

## LAW REVIEW<sup>1</sup> 17080

August 2017

### Military and Overseas Voting in 2017

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

4.5—SCRA protection from state/local tax authorities

7.2—Service member or military spouse voting and domicile

7.3—Voting in Non-Federal Elections

Five states (Kentucky, Louisiana, Mississippi, New Jersey, and Virginia) conduct their important state elections in odd-numbered years, like 2017. Those states will conduct their state elections on Tuesday, November 7, 2017. In addition, several major cities and hundreds of smaller cities will conduct municipal elections on that date. I urge active duty service members and their accompanying spouses and voting-age dependents to inform themselves about the candidates and issues and to vote by absentee ballot in these important elections.

In Virginia, Governor Terry McAuliffe is term-limited and not seeking reelection this year, so Virginia will elect a new Governor on November 7, and a new Lieutenant Governor and Attorney General and state legislators, as well as local officials. In New Jersey, Governor Chris

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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).

Christie is term-limited and not seeking reelection. New Jersey will elect a new Governor and Lieutenant Governor and state legislators on November 7.

In Kentucky, Louisiana, and Mississippi, Governors were elected in 2015 for four-year terms. In those three states, state legislators and other officials will be elected on November 7.

I hope that this question-and-answer discussion will be helpful to military personnel, military spouses, and overseas citizens who may be interested in participating in these important 2017 elections.

**Q: I am a Major in the Army, and I currently serve at the Pentagon in Arlington, Virginia. I live in an apartment in Arlington and walk to work at the Pentagon. On bad weather days, I travel to the Pentagon by bus.**

**I was born and raised in a small town in Florida, and I lived there with my parents when I graduated from high school and left to report to the United States Military Academy (West Point) in 1999. Since 1999, I have voted by absentee ballot in most federal elections in that small town. In the last five years, my father died and my mother moved to California. My mother sold the house, and I no longer have any relatives living in that small town. I have no way to receive mail there, and I have been back to that town only very infrequently, most recently for my father's funeral in 2012. If I were to visit that small town, I would have no place to sleep, because the town's only motel closed several years ago. I will likely retire from the Army sometime after 2023, 20 years after I graduated from West Point and was commissioned a Second Lieutenant in 2003. I have no idea where I will live after I retire from the Army, but it will certainly not be in that small town, where there are no job opportunities commensurate with my education and my military career.**

**Am I eligible to vote (either in person or by absentee ballot) in state and local elections as well as federal elections? Am I still eligible to vote by absentee ballot in that small town in Florida despite all the facts I have outlined in the paragraph above?**

**A:** As an active duty service member, you are eligible, under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the Servicemembers Civil Relief Act (SCRA), to vote in state and local elections as well as federal elections. Please see Law Review 17061 (June 2017).

Like any citizen, you are eligible to vote only in the place that constitutes your *domicile* (legal residence). As I explained in detail in Law Review 17061, your domicile is that place where you lived with your parents just before you left home to report to West Point in 1999. As an active duty service member, you can maintain that domicile until you establish a new domicile elsewhere or until you leave active duty, whichever comes first.

It does not matter that your father has passed away and your mother has moved to another state. It does not matter that you have no place to sleep or to receive mail in that town. It does

not matter that you have not set foot in the town for several years. It does not matter that you will almost certainly not live in that town after you retire from the Army. Your domicile is the place where you lived with your parents while you were in high school and until you left to go to West Point. That address (even if the house is torn down) is your domicile until you leave active duty, so long as you do not establish a new domicile somewhere else while you are on active duty. I explain all of this in detail in Law Review 17061.

**Q: I have gotten interested in one of the Virginia gubernatorial candidates. I am thinking about registering to vote in Virginia and voting in person on November 7, so that I can vote for this gubernatorial candidate. Am I eligible to do that?**

**A:** Yes, because you are physically residing in Virginia for a significant time, you can change your domicile from Florida to Virginia, register to vote in Virginia, and then vote on November 7. You probably don't want to do that, because Virginia has a state income tax and Florida does not.<sup>3</sup>

Under a federal statute called the Servicemembers Civil Relief Act (SCRA), Virginia is precluded from taxing your military income and your personal property (vehicle, furniture, etc.) so long as you are not domiciled in Virginia and so long as you can say that you physically reside in Virginia solely because you need a place to sleep that is within reasonable commuting distance of your military assignment.

