

Virginia Voter registration Unlawfully Challenges The Voter Registration Of Military Personnel And Spouses

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

4.5—SCRA right to protection against state and local tax authorities

7.2—Service member or military spouse voting and domicile

This is a follow-up to Law Review 204. Both the U.S. Department of Justice and Virginia's State Board of Elections have called upon the Stafford County Voter Registrar and have apparently advised him to "cool it" with respect to his efforts to discourage and prevent voting by military personnel and their spouses, but the Registrar has apparently rejected that advice.

Ray Davis, the Registrar of Voters of Stafford County, Va., has formally challenged the voter registration of 100 registered voters in the county through a series of identical form letters. Each of these voters is (or was) a member of the armed forces on active duty or the spouse of such a member. Each voter was directed to appear at a hearing at Mr. Davis' office December 6,

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 (VRRRA—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 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.

2005. The letter states that if the voter does not appear as directed, the voter registration of that voter would be canceled December 7.

In his letter, Mr. Davis refers to the Soldiers' and Sailors' Civil Relief Act (SSCRA)—he is apparently unaware that Congress comprehensively amended that law (which dates back to World War I) and recodified it in 2003. The new law is called the Servicemembers' Civil Relief Act (SCRA).

Some of the challenged voters are on active duty and deployed to places like Iraq or Afghanistan. Some of these folks probably have not even received the letters, which were not sent by certified mail. When such a member returns from deployment, months from now, Mr. Davis' letter will be in a huge stack of unread mail. The whole point of the SCRA, as well as the SSCRA, is that those who are serving our country in combat should be able to devote their full attention to their military duties. The SCRA is intended to remove, to the maximum extent feasible, distractions based on civil matters at home.

Section 202 of the SCRA provides for a *mandatory* continuance in cases like this. One big improvement made by the SCRA in 2003, as compared to the SSCRA provision, is that the right to a continuance now applies to administrative as well as judicial proceedings. If Mr. Davis were to cancel the voter registration of a deployed servicemember on December 7, based on his or her failure to appear for the December 6 hearing, Mr. Davis would have been flouting Federal law.

In his form letter, Mr. Davis relies solely on the fact that the challenged voter has, according to Mr. Davis, claimed exemption from Virginia's personal property tax on vehicles, relying on the SSCRA (now SCRA). Here are the relevant SCRA provisions:

"A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders." Section 511(a).

"The personal property of a servicemember shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the servicemember is serving in compliance with military orders." Section 511(c)(1).

"This subsection applies to personal property or its use within any tax jurisdiction other than the servicemember's domicile or residence." Section 511(c)(2).

Let us take the case of the hypothetical Col Joe Smith, USMC, assigned to Marine Corps Base Quantico, located just the other side of the county line in Prince William County, Virginia. Col Smith is a domiciliary of California—he joined the Marine Corps while living in that state 28 years ago, and he has never established a new domicile in any other state. Colonel Smith

cannot commute to Quantico from California, so he buys or rents a house in Stafford County, just a few miles south of Quantico.

Under Section 511 of the SCRA, Virginia and Stafford County are precluded from collecting the personal property tax on Colonel Smith's vehicle as long as Colonel Smith remains on active duty, remains a domiciliary of a state other than Virginia, and has the vehicle registered in his name alone. Section 511(b) of the SCRA also precludes Virginia from collecting its state income tax on Col Smith's military salary, so long as he remains on active duty and remains domiciled in another state.

Physically living in Virginia, and specifically in Stafford County, does not make Col Smith a Virginian. He is living in Virginia only because his military duties require that he sleep within a reasonable commuting distance of his duty station. If he chooses, he can become a Virginia domiciliary, but to do so he needs the simultaneous *physical presence* in Virginia (which he already has) and the *intent* to make Virginia his home (which he can establish at any time while he has the physical presence in Virginia). Col Smith could register to vote in Stafford County as a way of demonstrating his intent to make Virginia home.

When Col Smith leaves active duty or when he becomes a Virginia domiciliary (whichever comes first), he loses his SCRA exemption from paying Virginia state income tax and personal property tax. If that is the situation of the folks that Registrar Davis has challenged, then Stafford County and Virginia should bill them for the tax they owe, and they should pay it. But note that the letters came not from the tax office but the voter registration office. This appears to be an effort to prevent military personnel and their spouses from voting, not an effort to collect taxes.

