

## LAW REVIEW<sup>1</sup> 17061

June 2017

### Career Service Member is Eligible to Vote in the Community where she Lived before Enlistment

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

4.5—SCRA protection from state and local tax authorities

6.0—Military service and tax laws

7.2—Service member or military spouse voting and domicile

**Q: I am the Town Clerk of a small town in New Hampshire.<sup>3</sup> I am the same person who asked the questions in Law Review 17060, the immediately preceding article in this series.**

**We have three active duty service members who vote by absentee ballot in our town. The oldest is Mary Smith. I question whether Mary still qualifies as a resident or domiciliary of our town and whether she is still eligible to vote here by absentee ballot.**

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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>The factual set-up is hypothetical but realistic.

**Mary was born in 1984 in California. Her family moved here in 1999, when Mary was 15 and a freshman in high school. Mary graduated from our local high school and enlisted in the Coast Guard in 2002. As best as I can determine, she has not set foot in our town since.**

**In 2003, just months after Mary graduated from high school and joined the Coast Guard, her parents divorced and moved away. They were never homeowners in our community—they lived in a small rented house. That house has been through several tenants since and was torn down five years ago. Mary has no relatives in our town and no place to lay her head if she were to visit—our town’s only motel closed last year. Mary has no place to receive mail in this town. When I send her election notices, they are always returned marked “no such address” since the house was torn down.**

**Mary is currently a Chief Petty Officer in the Coast Guard and is serving at a Coast Guard station in Hawaii. It seems to me that she should vote there, not here. Is Mary still eligible to vote by absentee ballot in this town?**

**A:** Yes, most definitely. As an active duty service member, Mary is eligible to vote by absentee ballot in your town, under a federal law called the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). If she applies for an absentee ballot and you fail or refuse to send her a ballot you are violating federal law.<sup>4</sup>

Mary’s domicile of origin is the place where she lived and was domiciled just before she entered active duty in the Coast Guard, 15 years ago. It does not matter that her parents no longer reside in your town. It does not matter that Mary has not set foot in your town since she left 15 years ago. It does not matter that Mary has no mailing address and no place to sleep in your town. It does not matter that the house where Mary lived 15 years ago has been torn down.

Under federal law, Mary is entitled to maintain her domicile of origin at the address where she lived and was domiciled just before she entered active duty. She can maintain that domicile of origin until she establishes a new domicile elsewhere or until she leaves active duty, whichever comes first. Because Mary has already been on active duty for 15 years, she will almost certainly remain on active duty for at least five more years, to qualify for military retirement. Mary will almost certainly retire from the Coast Guard sometime between 2022 and 2032.

Every human being, including every service member, has one and only one domicile (legal residence). Under a federal law called the Servicemembers Civil Relief Act (SCRA),<sup>5</sup> an *active duty* service member<sup>6</sup> is treated differently from civilians in the determination of the individual’s domicile and in the liability to pay state income tax and personal property tax to the state and

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<sup>4</sup>52 U.S.C. § 20302(a).

<sup>5</sup>The SCRA is codified in title 50 of the United States Code, at sections 3901 through 4043 (50 U.S.C. 3901-4043). Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), which was originally enacted in 1917, when our country entered World War I.

<sup>6</sup>50 U.S.C. § 3911(2)(A)(i).

local tax authorities of the place where the service member has a physical residence (the place where he or she usually sleeps) if that place is not the service member's domicile.

For a civilian (a person not presently on active duty in one of the uniformed services),<sup>7</sup> the person's domicile is the place where he or she usually sleeps, unless it is for a temporary purpose, measured in weeks or months and with a definite intent to return to the place of domicile.<sup>8</sup> For example, Alice Adams, a civilian, quits her job in Boston and takes a new job in Los Angeles. She vacates her Boston apartment and rents a new apartment in Los Angeles. On day one in the Los Angeles apartment, she becomes a domiciliary of California and ceases to be a domiciliary of Massachusetts. She must begin paying California state income tax on that first day, and her obligation to pay Massachusetts state income tax ends on the first day in the California apartment.<sup>9</sup>

If Alice has brought her vehicle with her to California she must register the vehicle in California and get California license tags and a California driver's license. On that first day in California, she loses the right to vote in Massachusetts, and she is eligible to register and then vote in California. By moving to California, Alice has become a Californian by operation of law, without regard to her preference.

