

LAW REVIEW¹ 18020
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**You Have the Right To Vote by Absentee Ballot in your Home Town
while You Are on Active Duty, even if You Don't Intend To Return
when You Leave Active Duty.**

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

4.5—SCRA protection from state/local tax authorities

7.2—Service member or military spouse voting and domicile

10.2—Other Supreme Court cases

Q: I am a Sergeant Major (E-9) in the Marine Corps.³ I have read with great interest several of your “Law Review” articles about military voting rights, especially Law Review 18016 (February 2018).

I was born in Waco, Texas in 1980 and raised there. I graduated from Waco High School in 1998 and shortly thereafter enlisted in the Marine Corps. I entered active duty by reporting to

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.

³This factual set-up is hypothetical but realistic.

boot camp in October 1998. I have been on active duty continuously and in October of this year I will have 20 years of active duty and will be eligible to retire.

I know that Texas is one of only nine states⁴ that do not tax salary and wage income. I have been careful to maintain my domicile (legal residence) in Waco (McLennan County) during my entire military career. I have voted in McLennan County by absentee ballot in most major elections. I have never registered to vote or voted in any of the states where I have had apartments or military housing quarters near my duty stations. I have always said, when asked, that I intend to return home to Waco when I retire from the Marine Corps, but I never gave the matter much thought until now, when retirement is only a few months away.

I am currently serving on active duty at Camp Lejeune in North Carolina, and this will almost certainly be my final active duty assignment. In 2016, I married the love of my life. She was born and raised in North Carolina, and her parents and other family members still live here. My father died 15 years ago, and my mother now lives in a retirement community in Florida. I have no close relatives still living in Waco, and I have lost contact with my high school classmates. I will only be 38 or 39 when I retire from the Marine Corps, and I will need to find a civilian job. I think that it will be much easier to find a suitable job here in North Carolina than in Waco. Now that my retirement date is rapidly approaching, it seems most unlikely that I will return home to Waco to retire.

I checked out the website of the McLennan County Elections Administrator, and that website states:

Having a permanent address in McLennan County is a prerequisite to requesting ballots from McLennan County. Residence is defined in Section 1.015 of the Texas Election Code as the voter's permanent home *to which he or she intends to return* after any temporary absence. This definition implies that you must have lived at the location at one time and intend to return, so generally, you cannot list a location where you have never been physically present.

U.S. citizens, whose most recent domicile was in McLennan County, but whose intent to return is uncertain, may vote a Federal ballot only. Voters in this category should indicate they are applying for a Federal Ballot only.

Emphasis supplied.

I am concerned about the statement that I am only eligible to vote a federal ballot if my intent to return to McLennan County is "uncertain." I have always voted a full ballot, including state and local offices and ballot questions. I have in mind some of the candidates that I want to vote for this year, for Governor, Lieutenant Governor, and the Texas House of

⁴Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming.

Representatives. Am I eligible to vote for those offices this year? Or must I limit myself to voting for United States Senator and United States Representative?

I will still be on active duty and serving in North Carolina through all of 2018 and probably the first few months of 2019.

Answer, bottom line up front:

You are eligible to vote by absentee ballot in McLennan County for all offices, not just federal offices, until the day that you leave active duty or the day that you establish a domicile in some other place, whichever comes first. I contacted and met with Ms. Kathy E. Van Wolfe, the McLennan County Elections Administrator, and she graciously considered my letter and then amended her website and removed the paragraphs that you quoted. I am very pleased with the amended version of her website.

EXPLANATION:

Every service member and every human being has one and only one domicile or legal residence, even if it is a legal fiction.⁵ For a civilian (a person who is not currently on active duty in the armed forces), moving from State A to State B means that the individual immediately ceases to be domiciled in State A and becomes domiciled in State B, unless the move is for a temporary purpose measured in weeks or months and the individual has the clear intent to return to State A at the end of a temporary job assignment or the like. Under a federal statute called the Servicemembers Civil Relief Act (SCRA), active duty service members are exempted from this general rule. The pertinent SCRA section is as follows:

(a) 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)) *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--

⁵Daddy Warbucks can afford to purchase and furnish 365 houses and to spend one night per year in each house, but he still has only one domicile and is only entitled to vote once. I.B. Itinerant is a traveling salesperson with no fixed place to sleep. He sleeps in the trailer that he tows behind his vehicle. Nonetheless, Itinerant has a domicile and is entitled to vote.

