

LAW REVIEW¹ 043

May 2002

Military Voting Rights

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

7.2—Service member or military spouse voting and domicile

Q: I enjoy your Law Review articles. In “Law Review Number 3” (May 1998), you discussed the case of Casarez v. Val Verde County, 957 F. Supp. 847 (W.D. Tex. 1997). How did that case finally turn out? Has that problem ever been resolved?

A: That case arose out of the 1996 general election in Val Verde County, Texas. (Del Rio is the county seat, and Laughlin AFB is located in the county.) For two local offices (sheriff and county commissioner), the 800 military absentee ballots determined the outcome of the election. When only ballots cast on Election Day were counted, one pair of candidates won. When the 800 mailed-in military ballots were added, a different pair of candidates won.

Using our federal tax dollars (through a Legal Services Corporation grant), Texas Rural Legal Aid (TRLA) brought suit in the United States District Court for the Western District of Texas (Judge

¹I invite the reader's attention to 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 very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 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 43 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 (VRRA—the 1940 version of the federal reemployment statute) for 36 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 SWright@roa.org.

Fred Biery presiding). Judge Biery wrote four published decisions: *Casarez v. Val Verde County*, 957 F. Supp. 847 (W.D. Tex. 1997) (*Casarez I*); *Casarez v. Val Verde County*, 967 F. Supp. 917 (W.D. Tex. 1997) (*Casarez II*); *Casarez v. Val Verde County*, 16 F. Supp. 2d 727 (W.D. Tex. 1998) (*Casarez III*); and *Casarez v. Val Verde County*, 27 F. Supp. 2d 749 (W.D. Tex. 1998) (*Casarez IV*). Finally, the United States Court of Appeals for the Fifth Circuit affirmed *Casarez IV*, without opinion: *Casarez v. Val Verde County*, 194 F.3d 1308, 1309 (5th Cir. 1999).

Before deciding *Casarez I*, Judge Biery permitted TRLA to use our federal tax dollars to send to each of the 800 military voters (mostly active-duty Air Force officers) a burdensome and intrusive deposition on written interrogatories, amounting to a comprehensive residency questionnaire. Each voter was legally required to complete the deposition under oath, get it notarized, and return it to the court, all in just three days.

The deposition inquired into each military voter's sleeping arrangements (and the sleeping arrangements of the voter's spouse), the location of bank accounts and insurance policies, the names of organizations to which the voter has belonged, and whether the voter had ever been charged with a felony. However, the bottom-line question was, "Where do you intend to live after leaving active duty in the Armed Forces?" Judge Biery relied upon the responses to the depositions in finding a "likelihood of success on the merits" and enjoining the installation of the two disputed victors (*Casarez I*).

Judge Biery's discussion of one particular voter is instructive and illustrative of the problem. The voter in question was an active-duty Air Force officer who had established a domicile of choice in Val Verde County while stationed at Laughlin AFB in the early 1990s. At the time of the 1996 general election, he was stationed in Colorado Springs, Colo. His wife completed and returned the deposition because he was away from Colorado on temporary additional duty when the deposition arrived in the mail.

In response to the deposition, the wife stated that the couple intended to return to Texas when he retires from the Air Force (sometime in the second decade of the 21st century), but that they would probably settle in Austin or San Antonio, not Val Verde County. Judge Biery held that the service member does not have the right to vote by absentee ballot in Val Verde County because he lacks the present intent to return to that particular county. [See *Casarez I*, 957 F. Supp. at 860. See also *Casarez III*, 16 F. Supp. 2d at 729.]

If this officer cannot vote by absentee ballot in Val Verde County, he cannot vote at all. He gave up his domicile of origin, at his home of record, when he established a domicile of choice while stationed at Laughlin AFB in the early 1990s. He cannot re-establish his domicile of origin without moving back to his original hometown. Of course, his military duties preclude him from moving back home. He cannot vote in Colorado because he has already decided and stated (according to his wife's oath) that he does not intend to live there after leaving active duty. He cannot establish a new domicile of choice in Austin or San Antonio merely by intending to move there upon retirement, many years in the future.

As I explained in “Law Review Number 3,” the service member enters active duty with a domicile of origin at the place he or she lived just before entering active duty. That domicile of origin persists unless and until the service member establishes a new domicile of choice at some other place while on active duty. To establish a new domicile of choice, one must have a physical presence in the place to which one wishes to change and the intent to make that place one’s home. One must have both elements simultaneously. Neither intent alone nor physical presence alone is sufficient to effect a new domicile of choice.

Because intent alone is not sufficient to effect a new domicile, a change in one’s intent about where to live after leaving active duty must not be enough to destroy a pre-existing domicile (of origin or of choice). Otherwise, a person like this Air Force officer is left without a domicile or the right to vote anywhere. His situation is typical among career military personnel. It is a rare career service member who can testify, under oath, that he or she is certain that he or she will move, immediately after retirement, to the place that he or she has claimed as a domicile while on active duty. He or she will probably move, upon retirement, to the place where he or she can find a civilian job. It is impossible to anticipate where that will be months in advance, much less years in advance.

In 1997–2000, the Senate, but not the House, each year passed language responding to Casarez, but each of those years the House refused to go along, and the pertinent language was deleted from the National Defense Authorization Act (NDAA) before enactment. Finally, in late 2001, the House went along with this much-needed legislation.

Public Law 107-107 is the FY02 NDAA, and section 1603 of that law adds a new provision (section 704) to the Soldiers’ and Sailors’ Civil Relief Act (SSCRA). This new section reads, in part, as follows: “For the purposes of voting for any Federal office ... or a State or local office, 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, without regard to whether or not the person intends to return to that State.” [Emphasis added.] New section 704 of the SSCRA is now codified in section 594 of title 50, United States Code Appendix (50 U.S.C. App. 594).

I think that this new provision solves the Casarez problem. We need to get the word out to the nation’s 5,000 local election officials who administer absentee voting.

The FY02 NDAA contains several other favorable new provisions concerning military voting rights. Those provisions are discussed in “Law Review Number 44” which appears on the following page. ROA

Captain Wright was employed as an attorney for DoL for ten years. He was largely responsible for drafting USERRA, along with one other DoL attorney. He also helped to write the successful appellate briefs for the veterans in both the Imel and the Akers cases. Most recently, he was on active duty for 71 days (May–July 2001), including 40 days in Bahrain. Please see his July 2001 “Law Review” article.

Update – April 2022

The location of the SCRA within the United States Code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.³ The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant section cited throughout the article can be found at:

50 U.S.C. App. § 594 discussing the guarantee of residency for military personnel and spouses of military personnel can be found at 50 U.S.C. § 4025.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved.*⁴

Please join or support ROA

This article is one of 1800-plus “Law Review” articles available at www.roa.org/page/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 or eligible to join, but please understand that ROA members, through their

³*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra> (last visited Mar. 10, 2022).

⁴Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

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 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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