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The Supreme Court Has Upheld the Constitutionality of Special Tax Benefits for Veterans' Organizations like ROA.[2]
By Captain Samuel F. Wright, JAGC, USN (Ret.)[3]

6.0—Military service and tax laws.
10.2—Other Supreme Court cases.

Regan v. Taxation With Representation, 461 U.S. 540 (1983).[4]

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,100 "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 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers and law students.

[2] This article is a reprint (with some additional material added) of Law Review 10036, published in 2010. We are republishing this article now because 14 years have passed and because this is a good time for a reminder.

[3] 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 46 years, I have collaborated 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 42 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 Service Members Law Center as a volunteer. You can reach me by e-mail at SWright@roa.org.

[4] This is a 41-year-old Supreme Court decision. The citation means that you can find this decision in Volume 461 of *United States Reports* starting on page 540.

How the Internal Revenue Code treats veterans' organizations

The Internal Revenue Code (IRC) is title 26 of the United States Code (U.S.C.). The IRC provides two kinds of tax benefits to certain nonprofit organizations, tax exemption and tax deductibility.

The United States Internal Revenue Service (IRS) has recognized the Reserve Officers Association (now doing business as the Reserve Organization of America) as a tax-exempt "veterans' organization" under section 501(c)(19) of the IRC.[5] This means that ROA is not required to pay federal income tax on contributions that it receives from members or other interested persons or from corporations or other entities.

ROA is required to pay income tax on its "unrelated business income" like the "Top of the Hill" income that we receive from renting out parts of our headquarters building for meetings held by others. On its website, the IRS has stated:

> Even though an organization is recognized as tax exempt, it still may be liable for tax on its unrelated business income. For most organizations, unrelated business income is income from a trade or business, regularly carried on, that is not substantially related to the charitable, educational, or other purpose that is the basis of the organization's exemption. An exempt organization that has $1,000 or more of gross income from an unrelated business must file Form 990-T **PDF**. An organization must pay estimated tax if it expects its tax for the year to be $500 or more.

[5] 26 U.S.C. § 501(c)(19).

> The obligation to file Form 990-T is in addition to the obligation to file the annual information return, Form 990, 990-EZ or 990-PF. Each organization must file a separate Form 990-T, except title holding corporations and organizations receiving their earnings that file a consolidated return under Internal Revenue Code section 1501.[6]

Under section 170(c)(3) of the IRC,[7] contributions to a "veterans' organization" are deductible to the person[8] or corporation making the contribution. For example, let us say that Joe Smith contributed $100,000 to ROA in 2023, and Joe Smith is in the 40% tax bracket. Smith's $100,000 contribution costs him $60,000.

The IRC defines the term "veterans' organization" as follows:

> A post or organization of past or present members of the Armed Forces of the United States, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization—
>
> **(A)** organized in the United States or any of its possessions,
>
> **(B)** at least 75 percent of the members of which are past or present members of the Armed Forces of the United States and substantially all of the other members of which are individuals who are cadets or are spouses, widows, widowers, ancestors, or lineal descendants of past or present members of the Armed Forces of the United States or of cadets, and

[6] *See* https://www.irs.gov/charities-non-orofits/unrelated-business-income-tax.
[7] 26 U.S.C. § 170(c)(3).
[8] The person making the contribution need not be a member of the veterans' organization or eligible for membership.

> **(C)** no part of the net earnings of which inures to the benefit of any private shareholder or individual.[9]

Section 501(c)(3) of the IRC provides:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)),* and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.[10]

Charities, recognized by the IRS under section 501(c)(3), are tax-exempt and tax-deductible, but charities are not permitted to engage in "substantial" lobbying, only "incidental" lobbying. Veterans' organizations, recognized by the IRS under section 501(c)(19), are also tax-exempt and tax-deductible. Unlike charities, veterans' organizations are permitted to lobby as much as they want without jeopardizing their tax-exempt and tax-deductible status.

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[9] 26 U.S.C. § 501(c)(19).
[10] 26 U.S.C. § 501(c)(3) (emphasis supplied).

