

Number 3, May 1998: Military Voting Rights

The broad issue I am covering in this article is the absolute right of military personnel and dependents to vote. It is immaterial to myself and to ROA which political candidates happen to prevail in these situations. To make it easier to follow this issue, the article is presented in a Q&A format.

Q: I heard about a federal lawsuit here in Texas challenging the right of military personnel to vote. What is all this about, and how did the lawsuit turn out?

A: The case is *Casarez v. Val Verde County*, 957 F. Supp. 847 (W.D. Tex. 1997). The lawsuit relates to the November 1996 general election in Val Verde County, Texas. Two of the candidates won narrow victories, and the plaintiff seeks to deny them their victory by throwing out 800 military absentee ballots. The two offices involved are county sheriff, where Republican D'Wayne Jernigan defeated Democrat Oscar Gonzalez Jr., by a vote of 5,373 to 5,106, and county commissioner for Precinct 1, where Republican Murry M. Kachel defeated Democrat Frank Coronado by a vote of 1,266 to 1,153. Mr. Jernigan and Mr. Kachel lost among election day voters but won heavily among absentee voters, most of whom were military.

Q: Who brought this lawsuit challenging military personnel voting?

A: The named plaintiff is Ms. Jovita Casarez, a citizen of the county. She meets the income criteria for assistance by a legal aid organization receiving federal funding through the Legal Services Corporation (LSC). The suit was filed on behalf of Ms. Casarez by Texas Rural Legal Aid (TRLA), an LSC grantee with a history of political activism.

Q: Didn't Congress enact a law forbidding LSC grantees from engaging in political litigation?

A: It appears to me that TRLA filed this lawsuit in violation of federal law, and in apparent violation of the contract it signed with LSC, under which it receives its federal grant. Upon the demands of Sen. Phil Gramm (R-Texas) and Sen. Kay Bailey Hutchison (R-Texas), LSC wrote to TRLA, contending that the filing of this lawsuit constituted a "material breach" of the LSC-TRLA grant contract. Eventually, TRLA withdrew from representing Ms. Casarez. The plaintiff got another lead counsel.

Q: Is it true that the 800 military voters received, in connection with this lawsuit, a lengthy questionnaire asking many personal details about their lives?

A: Yes. With the permission of the court, TRLA sent each of these voters a 24-page "deposition upon written questions pursuant to court order." In an editorial dated 28 January 1997, the Washington Times had the following comment about this deposition:

"To make the case that these military personnel were not full-time residents of the county, TRLA attorneys ... pried into some of the more intimate aspects of their lives. In a ... 24-page written deposition, TRLA inquired, among other things, into the sleeping arrangements of the soldiers and their wives, personal financial information, the names of organizations to which they have belonged, and whether they had ever been charged with a felony. Oh yes, and recipients had three days to fill out the forms, find a notary public to administer an oath to them and then get it in the mail...."

Q: Just who are the 800 military absentee voters whose ballots are at issue in this lawsuit?

A: Some are military personnel who lived in Val Verde County at the time they joined any one of the five armed forces; some are Air Force personnel who served in that county earlier in their military careers, and who established bona fide domiciles in the county while stationed there. Val Verde County includes Laughlin Air Force Base, one of the places where the Air Force conducts "undergraduate pilot training." According to the complaint filed by TRLA, "only" 5 percent of these 800 military absentee voters are Hispanic, in a county with a fairly heavy Hispanic population.

Q: How could the ethnic background of these military absentee voters be determined?

A: Military personnel and dependents almost always use the Federal Post Card Application (FPCA) when applying for absentee ballots. Item 1(c) of the FPCA (1995 edition) requires the applicant to state his or her race.

Q: Where is a military servicemember supposed to vote?

A: In the place that constitutes his or her residence or domicile. For some servicemembers, this will be the place where he or she lived immediately before entering the service.

"A servicemember may maintain domicile in his or her home of record throughout the servicemember's military career if he or she never demonstrates an intent to establish a new domicile elsewhere." Veldhuyzen and Wright, "Domicile of Military Personnel for Voting and Taxation," *The Army Lawyer*, September 1992, page 15.

