to testify before the subcommittee was from the Department of Defense. He explained the purposes of those portions of the bill dealing with promotion and retention rights, and said that the bill would “educate public opinion in the vital importance of a trained Reserve to the safety of our Nation.”²⁷

Subcommittee members sought clarification of the bill as it dealt with retention in employment. The subcommittee agreed that the burden of proof would be on an employer charged with a violation of the provision to show cause for discharging an employee-reservist.²⁸

The bill was reported upon favorably by the full Armed Services Committee²⁹ and was passed without debate by the House.³⁰ The measure died, however, when the Senate failed to take action in the 89th Congress.

In the 90th Congress the bill was reintroduced.³¹ In his introductory remarks, the chairman of the House Armed Services Subcommittee stated that the purpose of the provision was to “protect reservists and guardsmen from being disadvantaged in employment because of their military obligations.”³² The identical written statement of the Department of Labor that was offered in the previous hearings³³ was again read into the record. No one questioned the Labor Department spokesman about section 2021(b)(3).

A written statement was also received by the subcommittee from a veterans’ advocate group spokesman. The veterans’ spokesman emphasized that “members of the National Guard and the Reserves . . . should be afforded all the employment opportu-

25. *Id.* at 5312 (testimony of Mr. Hugh W. Bradley, Chief, Bureau of Reemployment Rights).

26. *Id.* at 5313.

27. *Id.* at 5315 (testimony of Rear Adm. Burton H. Shupper, U.S.N.).

28. *Id.* at 5320.

29. H.R. REP. NO. 1303, 89th Cong., 2d Sess. 2 (1966).

30. H.R. 11509, 89th Cong., 2d Sess., 112 CONG. REC. 5016-17 (1966).

31. H.R. 1093, 90th Cong., 1st Sess. (1967).

32. *Subcomm. No. 3 Consideration of H.R. 1093 to Amend and Clarify the Reemployment Provisions of the Universal Military Training and Service Act, and for other Purposes*, 90th Cong., 2d Sess. 45 (1968) (remarks of Hon. Melvin Price) [hereinafter cited as *Hearings on H.R. 1093*].

33. See *supra* note 25 and accompanying text. The reference to “moral obligation” cited *supra* text accompanying note 26 was deleted from the statement in the 1968 hearings on the proposed amendment.

nities and benefits as those who do not have [military] training obligations."³⁴

The report of the full House Armed Services Committee incorporated the testimony into a declaration that section 2021(b)(3) was designed to "protect reservists and guardsmen from being disadvantaged in employment because of their military obligations."³⁵ The bill further was aimed at preventing employer discrimination by affording reservists "the same treatment as their co-workers without military obligations."³⁶ The measure passed the House.³⁷

The hearings before the Senate Armed Services Committee consisted solely of a reading into the record of the Labor Department statement.³⁸ In the committee's report to the full Senate,³⁹ the descriptive term "disadvantage"⁴⁰ used by the House did not appear. Instead, the purpose of the remedial provision was stated solely in terms of prevention of intentional employer discrimination. This was a narrower interpretation of H.R. 1093 than that reported by the House Armed Services Committee.⁴¹ The full Senate concurred in a minor House amendment⁴² and the bill was signed into law on August 17, 1968.⁴³ It was later recodified with the other military reemployment rights under the Vietnam Era Veterans' Readjustment Act of 1974.⁴⁴

Administrative Guidelines

The scant case law interpreting section 2021(b)(3)⁴⁵ is supplemented by a Labor Department-published handbook entitled *The*

34. *Hearings on H.R. 1093, supra* note 32 (testimony of Mr. Austin Kerby, Director, National Economic Comm., The American Legion).

35. H.R. REP. NO. 1303, 90th Cong., 2d Sess. 3 (1968).

36. *Id.*

37. H.R. 1093, 90th Cong., 2d Sess., 114 CONG. REC. 11779 (1968).

38. *Reemployment Provisions of the Universal Military Training and Service Act and Retired Serviceman's Family Protection Plan: Hearing on H.R. 1093 Before the Senate Armed Services Comm.*, 90th Cong., 2d Sess. 1 (1968).