- (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.⁶

Treating active duty service members differently from civilians, for this purpose, is entirely fair and reasonable. Unlike the civilian, the service member does not choose where to live. When the Marine Corps assigned you to duty at Camp Lejeune, you needed to find a place to live that was on or near the base, because you cannot commute to Camp Lejeune from Waco.

A civilian can be transferred from one state to another by his or her employer, but there is a big difference. If the civilian does not want to move, he or she can quit the job. You cannot quit the Marine Corps until the end of your enlistment or the period of active duty to which you committed yourself. Failing to go to a new appointed place of duty is a military criminal offense called “unauthorized absence” (UA).

The active duty service member can be away from his or her domicile for many years, even a full career of 20 years or more, without losing the domicile at the place where he or she lived and was domiciled just before entering active duty. It should not be necessary, and under the SCRA it is not necessary, for the career service member to aver an intent to return to that domicile of origin throughout an active duty career to be eligible to vote in that original home place for non-federal as well as federal offices. The right to maintain the original domicile and to vote for all offices in that place applies “*without regard to whether or not the person intends to return to that State.*”⁷

For many career service members nearing the end of their active duty careers, not being able to vote in the community where he or she lived before entering active duty means not being able to vote at all, and that cannot be the correct answer since every human being has one and only one domicile. For example, let us consider your hypothetical friend Mary Jones. Like you, she graduated from Waco High School in 1998 and enlisted in the Marine Corps that same year. Like you, she has been on continuous active duty for almost 20 years and will be eligible for retirement later this year. Like you, she is currently serving at Camp Lejeune in North Carolina.

Mary expects to leave active duty by retirement on 12/31/2018, and she has already accepted a civilian job in the Washington DC metropolitan area. Mary cannot register and vote in North Carolina because she already intends to leave at the end of this year when she retires from the Marine Corps. She cannot register to vote in the DC metropolitan area based on the intent to move there months in the future. If she cannot vote in McLennan County by absentee ballot, she cannot vote at all. That cannot be the right answer.

Texas law defines “residence” for election purposes as follows: “Residence means domicile, that is one’s home and fixed place of habitation *to which he intends to return* after any

⁶50 U.S.C. § 4025 (emphasis supplied).

⁷*Id.* § 4025(a)(1) (emphasis supplied).

temporary absence.”⁸ In 1997, in a case arising out of a hotly contested election in Val Verde County, Texas, the United States District Court for the Western District of Texas held that a career service member who averred an intent to return to Texas upon retirement from active duty many years in the future, but who candidly admitted that he would probably not return to the specific Texas county where he had voted by absentee ballot, was not domiciled in the county at the time of the 1996 general election and was not entitled to vote for non-federal offices in that county.⁹

In Law Review 3 (May 1998), I pointed out that the rule stated by that case would result in the disenfranchisement (at least as to non-federal offices) of most career military personnel. It is the rare career service member who can positively state under oath that he or she will return, upon retirement from active duty, to the specific county where he or she has been domiciled and voting during career-long military service. Where the service member chooses to live after retirement will in most cases depend upon where he or she finds a post-retirement civilian job.¹⁰

In 1997, shortly after *Casarez* was decided, I drafted a proposed amendment to the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), adding “or a State or local office” and “without regard to whether or not the person intends to return to that State” to the pertinent SSCRA section. I lobbied for this amendment diligently for more than four years, and finally, in 2001, Congress enacted this amendment to the SSCRA.¹¹

The purpose and effect of the 2001 amendment were to overrule *Casarez* and to make clear that the service member has the right to maintain his or her domicile and the right to vote, for non-federal as well as federal offices, until he or she establishes a new domicile elsewhere or leaves active duty, whichever comes first, and that the service member is not required to maintain an ongoing intent to return to a specific county or state to be eligible to vote in that county and state by absentee ballot while on active duty.

Section 4025 of the SCRA¹² supersedes and overrides section 1.015 of the Texas Election Code, as applied to active duty service members, insofar as the Texas law can be read to require that the service member aver an intent to return to Texas and/or to a specific Texas county as a condition precedent to eligibility to vote by absentee ballot for non-federal offices while on

⁸Texas Election Code, section 1.015(1) (emphasis supplied).

⁹*Casarez v. Val Verde County*, 957 F. Supp. 847 (W.D. Texas 1997).

¹⁰In almost all cases, the career service member will be retiring sometime between his or her late 30s and early 50s. This is far too early to “retire retire” in the military lingo. The career service member probably won’t be able to find a suitable job in his or her home county, especially if that county is not a major metropolitan county.

