

# LAW REVIEW<sup>1</sup> 24019

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## The Florida State Guard Is Different From the Florida National Guard.

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### 1.1.3.3—USERRA applies to National Guard service.

**Q: I am a retired Army Reserve Colonel and a life member of the Reserve Organization of America (ROA).<sup>3</sup> I have seen several newspaper articles and television reports saying that Florida Governor Ron DeSantis is sending members of the Florida National Guard and**

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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 2,000 "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 Spouses' 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.

<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 45 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 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 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 <mailto:swright@roa.org>.

<sup>3</sup> The Reserve Officers Association was established in 1922 and congressionally chartered in 1950. In 2018, the association's members amended the association's constitution and made enlisted personnel, as well as officers, eligible for full membership in the organization, including voting and running for office. The association adopted the doing-business-as name of "Reserve Organization of America" to emphasize that we represent and seek to recruit as members all personnel, enlisted as well as officers.

**the Florida State Guard to Texas to assist in the effort to prevent illegal immigration across the Rio Grande River. I thought that “Florida State Guard” and “Florida National Guard” were two different names for the same entity. What gives?**

**Answer, bottom line up front:**

These are two separate entities, not two names for the same entity. The Florida Governor is dispatching members of both entities to Texas for this purpose.

**Explanation:**

Until the start of World War II, the United States Army was tiny. A military operation of any size required the President to mobilize militia forces from the States. This was the pattern followed for the War of 1812, the Mexican American War, the Civil War, and the Spanish American War. Mobilization problems for the Spanish American War demonstrated the need for a better organized and trained militia.

As the 19<sup>th</sup> Century turned to the 20<sup>th</sup>, Congress correctly anticipated that the new century would bring major new responsibilities for our country as an emerging world power. One of the results of that understanding was the enactment of the Militia Act of 1903, also known as the “Dick Act.”<sup>4</sup> The law was named for Senator Charles W.F. Dick, a major general in the Ohio Militia and Chairman of the Senate Committee on the Militia.

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<sup>4</sup> Militia Act of 1903, 32 Stat. 775.

The Dick Act gave Federal funding and Federal assistance to the organized militia forces of the various States. Federal funding for the militia during the first 13 years after the enactment of the Dick Act exceeded Federal funding during the century before enactment. The Dick Act required National Guard members to attend 24 drills and five days of annual training per year and for the first time provided for Federal pay for annual training. National Guard units were subject to inspection by Regular Army officers and were required to meet certain standards. When the United States entered World War I in April 1917, National Guard members and units were much better prepared for service than the State Militia soldiers who were called up for service in the Spanish American War less than a generation earlier.<sup>5</sup>

The Dick Act created the dual-enlistment system that is utilized to this day. Let us discuss the hypothetical but realistic Joe Smith, who enlisted in the Florida Army National Guard<sup>6</sup> in 2019. He took two enlistment oaths, one to Florida and one to the United States. He joined two overlapping but legally distinct entities, the Florida Army National Guard (modern-day equivalent of the Florida Militia) and the Army National Guard of the United States.<sup>7</sup>

In his Federal (ARNGUS) status, Smith is subject to call-up by the President for involuntary duty under Title 10 of the United States Code, or he can volunteer for such service. In his Florida Army National Guard

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<sup>5</sup> The famous “Rainbow Division” of World War I was created by consolidating National Guard units from 26 states and the District of Columbia. At the end of this article, I have attached a link to an article about the Rainbow Division.

<sup>6</sup> The same is true of the Florida Air National Guard.

<sup>7</sup> The Army National Guard of the United States is one of the eight Reserve Components of the armed forces. In descending order of size they are the Army National Guard of the United States (ARNGUS), the Army Reserve (USAR), the Air National Guard of the United States (ANGUS), the Air Force Reserve (USAFR), the Navy Reserve (USNR), the Marine Corps Reserve (USMCR), the Coast Guard Reserve (USCGR), and the Space Force Reserve, which is new and just getting organized. The ARNGUS and ANGUS are hybrid Federal-State entities. The other Reserve Components are purely Federal entities.

status, Smith performs Federally sponsored inactive duty training (drills), annual training, and “full-time National Guard duty” and of course must be away from his civilian job for that duty.

In his Florida Army National Guard status, Smith is also subject to be called up for State Active Duty—called by the Governor, under State authority, paid with State funds, for State emergencies like hurricanes, fires, floods, tornadoes, riots, and other damaging events.

In 1915, Congress created the United States Naval Reserve.<sup>8</sup> In 2015, I attended three ceremonies commemorating the centennial of the organization in which I served for many years. Prior to 1915, New York and several other States had “naval militia” organizations. Some sailors in those organizations were recruited for the new Naval Reserve, but Congress did not create a “Naval National Guard.” Organizations like the New York Naval Militia, the California State Guard Maritime Component, and the Florida State Guard are purely State entities, not hybrid Federal-State entities like the Army National Guard.

In the years since the terrorist attacks of 9/11/2001, there have been times when so many Army National Guard soldiers and Air National Guard airmen had been Federalized that there were not enough left at home to respond to domestic emergencies like fires, floods, riots, pandemics, and other emergencies. Accordingly, several States have reinvigorated their “State Guard” organizations to fill this gap. Members of these State organizations perform important work, but absences from their civilian jobs (Federal, State, local, or private sector)

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<sup>8</sup> In 2005, Congress changed the name to “Navy Reserve.”

are not protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>9</sup>

**Q: My good friend Joe Smith is a Colonel in the Florida State Guard. I want to recruit him for ROA if he is eligible. Is a member of the Florida State Guard eligible to join ROA?**

**A:** Under the ROA Constitution, section A-3-1-a, past and present members of the *United States* uniformed services are eligible for ROA membership. The uniformed services are the United States armed forces (Army, Navy, Marine Corps, Air Force, Coast Guard, and Space Force) plus the commissioned corps of the Public Health Service (a part of the United States Department of Health & Human Services) and the commissioned corps of the National Oceanic & Atmospheric Administration (a part of the United States Department of Commerce).<sup>10</sup>

The Florida State Guard is a state entity, not a hybrid federal-state entity like the Florida Army National Guard. Joe's service in the Florida State Guard does not make him eligible to join ROA. It is likely that Joe previously served in the United States Army or one of the other federal uniformed services. If so, Joe is eligible to join ROA on that basis.

**Please join or support ROA.**

This article is one of 2,100-plus "Law Review" articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing

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<sup>9</sup> I am telling you what the law is, not what I want it to be. Most states that have "state guard" organizations have state laws that protect the civilian jobs of state guard members when they are called to state duty, but such state laws cannot be applied to federal agencies as employers.

<sup>10</sup> 10 U.S.C. § 101(a)(5).

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).<sup>11</sup>

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

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<sup>11</sup> See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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, 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<sup>12</sup> 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<sup>13</sup>

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<sup>12</sup> Congress recently established the United States Space Force as the eighth uniformed service.

<sup>13</sup> You can also contribute on-line at [www.roa.org](https://www.roa.org).