LAW REVIEW[1] 204

Domicile of Military Spouses for Voting and Taxation Purposes

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

4.5—Protection from State/Local Tax Authorities
7.2—Service member or military spouse voting and domicile

Q: I have found your "Law Review" articles on the Reserve Officers Association (ROA) Web site, www.roa.org/page/lawcenter. I have read with great interest your articles about military voting rights, especially Law Reviews 3, 43, and 109, concerning the domicile of military personnel for voting and taxation purposes. I would appreciate it if you could elaborate concerning the perhaps different considerations that apply to military spouses like myself.

My husband graduated from high school in a small town in Florida in 1976 and then reported to the United States Naval Academy for "plebe summer." In 1980, he graduated and was commissioned a second lieutenant of Marines. We met in 1981, in California, where he was stationed at the time, and we married in 1983. In the last 23 years, I have accompanied him

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[1]I 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.

[2]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.

all over the United States, as he has moved up the ranks to Colonel. When he deployed overseas, I stayed in the United States with the kids.

My husband has maintained his legal residence or domicile in Florida—he still votes by absentee ballot in that small Florida town. On his Federal Post Card Application (FPCA), he uses the address where he lived with his parents when he graduated from high school and then traveled to Annapolis almost 30 years ago. His father died in 1985, and his mother then moved to retirement community in another state, where she died in 1995. His family no longer owns the house where he grew up and graduated from high school, and the house itself has been torn down to make room for a commercial development. But the local election official has never given him any hassle about using that address as his permanent residence address.

My husband has maintained his Florida domicile for tax and other reasons, but I have never lived in Florida, either before or after the marriage. I was a legal resident of California at the time of the marriage. As I have moved to each new home, as my husband has been transferred from duty station to duty station, I have registered and voted in each new community, and my right to do that was never questioned until recently, when my husband and I moved to Stafford County, Va., to be near his Pentagon duty station.

The Registrar of Voters of Stafford County rejected my voter registration application. He said that I am not a resident of the county because I cannot swear that I will still live in the county after my husband retires or transfers to a new duty station. I have no way to predict where I will be five years from now, or even next year. My husband can retire at any time, since he completed his 20 years of active duty in 2000, but he is not required to retire until May 2010. If he is selected for brigadier general, he could well remain on active duty past May 2010. When he does retire, he will look for a civilian job and move to the location of that job, if he cannot find a suitable job in the Washington area. Of course, I plan to move with him, wherever he goes. I don't think that it is fair that my right to vote is under attack because of the circumstances of my husband's service to America. (My husband and I have two sons on active duty, one in Iraq and the other in Afghanistan.) If I cannot vote in Stafford County, where am I supposed to vote?

I am very angry about the way that the registrar has treated me. I am not alone—there are hundreds of other military spouses who have sought to register in the county and who have been hassled by this man. I have a good job in Washington, and I pay Virginia state income tax. I think that I should have a say in the election of the governor and other state officials who spend my tax money, but my greatest concern relates to the local school board. Military children (including our two younger children) are not getting a fair break in the local school system, and the school board thinks that it need not give any respect to military families, because they don't vote here or are not permitted to vote here.

I am a college graduate and the wife of an O-6—I can speak for myself and stand up for my rights. My real concern is for the 20-year-old wife of a lance corporal. Who will speak for her? Please address the legal considerations that apply here. What do you suggest that we do?

A: The Supreme Court has referred to the right to vote as "preservative of all other rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). The situation that you relate concerning the local school board's policies for military students is the best illustration that I have heard of the truth of that statement. I am sure that you are correct that the elected school board members pay little attention to the needs of military families because the parents in those families seldom vote in the county. They generally vote by absentee ballot all over the country, or they do not vote at all.

I will discuss the practical considerations that you and the other military spouses need to consider when deciding where to vote, and where to consider yourself a domiciliary. I will also discuss the lawfulness of the registrar's policies of discouraging and challenging voting by military members and families in your county. I think that his policies are clearly unlawful.