As is explained in that article, a servicemember, unlike a civilian, does not necessarily gain or lose a domicile or residence when he or she moves from one place to another pursuant to military orders. To change one's domicile while on active duty, one must simultaneously have a physical presence in the place where one wants to establish one's domicile, and the intent to make that place one's domicile. Neither intent alone nor physical presence alone is sufficient to change one's domicile. If a servicemember makes a bona fide change of his or her domicile, as explained above, he or she can maintain the new domicile while stationed elsewhere, even for many years. At least, that is what military lawyers have been

telling military personnel for decades. If the initial holding in this lawsuit is allowed to stand, that advice may have to be reconsidered.

Q: Why are military personnel and their dependents treated differently from civilians for voting purposes?

A: Because both state and federal law have recognized that, unlike civilians, military personnel cannot choose where to live but must go where assigned by military authorities.

Some states have made this point explicitly in their election codes. For example, Section 206 of the California Election Code provides: "A person does not gain or lose a domicile solely by reason of his or her presence or absence from a place while employed in the service of the United States." The Texas Election Code does not contain quite so explicit a provision, but this holding has been considered to be a part of the common law of domicile. In an opinion piece published in the 17 February 1997 issue of *Army Times* (page 62), Senator Hutchison said, "Legal niceties aside, this lawsuit claiming that a voter can be disqualified because he or she serves in the military is a cynical affront to our Constitution."

Q: So it is possible for a servicemember who was stationed at Laughlin Air Force Base 20 years ago, as a second lieutenant in pilot training, to vote there now by absentee ballot, as a colonel in the Pentagon, even if the servicemember hasn't been back since and plans to live somewhere else upon retirement?

A: That is correct, in my view. If the servicemember established a bona fide domicile in Val Verde County in 1976, and has remained on active duty continuously since, and has not established a bona fide domicile elsewhere in the intervening years, that servicemember is still eligible to vote in Val Verde County by absentee ballot, for non-federal offices as well as federal offices.

But in his opinion in this case, Federal District Judge Fred Biery referred to one of the military voters who completed and returned TRLA's residency questionnaire. The voter, an Air Force officer, stated that he intends to return to Texas upon retirement, but probably to San Antonio in Bexar County, not to Del Rio in Val Verde County, and Judge Biery thinks that this intent makes this voter ineligible.

However, I respectfully disagree! In my view, the interpretation should be that, to establish a bona fide domicile in Val Verde County, this officer only needed an intent to make that place his domicile at that time. Subsequent changes in his intent are irrelevant, unless he establishes a bona fide domicile in another jurisdiction, by both physical presence and intent.

Q: Is this lawsuit about where military personnel should vote, or about whether they will be allowed to vote at all?

A: Although Judge Biery insisted, in his opinion, that this case is only about where military personnel are to vote, it seems possible that if his decision is allowed to

stand, hundreds of thousands of military personnel may not be able to vote anywhere. For example, let's discuss the situation of the Air Force officer mentioned by Judge Biery.

When the officer established a domicile in Val Verde County, this officer clearly abandoned his original domicile in the place he lived before joining the Air Force. Thus, he cannot vote in his original hometown. If he is currently stationed in the United States, he may have a physical presence where he is stationed, but cannot vote there because he has no intent to make that place his home. (He has already said he plans to move to San Antonio upon retirement.) The officer has no physical presence in San Antonio, so he cannot vote there because he can't establish a domicile based only on the intent to move there in the future.

Thus, this Air Force officer cannot vote in his original hometown, he cannot vote at the place where he is currently stationed, and he cannot vote in San Antonio. If he cannot vote by absentee ballot in Val Verde County, he cannot vote anywhere.

Whether military or civilian, each individual must have a domicile, controlling voting rights and other important legal consequences. Because intent alone is not sufficient to change one's domicile, a change in intent must never be allowed to destroy a previously established domicile.

Q: What exactly did Judge Biery hold, and what did he order?

A: On 24 January 1997, Judge Biery extended indefinitely the temporary restraining order that prevented the two victorious candidates from taking office on 1 January. He held that counting these 800 military absentee ballots for non-federal offices probably violated the Voting Rights Act, because these ballots "diluted Hispanic votes." However, he didn't explicitly hold that, and he "abated" the federal lawsuit pending a determination in the Texas court system as to the validity of these military absentee ballots under state law.

The case was referred to Texas District Court, and a trial was held there in June 1997. The state judge held that the state plaintiffs (the unsuccessful candidates) had not presented sufficient evidence that any of the 800 military ballots were invalid. Shortly thereafter, Judge Biery dissolved his injunction. The successful candidate for sheriff was installed in office. The successful candidate for county commissioner declined to take office, and a replacement was named.