If the 100 challenged voters owe personal property tax, Stafford County has remedies such as suing them and putting liens on their personal and real property. Denying these folks the right to vote is *not* one of the remedies that Stafford County can use to collect its taxes, as stipulated in the 24th Amendment of the U.S. Constitution and the U.S. Supreme Court case *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

Section 1 of the 24th Amendment provides: "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax *or other tax*." (emphasis supplied). In *Harper*, the Supreme Court extended this prohibition to include state and local elections as well. Making the right to vote depend upon a wealth test or upon the payment of any tax or fee is a violation of the Equal Protection Clause of the 14th Amendment.

Now let us take the case of Mrs. Karen Smith, wife of Col Smith. She lives with her husband in the house in Stafford County. She is not on active duty. If she works outside the home, she must pay Virginia state income tax on her salary, regardless of whether she votes in Virginia, or votes somewhere else, or does not vote at all. If she owns a vehicle or other personal (moveable)

property, the SCRA does not preclude Virginia and Stafford County from collecting personal property tax on that property.

Mrs. Smith's right to vote in Stafford County has been challenged by Ray Davis on the grounds that her husband has claimed an exemption from the personal property tax on *his* vehicle (a vehicle registered and titled in California in Col Smith's name alone.) Challenging Mrs. Smith's registration on this basis is unlawful and unconstitutional. Every human being (married or single) has one and only one domicile, and that domicile is not dependent upon the domicile of the individual's spouse, if any.

Mrs. Smith cannot vote in California, because she has never lived there, either before or after marrying Joe Smith in 1990. While married to Col Smith, Mrs. Smith has registered and voted in each of the five places where the Marine Corps has sent her husband. Her right to register and vote was never questioned by any local election official until she arrived in Stafford County in 2005. If she cannot vote in Stafford County, she cannot vote anywhere. The personal property tax Col Smith has or has not paid on *his* vehicle has no bearing on Mrs. Smith's right to vote in Stafford County.

Update – April 2022

SCRA has moved

The location of the SCRA within the United States code changed in late 2015. 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.

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

Section 202 discussing stay of proceedings when the servicemember has notice can be found at 50 U.S.C. § 3932.

Section 511 discussing residence for tax purposes can be found at 50 U.S.C. § 4001.

Spouse of active-duty service member

On December 21, 2018, President Trump signed into law the Veterans benefit and Transition Act of 2018.⁴ Section 302(a) of the Act adds to the SCRA to allow spouses of a servicemember

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).

⁴Veterans Benefits and Transition Act of 2018, Pub. L. NO. 115-407. 132 Stat. 5367. *See also The Veterans Benefits and Transition Act*, MILITARY BENEFITS, <https://militarybenefits.info/veterans-benefits-transition-act/> (last visited Mar. 18, 2022).

to use the same residence for purposes of taxation as the servicemember regardless of when they were married.⁵ The provision is codified in 50 U.S.C. § 4001(a)(2)(B) as follows:

For any taxable year of the marriage, the spouse of a servicemember may elect to use the same residence for purposes of taxation as the servicemember regardless of the date on which the marriage of the spouse and the servicemember occurred.

Let us reconsider the hypothetical of Karen Smith, wife of Col. Smith. She does not have to pay Virginia state income tax on her salary and vote in Virginia. Mrs. Smith may change her domiciliary to California, to match her husband's, if she chooses even though she has never lived in California. Mrs. Smith may change her domicile to California simply because her husband is domiciliary of California. It should be noted, if Mrs. Smith decides to change her domicile to California, she will also need to register to vote in California. Monica cannot be a Virginia domiciliary for voting purposes and a California domiciliary for tax purposes.

Mrs. Smith has another option as well. The SCRA states as follows:

A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse.

50 U.S.C. § 4001(a)(2)(A).

Mrs. Smith has moved to five different places with her husband under Marine Corps orders. Mrs. Smith could have decided to make one of those five places her domiciliary and kept the domiciliary as she moved with her husband in compliance with the military orders. Let us say that location three was Florida. Mrs. Smith could have made that her domiciliary because she was physically present in Florida, and she could demonstrate the intent to make Florida her domiciliary (registering to vote). This would likely be beneficial for Mrs. Smith since Florida is one of the few states with no state income tax.

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⁵Veterans Benefits and Transition Act § 302(a).

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