A person should register and vote at the place that constitutes his or her domicile or legal residence. The word "domicile" has been defined as "That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." *Black's Law Dictionary,* Revised Fourth Edition, page 572.

The *Black's* definition cites many very old cases. More recent cases have considerably watered down the "permanence" requirement, in recognition of the mobility of many members of our society. "[N]either bodily presence alone nor intention alone will suffice to create the residence [for voting purposes], but when the two coincide at that moment the residence is fixed and determined. *There is no fixed length of time for the bodily presence to continue.*" *Mills v. Bartlett,* 377 S.W.2d 636, 637 (]Tex. 1964) (emphasis supplied).

The concept of domicile is important in many legal contexts, not just voting and taxation. For example, if you die without a will, the state law of intestacy will govern the distribution of the property you leave behind. But which state? The answer is your state of domicile at the time of your demise. Every human being has one and only one domicile, even if it is something of a legal fiction. The billionaire who owns 20 houses has one domicile—and the same is true for the seaman who sleeps and has all his worldly goods in his "rack" and his locker on a submarine.

The idea that an individual must have a "principal establishment ... to which whenever he is absent he has the intention of returning" is an anachronism and is inconsistent with the idea that every human being has a domicile. How does the law treat those folks whose circumstances do not comport with this model? In our mobile society, many people move frequently for employment or other reasons and do not have any one place to which they reasonably expect to return. This issue has been swept under the rug for far too long.

Let us start with the Virginia Election Code's definition of "residence" for election purposes: "'Residence' or 'resident,' for all purposes of qualification to register and to vote, means and requires both domicile and place of abode. In determining domicile, consideration may be given to a person's expressed intent, conduct, and all attendant circumstances including, but not limited to, financial independence, business pursuits, employment, income sources, residence for income tax purposes, marital status, residence of parents, spouse, and children, if any, leasehold, sites of personal and real property owned by the person, motor vehicle and other personal property registration, and other factors reasonably necessary to determine the qualification of a person to register or to vote." *Code of Virginia,* Section 24.2-101.

In a recent case, the Virginia Supreme Court wrote, "To establish domicile, a person must live in a particular locality with the intention to remain there for an unlimited time. *State- Planters Bank & Trust Co. v. Commonwealth,* 174 Va. 289, 295, 6 S.E.2d 629, 631 (1940)." *Sachs v. Horan,* 252 Va. 247, 250, 475 S.E.2d 276, 278 (1996). I am informed that the Stafford County Registrar has used this throw-away line about "intention to remain there for an unlimited time" as his justification for rejecting voter registration applications submitted by military personnel and their spouses—because such folks cannot, in the registrar's view, show an intention to remain in Stafford County for an unlimited time (beyond the service member's expected transfer to a new duty station or retirement).

I believe that *Sachs* was wrongly decided. Moreover, it is not about the domicile requirement at all—it is about the "place of abode" prong of Virginia's two-pronged test. To the extent that *Sachs* establishes an "intent to remain for an unlimited time" rule, that statement is obiter dicta and not entitled to deference. "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to the determination of the case in hand are obiter dicta, and lack the force of an adjudication. *Wheeler v. Wilkin,* 98 Colo. 568, 58 P.2d 1223, 1226; *Roquemore v. Sovereign Camp, W.O.W.,* 226 Ala. 279, 146 So. 619, 622." *Black's,* page 541.

Daniel H. Sachs owned and lived in a home in Springfield (Fairfax County), Va. In 1994, he left that home and moved to a rented house in Abingdon (Washington County), Va., when he took a job for the United Mine Workers (UMW) that required his presence in far southwestern Virginia. His UMW job was initially a one-year assignment that was extended. Sachs did not sell the Springfield house, but he leased it to a tenant. At the time of the court decision, Sachs was seeking employment in the Washington area and intending to move back into the Springfield house as soon as he found such employment and could get the tenant out. The Virginia Supreme Court upheld the cancellation of Sachs' Fairfax County registration, on grounds that he did not have a "place of abode" in Fairfax County. I guess that Sachs was supposed to leave the house vacant and sleep in it occasionally, just so that he could vote.

