

LAW REVIEW¹ 10036

Supreme Court Upholds Constitutionality of Special Treatment for Veterans' Organizations

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6.0—Military Service and Tax Law

10.2—Other Supreme Court Cases

Regan v. Taxation With Representation, 461 U.S. 540 (1983).

The Supreme Court has upheld the constitutionality of favorable special treatment that the Internal Revenue Code (IRC) provides to “veterans’ organizations” organized under section 501(c)(19) of the IRC, 26 U.S.C. 501(c)(19).

The IRC provides two kinds of subsidies to certain organizations—tax exemption and tax deductibility. Each subsidy is valuable, but having both together is especially valuable. Tax exemption means that the organization is not required to pay federal income tax on its income, including contributions that it receives. Tax deductibility means that the individual donor is

¹I invite the reader’s attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

permitted to deduct from the donor's gross income (the figure from which the federal income tax liability is computed) contributions that he or she has made to the organization.

For example, let us say that Colonel Joe Smith contributes \$1,000 to ROA (or any tax-deductible organization), and let us assume that Colonel Smith is in the 40% tax bracket. Because of the deduction, the \$1,000 contribution costs Colonel Smith \$600.

Section 501(c) of the IRC outlines many different categories of organizations. For purposes of this article, we will limit our discussion to three subsections—section 501(c)(3), section 501(c)(4), and section 501(c)(19).

Section 501(c)(3) organizations are both tax exempt and tax deductible. These organizations are not permitted to lobby, except for “incidental” lobbying that makes up a tiny percentage of the organization’s activities. Section 501(c)(4) organizations are tax exempt but not tax deductible. These organizations are permitted to lobby without limitation.

Veterans’ organizations under section 501(c)(19) enjoy special treatment—they are both tax exempt and tax deductible, and they are permitted to lobby without limitation. As you can imagine, this special treatment is most advantageous. ROA is a 501(c)(19) organization.

Taxation With Representation (TWR) is an organization that seeks fundamental changes in federal tax policies. Some of its activities (publishing a scholarly newsletter and engaging in litigation) are appropriate for tax deductible 501(c)(3) organizations. Other activities (including lobbying) are appropriate for section 501(c)(4) organizations but not organizations recognized under section 501(c)(3).

TWR applied to the Internal Revenue Service (IRS) for recognition under section 501(c)(3). The IRS denied the application, because it appeared that a substantial part of TWR’s proposed activities would amount to lobbying and would not be appropriate for a tax deductible 501(c)(3) organizations.

TWR filed suit against Donald Regan (Secretary of the Treasury under President Ronald Reagan) in the United States District Court for the District of Columbia, alleging that the IRC was unconstitutional insofar as it permitted a veterans’ organization to have tax deductible status and to lobby, while denying that valuable privilege to an organization like TWR. TWR claimed that this unequal IRC treatment violated the First Amendment (freedom of speech) and the Fifth Amendment (equal protection of the law).

The District Court ruled against TWR, upholding the constitutionality of the IRC. TWR appealed to the United States Court of Appeals for the District of Columbia Circuit, which upheld TWR’s 5th Amendment argument while rejecting the 1st Amendment argument. The Secretary of the Treasury appealed to the Supreme Court.

The Supreme Court rejected both the 1st Amendment and the 5th Amendment arguments and upheld the constitutionality of the IRC. With regard to TWR's equal protection argument, the Court noted, "It is also not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations. Veterans have 'been obliged to drop their own affairs to take up the burdens of the nation,' 319 U.S. 575 (1943), 'subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life.' *Johnson v. Robinson*, 415 U.S. 361, 380 (1974) (emphasis deleted). Our country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy 'has always been deemed to be legitimate.' *Personnel Administrator of Massachusetts v. Feeney*, 429 U.S. 256, 279 n. 25 (1979)."

The most effective advocacy is "grass roots." We want ROA members, through the departments and chapters, to communicate with federal and state legislators. We want you to use the ROA name and logo in these communications, so long as the communication is consistent with the ROA congressional charter and with the ROA resolutions and agenda.

ROA and other veterans' organizations are permitted to lobby but not to "intervene in an election." This is a critical distinction that we must understand. We can and we do advocate changes in public policy in support of "adequate national defense" (in the words of our congressional charter). We must not make reference to ROA with respect to advocacy for the election or defeat of candidates for federal, state, or local public office.

Because this is an election year, this is a good time for a reminder that ROA is a *non-partisan organization*. For both legal and practical reasons, we must steer clear of any activity or communication that associates ROA with a political party or that advocates the election or defeat of a political candidate. Electoral advocacy by ROA, or by any department or chapter, could endanger our favorable tax status. Moreover, regardless of the outcome of the 2010 elections, we will be back in 2011, advocating for public policies that promote national defense. We may be making our arguments to reelected incumbents, or we may be making our arguments to a whole new group of officials. In either case, ROA must steer clear of any advocacy concerning the outcome of elections.

The fact that you are an ROA member, or even an officer, does not preclude you from engaging in campaign activity on behalf of the candidates of your choice, but please do not make any reference to or mention of ROA while performing campaign activities. If your name appears in an advertisement favoring a candidate, the advertisement must not mention your ROA membership or any ROA office that you hold or may have held. When you engage in campaign activity, please do not wear or display ROA paraphernalia.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org.