Every human being has one and only one domicile. Daddy Warbucks can afford to purchase and furnish 365 houses and to spend one night of the year in each house. Nonetheless, he has only one domicile and he is only entitled to one vote.

Under the SCRA, *active duty* service members are exempted from the rule that moving to a new state necessarily means becoming a domiciliary of that state and losing one's domicile in the former state.<sup>10</sup> If soldier Alexander Williams is transferred by the Army from State A to State B, he does not automatically lose his domicile in State A or become a domiciliary of State B. Of course, Alexander will need to make living arrangements in State B, within a reasonable commuting distance of his new military assignment there. Making such living arrangements in State B, while on active duty, does not make him a domiciliary of State B. If Alexander has a physical residence in State B but is not domiciled there, State B is precluded by federal law (the SCRA) from taxing Alexander's military income or his personal (moveable) property.

The idea is that active duty service members must be protected from double taxation—by the "home" state and the state where the service member is currently stationed. Moreover, unlike

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<sup>7</sup>The uniformed services are the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service and the commissioned corps of the National Oceanic and Atmospheric Administration. 10 U.S.C. 101(a)(5) and 50 U.S.C. 3911(2)(A).

<sup>8</sup>For example, Bob Jones, a civilian, lives in Boston and works for a major corporation. Bob's employer sends him from its headquarters in Boston to its branch office in Los Angeles for a three-month assignment. Bob fully intends to return to his home in Boston at the end of the assignment. Under these circumstances, Bob does not lose his domicile in Boston and gain a domicile in Los Angeles.

<sup>9</sup>Unless she moves on the first of January, she will need to pay partial-year income tax to Massachusetts and partial-year income tax to California for the year of the move.

<sup>10</sup>Under the SCRA, a reservist or National Guard member is not considered a "servicemember" except when he or she is on active duty.

civilians, active duty service members do not choose where to live. When the Army transfers Alexander from State A to State B, he has a legal obligation to report to his new duty station as ordered. If he fails to go to his new appointed place of duty, he is guilty of the military criminal offense called “unauthorized absence.”

The SCRA provides:

- (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.
- (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.<sup>11</sup>

Brenda Barnes, a civilian, works for a major corporation with operations in many states. Her employer transfers her from State A to State B, and she buys a house or rents an apartment in State B to go to her new job assignment. Brenda is not protected by the SCRA. She loses her domicile in State A and becomes a domiciliary of State B as soon as she moves into the new apartment in State B. Brenda must register to vote in State B, if she wants to vote, and she is no longer eligible to vote in State A. Brenda must pay state income tax and personal property tax to State B after she moves into the state.

Why is Alexander treated better than Brenda? The difference is that if Brenda does not want to move she can quit her job. Alexander cannot quit the Army, at least not until the end of his enlistment or the period of active service to which he obligated himself.

Now, let us apply these principles to Mary's situation. When the Coast Guard transferred her to Hawaii, she of course needed to make living arrangements near her new duty station. But she is not a domiciliary of Hawaii. She is still domiciled in New Hampshire, in your town, at the place where she lived before entering active duty. She is eligible to vote in New Hampshire, not in Hawaii. Under these circumstances, Hawaii is precluded by federal law from taxing her military income.

**Q: Is it possible for Mary to become a Hawaii domiciliary while stationed in Hawaii?**

**A:** Yes. An active duty service member can change his or her domicile while on active duty, but the domicile does not change automatically. To change one's domicile while on active duty, one must *simultaneously* have a physical presence in the state to which one wishes to change and the *intent* to make that place home. Neither intent alone nor physical presence or absence alone is

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<sup>11</sup>50 U.S.C. § 4001 (emphasis supplied).

sufficient to make the active duty service member a domiciliary of the new state or to cause him or her to lose the domicile in the former state.

