

Can I Keep my Texas Domicile while on a Three-Year AGR Tour in DC?

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Q: I am a Captain in the Air Force Reserve and a member of ROA. I live and work in Houston, and I am a traditional reservist, drilling at Ellington Field near Houston. I applied for and was accepted for a three-year Active Guard and Reserve (AGR) tour at Andrews AFB, in Maryland very close to DC. I will report to active duty on October 1, 2013. My wife and I are selling our Houston house and will be moving into an apartment near Andrews AFB, while we look to purchase a house in the DC area.

Texas has no state income tax, but Maryland, Virginia, and DC all have state income tax. Will it be possible for me to maintain my Texas domicile while serving on AGR duty at Andrews

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.

AFB for three years or more? Will it be possible for me to avoid paying Maryland state income tax while living in Maryland pursuant to my Air Force orders?

A: The answer is *clearly yes* to both questions, but you need to be careful about how you go about this, and you may need expert legal advice.

The relevant federal statute is the Servicemembers Civil Relief Act (SCRA), which Congress enacted in 2003, as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917, to protect the civil rights of the "doughboys" who answered the call to serve "over there" in "the war to end all wars." The SSCRA protected those who were drafted, those who voluntarily enlisted, and those who were called to active duty from the nascent National Guard, Army Reserve, Navy Reserve, and Marine Corps Reserve.³

The SCRA is codified in the Appendix of title 50 of the United States Code, at sections 501 through 597b (50 U.S.C. App. 501-597b).

Every human being has one and only one domicile, even if it is a legal fiction. Normally, the person's domicile is the place where he or she usually sleeps. George Soros could probably afford to buy and furnish 365 houses and to sleep in each house for one night per year, but he still has only one domicile, and he is only entitled to vote once.

When a civilian⁴ moves from State A to State B he or she immediately loses his or her domicile in State A and becomes a domiciliary of State B.⁵ On the day of the move, this individual would become liable for paying state income tax to State B, assuming that State B has an income tax. Unless the move happens on New Year's Day, the person will likely have to file a part-year state income tax return for State A and a separate part-year return for State B.

Active duty military personnel are exempted from the general rule that moving from State A to State B automatically means losing the individual's domicile in State A and gaining a domicile in State B. It is entirely appropriate that military personnel be treated differently in this respect, because military personnel do not choose where to live—they must go where they are assigned by the service.

Yes, a civilian can be transferred by his or her employer. The difference is that the civilian can always quit the job. For the service member, failure to go to one's appointed place of duty is a crime (unauthorized absence) in the military justice system.

³The Coast Guard was not established until the eve of World War II. The Air Force did not become a separate service until 1947.

⁴A reservist or National Guard member who is not on active duty is a civilian for this purpose.

⁵There would be an exception of a move for a temporary purpose. If Joe Smith's employer sends him from State A to State B for a three-month assignment, and Joe intends to return to State A at the end of the assignment, Joe's domicile would not change.

Two SCRA provisions are directly pertinent to the question of your domicile in Texas, while serving on AGR duty in Maryland (Andrews AFB), and your liability for Maryland income tax⁶ while you are physically residing in Maryland (pursuant to your military orders) but domiciled in Texas:

“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).

“Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.” 50 U.S.C. App. 571(b).

Let us apply these two subsections to your situation. Because you will be serving on AGR duty at Andrews AFB in Maryland, you will need to rent an apartment or buy a house within a reasonable commuting distance of Andrews AFB—you cannot commute to Andrews from your current home in Houston. Your physical residence in Maryland will not amount to a domicile in Maryland. The SCRA precludes Maryland from taxing your military income in these circumstances.⁷

As a federal statute, the SCRA supersedes and overrides conflicting state statutes and state constitutions, under Article VI, Clause 2 of the United States Constitution. This clause is commonly called the Supremacy Clause.

In order to maintain your exemption from having to pay Maryland state income tax, it is important that you maintain your incidents of domicile in Texas, not Maryland. You should continue voting in Houston, by absentee ballot, using as your “permanent home address” your current house in Houston. While you are on active duty, you are eligible to vote by absentee ballot and to use that address as your domicile address even if you sell the house and even if you cannot receive mail at that address. The relevant SCRA section is as follows:

§ 595. Guarantee of residency for military personnel and spouses of military personnel

(a) In general. For the purposes of voting for any Federal office (as defined in section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. §431) 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 —

⁶The answer is exactly the same if you rent an apartment or buy a house in Virginia or the District of Columbia and commute to your duties at Andrews AFB.

⁷If you have non-military income, like a moonlighting civilian job or investment income, the SCRA does not preclude Maryland from taxing that income.

(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*;

(2) be deemed to have acquired a residence or domicile in any other State; or

(3) be deemed to have become a resident in or a resident of any other State.

(b) Spouses. For the purposes of voting for any Federal office (as defined in section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. §431) or a State or local office, a person who is absent from a State because the person is accompanying the person's spouse who is absent from that same 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;

(2) be deemed to have acquired a residence or domicile in any other State; or

(3) be deemed to have become a resident in or a resident of any other State.”

50 U.S.C. App. 595 (emphasis supplied). I am proud to report that I drafted the italicized language and successfully lobbied for Congress to add this language as an amendment to the SSCRA in 2001.