The Virginia Supreme Court decision does not discuss the likelihood that the literal interpretation of Virginia's two-pronged test (domicile and place of abode) will lead to the inevitable disenfranchisement of a person like Daniel Sachs. Fairfax County says, "You cannot vote here, because you have no place of abode—you have leased it out to another family."

Washington County says, “You cannot vote here, because you do not intend to live here for an unlimited time. You intend to move back to Fairfax County as soon as you finish that UMW job assignment.” Sachs is left without the right to vote anywhere—a result that runs afoul of the Equal Protection Clause of the 14th Amendment as well as the basic idea that every human being must have a domicile.

Sachs v. Horan contains not one sentence about these constitutional issues. It is my thesis that a constitutional gloss must be put on the application of traditional requirements of domicile and place of abode, especially when we are talking about *whether* a person will be allowed to vote, not just *where* the person should vote.

It should also be noted that in *Sachs v. Horan* the Virginia Supreme Court cited its own 1940 case of *State-Planters Bank & Trust Co. v. Commonwealth.* The 1940 case is not about voting at all—it is about the alleged liability of an estate for $1,505.24 in Virginia inheritance tax. (Apparently, that was a sufficient sum in 1940 dollars to warrant extended litigation.) The Virginia Supreme Court held that the estate was not liable for the tax because the decedent was not a Virginia domiciliary at the time of her death. She had lived in Europe for the last 40 years of her life and had only been back to Virginia four times, for short visits, during those years, and she had been buried (in accordance with her instructions) in Europe. *State-Planters Bank & Trust* is an interesting case, but it is not particularly relevant to the issues we face here.

The other relevant Virginia Supreme Court case is *Kegley v. Johnson,* 207 Va. 54, 147 S.E.2d 735 (1966). In that case, the court held that Mr. Johnson was not entitled to register and vote in Albemarle County because he had come there as a University of Virginia student and had not demonstrated an intent to remain in the county after graduation. The Virginia Supreme Court gave only the most perfunctory consideration to the possibility that there might be constitutional issues at stake: “Johnson finally argues that to construe section 24 of the Constitution and Code section 24-20 as imposing an absolute bar to his gaining a voting residence in Virginia would be a violation of his right to equal protection of the laws. We do not so construe the constitutional and statutory provisions here in question. We simply say that Johnson’s presence in Albemarle County, without the requisite domiciliary intent, was not sufficient to qualify him as a resident, for voting purposes.” *Kegley,* 147 S.E.2d at 738.

In the same year that the Virginia Supreme Court decided *Kegley v. Johnson,* the United States Supreme Court decided *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966), holding Virginia’s poll tax to be unconstitutional for State as well as Federal elections. The Court held, “For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. That is to say, the right of suffrage is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. ... We conclude that a State violates the Equal Protection Clause of the 14th Amendment whenever it makes the affluence of the voter or the payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.” *Harper,* 383 U.S. at 665-66.

Like *Harper,* your case is about the drawing of lines that affect the fundamental right to vote. The registrar of Stafford County is trying to draw a line between citizens who can truthfully swear that they expect to remain in Stafford County for an unlimited time (and who are permitted to vote) and citizens who, for reasons of employment or otherwise, cannot truthfully make such an affirmation under oath, because they reasonably expect to leave the county at a certain point, like the end of a particular military assignment or military career (and who are not allowed to vote). The Stafford County registrar is only trying to impose this "prove to me that you intend to remain in the county for an unlimited time" requirement upon military personnel and their spouses—he has made no effort to apply that rule to other voter registration applicants who show indicia of impermanence (*e.g.,* persons living in Northern Virginia for three- year civilian job assignments).

It should also be noted that Virginia has 95 counties and 40 independent cities that are not part of counties for election administration purposes. No other county or independent city has singled out military personnel and family members for this odious special scrutiny of their long-term residence intentions, as a condition precedent to registering to vote. The Supreme Court recently reminded us that the Equal Protection Clause imposes an outer constitutional limit on the permissible range of procedural variations in electoral procedures, particularly where the election procedure at issue has a direct impact on the fundamental right of each person to vote. *See Bush v. Gore,* 531 U.S. 98 (2000).