39. S. REP. NO. 1477, 90th Cong., 2d Sess. 1 (1968).

40. *See supra* note 35.

41. *Id.*

42. This amendment was not relevant to section 2021(b)(3). H.R. 1093, 90th Cong., 2d Sess., 114 CONG. REC. 24999, 25000 (1968).

43. Pub. L. No. 90-491, 82 Stat. 790 (1968) (formerly codified at 50 U.S.C. app. § 459(c)).

44. 38 U.S.C. §§ 2011-2026 (1976).

45. *See, e.g.*, cases cited *supra* notes 3-9.

Veteran's Reemployment Rights Handbook.⁴⁶ The handbook, still in use today, declares that employers are not required to make pay adjustments for reservist-employees during periods of active duty.⁴⁷ Nevertheless, the publication does cite in the form of situational analyses several problem areas that employees with military obligations might encounter in their civilian employment.⁴⁸ One hypothetical in particular suggests that if an employment schedule conflicts with an employee's Reserve obligations, the employer must rearrange the work schedule.⁴⁹

THE *Monroe* STANDARD

The Supreme Court adopted the Sixth Circuit test enunciated in *Monroe v. Standard Oil Co.*⁵⁰ that "section 2021(b)(3) . . . requires that reservists be treated equally or neutrally with their fellow employees without military obligations."⁵¹ The Court then failed to apply this standard. The majority declared that "the legislative history . . . strongly suggests that Congress did not intend employers to provide special benefits to employee-reservists not generally made available to other employees."⁵² The Court concluded that section 2021(b)(3) was "enacted for the . . . limited purpose of protecting the employee-reservist against discriminatory discharge and demotion,"⁵³ while not preserving "all the 'incidents and advantages of employment' accorded . . . to working employees. . . ."⁵⁴

Employee-reservists are already protected from discriminatory

46. OFFICE OF VETERANS' REEMPLOYMENT RIGHTS, DEPARTMENT OF LABOR, THE VETERAN'S REEMPLOYMENT RIGHTS HANDBOOK (1970).

47. *Id.* at 113.

48. *Id.* at 115-19.

49. *Id.* at 119. The hypothetical reads as follows:

Maintenance Man M's reserve unit meets for training duty every Saturday morning. His employer, W Window Company, has a Machine Operator vacancy which it offers M under its policy of always promoting the senior Maintenance Man to such jobs, but since Machine Operators must often work on Saturdays, it makes the offer conditional on M's getting himself excused from the reserve meetings. M does not wish to jeopardize his status with the reserves, so W Company promotes another employee to the Machine Operator job, and M objects.

Under the August 17, 1968 amendments, W Company must grant M the promotion he clearly would have had but for his reserve obligation, *and solve its Saturday staffing problem in some other way*. It does not matter whether that obligation was imposed on M by law or voluntarily assumed by him.

Id. (emphasis added).

50. 613 F.2d 641 (6th Cir. 1980), *aff'd*, 452 U.S. 549 (1981).

51. *Id.* at 646.

52. 452 U.S. 549, 561 (1981).

53. *Id.* at 559.

54. *Id.* at 563.

discharge under 38 U.S.C. § 2024(d).⁵⁵ What remains is a construction that section 2021(b)(3) only additionally protects employee-reservists and National Guardsmen from intentional discriminatory demotion. The term "demotion," however, does not appear in the sparse legislative history that the majority relies so strongly upon.⁵⁶ The case law presents only one reported case related to discriminatory demotion of an employee-reservist.⁵⁷ In that case, the First Circuit disallowed the lateral transfer of a reservist to a less desirable assignment because of his military obligations; the court also held that the requirements of section 2021(b)(3) are not satisfied by treating military obligations as personal leaves of absence.⁵⁸ How then can the Supreme Court justify the evisceration of section 2021(b)(3)?

