

**LAW REVIEW<sup>1</sup> 13158**  
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## **Why Are Service Members Treated Differently**

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**Q: Why is it necessary to have different legal and financial rules for military? Why can't the rule that apply to all of us apply equally to those who serve on active duty in the military?**

**A:** In April 1917 the United States entered World War 1. Millions of “doughboys” (and a few thousand “doughgirls”) entered active military service, by draft, by voluntary enlistment, or by

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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 2300 “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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup>Update by Second Lieutenant Lauren Walker, USCM.

<sup>3</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 44 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 38 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).

call-up from nascent Army National Guard, Army Reserve, Naval Reserve, and Marine Corps Reserve. While in boot camp and then on the front lines in France, they could not attend to civilian matters back home.

In 1917, John Henry Wigmore was the Dean of the Northwestern University School of Law and already a distinguished legal scholar—the first edition of Wigmore on Evidence was published in 1905.<sup>4</sup> He volunteered to come on active duty as a Major in the Army’s Judge Advocate Department.<sup>5</sup> In a matter of days, he drafted the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), and Congress quickly enacted his handiwork.<sup>6</sup>

The original SSCRA applied during the period of the national emergency that began when the United States entered World War I and ended in 1919.<sup>7</sup> In 1940, as the United States contemplated the possibility of entering World War II, Congress enacted a new SSCRA that was almost identical to the first one.<sup>8</sup> After World War II, when it became clear that our country would need a large military establishment in peacetime as well as wartime, Congress made the SSCRA permanent.<sup>9</sup>

The SSCRA served our nation well through two world wars, the Korean War, the Vietnam War, and the long Cold War, but by the time the 1990-91 Persian Gulf War, when Reserve Component (PC) personnel were involuntarily called to active duty in significant numbers for the first time since the Korean War, the law was showing its age and needed updating.<sup>10</sup> Situations that Major Wigmore could not have anticipated in 1917 (like leasing an automobile instead of buying it) necessitated changes in the law.

Through the 1990s, the judge advocates of the five-armed forces (Army, Navy, Marine Corps, Air Force, and Coast Guard) came up with proposals to improve upon the SSCRA. Finally, in December 2003 Congress enacted their handiwork and the new law is called the Servicemembers Civil Relief Act (SCRA).<sup>11</sup> The SCRA is codified in 50 U.S.C. §§ 3901-4043.

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<sup>4</sup>John Henry Wigmore, WE’LL SEE THEM THROUGH, NORTHWESTERN PRITZKER SCHOOL OF LAW IN THE WORLD WAR I ERA, <https://sites.northwestern.edu/plrcwwi/john-henry-wigmore/> (last visited Mar. 10, 2022).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>Roy L. Kaufmann, *What is the History of the Servicemembers Civil Relief Act?*, SERVICEMEMBERS CIVIL RELIEF ACT CENTRALIZED VERIFICATION SERVICE, <https://www.servicememberscivilreliefact.com/blog/what-is-history-of-servicemembers-civil-relief-act/> (last visited Mar. 10, 2022).

<sup>8</sup>*See id.*

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

<sup>10</sup>*See* CONGRESSIONAL RESEARCH SERVICE, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS 7 (updated Nov. 2, 2021); *The Korean war saw more than 240,000 Army Reserve Soldiers called to active duty, reflecting the Army’s reliance on the reserve component*, U.S. ARMY RESERVE, <https://www.usar.army.mil/OurHistory/KoreanWar/> (last visited Mar. 10, 2022); *Air Force Reserve and Air National Guard*, NATIONAL MUSEUM OF THE UNITED STATES AIR FORCE, <https://www.nationalmuseum.af.mil/Visit/Museum-Exhibits/Fact-Sheets/Display/Article/195889/air-force-reserve-and-air-national-guard-in-korea/> (last visited Mar. 10, 2022).

<sup>11</sup>*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).

To answer why the rules are different for active-duty service members, let us first examine the ways that the rules are different.

### **Right to a continuance and default judgment protection**

I have sued Joe Smith, on behalf of a client, and Joe has not filed an answer or otherwise acknowledged the lawsuit. The 60-day period for Joe to file an answer has come and gone, and no answer has been filed. Now, I can move for a default judgment, for the full amount I sought in my complaint. Normally, I will get such a default judgment. Joe has waived his right to deny liability or to offer a defense, because he failed to file an answer within the limited time permitted by law.