Like so many legal concepts in Anglo-American common law, the concept of domicile has its origins in Medieval England—and the world of the 21st Century is very different. Perhaps in England 800 years ago (and perhaps in Virginia before the Civil War) the norm was to be born, live, and die on the same manor or plantation, either as part of the privileged class or as a serf or slave. Today's world is very different. Military members and spouses are among the most mobile members of our society, but they are certainly not the only mobile members. Limiting the right to vote to persons who have a "principal establishment" where they can expect to reside for the remainder of their lives, or at least for many years, is unconstitutional.

At the time our Constitution was ratified, the right to vote was limited to white males who owned real property (land). Our whole history has been about expanding suffrage until today it is nearly universal. The 13th Amendment (ratified in 1865) abolished slavery. The 14th Amendment (1868) established civil rights for the newly freed slaves and for all, including the Equal Protection Clause and the Due Process Clause. The 15th Amendment (1870) provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude."

Yes, federal troops pulled out of the former Confederate states in 1877, and the Reconstruction period ended. The 14th and 15th Amendments were largely an empty promise for almost a century, until the Civil Rights Movement during my lifetime. Progress in America is not always rapid, and there have been decades of retrenchment and backsliding, but overall we have much to be proud about.

The 19th Amendment (1920) provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” The 23rd Amendment (1961) gave residents of the District of Columbia the right to vote in presidential elections. The 24th Amendment (1964) abolished poll taxes as a prerequisite to voting in federal elections. Finally, the 26th Amendment (1971) lowered the national voting age from 21 to 18. Progress toward universal suffrage was greatly enhanced by a series of Supreme Court decisions in the 1960s and 1970s, and those cases are discussed later in this article.

Your husband entered active duty (at the Naval Academy almost 30 years ago) with a domicile of origin at the place where he lived with his parents until they drove him to Annapolis to begin his military career. In 2001, Congress enacted a provision (that I drafted) that is very pertinent to his situation: “For 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.” 50 U.S.C. App. 595 (emphasis supplied).

Congress enacted this provision in 2001, as an amendment to the Soldiers’ and Sailors’ Civil Relief Act (SSCRA). In 2003, Congress enacted the Servicemembers’ Civil Relief Act (SCRA), a long-overdue rewrite of the SSCRA, which can be traced back to World War I. This particular provision was carried over to the new law without change. I invite your attention to my Law Review 43 for a detailed discussion of this provision. I also invite your attention to Law Review 109, by Major Albert Veldhuyzen.

There is another SCRA (formerly SSCRA) provision that is most pertinent to your husband’s situation: “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.” 50 U.S.C. App. 571(a). “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.” 50 U.S.C. App. 571(b).

Your husband has been smart to maintain his domicile in Florida for these last three decades, during his long and distinguished Marine Corps career. Because he has been on active duty continuously since he left his Florida home in 1976 to report to the Naval Academy, and because he has not established a new domicile of choice at any of the places where the Marine Corps has sent him, he remains a domiciliary of Florida and of that particular address where he lived with his parents all those years ago. It matters not that his parents are now deceased and that the house at that address no longer exists.

Section 571 means that Virginia (where your husband physically resides so that he can commute to his Pentagon assignment) is not permitted to impose its state income tax on your husband's Marine Corps salary and benefits. Your husband is also exempt from the Virginia and Stafford County personal property tax on his automobile—the dreaded "car tax" that Governor Gilmore promised to abolish but did not quite kill. *See* 50 U.S.C. App. 571(c)(1). All of this assumes, of course, that Virginia is not your husband's domicile and that he physically resides in Virginia only because his Marine Corps duties require that he sleep within a reasonable commuting distance of the Pentagon.