¹¹On December 19, 2003, President George W. Bush signed into law the SCRA, Public Law 108-189, 117 Stat. 2865. The SCRA was a long-overdue rewrite of and improvement upon the SSCRA, which was originally enacted in 1917. This SSCRA section was carried over into the new law unchanged.

¹²50 U.S.C. § 4025.

active duty. Under the Supremacy Clause of the United States Constitution, a federal statute like the SCRA trumps a conflicting state statute or even a state constitution.

The Supremacy Clause reads as follows:

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 bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹³

A great war was fought about the supremacy of federal authority over state authority, and General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

The SCRA was validly enacted by Congress, under the authority conferred by the Constitution, Article I, section 8, clauses 11-16.¹⁴ Almost 65 years ago, the Supreme Court upheld (rejecting a vigorous objection by the State of Colorado) the constitutionality of the SSCRA provision that made it unlawful for a state or local government to impose a personal property tax on personal (moveable) property of an active duty service member who has a physical residence in the state, to be near the service member's military assignment, but who is domiciled elsewhere.¹⁵

In firmly rejecting Colorado's constitutional objection to the SSCRA, the Supreme Court held:

The constitutionality of federal legislation exempting servicemen from the substantial burdens of seriate taxation by the states in which they may be required to be present by virtue of their service cannot be doubted. Generally similar relief has often been accorded other types of federal operations or functions. And we have upheld the validity of such enactments, even when they reach beyond the activities of federal agencies and corporations to private parties who have seen fit to contract to carry on functions of the Federal Government. *Carson v. Roane-Anderson Co.*, 342 U.S. 232, and cases cited; cf. *James v. Dravo Contracting Co.*, 302 U.S. 134, 160-161.

Nor do we see any distinction between those cases and this. Surely, respondent may not rely on the fact that petitioner here is not a business contractor. He is not the less engaged in a function of the Federal Government merely because his relationship is not entirely economic. We have, in fact, generally recognized the especial burdens of

¹³U.S. CONST., art VI, cl. 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

¹⁴These six clauses are collectively referred to as the "war powers clauses." Clause 11 gives Congress the power to declare war. Clause 12 gives Congress the power to raise and support armies. Clause 13 gives Congress the power to provide and maintain a navy. Clause 14 gives Congress the power to make rules for the government and regulation of land and naval forces. Clause 15 gives Congress the power to provide for calling forth state militia forces. Clause 16 empowers Congress to provide for organizing, arming, and disciplining militia forces. These clauses, taken together, give Congress plenary power to "provide for the common defence" in the words of the Constitution's Preamble.

¹⁵*Dameron v. Brodhead*, 345 U.S. 322 (1953). I discuss *Dameron* in detail in Law Review 09017 (April 2009).

required service with the armed forces in discussing the compensating benefits Congress provides. *Le Maistre v. Leffers*, 333 U.S. 1; *Boone v. Lightner*, 319 U.S. 561. Cf. *Board of Commissioners v. Seber*, 318 U.S. 705. Petitioner's duties are directly related to an activity which the Constitution delegated to the National Government, that "to declare War," U.S. Const., Art. I, § 8, cl. 11, and "to raise and support Armies." *Ibid.*, cl. 12. Since this is so, congressional exercise of a "necessary and proper" supplementary power such as this statute must be upheld. *Pittman v. Home Owners' Corp.*, 308 U.S. 21, 32-33; *Federal Land Bank v. Bismarck Co.*, 314 U.S. 95, 102-104. *Carson v. Roane-Anderson Co.*, *supra*, at 234. What has been said in no way affects the reserved powers of the states to tax. For this statute merely states that the taxable domicile of servicemen shall not be changed by military assignments. This, we think, is within the Federal power.¹⁶

Protecting the rights and economic interests of service members is even more important today than it was in 1953, when the Supreme Court decided *Dameron*. In 1973, Congress abolished the draft and established the All-Volunteer Military. Without laws like the SCRA and the Uniformed Services Employment and Reemployment Rights Act (USERRA), the services would not be able to recruit and retain the quality and quantity of military personnel needed to defend our country.¹⁷

Section 4025 is clearly necessary, reasonable, and constitutional. You have the right to vote for all offices (not just federal offices) in McLennan County, by absentee ballot, until the day you leave active duty, even if you have firmly decided not to return to that county after you retire from the Marine Corps. This is an important legal principle that affects many (perhaps most) career military personnel.

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.

¹⁶*Dameron*, 345 U.S. at 324-25.

¹⁷Please see Law Review 14080 (July 2014).

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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