

LAW REVIEW¹ 16048

June 2016

Where and How Does the Service Member Vote

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

[About Sam Wright](#)

4.5—SCRA Protection from State/Local Tax Authorities

7.2—Service Member or Military Spouse Voting and Domicile

7.4—How a Service Member or Military Spouse Can Vote

Where should I vote?

Q: I have read with great interest your Law Review 16045 (May 2016), concerning military voting rights. As an active duty Air Force officer, I am most pleased to learn of the efforts that you and others have made and are making to ensure that absentee ballots go out on time so that service members like me will have the opportunity to vote, no matter where the service of our country has taken them.

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. I am the author of more than 1800 of the articles.

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.

I am a Captain, and I currently serve at Offutt Air Force Base (AFB) in Nebraska. Although I have been eligible to vote for ten years, I have never registered to vote or voted. I want start now. How do I do that? Should I register to vote here in Nebraska and vote on Election Day? Or should I vote by absentee ballot back home in Houston?

I was born in Houston in 1988 and graduated from high school there in 2006. I then reported to the United States Air Force Academy (USAFA). I graduated four years later and was commissioned a Second Lieutenant. Because I lived in Texas when I joined the Air Force in 2006, and because Texas has no state income tax, I have not been paying state income tax during the four years that I was at the USAFA and the six years that I have been a commissioned officer on active duty.

A: You can establish your domicile (legal residence) in Nebraska and register to vote there, but you almost certainly do not want to do that, because Nebraska has a state income tax and personal property tax and Texas has no such taxes.

Like any American citizen of voting age, you are eligible to vote only at the place that constitutes your domicile (legal residence). You have one and only one domicile, for all legal purposes. You cannot be a Texan for state income tax purposes and a Nebraskan for voting purposes. If you register to vote in Nebraska, you will thereby become a Nebraskan, and you will then be required to pay Nebraska state income tax and personal property tax. If you are a Texan, and if you have a physical residence in Nebraska only because your military duties require that you sleep at the place that is within a reasonable commuting distance of your military assignment, Nebraska is precluded from taxing your military income and your personal property (vehicle, household furniture, etc.), under a federal statute called the Servicemembers Civil Relief Act (Act).

For a civilian,³ the place where he or she usually sleeps is his or her domicile, and the domicile changes immediately upon moving, unless the move is for a temporary purpose measured in weeks or months. For example, Joe Smith works for Big Oil Company (BOC), at its headquarters in Houston. BOC transfers Smith to its new regional office in Omaha, Nebraska, and Smith buys a house or rents an apartment in Omaha to be near his new workplace. On the very day that Smith moves into the new house or apartment, he becomes a Nebraskan rather than a Texan. From that first day, Smith must pay Nebraska state income tax and personal property tax. Smith is eligible to register to vote in Nebraska on the very day that he moves into that new house or apartment, and he will be eligible to vote 30 days after he registers. Smith loses his right to vote in Texas on the very day that he moves into the new house or apartment in Nebraska.

Your situation is different, because you are on active duty in the Air Force. Renting an apartment or even buying a house in Nebraska, within reasonable commuting distance of your

³For this purpose, a civilian is a person who is not presently on active duty in one of our country's seven uniformed services (Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service commissioned corps, or National Oceanic & Atmospheric Administration commissioned corps). A military reservist or retiree who is not presently active duty is considered to be a civilian for this purpose.

Offutt AFB assignment, does not automatically cause you to lose your Texas domicile or to become a domiciliary of Nebraska. Why are you treated differently from Joe Smith? You are treated differently because military service is fundamentally more than and different from holding a civilian job. BOC cannot make Joe move to Nebraska. If he refuses to move, he will probably lose his job, but refusing to move is not a crime. If you fail or refuse to report to your new duty station at Offutt AFB, you are guilty of the military criminal offense of “unauthorized absence.”

The SCRA provides:

For the purposes of voting for any Federal office ... 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—

- (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 resident of any other State.⁴

The SCRA precludes Nebraska from charging you state income tax or personal property tax, so long as you are present in Nebraska only because your military duties require your presence there, and only so long as you do not register to vote or vote in Nebraska. If you register or vote in Nebraska, you thereby become a Nebraskan, and you will then be required to pay Nebraska state income tax and personal property tax, just like any other Nebraskan.