Because the bill was not debated on the floor of Congress, the three hearings and committee reports⁵⁹ are the only indicators of legislative intent.⁶⁰ Moreover, there was no debate in either the subcommittee or full committee. The written statement submitted by the Department of Labor⁶¹ formed the crux of the testimony at all three hearings. The repetitive theme throughout the hearings was that section 2021(b)(3) was designed to enable reservists to "enjoy all of the employment opportunities and benefits afforded to their co-workers who do not have military training obligations."⁶² This suggests Congress intended that military reservists not be disadvantaged in their civilian employment because of service to country. This was the stated purpose in both House Armed Services Committee reports.⁶³

The Supreme Court apparently relied exclusively on the Senate hearing of 1968 in reaching its conclusions. It was in this hearing that references to disadvantages were deleted, and the bill's purpose was stated solely in terms of prevention of intentional employer discrimination. Reliance on the Senate report, however, is unjustified. The Senate hearing was inconclusive; it consisted

55. See *supra* note 21 and accompanying text.

56. See *supra* notes 23-42 and accompanying text.

57. See *Carlson v. New Hampshire Dep't of Safety*, 609 F.2d 1024 (1st Cir. 1979), *cert. denied*, 446 U.S. 913 (1980).

58. See *id.* at 1027.

59. See *supra* notes 24, 29, 32, 35, 38, 39 and accompanying text.

60. See *Monroe v. Standard Oil Co.*, 452 U.S. 549, 557 n.10 (1981).

61. See *supra* note 25 and accompanying text.

62. *Id.*

63. See *supra* notes 29 and 35 and accompanying text.

only of a reading into the record of the Labor Department statement.⁶⁴ The Labor Department spokesman was not questioned and no other witnesses testified. In contrast, the 1966 and 1968 House subcommittee hearings were substantive. Furthermore, section 2021(b)(3) was a House-sponsored measure, and the Senate concurred in the House version of the bill.⁶⁵ Therefore, any interpretation of legislative history should be based on the House subcommittee hearings and reports. This does not mean that the legislative intent is clear and conclusive. Nonetheless, no fair reading of the record supports the majority's conclusion in *Monroe* that "Congress . . . imposed [no] duty to 'take reasonable steps to accommodate reservists' in . . . any respect."⁶⁶

By labeling section 2021(b)(3) as anti-discriminatory, the Court followed its recent precedent that affirmative action requirements will not be read into federal statutes, but that such requirements must be expressly stated.⁶⁷ The majority rationalized its holding in part by saying that if Congress intended to burden employers under section 2021(b)(3), it could have done so expressly as it did in section 403 of the 1974 Act.⁶⁸

Congress did not expressly require affirmative action under section 2021(b)(3), because the provision deals with more than intentional discrimination. It deals equally with employment disadvantages that naturally accompany a military reserve commitment. What Congress envisioned under section 2021(b)(3) was a flexible standard that would be amenable to change in light of evolving contingencies not foreseeable at the time of its enactment, such as the all-volunteer forces concept that emerged in the early 1970's.⁶⁹

The Court has shown on other occasions that it recognizes "Congress' desire to minimize the disruption in individuals' lives resulting from the national need for military personnel."⁷⁰ By failing to consider congressional intent in its restrictive holding,

64. See *supra* note 38 and accompanying text.

65. See *supra* note 42 and accompanying text.

66. 452 U.S. 549, 564 (1981).

67. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (refusing to read an affirmative action requirement into the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504 (codified at 29 U.S.C. § 794)). Cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (refusing to interpret Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), as requiring an employer to alter existing scheduling practices to accommodate an employee's religious beliefs).

68. See *Monroe v. Standard Oil Co.*, 452 U.S. 549, 564 n.15 (1981), referring to 38 U.S.C. § 2012 (1976), a section which imposes affirmative action requirements on employers with respect to disabled Vietnam era veterans.

69. See Proclamation No. 4360, 40 Fed. Reg. 14567 (1975), reprinted in 50 U.S.C.A. app. § 453 at 15 (West 1980).

70. *Alabama Power Co. v. Davis*, 431 U.S. 581, 583 (1977).

the *Monroe* majority violated its own longstanding precedent that reemployment rights statutes are "to be liberally construed for the benefit of those who . . . serve their country. . . ."71