Your husband cannot have it both ways. If he registers and votes in Virginia, he thereby becomes a Virginian. He cannot claim to be a Virginian for voting purposes while remaining a Floridian for tax purposes. He can establish a domicile of choice in Virginia, and Stafford County, by simultaneously establishing the requisite physical presence (which he has already done) and the intent to make Virginia and Stafford County his home (which he has wisely chosen not to do). Your husband is protected by Section 595 and Section 571 until the day that he leaves active duty, by retirement or otherwise, but he can easily waive his protection from state income and personal property taxation by establishing a Virginia domicile—and registering to vote in Virginia would be powerful evidence of his Virginia domicile. I think that your husband has been well advised, and he probably understands quite well that it is advisable for him to maintain his Florida domicile until the day that he retires from the military.

Your husband will want to maintain his domicile in Florida until he retires, but his domicile does not control your domicile, or vice versa. It would not be lawful for you to vote by absentee ballot in Florida, because you have never lived there. Marrying a Floridian does not make you a Floridian. It may seem anomalous, but it is entirely possible for a married couple to live together in the same house but be domiciled in different states, if one or both of them are on active duty in the armed forces.

Yes, some state election codes still say that the domicile of the husband controls the domicile of the wife, but such provisions are almost certainly unconstitutional. "The joint operation of Georgia Code Sections 79-403, 79-407, and 34-632, insofar as it establishes an irrebuttable presumption that the domicile and residence of a married woman is that of her husband, and thereby prevents her from registering to vote in Georgia, violates the 19th amendment of the Constitution of the United States." *Kane v. Fortson,* 369 F. Supp. 1342, 1343 (N.D. Ga. 1973).

Section 571 does not protect you from the Commonwealth of Virginia, concerning your obligation to pay Virginia income tax. Because you work outside the home and at least physically reside in Virginia, and because you are not on active duty in the uniformed services, Virginia can (and does) lawfully tax your income, regardless of where you vote or where you consider "home." You must still pay the same Virginia income tax even if you vote somewhere else or do not vote at all, so you might as well vote in Virginia, so that you can have some say on how those tax dollars are spent. Moreover, in your case you probably have no other alternative to voting in Stafford County—you cannot now re-establish your original California domicile after you have been away for more than two decades and have registered and voted

in many other states in the interim. If you cannot vote in Stafford County, you cannot vote at all—a result that runs afoul of the Equal Protection Clause and federal law.

I suggest that you and the other military spouses need to get legal advice from a military legal assistance attorney—see Law Review 125. You need to come to a considered judgment about the place that you consider to your domicile, and then you need to act in ways that are entirely consistent with that reasonable determination. Remember that you have one and only one domicile—like every human being. You cannot be a Virginian for voting purposes but a Texan (or a domiciliary of some other State) for tax purposes.

I strongly suggest that you have your employer withhold Virginia income tax from your salary, not the state income tax for some other state that you may have considered to be your home in the past and to which you *incorrectly* believe that you may owe state income tax. If your employer withholds state income tax and sends it to a particular state, based on your request (on the tax form you filled out when you started the job), it may be most difficult for you to recover that money from that other state. Moreover, Virginia's attitude will be, "We don't care what you may have paid some other state, *you owe us.* Now pay up. Getting your money back from that other state is your problem, not ours."

You will probably want to file a joint federal return, with your husband, but a separate Virginia return covering only your income (not his). Virginia may give you a hassle about this: "You cannot file a separate state return if you file a joint Federal return." That Virginia policy is wrong—it violates the SCRA, as applied to someone like you. "A tax jurisdiction may not use the military compensation of a nonresident servicemember to increase the tax liability on other income earned by the nonresident servicemember *or spouse* subject to tax by the jurisdiction." 50 U.S.C. App. 571(d) (emphasis supplied).

This is a new provision enacted in 2003, as part of the SCRA. This provision was enacted to close a loophole in the SSCRA that had been utilized by Kansas and some other states. "Yes, we realize that we cannot tax the military salary of Major Jones, who is not a Kansas domiciliary and is only here because the Army sent him here. But we are going to consider Major Jones' military salary in determining the *rate* at which we tax Mrs. Jones, for her income as the manager of a store." (Considering the servicemember's salary makes a big difference, because the state income tax is progressive—those who earn more money pay a higher *percentage* of that money in tax.) That policy was not a violation of federal law until 2003, when Congress enacted the SCRA, closing this and many other SSCRA loopholes.