The SCRA provides:

A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property,⁵ 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.⁶

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 of the jurisdiction in which the servicemember is serving in compliance with military orders.⁷

Federal law (the SCRA) precludes Nebraska from taxing your military income and your personal property (especially your vehicle) so long as you are in Nebraska *solely* in compliance with your Air Force orders and so long as you do not establish a domicile in Nebraska. You are not eligible to register to vote or vote in Nebraska unless you are a Nebraska domiciliary. If you register to vote or vote in Nebraska, you are thereby representing yourself to be a Nebraska domiciliary,

⁴50 U.S.C. § 4025(a). The citation refers to subsection 9a) of section 4025 of title 50 of the United States Code.

⁵Personal property is moveable property, including vehicles, furniture, and household goods. If you own real property (like land or a building), you will be taxed on that property by the jurisdiction where the property is located, without regard to where you are domiciled.

⁶50 U.S.C. § 4001(a) (emphasis supplied).

⁷50 U.S.C. § 4001(b).

and you are stuck with that representation. Maryland's high court has held: "Evidence that a person registered to vote or voted is admissible and ordinarily persuasive when the question of domicile is at issue."⁸

In 1992, Captain Albert Veldhuyzen (an Army judge advocate) and I wrote an article about domicile for voting and tax purposes, and our article was published in *The Army Lawyer* two months before the 1992 presidential election. Shortly after the 1992 election, I received a frantic call from an Air Force legal assistance attorney at Offutt AFB, an attorney who had clients waiting in his waiting room, frantic about tax notices received from the State of Nebraska and the county that includes Offutt.

A Voting Assistance Officer (VAO) at Offutt had zeal that exceeded his judgment. Instead of distributing Federal Post Card Application (FPCA) forms and assisting service members in completing those forms and sending them to home town local election officials all over the country, this VAO had the "bright idea" to distribute Nebraska voter registration forms. Relying on the VAO's ignorant advice, several hundred Air Force personnel registered to vote in Nebraska and voted in person on Election Day. The county tax assessor then compared the voter registration list with the list of persons claiming exemption from the personal property tax on their vehicles, based on being "non-residents" in Nebraska solely pursuant to military orders, and the assessor then sent tax bills to all of these "non-residents" who had registered to vote in Nebraska. This was a big problem for which there was no solution. Ignorance of the law is no excuse.

The lesson here is that (like any human) you have one and only one domicile, and you must be consistent in making claims about that domicile. You cannot have it both ways. You cannot be domiciled in Texas for tax purposes but in Nebraska for voting purposes. You are either a Texan or a Nebraskan.

A service member on active duty starts out with his or her *domicile of origin*. That is the place where he or she lived and was domiciled immediately before entering active duty. It is possible for a service member to maintain the domicile of origin for an entire active duty career of 20 years or more. You will likely want to maintain your Texas domicile, because Texas is one of a handful of states with no state income tax.⁹

It is possible for a service member to establish a new domicile while on active duty. To do so, the member must *simultaneously* have a physical presence in the state to which he or she wishes to establish a domicile and the intent to make that place home. Neither intent alone nor physical presence or absence alone is sufficient to establish a new domicile or to destroy a pre-existing domicile.

⁸*Comptroller of the Treasury v. Lenderking*, 303 A.2d 402, 405 (Md. 1976). See also *Sunglove v. Okla. Tax Comm'n*, 605 P.2d 1315 (Okla. 1979).

⁹Nine states have no income tax: Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming.

For example, Mary Jones was born and raised in Boston and graduated from high school there in 2012. Shortly thereafter, she joined the Army and reported to basic training. She has remained on active duty and she recently reported to her new duty station at Fort Hood in Texas. For the four years that she has been on active duty, Mary has been paying Massachusetts (also known as “Taxachusetts”) state income tax. Mary now has the opportunity to get out from under the obligation to pay Massachusetts state income tax, by changing her domicile to Texas. She has a physical presence in Texas for a significant time—her orders to Fort Hood are expected to last for three years. By establishing the intent to make Texas home, while she is stationed there, she can change her domicile from Massachusetts to Texas. Registering to vote and voting in Texas is a powerful way for her to show her intent to make Texas her new domicile.

Let us assume that Mary decides to remain on active duty for a career of 20 years or more. In 2019, she completes her three-year tour of duty at Fort Hood and transfers to Fort Bragg in North Carolina, a state that has a state income tax. Having made a *bona fide* change of her domicile from Massachusetts to Texas, Mary is entitled to maintain her Texas domicile while she is stationed in North Carolina and for the remainder of the time that she is on active duty. A domicile of choice is entitled to the same permanence as a domicile of origin.

