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The SCRA Protects the Active Duty Service Member from having to Pay Income Tax, but only under Certain Circumstances

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[About Sam Wright](#)

4.5—SCRA protection from state and local tax authorities

7.2—Service member or military spouse voting and domicile

Q: I am a Lieutenant Commander in the Coast Guard Reserve and a member of the Reserve Officers Association (ROA). I have read with great interest some of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA).

I was born and raised in Miami, Florida. In 2002, I graduated from high school and almost immediately reported to the United States Coast Guard Academy in New London, Connecticut. In 2006, I graduated and was commissioned an Ensign. I remained on active duty

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.

for eight years. In 2014, I left active duty and affiliated with the Coast Guard Reserve, and I returned home to Miami.

In January 2015, several months after I had left active duty,³ I moved to Honolulu to take a new civilian job. The new job came with a substantially higher rate of pay than I had been earning in Miami, but the advantage of the higher pay is largely negated by the high cost of living in Hawaii and the high Hawaii state income tax. I have never had to pay state income tax before, either while on active duty at the Academy and as a junior officer serving in three different states, or in the months after I left active duty and returned home to Miami.

In January 2016, after I had been living in Honolulu for a year, I returned to active duty for one year, and I am currently serving in Hawaii, at a Coast Guard station. The other Coast Guard personnel serving at the station are not required to pay Hawaii state income tax, but I have to pay this tax. I asked a Coast Guard judge advocate (lawyer), and he told me that a federal law called the Servicemembers Civil Relief Act (SCRA) precludes Hawaii from taxing the military incomes of the other personnel at the station, but that the SCRA does not protect me from having to pay Hawaii state income tax. Why am I treated differently? Why do I have to pay state income tax, while these other personnel are exempt? Is this an example of discrimination against Reserve Component (RC) personnel?

A: Congress enacted the SCRA and President George W. Bush signed it into law in 2003, as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which goes back to 1917. Like the SSCRA, the SCRA was codified in the "Appendix" of title 50 of the United States Code until 2015, when the codifiers of the United States Code eliminated this confusing and cumbersome "Appendix." The SCRA is now codified in title 50 at sections 3901 and following.⁴ The pertinent SCRA section is as follows

- a) Residence or domicile.
 - (1) *In general. 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.*
 - (2) Spouses. 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.

³The nine states are Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming.

⁴50 U.S.C. §§ 3901 et seq.

- (b) Military service compensation. *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.
- (c) Income of a military spouse. 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.
- (d) Personal property.
 - (1) Relief from personal property taxes. The personal property of a servicemember or the spouse of a servicemember shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the servicemember is serving in compliance with military orders.
 - (2) Exception for property within member's domicile or residence. This subsection applies to personal property or its use within any tax jurisdiction other than the servicemember's or the spouse's domicile or residence.
 - (3) Exception for property used in trade or business. This section does not prevent taxation by a tax jurisdiction with respect to personal property used in or arising from a trade or business, if it has jurisdiction.
 - (4) Relationship to law of state of domicile. Eligibility for relief from personal property taxes under this subsection is not contingent on whether or not such taxes are paid to the State of domicile.
- (e) Increase of tax liability. A tax jurisdiction may not use the military compensation of a nonresident servicemember to increase the tax liability imposed on other income earned by the nonresident servicemember or spouse subject to tax by the jurisdiction.
- (f) Federal Indian reservations. An Indian servicemember whose legal residence or domicile is a Federal Indian reservation shall be taxed by the laws applicable to Federal Indian reservations and not the State where the reservation is located.
- (g) Definitions. For purposes of this section:
 - (1) Personal property. The term "personal property" means intangible and tangible property (including motor vehicles).
 - (2) Taxation. The term "taxation" includes licenses, fees, or excises imposed with respect to motor vehicles and their use, if the license, fee, or excise is paid by the servicemember in the servicemember's State of domicile or residence.
 - (3) Tax jurisdiction. The term "tax jurisdiction" means a State or a political subdivision of a State.⁵

⁵50 U.S.C. § 4001 (emphasis supplied).

