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Congress Tinkers yet again with the SCRA Concerning Domicile of the Spouses of Active Duty Service Members

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New legislative development

On 12/20/2019, President Trump signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2020.³ Each year, Congress passes an NDAA, authorizing the activities of the Department of Defense (DOD) and the services and the national defense activities of 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.

³Fiscal Year 2020 began on 10/1/2019, and it will end on 9/30/2020.

Department of Energy.⁴ Each year, Congress uses the NDAA to amend provisions of many titles of the United States Code.

Section 1739 of NDAA 2020 amends the Servicemembers Civil Relief Act (SCRA)⁵ by adding a new section 707, as follows:

For the purpose of establishing the residency of a spouse of a servicemember for any purpose (including the registration of a business), the spouse of a servicemember may elect to use the same residence as the servicemember regardless of the date on which the marriage of the spouse and the servicemember occurred.

How this provision works

To understand how this provision works, let us consider a hypothetical but realistic scenario. Joe Smith was born in May 1971 in Miami, Florida. He lived in Miami, with his parents and siblings, until he graduated from high school in May 1989. Within a month after he graduated, he reported to the United States Naval Academy (USNA) in Annapolis, Maryland for “plebe summer.” Four years later, in May 1993, he graduated and was commissioned a Second Lieutenant in the Marine Corps.

Joe has remained on active duty continuously and is now a full Colonel, stationed at the Pentagon in Arlington, Virginia. In each major election since May 1989, Joe has voted by absentee ballot in Miami, Florida. He uses as his “permanent home address” on each absentee ballot application form the address of the house in Miami where he lived with his parents and siblings for the first 18 years of his life. It does not matter that his father died in 1999 and his mother sold the house and now lives in California. Joe has never registered to vote or voted in any of the places where he has been stationed by the Marine Corps. His domicile remains at the address where he lived just before he reported to active duty in 1989.

In 2018, shortly after he transferred to the Pentagon, Joe met the love of his life, Mary Jones, and they married in 2019. Mary has lived in Arlington for her entire life, except when she was away for college and law school. She is not a Floridian, and she has never been to Florida. Mary is the Managing Partner of Dewey Cheatham & Howe (DCH), a major DC law firm. Her DCH compensation is an order of magnitude greater than Joe’s salary as a Colonel in the Marine Corps. After the marriage, Joe and Mary purchased a condominium in the Rosslyn section of Arlington, Virginia. They live in the condominium because it is an easy commute to Joe’s assignment at the Pentagon and the DCH office on K Street in the District of Columbia.

⁴The Department of Energy is responsible for nuclear weapons and nuclear power for Navy submarines and aircraft carriers.

⁵As Colonel Mark E. Sullivan explained in Law Review 116 (March 2004), the SCRA was passed by Congress and signed into law by President George W. Bush in December 2003, as a long-overdue update and rewrite of the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), which was originally enacted in 1917.

Under the new section 707 of the SCRA, Mary can “elect” to become a domiciliary of Florida, and she need not move to Florida to do so. Changing her domicile to Florida will save Mary tens of thousands of dollars of state income tax that she would otherwise be required to pay to Virginia, because Florida is one of nine states without a broad state income tax.⁶

States will challenge the constitutionality of this new provision.

I predict that Virginia and similarly situated states will be upset about losing the opportunity to tax the substantial non-military income of Mary Jones and others like her. I predict that Virginia will challenge the constitutionality of this new SCRA provision, but I also predict that Virginia will lose that challenge, based on a Supreme Court case that was decided when I was two years old:

The constitutionality of federal legislation exempting servicemen from the substantial burden 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 been accorded to other types of federal operations or functions. And we [the Supreme Court] have upheld the validity of such enactments. ... Nor do we see any distinction between those cases and this. ... We have, in fact, generally recognized the especial burdens of required service with the armed forces in discussing the compensating benefits Congress provides. ... Petitioner's [Dameron's] duties are directly related to an activity which the Constitution delegated to the National Government [national defense]. ... Since this is so, congressional exercise of a “necessary and proper” supplementary power such as this statute must be upheld.⁷