Petitioner *Monroe* asked for a reasonable attempt to provide employee-reservists with parity with their fellow employees without active duty military commitments. The Court misinterpreted the ambiguous legislative history as involving whether accommodation was required, when it only involved how accommodation was to be undertaken. The Department of Labor, which initiated action on section 2021(b)(3), apparently interpreted the section to require work scheduling accommodation as a matter of right.⁷² The majority was quick to point out how "frequent absences from work of an employee-reservist may affect productivity and cause considerable inconvenience to an employer who must find alternative means to get the necessary work done,"⁷³ without considering the burdens to the reservist in serving his country. As the petitioner's brief in *Monroe* stated:

The requirement that military absences be placed in a special category is not "preferential treatment;" a reservist is no better off, relative to his fellow employees, for having entered military service. Rather, such special treatment of military absences is necessary in order to attempt to ensure that veterans and reservists are no worse off for having entered military service.⁷⁴

THE AFTERMATH OF *Monroe*

One of the remaining ambiguities after *Monroe* involves the continued applicability of section 2021(b)(3) to other judicially established incidents and advantages of employment. The rule now is that section 2021(b)(3) only protects employee-reservists against "discriminations like discharge or demotion, motivated solely by reserve status."⁷⁵ Does section 2021(b)(3) still protect an employee-reservist's right to receive paid holidays that his fellow employees receive while he undertakes mandatory military training during the pay period in which the holiday falls?⁷⁶ Is it discriminatory for an employer to deny a reservist the opportu-

71. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *accord Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980).

72. *See supra* note 49 and accompanying text.

73. 452 U.S. 549, 565 (1981).

74. Brief for Petitioner at 7-8, *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981).

75. 452 U.S. 549, 559 (1981).

76. *See supra* note 3 and accompanying text.

nity to make up missed overtime opportunities afforded to his fellow employees, because of his absence from work due to military training obligations?⁷⁷ If, as the majority hints in dictum, section 2021(b)(3) entitles employee-reservists only to protection of benefits not “conditioned upon work requirements demanding actual performance on the job,”⁷⁸ then these incidents of employment may no longer be protected. Such a condition, however, violates the general standard of equality with respect to fellow employees without military obligations. If employers were permitted to deny a benefit on the ground that it is conditioned upon presence at work, military reservist-employees would not be entitled to most of the incidents and advantages of employment that section 2021(b)(3) seeks to protect. In essence, the courts would be penalizing a reservist for having to miss time on the job, while denying him the equality that the statute and the *Monroe* standard demand. The lower federal courts may seek to avoid the confusion of the “equality” test, and rely instead on the language in *Monroe* proscribing only discriminatory conduct such as discharge or demotion.⁷⁹ The application of this pseudo-test would produce an inequitable result in that virtually no incident or advantage of employment would remain protected under section 2021(b)(3). Should this happen, the fear expressed by the Fifth Circuit in *West* will be realized: section 2021(b)(3) will be “effectively annulled.”⁸⁰ At some point, Congress must clarify its intent in order to avoid the annulment of the protections afforded employee-reservists under section 2021(b)(3).

The Supreme Court could have deduced the legislative intent behind section 2021(b)(3) by examining state and federal statutes protecting governmental reservist-employees. As the majority in *Monroe* noted,⁸¹ the states are not pre-empted from providing benefits in excess of those conferred under section 2021(b)(3). Virtually every state currently provides statutory protection of some kind for state employees with military Reserve or National Guard obligations.⁸² Most provide for paid military leaves of absence ranging from fourteen to thirty days annually.⁸³ Many do

77. See *supra* note 4 and accompanying text.

78. 452 U.S. 549, 553 n.7 (1981).

79. The case law subsequent to *Monroe* indicates that they are doing precisely that. See, e.g., *Mendaloff v. Weiner*, 109 L.R.R.M. 2166 (D. Md. 1981).

80. *West v. Safeway Stores, Inc.*, 609 F.2d 147, 149 (5th Cir. 1980).

81. See *Monroe v. Standard Oil Co.*, 452 U.S. 549, 563 n.14 (1981).

82. Interview with Lieutenant Col. Barbara Bacon, U.S. Army, Ombudsman, National Comm. for Employer Support of the Guard and Reserve, Department of Defense (Oct. 23, 1981).