Section 4001 means that the *active duty* service member cannot be required to pay state income tax on his or her military income to the state where he or she *physically resides but is not domiciled*. Your Coast Guard colleagues at the Hawaii Coast Guard station are not domiciled in Hawaii—they have physical residences in Hawaii only because their military duties require their presence in Hawaii. Lieutenant Smith cannot commute to the Coast Guard station from his home in Florida or any one of the other 49 states. In order to perform his duties in Hawaii, he must rent an apartment or buy a house in Hawaii, but doing that does not make him a Hawaiian for taxation and voting purposes or other legal purposes.

Every human being has one and only one *domicile* or other legal residence. For a civilian (a person who is not presently on active duty), the domicile is where the person usually sleeps, but owning more than one home does not give the person more than one domicile. Daddy Warbucks can afford to buy and furnish 365 houses and to sleep each night of the year in a different house, but he still has only one domicile, and he is only entitled to vote once in an election.

Service members are not exempt from the rule of having one and only one domicile, but under section 4001 they are subject to different rules about the *determination* of that domicile. Moving from State A to State B pursuant to military orders while on active duty does not cause the service member to become a domiciliary of State B or to lose his or her domicile in State A. Military personnel are treated differently from civilians because the service member does not get to choose where he or she will serve. If Lieutenant Commander Jones is transferred from a Coast Guard station in Florida to a Coast Guard station in Hawaii, she must report to Hawaii as ordered, and that means that she will need to find living quarters in Hawaii. If she fails to go to her new appointed place of duty, she is guilty of the military criminal offense of “unauthorized absence.”

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

To understand how these rules apply in practice, let us consider a series of realistic but hypothetical examples.

Alice Adams moved to Hawaii in 2007 with her family, and she was in seventh grade at the time. In 2012, she graduated from high school in Honolulu and joined the Army, reporting to basic training in September 2012. She is still on active duty.

Alice is domiciled in Hawaii, because she lived in Hawaii when she entered active duty in 2012, unless she has established a bona fide domicile in some other state, by simultaneously having a physical presence in that state for a significant time and the intent to make that state home. So

long as Alice is domiciled in Hawaii, she must pay Hawaii state income tax, regardless of whether she is serving in Hawaii, or in one of the other 49 states, or overseas.

Bob Barnes graduated from high school in Houston, Texas in 2008 and shortly thereafter reported to the United States Naval Academy (Annapolis, Maryland) for plebe summer. In 2012, he graduated and was commissioned an Ensign. He is currently serving on active duty at Pacific Fleet headquarters in Hawaii. He has carefully maintained his domicile in Texas, because Texas has no state income tax. Under the SCRA, Hawaii is precluded from taxing Bob's Navy income.

In 2014, shortly after he was transferred to Hawaii by the Navy, Bob met and fell in love with Lani Koolloni, an attorney in Honolulu who was born and raised and has lived her whole life in Hawaii. They married in late 2015, and they live together in the same house or apartment in Honolulu, but they are domiciled in different states. Lani is domiciled in Hawaii—marrying a Texan did not make her a Texan. Bob has maintained his domicile in Texas, as authorized by the SCRA.

In 2016, Lani is a candidate for the Hawaii House of Representatives and is in a tight race. She persuaded Bob to register to vote in Hawaii so that he can vote for her. By registering to vote in Hawaii, Bob has forfeited his SCRA protection from having to pay Hawaii state income tax. Bob cannot simultaneously be a Texan for state income tax purposes and a Hawaiian for voting purposes.⁶

Charlene Cox is a Major in the Army Reserve and lives in Honolulu with her husband and two small children, and she has a civilian job in Honolulu. She voluntarily returns to active duty for one year⁷ and she serves that year at Fort Hood, in Texas. Immediately upon her arrival at Fort Hood, she claims that it is her intent to make Texas home, and she registers to vote in Texas, using as her address the temporary quarters where she sleeps, on or near Fort Hood. She seeks thereby to avoid having to pay Hawaii state income tax on her Army salary during her year of active duty.

Although Charlene claims to have the intent to make Texas home, her claim is effectively rebutted by objective facts. She has a house, a spouse, two small children, and a civilian job in Honolulu, and these facts demonstrate that she will return to Hawaii at the end of her active duty assignment. She must pay Hawaii state income tax on her Army income during her year of active duty. Moreover, her Texas voter registration is illegal. She is not domiciled in Texas, so she has no right to vote there.