Section 511 of the SCRA defines several terms that are used in this statute, including the term “military service.” The definition provides that for members of the Army, Navy, Air Force, Marine Corps, or Coast Guard the term “military service” means “active duty, as defined in section 101(d)(1) of title 10, United States Code.” 50 U.S.C. App. 511(2)(A)(i). Section 101(d)(1) of title 10 provides as follows:

“(1) The term ‘active duty’ means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. *Such term does not include full-time National Guard duty.*”

10 U.S.C. 101(d)(1) (emphasis supplied).

Your Air Force Reserve AGR duty clearly qualifies as “military service” for purposes of the SCRA. If you were performing AGR duty as a member of the Air National Guard or Army National Guard, this would be a much more difficult question.

I think that it is clear that you can maintain your Texas domicile while physically residing in Maryland and performing Air Force Reserve AGR duty at Andrews AFB, and that while you are doing this Maryland is precluded from taxing your military income.

You must not register or vote in Maryland if you want to maintain your claim of exemption from having to pay Maryland state income tax. Registering to vote or voting in Maryland is fundamentally inconsistent with your claim that you are domiciled in Texas and that you are

physically residing in Maryland only because your military duties require your presence in that state. See *Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (Maryland Court of Appeals 1973).

You cannot have it both ways. You cannot be a domiciliary of Texas for tax purposes, because Texas has no state income tax, and simultaneously be a domiciliary of Maryland for voting purposes.

Q: What about my wife? Currently, we live together with our two young children in the house we own in Houston. My wife has a great job, and she makes substantially more money than I make. We want to keep the family together, so she is quitting her great job to accompany me to Maryland for my three-year AGR tour at Andrews AFB.

I am sure that my wife will find a good job in the DC area, but perhaps not as great a job as the one she is giving up for me. If my wife works outside the home during my AGR tour, will Maryland be precluded from taxing her civilian salary?

A: Most likely. In 2009, Congress enacted the Military Spouse Residency Relief Act (MSRRA), amending the SCRA to try to provide some of the same benefits to military spouses. Divorce is a big problem in the military, and it contributes to a lot of other big problems, including depression, suicide, etc. We certainly favor public policies that promote the preservation rather than the break-up of military families.

As I explained in Law Review 0959 and other articles, the MSRRA is poorly drafted and does not accomplish its intended purpose for most military families, but I think that it works in the situation that you and your wife face. The two pertinent SCRA subsections are 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. App. 571(a)(2).

“Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the jurisdiction solely to be with the servicemember serving in compliance with military orders.”

50 U.S.C. App. 571(c).

Let us apply these two subsections to the situation that you and your wife face. You currently share the same domicile at the house you own and occupy in Houston. You are moving to Maryland solely for the purpose of complying with your military orders. She is moving to Maryland solely for the purpose of accompanying you as you comply with your military orders. Under these circumstances, your wife does not lose her Texas domicile or establish a Maryland domicile, and Maryland is precluded from taxing her income.

Your wife must maintain all of her incidents of domicile in Texas, not Maryland. She should continue to vote in Houston, by absentee ballot, and she must not register or vote in Maryland. It is likely that Maryland's tax authorities will try to challenge your wife's exemption from having to pay Maryland state income tax, so she needs to dot her is and cross her ts.

Q: I have a good friend at Ellington Field—let's call him Bob Williams. Bob is an Air Reserve Technician (ART), in the grade of Captain. Bob has applied for an ART position at Andrews AFB—a promotion opportunity. If Bob is offered and takes this promotion opportunity at Andrews, will he be able to maintain his Texas domicile? Will he be able to avoid paying Maryland state income tax while living in an apartment near Andrews AFB in order to serve there in an ART capacity?

A: No. An ART is a civilian employee, not a member of the armed forces on active duty. Yes, I understand that Bob routinely wears his Air Force uniform and observes military courtesies (saluting, etc.) while at work. Yes, I understand that Bob is required to maintain his membership in an Air Force Reserve unit as a condition of employment. Yes, I understand that Bob performs inactive duty training (drill weekends) and annual training with his unit, in a military capacity.

As an ART, Bob is a civilian employee. If he moves to Maryland to take a new ART position, he is not protected by the SCRA. Moving to Maryland will make him a Maryland domiciliary, and he will be required to pay Maryland state income tax, just like other Maryland domiciliaries.

Update – March 2022⁸

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, 2015.⁹ 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 sections cited throughout the article can be found at:

⁸Update by Second Lieutenant Lauren Walker, USMC.

⁹*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).

50 U.S.C. App. § 511 discussing the definitions can be found at 50 U.S.C. § 3911.

50 U.S.C. App. § 571 discussing residence for tax purposes found at 50 U.S.C. § 4001.

50 U.S.C. App. § 595 discussing the guarantee of residency for military personnel and spouses of military personnel can be found at 50 U.S.C. § 4025.

On December 20, 2019, President Trump signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2020. Section 1739 of NDAA amended 50 U.S.C. § 4025 of the SCRA by adding the following provision:

For the purpose of establishing the residency of a spouse of a servicemember for any purpose (including the registration of a business), the spouse of a servicemember may elect to use the same residence as the servicemember regardless of the date on which the marriage of the spouse and the servicemember occurred.

The amendment does not change how the SCRA applies to this article.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.¹⁰

Please join or support ROA

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.

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.

¹⁰Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

If you are now serving or have ever served in any one of our nation's eight¹¹ 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
1 Constitution Ave. NE
Washington, DC 20002

¹¹Congress recently established the United States Space Force as the 8th uniformed service.