

## LAW REVIEW<sup>1</sup> 12041

April 2012

### Redistricting Litigation in Hawaii Threatens to Disfranchise Military Voters

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

4.5—SCRA protection from state-local tax authorities

7.2—Service member or military spouse voting and domicile

7.9—Other Military Voting Rights

*The actual Enumeration [of the population of the United States] shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they [the Congress] shall by Law direct.<sup>3</sup>*

In accordance with this constitutional directive, our nation conducted a decennial census in 2010, and now the state legislatures are redrawing congressional district lines and their own district lines. But first the 435 districts for the United States House of Representatives were reapportioned among the 50 states, under a mathematical process established by a federal law enacted early in the 20th Century. States that had grown faster than the overall rate of

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<sup>1</sup>I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup>BA 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](mailto:SWright@roa.org).

<sup>3</sup>US. CONST. art. I, sec. 2

population growth gained House seats, and Texas gained four. States that had grown slowly or lost population (Michigan) lost seats in the House, to keep the overall number at 435.

It should be emphasized that the Census counts human beings, regardless of their eligibility to vote. Children, legal and illegal aliens, and other persons who are not eligible to vote are counted in the Census. Human beings are counted based on their actual location in April of the decennial year. Thus, the 45,000 active duty service members who were stationed in Hawaii in April of 2010 counted in determining Hawaii's population for congressional reapportionment purposes, but the state seeks to exclude them for congressional and state legislative redistricting purposes. This makes no sense.

Half a century ago, the Supreme Court established the "one man one vote" principle when it decided *Baker v. Carr*, 369 U.S. 186 (1962). The Supreme Court held that the congressional districts within a particular state must be very close to equal in population, based on the decennial census.<sup>4</sup> Two years later, the Supreme Court extended this principle to state legislative districts as well. *Reynolds v. Sims*, 377 U.S. 533 (1964).

As Director of the Service Members Law Center, my concern is that delays in the redistricting process may disenfranchise the brave men and women who are away from home and prepared to lay down their lives in defense of our country. The 2012 general election is barely six months away, and in Hawaii and several other states disputes about redistricting have not been resolved. Until those disputes are resolved, the states cannot conduct primaries, and until the primaries are conducted local election officials cannot print and mail absentee ballots for the general election. Under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), as amended in 2009, the states are required to mail out absentee ballots at least 45 days before the primary or general election for federal offices, but lingering disputes about redistricting could prevent some states from meeting this deadline.

Since the Supreme Court decided *Baker v. Carr* half a century ago, it has always been *population* that must be equal among the districts in a state—not registered voters, not voting-age eligible population, etc. But this year the Hawaii State Reapportionment Commission excluded 108,000 "non-permanent residents" from the base that was used to draw legislative lines. Among those excluded were active duty service members, military family members, and college students from other states attending Hawaii universities. The lawfulness of this exclusion has been challenged, and I am concerned that this dispute will drag on and result in disenfranchisement of the 5,580 active duty service members who are eligible to vote in Hawaii.<sup>5</sup>

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<sup>4</sup>The state legislatures are not required to redraw lines based on estimates of population change between decennial censuses. Within a decade, part of a state may gain population rapidly while another part may gain population slowly or even lose population.

<sup>5</sup>Please see Law Review 1142 for official DOD figures on the number of military personnel and voting-age military family members who are eligible to vote in each state. I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 741 articles about the Uniformed Services Employment and Reemployment Rights Act

According to the Department of Defense (DOD), there are approximately 45,000 active duty service members stationed in Hawaii, but almost none of them are Hawaiians. Of the 5,580 Hawaiians serving on active duty, almost none of them are currently serving in Hawaii. The vast majority of the 45,000 members serving in Hawaii are from the other 49 states. These service members could choose to become Hawaiians while serving there, but doing that would mean that they would have to pay Hawaii state income tax, which is among the highest in the nation. Please see my Law Review 1142 for a discussion of the legal principles determining the domicile of the service member or military family member for voting and tax purposes.

Excluding active duty service members from the base used for redistricting purposes while counting them for reapportionment purposes is nonsensical. Excluding military family members makes even less sense, since many of them have established Hawaii domiciles and have quite properly voted in Hawaii. According to DOD, there are 29,653 voting-age military family members who are eligible to vote in Hawaii, mostly in person on Election Day.<sup>6</sup> Most politicians do not understand that the domicile of the service member does not determine the domicile of his or her spouse, and it is very common for a married couple to live together in the same house or apartment but be domiciled in different states, if one or both of them are on active duty in the armed forces.