You cannot have it both ways. You cannot be a Florida domiciliary for tax purposes and a Virginia domiciliary for voting purposes. You have one domicile for all legal purposes, including both voting and taxation. If you register to vote or vote in Virginia, you lose your SCRA exemption from Virginia taxes. Please see Law Review 17061.

**Q: Four years ago, I met the love of my life, and we got married three years ago. My wife and I live together in the Arlington apartment, with our infant daughter. My wife was born and raised in northern Virginia and has never lived in Florida. My wife has a great job in the District of Columbia and earns substantially more money than I earn as a Major. Is my wife eligible to vote in Florida? Is my wife exempted from having to pay Virginia state income tax on her substantial income?**

**A:** Each adult has his or her own domicile. The domicile of the husband does not control the domicile of the wife, or vice versa. Marrying a Floridian did not make your wife a Floridian. The SCRA does not exempt your wife from the obligation to pay Virginia state income tax on her income. Regardless of whether she votes, your wife must pay Virginia state income tax. Your wife is certainly eligible to vote in the Virginia election on November 7. If she is not registered to vote, she still has time to do so.

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<sup>3</sup>Florida is one of seven states with no state income tax. The other six states are Alaska, Nevada, South Dakota, Texas, Washington, and Wyoming. New Hampshire and Tennessee tax only dividend and interest income, not salary or wage income.

It may seem anomalous, but you are domiciled in Florida and your wife is domiciled in Virginia, although you live together in the Arlington apartment. This “mixed domicile” situation is very common in military families.

**Q: My beloved Uncle Wilbur, older brother of my late father, graduated from West Point in 1970 and served on active duty continuously until 1999, when he retired as a Colonel. He lived in Hawaii from 1999 until 2009, when he moved to the Republic of the Philippines (RP). He paid Hawaii state income tax from 1999, when he left active duty and moved to Hawaii, until 2009, when he moved to the RP. I don't know if he has been paying Hawaii state income tax since 2009.**

**Is Uncle Wilbur eligible to vote by absentee ballot in federal elections? What about state and local elections? Where and how is he eligible to vote by absentee ballot?**

**A:** Uncle Wilbur is not eligible to vote as a service member, because he left active duty 18 years ago. Under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), he is eligible to vote as an “overseas voter” in Hawaii by absentee ballot, for federal offices.<sup>4</sup> Uncle Wilbur’s eligibility to vote for state and local offices is governed by Hawaii state law. If he is still a *domiciliary* of Hawaii, he is eligible to vote for all offices. If he is no longer a Hawaii domiciliary, he is nonetheless eligible, under UOCAVA, to vote by absentee ballot for federal offices.

Under UOCAVA, Hawaii is required to “permit absent uniformed services voters *and overseas voters* to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and run-off elections for Federal office.”<sup>5</sup> UOCAVA defines the term “overseas voter” as follows:

(5) “overseas voter” means--

- (A) an absent uniformed services voter who, by reason of active duty or service is absent from the United States on the date of the election involved;
- (B) a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or
- (C) a person who resides outside the United States and (but for such residence) *would be qualified to vote in the last place in which the person was domiciled before leaving the United States.*<sup>6</sup>

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<sup>4</sup>Federal offices include President and Vice President (elected together), United States Senators, and United States Representatives.

<sup>5</sup>52 U.S.C. 20302(a)(1) (emphasis supplied). The citation refers to section 20302(a)(1) of title 52 of the United States Code.

<sup>6</sup>52 U.S.C. § 20310(5) (emphasis supplied).

Let us say that Uncle Wilbur lived at 123 Beach Drive in Honolulu, Hawaii between 1999 and 2009, when he moved to the RP. If he *intends* to return to Hawaii, and if his presence in the RP is temporary, he may still qualify as a domiciliary of Hawaii. In that case, he is eligible to vote in Hawaii by absentee ballot for all offices, including state and local offices.