David Davis graduated from high school in Hawaii in 2001 and joined the Air Force soon thereafter, and he is still on active duty. He was stationed at MacDill Air Force Base in Tampa, Florida for three years, from 2005 to 2008. While stationed at MacDill, he made a bona fide

⁶Maryland's high court held, "Evidence that a person registered or voted is admissible and ordinarily persuasive when the question of domicile is at issue." *Comptroller of the Treasury v. Lenderking*, 303 A.2d 402, 405 (Md. 1971). See also *Sunglove v. Okla. Tax Comm'n*, 605 P.2d 1315 (Okla. 1979).

⁷The result would not be different if she had been recalled to active duty involuntarily.

change of his domicile from Hawaii to Florida. He registered to vote in Tampa and voted there in person in November 2006 and November 2008. In December 2008, he was transferred by the Air Force to Edwards Air Force Base in California, and while serving there he maintained his domicile in Tampa, Florida. He has voted by absentee ballot in Tampa in 2010, 2012, and 2014, and he plans to continue voting there until he leaves active duty by retirement in 2021 or thereafter.

In January 2016, the Air Force transferred David to an installation in Hawaii, and he has purchased a house in Hawaii, near his duty station. Although David lived in Hawaii for the first 18 years of his life and was domiciled in the state when he enlisted in 2001 and for the first years of his active duty service, he has made a bona fide change of his domicile from Hawaii to Florida. Under the SCRA, Hawaii is precluded from taxing his military income, even when he is serving in Hawaii and physically resides there.

Earnestine Evans is an active duty Navy physician, currently serving in Hawaii. She is domiciled in Nevada. Thus, Hawaii is precluded from imposing its state income tax on her Navy income.

In addition to her Navy income, Earnestine also earns substantial “moonlighting” income working as a physician in a civilian hospital on weekends. She also owns an apartment building in Hawaii, and she earns substantial income renting out the apartments. The SCRA only protects Earnestine from having to pay Hawaii state income tax on her military income. Hawaii is not precluded from taxing her moonlighting income at the civilian hospital and her rental income. Moreover, Hawaii can and will impose its property tax on her *real* property—the apartment building and the land it sits on. The SCRA protects her from having to pay property tax on *personal* (moveable) property, like her vehicle, her furniture, and her household goods, as well as intangible personal property like a copyright or patent. The owner of real property (land, buildings) must pay property tax on the real property regardless of where he or she is domiciled and regardless of his or her military status.

The underlying point here is that you have one and only one domicile, whether you are on active duty or not. At certain points in your career, you may have the opportunity to change your domicile, but *this is not a matter of pick a state any state*. You need to know which state is your domicile, and you need to maintain all your incidents of domicile (where you vote, where you pay state income tax, where you have a driver’s license, etc.) in that one state. Do not give multiple states the opportunity to assert that you owe them state income tax.

If you are uncertain about your domicile, you need to make an appointment and visit with a *military legal assistance attorney*—not just any judge advocate, but a military legal assistance attorney, an attorney (military or civilian) who has the training and the responsibility to advise service members and military family members. 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.

For a discussion of the domicile, eligibility to vote, and state income tax liability of military spouses, please see Law Review 0959 (August 2009), Law Review 1142 (May 2011), and Law Review 13003 (January 2013).

Update – April 2022

On December 21, 2018, President Trump signed into law the Veterans benefit and Transition Act of 2018.⁸ 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.⁹ 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 Bob and his wife Lani Koolloni. Lani may change her domicile to Houston Texas, to match her husband's, even though she has never lived in Houston. Lani may change her domicile to Houston simply because that is where Bob is domiciled. This would likely be beneficial for her because if she changes her domicile to Houston, she will avoid paying the high Hawaii state income tax. If Lani decides to change her domicile to Houston, she will also need to register to vote in Houston as well. She cannot be a Hawaii domiciliary for voting purposes and a Texas domiciliary for tax purposes.

⁸Veterans 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).

⁹Veterans Benefits and Transition Act § 302(a).