Please understand that a comparison of state tax rates and policies is not the only issue that you will want to consider when deciding whether to change or maintain your domicile. For example, if you plan to leave active duty and return to your home state, and if you plan to attend college at a public university and want to be eligible for the “in state” tuition rate, it may be worthwhile for you to keep your domicile in that state, and keep paying state income tax to that state, in order to maintain your eligibility for the “in state” tuition rate.

If you are uncertain as to where you are domiciled, you should make an appointment to consult with a military *legal assistance attorney* to discuss this matter in detail and get legal advice. Do not rely on “bum scoop” that you may hear from “sea lawyers” in your unit.

Go to <https://legalassistance.law.af.mil/>. This website includes military legal assistance offices run by all five armed forces, including the Coast Guard. The locator will show the location and telephone number for a nearby military legal assistance office. You are eligible for military legal assistance at any military legal assistance office—you are not limited to an office run by your own service. You need to call and make an appointment to go in person. Military legal assistance attorneys will not give legal advice by telephone.

You need to make an appointment with a *legal assistance attorney*, not just any judge advocate (military lawyer). Most judge advocates serve as prosecutors or defense counsel in courts martial or advise commanders about legal matters or represent the service with respect to claims or other legal matters. Legal assistance attorneys have the specific responsibility of advising service members and their families about civilian legal issues.

Q: When I was born in 1988, my family lived in a house, and I continued to live there with my family through 2006, when I graduated from high school and reported to the Air Force Academy. In 2009, while I was still a cadet at the Academy, my parents divorced and sold the house. My father now lives in California and my mother in New York. Where is my domicile?

A: Your domicile is the place where *you lived* and were domiciled for the first 18 years of your life and until you left to report to the Air Force Academy in 2006. It does not matter that you have no relatives living at that house and that you cannot receive mail at that address. You can maintain your domicile at that address until you establish a new domicile elsewhere or until you leave active duty, whichever comes first. Even if the house at that address is torn down to make way for a new highway, that address does not cease to be your domicile.

How should I vote?

Q: Thank you for your explanation of the domicile issue. Now, I understand that it is better that I vote by absentee ballot, at home in Houston, rather than registering to vote and voting in person on Election Day, in Nebraska. How do I go about voting by absentee ballot in Houston?

A: You need to complete a Federal Post Card Application (FPCA)¹⁰ and send it to your local election official (LEO), the County Clerk of Harris County, Texas. The FPCA requires you to provide two addresses—your “permanent home address” and your “mail my ballot to” address. In your case, your permanent home address is the place where you lived with your parents at the time you left to report to the Air Force Academy in 2006, even though your parents now live elsewhere.

It is still possible to obtain a paper FPCA from the Voting Assistance Officer of your military unit and to complete the form pen-on-paper and mail it to your election official back home. In the second decade of the 21st Century, a much better way is to go to:
<https://www.overseasvotefoundation.org/vote/home.htm>.

This website is operated by the Overseas Vote Foundation (OVF). You can use a “wizard” that will help you complete the FPCA in a way that is complete, correct, and legible, and you can probably submit your completed FPCA by instantaneous electronic means. You may be able to receive your unmarked absentee ballot by electronic means. You will probably need to return your marked ballot to the election official by postal mail.

After you mark your ballot for your preferred candidates, you place that marked ballot in an unmarked “inner envelope,” and then you seal that inner envelope and place it in the outer

¹⁰This form is misnamed. The current version, since 2003, folds over into a sealed envelope. You will not be asked to put personal information on a postcard.

envelope, which is addressed to the election official back home. Be sure to complete and sign the affidavit on the back of the outer envelope. You mail the ballot back to the election official.

The purpose of the double envelope system is to protect the secrecy of your ballot. The canvassing board will review your outer envelope without opening it, along with all the other outer envelopes, and will make determinations about identity and eligibility before opening the envelopes. The ballots that are to be counted are then removed from the outer envelopes, and the opened outer envelopes are removed from the room. When the inner envelopes are opened and the ballots are counted, there is no way to match up a ballot with a specific voter, and ballot secrecy is preserved.

Please join or support ROA

This article is one of 2000-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 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, 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 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 Officers Association 1 Constitution Ave. NE Washington, DC 20002