But what if Joe is on active duty and serving in Afghanistan? Joe may be unaware that I have filed this lawsuit. *Because of his service to our country*, Joe has been unable to retain a lawyer and file an answer.

Before I can get a default judgment against any defendant, military or not, I must first file an affidavit (statement under oath) with the court, stating that the defendant is or is not a member of the armed forces on active duty, and in my affidavit, I must set forth the necessary facts to show the basis for my statement.<sup>12</sup> Filing or using a false affidavit (i.e., claiming that Joe Smith is not on active duty when in fact he is) is a crime punishable by up to a year in jail.<sup>13</sup>

I do not believe Joe Smith is on active duty. However, before I swear under oath that he is not, and risk jail time, it certainly behooves me to check.<sup>14</sup> The Service Members Civil Relief Act Website allows me to see if a named individual is or was on active duty at a specific date. All that is needed is the individual's Social Security number, date of birth, and last name.

The Service Members Civil Relief Act Website also has a *free* online service for looking up multiple people or multiple dates for one person all at the same time. To use this service an account must first be created.<sup>15</sup> If one plans on using this service several times, it is worthwhile to get an account.

Some of the "robo signing" mess has involved false statements about the military status, or lack of military status, of the delinquent homeowners who are being foreclosed upon. If I sign an affidavit averring that a particular named individual is not a member of the armed forces on active duty, I will be right about 99 percent of the time, but what about the other one percent? Before I (as an attorney) sign or use such an affidavit, I have an affirmative duty to check.

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<sup>12</sup>50 U.S.C § 3931(b).

<sup>13</sup>50 U.S.C. § 3931(c).

<sup>14</sup>The Service Members Civil Relief Act Website provides a free online service to look up if someone is on active duty for purposes of the SCRA. *Welcome to SCRA*, SERVICEMEMBERS CIVIL RELIEF ACT (SCRA) WEBSITE, <https://scra-w.dmdc.osd.mil/scra/#/home> (last visited Mar. 10, 2022).

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

Otherwise, there is a risk of jail time if I claim that the individual is not in the military without having checked.

If Joe Smith is on active duty, he is entitled to a continuance of at least 90 days, as a matter of right.<sup>16</sup> Continuances beyond the initial 90 days are in the discretion of the court. If Joe's commanding officer (CO) has stated in writing, under oath, that Joe is serving in Afghanistan and (because of military necessity) cannot be granted leave and cannot be permitted to travel to the place of trial, additional continuances should be granted.

This provision was not intended to give and should not be construed to give Joe Smith the opportunity to keep the plaintiff waiting indefinitely, while Joe completes a 20-year active duty career in another 15 years. At some point, within a matter of months rather than years, Joe's assignment to Afghanistan will be over and military necessity no longer makes it impossible for him to appear and defend in the civil proceeding back home.

Since 1917, the SSCRA has given service members on active duty this protection in civil proceedings in federal court and state court. The enactment of the SCRA in 2003 expanded this principle to make it apply also to federal, state, and local administrative proceedings, as well as judicial proceedings. Major Wigmore could not have anticipated, almost a century ago, the modern administrative state, where important questions are often decided in administrative rather than judicial proceedings.

The world has changed a great deal since 1917, but as always U.S. military personnel are being deployed around the world and on ships at sea for months at a time. Administrative and judicial proceedings back home will have to wait a few weeks or months, until the service member has completed the overseas assignment and until military necessity no longer precludes the individual service member from giving his or her side of the story in the proceeding.

#### **Reduction of interest rate to 6 percent on financial obligations incurred before entry on active duty**

Bob Jones has a great civilian job, making \$150,000 per year. In the Army Reserve, Bob is an E-4 (junior enlisted). Although Bob makes a lot of money, he spends more. Bob missed some payments on his credit card, and the interest rate has gone up to 29 percent, a punitive rate.

Now, Bob has been called to active duty as an E-4, and his income has been diminished by almost 50 percent, so his financial situation has gone from bad to worse.

Under these circumstances, Bob can certainly say in good faith that his entry on active duty has materially (adversely) affected his ability to meet his financial obligations.<sup>17</sup> Bob is entitled to

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<sup>16</sup>50 U.S.C. § 3931(d).