83. See, e.g., CAL. MIL. & VET. CODE § 395 (Deering 1970) (thirty days annually); N.Y. MIL. LAW § 242 (McKinney 1953) (thirty days annually).

not limit continuance of civilian pay to the traditional annual summer training camp, but provide the same protection for weekend drills as well.⁸⁴ The federal government provides the same kind of protection to federal and District of Columbia employees.⁸⁵ This federal statute alone makes it difficult to justify the Court's declaration in *Monroe* that Congress "did not intend employers to provide special benefits to employee-reservists not generally made available to other employees."⁸⁶ By analogy, it must be concluded that Congress intended to afford some level of preferential treatment to employee-reservists in the private sector. The requirement of reasonable accommodation is less onerous to private-sector employers than the double compensation governmental employee-reservists receive, yet it is equitable to both employer and employee. Such a requirement conforms with legislative intent and administrative interpretation of section 2021(b)(3).⁸⁷ Unless Congress clarifies the requirements of section 2021(b)(3), private sector employee-reservists will be disadvantaged not only in relation to co-workers without military commitments, but in relation to public sector employee-reservists as well.

Finally, the *Monroe* decision will have an adverse effect on the morale of employee-reservists. Reserve and National Guard forces comprise approximately forty percent of the total strength of the all-volunteer forces.⁸⁸ Yet reservists do not enjoy the same tax, salary, and retirement benefits that are enjoyed by their active duty counterparts.⁸⁹ Clearly the burdens and responsibilities of a Reserve commitment justify reasonable job accommodation on public policy grounds.

The courts have recognized the "increased reliance on Reserve forces for the national defense of our country."⁹⁰ Congress also is cognizant of the indispensability of the Reserves, and it plans pol-

84. See, e.g., *id.*

85. See U.S.C. § 6323(a) (1976) (fifteen days annually).

86. 452 U.S. 549, 561 (1981).

87. See *supra* notes 35 and 49 and accompanying text.

88. *Official Guard and Reserve Manpower Strengths and Statistics*, Office of the Deputy Ass't Sec'y of Defense (Reserve Affairs), REP. NO. 1147-48 (Sept. 1981); DEPARTMENT OF DEFENSE, ANNUAL REPORT TO THE CONGRESS: FY 82 (Jan. 19, 1981).

89. Interview with Mr. Lester Spear, Office of Veterans' Reemployment Rights, Department of Labor (Oct. 26, 1981).

90. *Peel v. Florida Dep't of Transp.*, 443 F. Supp. 451, 459 (N.D. Fla. 1977), *aff'd*, 600 F.2d 1070 (5th Cir. 1979).

icy and military strategy around its reliance on a strong Reserve force.⁹¹ Military leaders acknowledge that the greatest problem in maintaining the Reserves is not recruitment, but retention, and that the attitude of employers toward accommodation is a major factor in retaining reservists.⁹² The Supreme Court's restrictive interpretation of section 2021(b)(3) in *Monroe* may eventually result in a significant exodus of highly trained middle management officer and enlisted personnel from the Reserves and National Guard, that will adversely affect not only national security directly, but also the viability of the all-volunteer forces concept indirectly.

CONCLUSION

Section 2021(b)(3) was enacted to prevent employee-reservists and national guardsmen from being disadvantaged in their civilian employment by their military obligations. The majority in *Monroe* misread the legislative intent to say that only intentional employer discrimination was proscribed by the statute. In doing so, the Court declined to require even reasonable attempts by employers in private industry to accommodate employee-reservists' work schedules. In sweeping dicta, the Court intimates that employers need not accommodate employee-reservists in any respect—effectively annulling the protection that section 2021(b)(3) was designed to provide. The ramifications on national defense will be manifested primarily by the exodus of highly trained personnel. In addition, the viability of the all-volunteer military force concept could be jeopardized. Clarification of congressional intent is urgently needed.

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91. See, e.g., S. REP. NO. 562, 94th Cong., 1st Sess. 538 (1975) (refers to S. 2115 which enables the President to involuntarily order to active duty selected reservists without a declaration of war).

92. Interview with Major General Berwyn Fragner, U.S.A.R., Commanding General, 63rd Army Reserve Command, Los Angeles, Cal. (Mar. 14, 1982).