Let us take the hypothetical but realistic Staff Sergeant Joe Smith, an active duty U.S. Army Soldier stationed at Schofield Barracks in Hawaii. He was born and raised in Florida, and in 2000 he graduated from high school there and joined the Army. He has been on active duty continuously for 12 years and expects to remain for at least eight more, to qualify for military retirement. He has maintained and plans to continue maintaining his Florida domicile. Florida has no state income tax, and the SCRA forbids Hawaii (or any state where he is stationed) from taxing his military income, unless he is domiciled in that state.

While stationed in California in 2005, Joe met Mary Jones, and they married in California in 2006. Mary had spent her whole life, up to that point, in California. She did not become a Floridian by marrying a Floridian. While Joe was stationed in California, the two of them shared an apartment near the Army base, but Joe was domiciled in Florida while Mary was domiciled in California. Mary stayed behind in that apartment when Joe deployed to Afghanistan. In January 2010, Joe was transferred to Schofield Barracks, and Mary moved to Hawaii to be with her husband. Both of them were in Hawaii in April 2010 and were counted by the Census and included in the number for Hawaii.

Mary found a job in town, and she pays Hawaii state income tax on her salary. The SCRA does not protect her income from state income taxation by Hawaii. She must pay Hawaii state

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(USERRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Servicemembers Civil Relief Act (SCRA), and other laws that are particularly pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

<sup>6</sup>Please see Law Review 1142 for a chart showing the number of military personnel and military family members who are eligible to vote in each state.

income tax regardless of whether she votes in Hawaii, votes somewhere else, or does not vote at all. Mary registered to vote in Hawaii and voted in person in 2010 and 2011. She plans to vote in person in Hawaii in the 2012 primary and general election. She is one of the 29,653 voting-age military family members who are eligible to vote in Hawaii, according to DOD.

On May 9 or 10, the United States Court of Appeals for the Ninth Circuit<sup>7</sup> will hear arguments on a case challenging the way that Hawaii has conducted redistricting. We will keep the readers informed of developments in this important case.

### **Update – April 2022**

#### *Redistricting*

In 2012, the United States District Court of Hawaii declined to issue a preliminary injunction to Kostick.<sup>8</sup> If the preliminary injunction were granted it would have prevented the defendants from further implementing the 2012 Reapportionment Plan and enjoin conducting the election that was approaching under that plan.<sup>9</sup> However, the court found that Kostick, the plaintiff, could not show likelihood of success on the merits to his claim that the 2012 Reapportionment Plan violated equal protection.<sup>10</sup> Even if Kostick could demonstrate a likelihood of success on the merits, the court stated that it would not have granted the preliminary injunction because the equities and public interest tip overwhelmingly in the defendants favor.<sup>11</sup>

In 2013, the United States District Court of Hawaii considered the equal protection challenges on cross motions for summary judgment.<sup>12</sup> The plaintiff asks the court to declare that the 2012 Reapportionment Plan violated equal protection while the defendant sought judgment in its favor to those questions.<sup>13</sup> The court concluded the 2012 Reapportionment Plan did not violate the equal protection clause of the United States Constitution.<sup>14</sup> The court further found the size of the Commission's legislative districts pass constitutional muster.<sup>15</sup> The Supreme Court of the United States affirmed the decision of the United States District Court in 2014.<sup>16</sup>

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<sup>7</sup>The 9th Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.

<sup>8</sup>Kostick v. Nago, 878 F.Supp. 2d 1124, 1149 (D. Haw. 2012).

<sup>9</sup>*Id.* at 1127

<sup>10</sup>*Id.* at 1140.

<sup>11</sup>*Id.* at 1149.

<sup>12</sup>Kostick v. Nago, 960 F.Supp. 2d 1074, 1077 (D. Haw. 2013).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>Kostick v. Nago, 571 U.S. 1161 (2014).

### *Domicile of Service Member Spouse*

On December 21, 2018, President Trump signed into law the Veterans benefit and Transition Act of 2018.<sup>17</sup> 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.<sup>18</sup> 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 Staff Sergeant Joe Smith and his wife Mary Smith. Mary may change her domicile to Florida, even though she has never lived in Florida, because Joe Smith is a domiciliary of Florida. It would likely be beneficial for Mary to change her domicile to match her husband's because Florida does not have state income tax, while Hawaii has a very high state income tax. If Mary does decide to change her domicile to Florida, she will also need to register to vote and vote in Florida as well. She cannot be a Hawaii domiciliary for voting purposes and a Florida domiciliary for tax purposes.

### **Please join or support ROA**

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

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<sup>17</sup>Veterans 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).

<sup>18</sup>Veterans Benefits and Transition Act § 302(a).

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.

If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://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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