<sup>17</sup>50 U.S.C. § 3937.

have the interest rate on his pre-service financial obligations (including this credit card balance with the 29 percent punitive interest rate) reduced to 6 percent during Bob's active duty.<sup>18</sup>

Any payments that Bob makes while on active duty must be applied to principal and interest at the 6 percent rate mandated by the SCRA, not the 29 percent contract rate. The difference is forgiven, not just deferred. It would make good sense for Bob to pay as much as he can during his active-duty time, in order to take advantage of the much lower interest rate. If there is a balance remaining when Bob leaves active duty, the interest rate goes back up to the 29 percent contract rate, but only on the remaining balance.

### **Determination of domicile for voting and taxation purposes**

Every human being has one and only one domicile, even if it is a legal fiction. For a civilian (a person who is not presently on active duty), the place where the individual usually sleeps is her or her domicile. When Alice Adams, a civilian, moves from Texas (a state with no state income tax) to Hawaii (a state with a high state income tax), she becomes a Hawaiian on the very day that she moves into a new house or apartment in Hawaii. As of that day, she is eligible to vote in Hawaii and no longer eligible to vote in Texas, and she must pay Hawaii state income tax as of the move-in date.

Brenda Barnes joined the Air Force and has been stationed in Hawaii. Of necessity, she must buy a house or rent an apartment in Hawaii—she cannot commute to her Hawaii duty station from the mainland. As an active-duty service member, Brenda is exempted, under the SCRA, from the domicile-determination rules that apply to everyone else.<sup>19</sup>

Under title 50 U.S.C. § 4025, Brenda does not lose her Texas domicile or gain a Hawaii domicile by virtue of having bought a house or rented an apartment in Hawaii in order to comply with her military orders. Hawaii is precluded, by the SCRA, from taxing Brenda's military income or her personal property (like an automobile) unless Brenda becomes a Hawaii domiciliary and moving to Hawaii to live near her military assignment does not make Brenda a Hawaii domiciliary.<sup>20</sup>

Why is Brenda treated differently from Alice? As a member of the armed forces on active duty, Brenda does not choose where to live—she must go where assigned by the Air Force. Failure to go to appointed place of duty is a crime (unauthorized absence) under the Uniform Code of Military Justice (UCMJ).

Perhaps Alice was transferred from Texas to Hawaii by her civilian employer—but unlike Brenda Alice can quit her job. Brenda cannot quit the Air Force, at least not until the end of her current enlistment or period of obligated service.

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<sup>18</sup>*Id.*

<sup>19</sup>*Id.* § 4025.

<sup>20</sup>*Id.*

## **Terminating leases of premises and vehicles and cell phone contracts**

Under the SSCRA, since 1917, a person entering active duty (whether by draft, by voluntary enlistment, or by voluntary or involuntary call-up from the National Guard or Reserve) has had the right to terminate a lease of premises—an apartment, a house, an office, a farm, etc. With the enactment of the SCRA in 2003, this principle was expanded to include vehicle leases as well.<sup>21</sup> When Major Wigmore drafted the SSCRA in 1917 a brand-new Model T only cost \$250, and the idea of leasing a vehicle instead of buying it was never considered. Additionally, a person entering active duty has the right to terminate a telephone service contract, including a cell phone contract.<sup>22</sup>

Conrad Cox, a recent college graduate with an excellent job on Wall Street, is entering active duty and reporting to Officer Candidate School (OCS) in January. He is enlisting because he wants to serve our country, and he realizes that he will be making a huge financial sacrifice. He is a bachelor with no children. He no longer needs and cannot afford that luxury apartment in Manhattan where he currently resides. He also does not need and can no longer afford the Mercedes Benz that he is leasing. His cell phone will be nothing but a distraction while he is at OCS. Under the SCRA, he has the right to shuck these things that he no longer needs and cannot afford *because he has chosen to serve our country.*<sup>23</sup>

I certainly think that these provisions are reasonable and defensible. Yes, this puts a burden on the landlord, the Mercedes Benz dealer, and the cell phone company, but this is a small accommodation to make for those who serve our country in uniform.

Yes, in some important respects the SCRA establishes rules for active-duty service members that are different from the rules that apply to civilians (persons who are not currently on active duty). In each of these respects, the differences are reasonable and necessary.

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

This article is one of 2,300-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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.

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<sup>21</sup>*Id.* § 3955(b)(2)

<sup>22</sup>*Id.* § 3965

<sup>23</sup>See *Id.* §§ 3955, 3965.

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 eight<sup>24</sup> 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](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:

Reserve Organization of America  
1 Constitution Ave. NE

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<sup>24</sup>Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.