

Military Spouse Voting in Virginia—Problem Solved

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

4.5—Protection from State/Local Tax Authorities

7.2—Service member or military spouse voting and domicile

In Law Review 204 (November 2005) and Law Review 0603 (February 2006), I addressed the problem that some military spouses have encountered in Stafford County, Va. That county's registrar of voters has sought to prevent military spouses from registering to vote and has sought to challenge the voter registrations of some of those already registered on the grounds that they do not have the intent to remain in the county for an "unlimited time."

The registrar figures that military spouses are not eligible to register and vote because they will be moving along when the Active Duty spouse retires or moves to a new duty station. He only asks military personnel and spouses to "prove your intent to remain for an unlimited time" as a condition precedent to registering to vote.

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.

In those two articles, I explained in detail the basis for my conclusion that the Virginia Election Code (as applied in Stafford County) is unconstitutional—it violates the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. I adhere to my conclusion, but I am pleased to report that this problem has now been solved through an amendment to the election code, without the need for a federal court lawsuit. I would like to express my sincere gratitude to Va. Del. Mark Cole, the sponsor of House Bill No. 138—passed both houses of the Virginia General Assembly and signed into law by Gov. Tim Kaine on April 6.

I also want to thank my friend and fellow ROA member LTC Albert Veldhuyzen, an Army Reserve lawyer with whom I have collaborated on several research and writing projects. LTC Veldhuyzen assisted Del. Cole in drafting the language of the corrective amendment.

Finally, I want to thank Jean Jensen, Secretary of the Virginia State Board of Elections and the chief election official of the Commonwealth of Virginia. She supported the enactment of this legislation and testified on its behalf at legislative hearings.

This new law amends and reenacts section 24.2-417.1 of the Code of Virginia to read (in pertinent part) as follows: “In determining the residence as defined in section 24.2-101 and domicile and place of abode of a military or merchant marine spouse or dependent, there shall be a presumption that a military or merchant marine spouse or dependent who has established physical presence and a place of abode in the Commonwealth shall also have established domicile in the Commonwealth unless the spouse or dependent expressly states otherwise. Once residence is changed, the military or merchant marine spouse or dependent may not revert to any previous residence without re-establishing new physical presence and intent to remain or return.” I think that this new law solves the problem, but we shall have to see how the Stafford County registrar applies the new law.

If you are on active duty in the Armed Forces, special rules apply to you under a federal law called the Servicemembers’ Civil Relief Act (SCRA), enacted by Congress in 2003 to replace the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), which can be traced back to 1917. The SCRA, like the SSCRA, protects the servicemember from double taxation on his or her military income. If Col Joe Smith buys or rents a house in Stafford to be close to his duty station at Quantico, Stafford County is precluded from taxing Col Smith’s military income and his personal property (like a vehicle) *unless he is a Virginian*. Physically residing in Stafford, pursuant to his military duties, does not by itself make Col Smith a Virginian. But, Col. Smith can become a Virginian if he simultaneously has the *intent* to make Virginia his home and a *physical presence* in Virginia.

Col. Smith currently has the physical presence but not the intent. Registering to vote in Stafford County would powerfully demonstrate Col. Smith’s intent to make Virginia his home. He cannot have it both ways. He cannot become a Virginian for voting purposes while maintaining his domicile in Florida (or some other state) for state income tax purposes.

Now let’s take Alice Smith, the colonel’s wife. She lives with Col Smith and the kids in the house in Stafford, and she has a civilian job in Washington, D.C. Mrs. Smith is not on active duty in the

Armed Forces, so the SCRA does not protect her from Virginia state income tax on *her* salary. She must pay that tax regardless of whether she votes in Virginia, or votes somewhere else, or does not vote at all. As I explained in Law Review 204, it is entirely possible for a married couple to live together in the same house but be domiciled in different states, if one or both of them are on active duty.

In this scenario, Mrs. Smith must be permitted to register and vote in Stafford County although her husband is still a legal resident of another state and votes there by absentee ballot. This was reasonably clear before the enactment of the recent legislation in Virginia, and it is now even more abundantly clear.

If you are on active duty, or if you are married to someone on active duty, registering to vote and voting can have important legal and financial consequences. *Do not ask the registrar of voters for advice on these questions.* The registrar is not a lawyer, in most cases, or may not be familiar with the special laws that apply to servicemembers and their families. *Ask a military legal assistance attorney* for advice on these questions. I invite your attention to Law Review 125 for a discussion of your right to military legal assistance.

The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. Government.

Update – April 2022

Spouse of active-duty service member

On December 21, 2018, President Trump signed into law the Veterans benefit and Transition Act of 2018.³ Section 302(a) of the Act adds to the SCRA to allow spouses of a servicemember to use the same residence for purposes of taxation as the servicemember regardless of when they were married.⁴ 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 Col. Smith and his wife, Alice Smith. Alice may change her domicile to Florida to match her husband's domicile., even though she has never lived in Florida. Alice may change her domicile to Florida simply because her husband is a domiciliary of Florida. This would likely be beneficial for Alice because she will be able to avoid paying Virginia

³Veterans 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).

⁴Veterans Benefits and Transition Act § 302(a).

state income tax. It should be noted, if Alice decides to change her domicile to Florida, she will also need to register to vote in Florida. Alice cannot be a Virginia domiciliary for voting purposes and a Florida domiciliary for tax purposes.

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This article is one of 1800-plus “Law Review” articles available at <https://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 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.

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