

LAW REVIEW¹ 18016
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Review of Service Member Voting and Domicile

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Since election year 2018 has begun, this is a good time for a review on the laws that govern service member voting and domicile and how those laws are related.

Q: I am a Colonel on active duty in the Army, stationed at the Pentagon in Arlington, Virginia. I am in my final active duty assignment. I expect to retire and leave active duty on or about 12/31/2018.

I was born in 1972 and raised in a small town in New Hampshire—let's call it Nokesville Notch or NN. I graduated from NN High School in 1990 and days later reported to the United States Military Academy (USMA) in West Point, New York. Four years later, I graduated from the

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.

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.

USMA and was commissioned a Second Lieutenant. I have been on active duty continuously since June 1990, including the four USMA years.

For all these years, I have maintained my domicile in NN, at the address of the house where I was born in 1972 and where I was living, with my parents and siblings, when I graduated from high school in 1990 and then reported to the USMA. My father passed away in 2001, and in 2002 my mother sold the house and moved to Florida, where she lives in a retirement community. I have no relatives living in NN and no place to receive mail in the town. I have been told that the house where I spent my childhood, from 1972 to 1990, was recently torn down.

I have always said that I intend to return to NN when I retire from the Army, but until recently I did not give the matter much thought. Now that I am within a few months of my retirement date, I am giving the matter a great deal of thought. I will only be 48 when I retire from the Army at the end of this year, and I will not be ready to "retire-retire" in the military lingo. There are literally no job opportunities for retired Colonels in the little town of NN. I have no house to return to in NN and no relatives there. Most of my high school classmates have moved away, and a few of them are dead. Now that I really think about the question, I see very little reason to move back to the small town that I left almost 30 years ago.

I have my physical residence in Arlington, Virginia, in a nice condo that I bought. From my home, it is a long walk or a short bus ride to my Pentagon office. I have already started looking for post-retirement employment in the DC metropolitan area. I expect that I will remain in my condo after I retire on 12/31/2018 and start a new civilian job in DC a few days later.

In 2017, I got interested in Virginia's election of a new Governor, Lieutenant Governor, Attorney General, and members of the lower house of the state legislature. I thought about registering to vote in Arlington so that I could participate in that election but based on your advice I decided not to do that. I don't want to pay Virginia state income tax and personal property tax on my automobile until I must do so.³

I will still be on active duty at the time of the New Hampshire primary in September and the general election in November. I recently contacted the NN Town Clerk and asked her to send me an absentee ballot for the September primary and November general election to my Arlington home address. She asked me lots of questions about my military status, my plans to retire from the Army soon, and my plans about where to live after retirement. She told me that she will not send me absentee ballots this year unless and until I send her a sworn and notarized affidavit to the effect that I will be returning to NN after I retire from the Army. I cannot make such a statement under oath, because at this point it is most likely that I will return to New Hampshire after I retire from the Army at the end of this year.

³Please see law Review 17061(June 2017).

Is the Town Clerk correct that I am not eligible to vote by absentee ballot in NN this year unless I am willing to state, under oath, that I will return to NN next January?

A: No, the Town Clerk is wrong.

Your right to vote is protected by two federal statutes, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the Servicemembers Civil Relief Act (SCRA). The pertinent SCRA provisions are as follows:

§ 4001. Residence for tax purposes

- (a) Residence or domicile.
 - o (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.*
 - o (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.
 - o (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.*
 - o (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.
 - o (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.

o (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:
 - o (1) Personal property. The term "personal property" means intangible and tangible property (including motor vehicles).
 - o (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.
 - o (3) Tax jurisdiction. The term "tax jurisdiction" means a State or a political subdivision of a State.⁴

§ 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—
 - o (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*;
 - o (2) be deemed to have acquired a residence or domicile in any other State; or
 - o (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--
 - o (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;
 - o (2) be deemed to have acquired a residence or domicile in any other State; or
 - o (3) be deemed to have become a resident in or a resident of any other State.⁵

⁴50 U.S.C. 4001 (emphasis supplied).

⁵50 U.S.C. 4025 (emphasis supplied).

Your right to maintain your domicile (legal residence) in NN until the very day that you leave active duty applies “without regard to whether or not the person intends to return to that State.”⁶ It does not matter that you now have a physical residence in Arlington, Virginia and that you have no physical residence in NN or in New Hampshire. It does not matter that you intend to remain in the Arlington condo after you retire on 12/31/2018 and that you will not be returning to New Hampshire. It does not matter that you have no relatives currently living in New Hampshire and no place to receive mail in that state.⁷ It does not matter that the house where you lived as a child has been torn down.

Maintaining your domicile in New Hampshire for the last 28 years, while you have been on active duty, has saved you tens of thousands of dollars in state income tax that you might otherwise have been required to pay to states (like Virginia currently) where you have maintained physical residences (houses, condos, apartments, military housing, etc.) within reasonable commuting distance of your Army duty assignments. New Hampshire is one of only nine states that do not tax salary and wage income.⁸

Q: What happens when I retire and leave active duty on 12/31/2018?

A: Let us assume that you do indeed retire on 12/31 and that you remain in your Arlington condo and start a new civilian job a few days later. When the ball drops at midnight on New Year’s Eve, you are no longer on active duty and no longer protected by the SCRA. At midnight, your domicile changes from New Hampshire to Virginia. Starting on New Year’s Day, you will need to pay Virginia state income tax on your Army retired pay and your income from your new civilian job, and you will also need to pay personal property tax to Arlington County on your automobile. If you want to vote in 2019 and beyond, you will need to register to vote in Arlington in the traditional way, and you will no longer be eligible to vote by absentee ballot under UOCAVA.⁹

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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

⁶50 U.S.C. 4025(a)(1).

⁷Please see Law Review 17061 (June 2017).

⁸The other eight states are Alaska, Florida, Nevada, South Dakota, Tennessee, Texas, Washington, and Wyoming.

⁹Please see Law Review 12098 (October 2012).

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 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:

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