

## **The Arkansas Constitution Violates USERRA and Is Void under the Supremacy Clause of the United States Constitution.**

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[About Sam Wright](#)

1.2—USERRA forbids discrimination

1.8—Relationship between USERRA and other laws/policies

Timothy Griffin is a judge advocate (lawyer), a Colonel in the Army Reserve, and a life member of the Reserve Officers Association, now doing business as the Reserve Organization of America (ROA).<sup>3</sup> He is also the Lieutenant Governor of Arkansas. He recently announced his candidacy

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/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. I am the author of more than 1800 of the articles.

<sup>2</sup> BA 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 44 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 (VRRRA—the 1940 version of the federal reemployment statute) for 38 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 VRRRA 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 VRRRA 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](mailto:SWright@roa.org).

<sup>3</sup> At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new "doing business as" name—the Reserve Organization of America. The point of the name change is to emphasize that the organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

for the Office of Attorney General of the State, and someone suggested that he is ineligible, based on an obscure provision of the Arkansas Constitution, as follows:

The Treasurer of the State, Secretary of State, Auditor of State, *and Attorney General* shall perform such duties as may be prescribed by law; they shall not hold any other office or commission, civil or military, in this State or under any State, *or the United States*, or any other power, at one and the same time...<sup>4</sup>

A blogger suggested that, under this provision of the Arkansas Constitution, Timothy Griffin cannot be permitted to run for Attorney General, or that if he is elected, he will not be allowed to serve, or that he will be forced to resign his Army Reserve commission to take office as Attorney General. I have been asked whether this provision of the Arkansas Constitution, as applied to a person like Timothy Griffin, runs afoul of the federal statute called the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>5</sup> My answer is *clearly yes*.

Preventing Timothy Griffin from running for Attorney General, or preventing him from serving if he is elected, directly violates section 4311(a) of USERRA, which provides:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services shall not be denied *initial employment*, reemployment, *retention in employment*, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.<sup>6</sup>

USERRA is a floor and not a ceiling on the employment and reemployment rights of those who are serving or have served our country in uniform, including in the Reserve Components of the uniformed services. Section 4302 of USERRA provides:

**(a)** Nothing in this chapter [USERRA] shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

**(b)** *This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of*

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<sup>4</sup> Arkansas Constitution, Article 6, Section 22 (emphasis supplied).

<sup>5</sup> 38 U.S.C. 4301-35.

<sup>6</sup> 38 U.S.C. 4311(a) (emphasis supplied).

additional prerequisites to the exercise of any such right or the receipt of any such benefit.<sup>7</sup>

The Supremacy Clause of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>8</sup>

Almost 200 years ago, the Supreme Court enunciated the basic principle that a federal statute trumps a conflicting State statute or State Constitution.<sup>9</sup> We will keep the readers informed of developments concerning this important controversy.

**Q: I recall that, almost 30 years ago, the Arkansas Supreme Court held that it was unlawful for Attorney General Steve Clark to hold simultaneously a commission in the Army Reserve. How is Griffin's situation different from Clark's?**

**A:** You are referring to *Jones v. Clark*, 644 S.W. 2d 257 (Arkansas Supreme Court 1983). Steve Clark was elected the Attorney General of Arkansas and reelected twice. While Clark was in his third term, a group of citizens sued Clark in state court, seeking a declaratory judgment that Clark's simultaneous service as Arkansas Attorney General and as a Captain (O-3) in the Army Reserve violated Article 6, section 22 of the Arkansas Constitution. The trial court denied the plaintiffs' motion for declaratory or other relief, and the plaintiffs appealed to the Arkansas Supreme Court, which reversed the trial court and granted the plaintiffs the declaratory relief they sought.

In the trial court and the Arkansas Supreme Court, Clark asserted that the Arkansas Constitution did not mean what the plaintiffs claimed that it meant, and that if it did have that meaning the state constitution was invalid because it conflicted with the United States Constitution. Clark did not assert that the Arkansas Constitution conflicted with the federal reemployment statute,<sup>10</sup> and the Supreme Court did not consider that argument. *Jones v. Clark* is relevant but not controlling.

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<sup>7</sup> 38 U.S.C. 4302 (emphasis supplied).

<sup>8</sup> United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18<sup>th</sup> Century.

<sup>9</sup> See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>10</sup> Congress enacted USERRA in 1994, as a long-overdue update and rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940. The federal reemployment statute has applied to the Federal Government and to private employers since 1940. In 1974, Congress amended the VRRRA to make it apply also to state and local governments. Section 2021(b)(3) of the VRRRA, formerly 38 U.S.C. 2021(b)(3), made it unlawful for

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This article is one of 2000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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employers to discriminate against employees based on obligations as members of Reserve Components of the armed forces. Clark could have argued that the Arkansas Constitution violated this statutory section, but he made no such argument.