In 2020, unlike in 1953, no one is *required* to perform military service. In 1973, almost two generations ago, Congress abolished the draft and established the All-Volunteer Military. But the fact that today's service members were not drafted in no way detracts from the need for statutes like the SCRA and the Uniformed Services Employment and Reemployment Rights Act (USERRA). Quite the contrary—without these laws the services would not be able to recruit and retain the necessary quality and quantity of young men and women to defend our country. Yes, laws like the SCRA and USERRA put some burdens on third parties like state tax authorities, banks, landlords, employers, etc. Those burdens are tiny as compared to the much greater burdens (sometimes the ultimate sacrifice) voluntarily undertaken by those who enlist in our country's armed forces.⁸

⁶The other eight states are Alaska, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming. See John Waggoner, *9 States That Don't Have an Income Tax*, AARP, <https://www.aarp.org/money/taxes/info-2020/states-without-an-income-tax.html> (last updated Mar. 9, 2022).

⁷*Dameron v. Brodhead*, 345 U.S. 322, 324-25 (1953). I discuss *Dameron* in detail in Law Review 09017 (April 2009). See also *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). I discuss *Rumsfeld* in Law Review 06012 (2006).

⁸Please see law Review 17055 (June 2017).

In 2020, much more than in 1953, most service members are married and have families. To persuade the service member to reenlist and serve for a full career of 20 years or more, on active duty or in a Reserve Component, it is necessary to persuade the spouse and the whole family, as well as the service member. Congress reasonably concluded that it was necessary to extend the SCRA protection of the service member from state income taxation of his or her military salary and benefits to include the spouses of active duty service members as well. I predict that the courts (including the Supreme Court, if the challenge gets that far) will uphold this extension as a necessary and proper exercise of Congress' power to provide for the national defense.⁹

Congress has not repealed the common law rule that every human being has one and only one domicile, for all legal purposes.

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."¹⁰ This common-sense statement is universally accepted among the 50 states.

Mary Jones (the law firm partner who married Colonel Joe Smith) cannot have it both ways. She cannot become a Florida domiciliary (to avoid paying Virginia state income tax on her law firm compensation) while maintaining her domicile in Virginia for voting purposes. She will need to give up her Virginia voter registration and start voting by absentee ballot in Miami, Florida.¹¹

Conclusion

For well over a decade, military spouses and organizations like the National Military Family Association¹² have sought to expand the SCRA protection of the service member's military income from state income taxation by a non-domicile state to include the non-military income of the spouse of the active duty service member.¹³ While I was originally ambivalent about this effort, I am pleased that the effort has finally succeeded. This change in the SCRA will benefit thousands of spouses of active duty service members, and it will help the services in their

⁹Article I, Section 8 of the United States Constitution provides for the powers of Congress, and sections 11-16 of that Section provide multiple powers related to war and national defense. Section 18 authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested in this Constitution in the Government of the United States, or in any Department or Officer thereof." Yes, it is capitalized just that way, in the style of the late 18th Century.

¹⁰*Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (1973).

¹¹When she applies for an absentee ballot, using the Federal Post Card Application as a military spouse, she will need to use as her "permanent home address" the house in Miami where husband Joe lived with his parents and siblings for the first 18 years of his life, before he reported to the United States Naval Academy in 1989. It does not matter that Mary has never been to Florida, much less lived in that house.

¹²See <https://www.militaryfamily.org>.

¹³When an active duty service member is married to a person who is not on active duty, it is by no means always the case that the spouse who is not on active duty is the wife. I know several female service members who have civilian husbands.

recruiting and retention efforts. While the constitutionality of this change will likely be challenged, I predict that the constitutionality will be upheld.

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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 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.

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