Article VI, Clause 2 of the United States Constitution, commonly called the "Supremacy Clause," is 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." (Yes, it is capitalized just that way, in the style of the late 18th Century.) Very early in our nation's history, the Supreme Court held that the Supremacy Clause means what it

says—that federal law trumps conflicting state law. *See M'Culloch v. State,* 17 U.S. 316 (1819). *See also Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001).

You and the other spouses need to get legal advice and to get your "ducks in a row," but you should not be receiving or relying upon legal advice or tax advice from the registrar of Stafford County. In the first place, he is not a lawyer, and he should know better than to practice law without a license. Moreover, he does not have your best interests at heart. He is not trying to protect you from double taxation—he is trying to confuse you and to discourage you from registering to vote in his county.

In applying its tax and election laws, including determinations of domicile for voting and tax purposes, Virginia must comply with federal statutes, including the SCRA and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Moreover, Virginia must obey the United States Constitution, including Section 1 of the 14th Amendment: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The most important clause for present purposes is this final clause, which has come to be known as the Equal Protection Clause. I won't bore you with a long law school dissertation on the "traditional" interpretation of the Equal Protection Clause and the "new" interpretation. Suffice it to say that the "new" and much stricter interpretation applies when the distinction drawn by a state law, either on its face or as applied, is based on a *suspect class* (like race) or affects a *fundamental right* (like the right to vote).

In the New Equal Protection jurisprudence, it is not sufficient for the state to show a "rational basis" for the distinction that it has made. The state must show much more if the state action or statute is to survive the strict scrutiny under the New Equal Protection jurisprudence.

More than a generation ago, the Supreme Court struck down, as violative of the Equal Protection Clause, a provision in the Tennessee Constitution that required that an individual must have resided in the county for at least three months and the state for at least one year before registering to vote. In that case, the Court held: "We [the Supreme Court] concluded that if a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest." (Emphasis in original.) *Dunn v. Blumstein,* 405 U.S. 330, 337 (1972), citing *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 627 (1969). In *Kramer,* the Court struck down a state law that limited voting in school district bond elections to owners of real property.

The right to vote is not the only fundamental right—the right to travel or move from one state to another has also been held to be a fundamental right for New Equal Protection strict scrutiny

purposes. In striking down a durational residence requirement for the receipt of welfare benefits, the Court held: "[A]ny classification which serves to penalize that right [the right to move to a new State], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Shapiro v. Thompson,* 394 U.S. 618, 629 (1969).

Please note that New Equal Protection strict scrutiny requires a two-part analysis. First, the governmental interest advanced by the state to justify drawing the line where it has is a *compelling* governmental interest—an interest based on a perception of how these folks might vote cannot be a compelling governmental interest. But even if the Court agrees that the interest is compelling, the state-imposed distinction will not necessarily pass muster. The state must also demonstrate that drawing the line in that place is *necessary* to promote that compelling interest. If the state could draw the line in a less restrictive way and still promote the compelling interest, then the line fails under the second prong of this analysis. The state bears a heavy burden to show that its line passes both parts of the strict scrutiny test.

"[A] heavy burden of justification is on the State, and the statute will be closely scrutinized in light of its asserted purposes. It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with precision ... and must be tailored to serve their legitimate objectives.... And if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn,* 405 U.S. at 343 (internal citations omitted).

The Supreme Court has also struck down a provision in the Texas Constitution. The provision forbade an active duty service member, stationed in Texas, from establishing a domicile (for voting purposes) in Texas while on active duty. The Court firmly rejected the argument that the provision was necessary to prevent "transitory" service members from overwhelming the votes of "permanent" Texans. The Court held: "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington v. Rash,* 380 U.S. 89, 94 (1965).