If Mary has been transferred to Hawaii on Permanent Change of Station (PCS) orders, for a significant period (like two years or more), she can become a domiciliary of Hawaii while physically present in the state by establishing the intent to become a Hawaiian. One good way to show her intent to become a Hawaiian is by registering to vote and voting in Hawaii while serving there in the Coast Guard.

**Q: Voting in person on Election Day is much more convenient than voting by absentee ballot. Is it possible for Mary to register to vote and vote in Hawaii but maintain her domicile in New Hampshire for state income tax purposes?**

**A:** No. She cannot have it both ways. She has one and only one domicile, for all legal purposes. She cannot simultaneously be a domiciliary of Hawaii for voting purposes and a domiciliary of New Hampshire for state income tax purposes. If she registers to vote or vote in Hawaii, she thereby become a Hawaiian for all legal purposes, and she will then be required to pay Hawaii state income tax and personal property tax and she will have other legal obligations as a Hawaiian (jury service, etc.). Maryland's high court has held: "Evidence that a person registered or voted is admissible and ordinarily persuasive when the question of domicile is at issue."<sup>12</sup>

In Hawaii, the state income tax rate is 11%, and that is the second highest state income tax rate in the country. Only California, at 13.3%, is higher.<sup>13</sup> New Hampshire is one of nine states without a broad state income tax that covers salary and wage income.<sup>14</sup> Mary could become a domiciliary of Hawaii and start paying an exorbitant state income tax, but she would be ill-advised to do so.

**Q: Mary will only be 38 years old when she is eligible to retire from the Coast Guard in 2022. I am sure that she won't want to retire from gainful employment at that young age, but there are very few employment opportunities for her in this small town. She has no home here and no relatives here. She only lived here for three years, and that was from 1999 to 2002, when she was in high school. I think that it is most unlikely that she will return to this small town when she retires from the Coast Guard. I want to make her affirm, under oath, that she will return to live in this town after she leaves the Coast Guard, before I send her another absentee ballot.**

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<sup>12</sup>*Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (Maryland Court of Appeals 1971). See also *Suglove v. Oklahoma Tax Commission*, 1979 OK 168, 605 P.2d 1315 (Oklahoma Supreme Court 1979). For other articles about the relationship between voting and state income tax liability for active duty service members, please see Law Review 17008 (February 2017) and Law Review 16076 (August 2016).

<sup>13</sup>See Timothy Vermeer & Katherine Loughead, *State Individual Income Tax Rates and Brackets for 2022*, TAX FOUNDATION (Feb. 15, 2022), <https://taxfoundation.org/state-income-tax-rates-2022/> (in 2022, California still has the highest rate of state income tax, followed by Hawaii).

<sup>14</sup>Lauren Perez, 9 States With No Income Tax, SMART ASSET (Oct. 18, 2021), <https://smartasset.com/taxes/states-with-no-income-tax#:~:text=States%20With%20No%20Income%20Taxes%201%20Alaska.%20Alaska,Texas.%20...%206%20Washington%20...%207%20Wyoming.%20>.

**A:** You have no right to impose that condition on her. Mary has the right to maintain her domicile of origin in your town until the day that she leaves active duty, “without regard to whether or not the person intends to return to that State.”<sup>15</sup>

Here is the pertinent SCRA section:

**§ 4025. Guarantee of residency for military personnel and spouses of military personnel**

- 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—
  - (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 [52 USCS § 30101])) 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.<sup>16</sup>

**Q: What you are telling me about federal law runs directly contrary to our New Hampshire state law. Which law controls?**

**A:** Under the Supremacy Clause of the United States Constitution, a federal statute like UOCAVA and the SCRA trumps a conflicting state statute or even a state constitution. Here is the Supremacy Clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be

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<sup>15</sup>50 U.S.C § 4025(a)(1).

<sup>16</sup>50 U.S.C. 4025 (emphasis supplied).

bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>17</sup>

### **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 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](https://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

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<sup>17</sup>U.S. Const., art. VI, cl. 2. Yes, it is capitalized just that way, in the style of the late 18th Century.