Regan v. Taxation With Representation

Taxation With Representation (TWR) was an organization that sought fundamental changes in federal tax policies. Some of its activities, such as engaging in litigation and publishing a scholarly newsletter, were appropriate for charities recognized under section 501(c)(3). Other activities, such as substantial lobbying, were not appropriate for charities recognized under section 501(c)(3).

TWR applied for IRS recognition under section 501(c)(3), but the IRS denied the application because it appeared that a substantial part of the organization's activities amounted to lobbying and were not permissible for a 501(c)(3) organization. TWR sued Donald Regan (the Secretary of the Treasury during the first term of President Ronald Reagan), challenging the constitutionality of the IRS decision and the statute upon which it was based, under the First Amendment (freedom of speech) and the Fifth Amendment (equal protection).

The United States District Court for the District of Columbia rejected both constitutional challenges. TWR appealed to the United States Court of Appeals for the District of Columbia, which rejected TWR's First Amendment challenge but upheld the Fifth Amendment challenge. The Solicitor General of the United States applied to the Supreme Court for certiorari (discretionary review), and the Supreme Court agreed to hear the case.

The Supreme Court firmly and unanimously rejected the argument that because Congress had chosen to subsidize lobbying activities by veterans' organizations it was also required to subsidize lobbying by

other nonprofit organizations. The Opinion of the Court, written by Justice William Rehnquist,[11] includes the following paragraph:

> 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," *Boone* v. *Lightner*, 319 U.S. 561, 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. *Robison*, 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 Mass*. v. *Feeney*, 442 U.S. 256, 279, n. 25 (1979).[12]

What this decision means for ROA

Because ROA is a veterans' organization, recognized as such by the IRS, it is permitted to spend money derived from tax-deductible contributions on lobbying—advocating for government policies that promote adequate national defense. This is an enormous advantage.

Most readers are familiar with The Heritage Foundation, a conservative think-tank in our nation's capital. The Heritage Foundation has two

[11] William Rehnquist was an Associate Justice at the time. President Richard Nixon nominated him for an Associate Justice position in 1972, and the Senate confirmed him. In 1986, President Ronald Reagan nominated him to be Chief Justice, and the Senate confirmed him again.
[12] *Regan,* 461 U.S. at 550-51.

related but separate entities. The Heritage Foundation itself is a charitable organization, recognized by the IRS under section 501(c)(3) of the IRC. The Heritage Foundation is both tax-exempt and tax-deductible. It engages in research and publishes the results of its research, but it does not expressly advocate for specific legislation or governmental action.

The separate but related organization is called "Heritage Action" (HA). HA is recognized by the IRS under section 501(c)(4) of the IRC. Like other 501(c)(4) organizations, HA is tax-exempt but not tax-deductible. HA raises money that is not tax-deductible and spends that money on legislative advocacy. Because ROA qualifies under section 501(c)(19), we do not need to bifurcate our organization in this way.

Q: Does this mean that ROA, as an organization, can support candidates who favor national defense or oppose candidates who oppose national defense?

A: *No, it does not mean that.* 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 for changes in public policy in support of "adequate national defense" (in the words of our congressional charter). We must not refer to ROA with respect to advocating for the election or defeat of candidates for federal, state, or local public office.

Because this is a presidential election year, this is a good time for a reminder that ROA is a *nonpartisan 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 for the

election or defeat of a candidate for public office. Electoral advocacy by ROA or by any chapter or department could endanger our favorable tax status.

Moreover, regardless of the outcome of the 2024 elections, we will be back in 2025 advocating for policies that provide for adequate national defense. We may be making our arguments to reelected incumbents, or we may be communicating to a whole new batch 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 activities on behalf of the candidates of your choice, but please do not refer to ROA while performing campaign activities. If your name appears in a campaign advertisement in support of or opposition to a candidate, please ensure that the advertisement does not mention your ROA membership or any ROA office that you hold or may have held. When you attend a campaign rally or engage in partisan activities like door-to-door canvassing, please do not wear or display ROA paraphernalia.

Please join or support ROA

This article is one of 2,100-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the

Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).[13]

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members 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,

[13] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

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 eight[14] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. 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 https://www.roa.org/page/memberoptions.

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:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002[15]

[14] Congress recently established the United States Space Force as the eighth uniformed service.
[15] You can also contribute on-line at www.roa.org.