Because Uncle Wilbur has been away from Hawaii, in the RP, for eight years already and has no present intent to return to the state, he probably does not qualify as a domiciliary of Hawaii. Nonetheless, he is eligible under UOCAVA to vote by absentee ballot in Hawaii for federal offices. Under UOCAVA, a person like Uncle Wilbur is entitled to vote by absentee ballot “in the last place in which the person was domiciled before leaving the United States.”<sup>7</sup>

When Uncle Wilbur left his Honolulu home and moved to the RP in 2009, he probably had in mind that his Army retired pay will support a much higher standard of living in low-cost RP than in high-cost Hawaii. Among the 50 states, Hawaii has the second-highest state income tax rate—only California has a higher rate. In Hawaii, and especially in Honolulu, housing, food, and other necessities are notoriously expensive.

If Uncle Wilbur is not paying Hawaii state income tax, and if he claims that he does not owe Hawaii state income tax because he now lives in the RP, he will want to limit his voting to federal offices, under UOCAVA. This federal law provides: “The exercise of any right under this title shall not affect, for purposes of any Federal, State, or local tax, the residence or domicile of a person exercising such right.”<sup>8</sup>

This UOCAVA provision means that if Hawaii argues that Uncle Wilbur is domiciled in Hawaii and that he owes Hawaii state income tax, Hawaii will be precluded from pointing to Wilbur’s having voted by absentee ballot for federal offices as a way of proving that Wilbur is domiciled in Hawaii. If Wilbur votes by absentee ballot for non-federal offices, Hawaii can point to his having voted as a way of establishing that he is still domiciled in Hawaii and must pay the state income tax.<sup>9</sup>

As to how Uncle Wilbur should vote, he is entitled to use the Federal Post Card Application (FPCA) as a simultaneous voter registration application and absentee ballot request.<sup>10</sup> He can obtain a paper FPCA form from an American consulate or the American Embassy in the RP. In the second decade of the 21st Century, a much better way is to go to USVOTEFOUNDATION,<sup>11</sup> where Uncle Wilbur can complete the FPCA on-line, print it out, sign it, and then submit it by

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<sup>7</sup>*Id.* § 20310(5)(C)

<sup>8</sup>*Id.* § 20309.

<sup>9</sup>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.” *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).

<sup>10</sup>52 U.S.C. § 20302(a)(4).

<sup>11</sup>Active duty service members and their voting-age spouses and dependents are also eligible to use the services of the United States Vote Foundation to apply for absentee ballots, and I urge them to do so. In the “domestic” part of the United States Vote Foundation website, any eligible voter can use this service to register to vote.

mail or perhaps electronically. Uncle Wilbur will then receive his unmarked absentee ballot by mail or perhaps electronically, and he marks the ballot pen on paper and returns it to the election official in Hawaii. Please see Law Review 16118 (November 2016).

When Uncle Wilbur completes the FPCA to apply for an absentee ballot, he will be asked for two addresses, his “send my ballot to” address and his “permanent home address.” His permanent home address is the last place where he lived in Hawaii before he moved to the RP in 2009.

### **Update – April 2022<sup>12</sup>**

#### **States that don't have an income tax**

There are now nine states that no have a state income tax: Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming.

#### **Spouse Domicile**

On December 21, 2018, President Trump signed into law the Veterans benefit and Transition Act of 2018.<sup>13</sup> 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.<sup>14</sup> 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.

Therefore, if your wife would like to change her domiciliary to Florida she may, even though she has never lived in Florida. She may change it to Florida because this is where you are domiciled. This would likely be beneficial for her because if she changes her domicile to Florida then she will avoid paying Virginia state income tax.<sup>15</sup> If she decides to change her domicile to take advantage of Florida's no state income tax, she will also need to vote in Florida as well. Like you, she cannot have it both ways. She cannot be a Florida domiciliary for tax purposes and a Virginia domiciliary for voting purposes.

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<sup>12</sup>Update by Second Lieutenant Lauren Walker, USMC.

<sup>13</sup>Veterans 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).

<sup>14</sup>Veterans Benefits and Transition Act § 302(a).

<sup>15</sup>See Samuel F. Wright, *SCRA Amended regarding Voting Rights of Military Spouses*, ROA LAW REVIEW 19020 (Feb. 2019) (discussing the Veterans Benefits and Transition Act of 2018 and how it affects spouses of service members).

## **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](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 Officers Association  
1 Constitution Ave. NE  
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