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Does USERRA Violate the 10th Amendment?

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1.1.1.7—USERRA applies to state and local governments
1.1.3.1—USERRA applies to voluntary service
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1.8—Relationship between USERRA and other laws/policies

Q: I am an officer in the Army Reserve and a member of ROA. I have read with interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).[1] I work for a state government agency, and I have had periodic difficulties with my employer about absences from work for military training and service and about my reemployment rights when returning from a period of service.

An attorney for the state told me that applying USERRA to a state violates the 10th Amendment. What is the 10th Amendment? Is there any validity to this assertion?

A: The 10th Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Since the Constitution clearly provides that securing the national defense is a responsibility of the Federal Government, not the states, I think that it is clear that applying USERRA to the states, as employers, is entirely consistent with the 10th Amendment.

The Constitution was drafted by the Constitutional Convention in Philadelphia, in the summer of 1787. Article VII of the Constitution provides that the ratification by at least nine of the original 13 states shall be sufficient to establish the Constitution. As the states debated ratifying the Constitution, some suggested that a "bill of rights" should be added. Accordingly, the First Congress proposed 12 constitutional amendments, and numbers three through 12 were quickly ratified by the states. These became the first ten amendments, all ratified with an effective date of December 15, 1791. These ten amendments are referred to collectively as the Bill of Rights.

In the last century, our Federal Government has taken on powers, functions, and responsibilities that the Founding Fathers could not have anticipated and probably would not approve, but Americans of every generation broadly agree that securing the national defense is at the core of the responsibility of the Federal Government.

Article I, Section 8 of the Constitution sets forth the powers granted to Congress, and Clauses 11-16 are collectively referred to as the "war powers clauses." Those clauses are as follows:
11. "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

12. "To raise and support Armies, but no appropriation of Money to that Use shall be for a longer Term than two Years."

13. "To provide and maintain a Navy."

14. "To make Rules for the Government and Regulation of the land and naval Forces."

15. "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

16. "To provide for the organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States, reserving to the States respectively the Appointment of the Officers and the Authority of training the Militia according to the discipline prescribed by Congress."[2]

These war powers clauses must be read in conjunction with Clause 18, the "necessary and proper" clause, which reads as follows: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Congress enacted USERRA in 1994, as the long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA).[3] As originally enacted in 1940, the VRRA only applied to draftees, but in 1941, as part of the Service Extension Act, Congress expanded the reemployment provision to include voluntary enlistees as well as draftees. The VRRA was part of the draft law, in title 50 of the United States Code, until 1974, when Congress moved this law to title 38 (veterans' benefits).

In 1973, almost 40 years ago, Congress made a fundamental decision about national defense policy—abolishing the draft and establishing the All Volunteer Military. The end of the draft did not mean the end of the need for military personnel—quite the contrary. Congress recognized from the outset that to make the military survive and thrive in the All Volunteer Era it is necessary to establish incentives for young men and women to join the military and to mitigate the disincentives. The reemployment statute is an integral part of the system of incentives that

Congress has provided to encourage enlistment and retention in the armed forces, Active Component as well as Reserve Component.

In 1974, Congress enacted the Vietnam Era Veterans Readjustment Assistance Act (VEVRA), which moved the VRRA from title 50 of the United States Code to title 38. VEVRA also made some important substantive amendments to the VRRA. The most important amendment was to expand the class of employers to which the reemployment statute applies. Since 1940, the reemployment statute has applied to the Federal Government and to private employers, regardless of size. VEVRA expanded the VRRA to make it apply to state and local governments as employers, in addition to the Federal Government and private employers.

After Congress expanded the VRRA to include state and local governments, the State of Florida challenged the constitutionality of this expansion, asserting that it violated the 10th Amendment. The United States Court of Appeals for the 5th Circuit[4] firmly rejected that argument. *See Peel v. Florida Department of Administration,* 600 F.2d 1070 (5th Cir. 1979).

I have done a computerized legal research search on *Peel.* I find that Florida did not apply to the Supreme Court for *certiorari* (discretionary review). I found many later court cases that cite *Peel,* but none of those cases cast doubt on the 5th Circuit's conclusion that applying the reemployment statute to the states passes muster under the 10th Amendment.

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 822 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week.

[2] Yes, these clauses are capitalized just this way, in the style of the late 18th Century.

[3] The STSA is the law that led to the drafting of millions of young men, including my late father, for World War II.

[4] At the time this case was decided, the 5th Circuit consisted of Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, and the Panama Canal Zone. In 1982, the Panama Canal Zone ceased to exist (sovereignty returned to Panama) and Alabama, Florida, and Georgia were split off from the 5th Circuit to form the new 11th Circuit.