Q: Does that mean that the Texas case is over?

A: No. The state plaintiffs have appealed their loss to Texas's intermediate appellate court, and that court's determination can be appealed to the Texas Supreme Court. Moreover, the federal lawsuit has not been dismissed. The federal plaintiff, Ms. Casarez, is continuing her efforts to use the federal discovery process to depose the military voters and military officials.

What is of greater concern is that now that TRLA has shown the way, there could

be more such lawsuits, whenever there is a close election in an area of heavy military concentration. To prevent that, we need new federal legislation clarifying that a member of the armed forces, or the family member of a servicemember, does not lose a residence, or the right to vote, because of absence from a place pursuant to military orders.

Q: Do military personnel and dependents have the right to vote in federal elections as a matter of federal law? What about non-federal elections?

A: Under the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA), 42 U.S. Code 1973ff-1(1), each state is required to "permit absent uniformed services voters ... to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for federal office."

UOCAVA does not require the states to permit uniformed services voters to vote for non-federal offices, like the two offices (sheriff and county commissioner) involved in this lawsuit. Judge Biery interpreted that to mean that Congress somehow intended to require the states to disenfranchise military personnel and dependents with respect to non-federal offices.

But I do not believe this makes sense because another part of UOCAVA (42 U.S.C. 1973ff-3) recommends that the states make nine accommodations "to afford maximum access to the polls by absent uniformed services voters" in all elections. Apparently, Judge Biery thinks that Congress intended to forbid that which it recommended, in the very same law!

Q: What is a possible solution to the issue of servicemembers voting in state and local elections?

A: A solution would be to enact federal legislation explicitly overruling Judge Biery's holding. In the past, Congress has enacted amendments to laws to correct some federal judge who, in Congress' judgment, has misunderstood or misconstrued the intent of Congress.

S. 278, the "Military Voting Rights Act of 1997," has been introduced by Senator Gramm, Senator Hutchison, Sen. Jeff Sessions (R-Ala.), and Sen. Paul Coverdell (R-Ga.). An identical bill, H.R. 699, has been introduced in the House by Cong. Henry Bonilla (R-Texas), whose district includes Val Verde County, and Cong. Sam Johnson (R-Texas).

These bills would, if enacted, amend UOCAVA to require the states to permit uniformed services voters to vote in all elections, including non-federal elections not covered by that law now. These bills would also amend the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix 501 et seq., by adding a new section that would provide:

"For purposes of voting for an office of the United States or of a state, a person who is absent from a state in compliance with military or naval orders shall not,

solely by reason of that absence-(1) be deemed to have lost a residence or domicile in that state...."

The MVRA language was included in the Senate version, but not the House version, of the proposed 1998 DoD Authorization Act. Cong. William Thomas (R-Calif.), chairman of the House Oversight Committee, was appointed an "outside conferee" for the conference committee on the DoD Authorization Act. At his insistence, the MVRA language dropped out of the act before final passage.

In November 1997, just before the end of the First Session of the 105th Congress, the Senate passed the MVRA as a separate piece of legislation (S. 1566). This was accomplished through the office of Sen. Strom Thurmond (R-S.C.), chairman of the Senate Armed Services Committee.

Q: What is Representative Thomas's objection to the MVRA?

A: In a meeting between military organizations and Representative Thomas, he would not budge from his "states' rights" objection to telling the states how to conduct non-federal elections. I pointed out to him that other federal laws, especially the Voting Rights Act (VRA), already govern non-federal elections in great detail. As a covered state under the VRA, Texas cannot move a polling place 50 feet without prior approval of the United States attorney general. He said that if it were up to him those other federal laws would be repealed.

Q: What can I do to help ensure that military servicemembers can vote?

A: Call Representative Thomas and tell him that you do not agree that a state has the right to disenfranchise military personnel. Call your own congressional representative about talking to Representative Thomas and/or supporting a discharge petition to get this critically needed legislation out of the House Oversight Committee, where it has been bottled up. (The legislation has already been approved by the House Committee on Veterans' Affairs.)

You can reach any representative or senator through the U.S. Capitol switchboard, 202-224-3121.

Since 1980, Captain Wright has headed a nationwide volunteer effort to reform absentee voting procedures for the benefit of military and overseas citizens. He has recruited more than 2,000 volunteers, mostly military Reservists and retirees, and reforms have been achieved in 45 states so far. Contact Captain Wright for specific information about the progress that has been made and what remains to be done in your state.