

Why Can't the Military Voters All Register to Vote Here on Base?

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

4.5—SCRA protection from state/local tax authorities

7.2—Service member or military spouse voting and domicile

Q: I have been appointed the Voting Assistance Officer (VAO) for a military unit currently stationed at a large military base here in the United States. This is complicated, because we have personnel from more than 40 states in this unit. I have what I think is a bright idea, but I wanted to run it by you. Instead of passing out Federal Post Card Applications (FPCAs) and encouraging service members to apply for absentee ballots from local election officials in their hometowns all over the country, I propose to pass out state voter registration forms. I want to encourage personnel in our unit to register to vote right here, using the military quarters or the off-base apartments where they physically reside as their home addresses. I think that our votes will be much more noticeable if they are cast in three voting precincts, in and around this base, rather than spread all over the country in absentee ballots. And if we vote right here we won't have to depend upon the United States Postal Service, which may

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.

lose or delay some of the ballots. If we all register here, we can vote in person on Election Day or during the early voting period leading up to Election Day. What do you think of this idea?

A: Thank you for giving me the opportunity to explain why this is a *terrible* idea. If you proceed with this idea, you risk causing service members in your unit to have to pay hundreds or thousands of dollars in state and local taxes that they otherwise can lawfully avoid.

In 1992, shortly before the 1992 presidential election, a young Army judge advocate (Albert R. Veldhuyzen) and I wrote an article titled “Domicile of Military Personnel for Voting and Taxation Purposes.” The article was published in the September 1992 issue of *The Army Lawyer*, the official publication of the Judge Advocate General of the Army. A few days after the 1992 general election, I received a frantic telephone call from an Air Force legal assistance attorney at Offutt Air Force Base in Nebraska.

A zealous but ill-informed VAO at Offutt AFB had encouraged several hundred Air Force personnel to register to vote in Nebraska, and most of them voted in person on Election Day. The county tax assessor (an Air Force retiree who was most familiar with these matters) compared the voter registration list with the list of military personnel who had claimed exemption from paying personal property tax on their automobiles and motorcycles, based on the Soldiers’ and Sailors’ Civil Relief Act (SSCRA). The assessor sent a notice to these service members, informing them that they were now required to pay the county’s personal property tax, because they had registered and voted locally. Many of the personnel who had received that notice were lined up at the legal assistance office, seeking advice as to how to respond.

The legal assistance attorney and I had a long chat, and we were at a loss as to how to advise these service members to proceed. Our concern was that the next shoe to drop would relate to Nebraska state income tax and that would be an even greater tax bill in most cases.

Every human being has one and only one *domicile*. Your domicile determines where you are eligible to vote, and it also determines where you must pay state income tax and personal property tax. You cannot simultaneously be domiciled in Florida for tax purposes and in Nebraska for voting purposes.

Domicile is a legal conclusion—this is not a matter of “pick a state, any state.” If you vote, it must be in the state where you are domiciled. You don’t get to pick a state, just because you like its tax policy (no state income tax) or just because you think that state will be closely contested in the presidential election.

When a civilian (Bob Jones) moves from Florida to Nebraska, he immediately becomes a domiciliary of Nebraska, unless the move was for a temporary purpose (like a three-month job assignment). Bob would probably prefer to remain a Floridian, as Florida has no state income tax, but Bob does not get that choice. He becomes a Nebraskan on the very day that he moves

into the new house or apartment in Nebraska, and he must pay Nebraska state income tax starting on that day.

Joe Smith moved from Florida to Nebraska when he enlisted in the Air Force and was assigned to duty at Offutt AFB. Because he is on active duty in the armed forces, Joe is treated differently from Bob, a civilian. Joe does not automatically become a Nebraskan just by moving there, in compliance with his military orders. Joe can become a Nebraskan if he wants; to do so, he must *simultaneously* have a physical presence in Nebraska for a significant time (like three-year PCS orders to Offutt AFB) and the *intent* to make Nebraska his home. Neither physical presence/absence alone nor intent alone is sufficient to create a new domicile or to destroy an old domicile, for a member of the armed forces on active duty.

It is entirely fair and logical that Joe Smith (a service member) is treated differently from Bob Jones (a civilian) in this respect. Bob Jones can choose to move or not to move, while Joe Smith does not have that choice. Bob may have been transferred by his employer, but he can always choose to quit. If Joe fails to go to his appointed place of duty at Offutt AFB, Joe is guilty of the military criminal offence of unauthorized absence.

In 2003, Congress enacted the Servicemembers Civil Relief Act (SCRA), as a long-overdue rewrite of the SSCRA, which dates back to 1917. The SCRA provides as follows concerning domicile and tax liability:

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.

50 U.S.C. App. 571(a)(1).

As applied to Joe Smith, this means that federal law exempts him from having to pay Nebraska state income tax on his Air Force salary or personal property tax on his automobile *so long as Joe is not domiciled in Nebraska*. Renting an apartment or even buying a house in Nebraska does not make Joe a Nebraskan—he needs to have a place to sleep that is within a reasonable commuting distance of his duty station at Offutt AFB, since he cannot commute from Florida.

If Joe registers to vote or votes in Nebraska, he loses his SCRA protection—he will have to pay Nebraska state income tax and personal property tax if he votes in Nebraska. The Maryland Court of Appeals has held, “Evidence that a person registered to vote or voted is admissible and ordinarily persuasive when the question of domicile is at issue.” *Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (1973)

As the VAO, it is your job to provide service members the forms and information that they need to vote, whether in person or by absentee ballot.³ Since you are not a lawyer, you are not qualified to advise a service member as to which state constitutes his or her domicile, or as to the collateral legal consequences of registering to vote locally rather than voting by absentee ballot in his or her hometown. If the service member is uncertain as to these issues, you should assist that member in making an appointment with a military legal assistance attorney.

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, 2015.⁴ 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, except in limited circumstances. 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. § 571 discussing residence for tax purposes found at 50 U.S.C. § 4001.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.⁵

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This article is one of 2,300-plus “Law Review” articles available at www.roa.org/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 on 10/1/1922 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 almost 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.

³Instead of distributing FPCAs and using the voluminous *Voting Assistance Guide* to assist voters in completing the form, I suggest that you refer these voters to www.fvap.gov. This is the website of the Federal Voting Assistance Program in the Department of Defense. The website includes a well-designed wizard that will assist the individual voter in completing the FPCA in a manner that is correct, complete, and legible.

⁴*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-skra> (last visited Mar. 10, 2022).

⁵Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

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 educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative 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 eight⁶ 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 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:

Reserve Organization of America
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⁶Congress recently established the United States Space Force as the 8th uniformed service.