The Supreme Court has also held that residents on the grounds of the National Institutes of Health are treated by the State of Maryland, in which the federal enclave is located, as state residents to such an extent that it violates the Equal Protection Clause to deny them the right to vote in that state. *See Evans v. Cornman,* 398 U.S. 419 (1970).

The issue of voting by service members and their spouses is similar to a question that has arisen in college towns around the country, especially since the voting age was lowered to 18 in 1971. Is a college student permitted to register and vote in the college town, even if it is quite unlikely that she will remain in that community after graduation? The answer to that question is "generally yes." A federal appellate court (one step below the Supreme Court) has struck down a former Texas Election Code provision that sought to establish a rebuttable statutory

presumption against a student voter establishing the college town as home. *See Whatley v. Clark,* 482 F.2d 1230 (5th Cir. 1973). The Virginia Supreme Court needs to reconsider its *Kegley v. Johnson* decision in light of the 26th Amendment (18-year-old vote) and cases like *Whatley.*

It has also been held that a Texas county registrar violated the 26th Amendment when he established a policy of requiring would-be student voters (and not other voter registration applicants) to complete a questionnaire demonstrating the intent to remain in the county indefinitely. *See United States v. Texas,* 445 F. Supp. 1245 (S.D. Tex. 1978) (three-judge district court), *affirmed sub nom. Symm v. United States,* 432 U.S. 1105 (1979).

It is really remarkable what you can find on the Internet these days. In my research for this article, I found and have utilized the eight-page "Election Law Opinion GSC-1," dated January 22, 2004, in the form of a letter from Texas Secretary of State Geoffrey S. Connor to Texas Governor Rick Perry.

After surveying the case law, the secretary of state held that the Waller County registrar could not lawfully prevent the students of Prairie View A&M University from registering and voting in the county. Secretary Connor relied heavily on *Dunn v. Blumstein,* the Supreme Court case that struck down Tennessee's one-year durational residence requirement as a prerequisite to registering to vote. A requirement that a voter reasonably predict that she will remain in the state or county for at least another year after registering is no more defensible than a requirement (already struck down by the Supreme Court) that the voter have already lived in the state for a year before registering.

I invite the reader's attention to the most eloquent and succinct bottom line of Election Law Opinion GSC-1: "It is our opinion that any state requiring a voter to state that he or she will be residing in a location for a stated number of months or years in the future would face a similar challenge [similar to the challenge faced, and failed, by Tennessee's one-year durational residence requirement]. An applicant filling out a Texas voter registration form is not required to state that the residence will be his or her home forever, or for the next five years, or even the next year. The applicant is only required for administrative reasons to submit the application 30 days before the election in which the applicant wishes to vote."

I respectfully submit that members of the armed forces and their spouses are entitled to at least as much deference and protection as college students. The federal government recruits service members and stations them around the country and the world. The federal government has a legal and moral responsibility to ensure that these folks do not lose the opportunity to exercise fundamental rights because of the circumstances of their and their spouses' military service.

In a 1952 letter to Congress (available at www.nationaldefensecommittee.org), President Harry S Truman (one of the founders of ROA) wrote: "About 2,500,000 men and women in the Armed Forces are of voting age at the present time. Many of those in uniform are serving overseas, or in parts of the country distant from their homes. They are unable to return to their States either

to register or to vote. Yet these men and women, who are serving their country and in many cases risking their lives, deserve above all others to exercise the right to vote in this election year. At a time when these young people are defending our country and its free institutions, the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve."

I respectfully submit that President Truman's most eloquent words are as true today as they were in 1952, and those words apply equally to military spouses as well as military members. These words should be addressed to the Virginia State Board of Elections. It is incumbent on *you* to correct or replace the general registrar of Stafford County. Servicemembers and their families should not have to wait another 53 years to exercise a basic civil right that the rest of us take for granted.

**Military title shown for purposes of identification only. The views expressed in this article are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. government.*

Update – April 2022

Location of SCRA

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.[3] The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant sections cited throughout the article can be found at:

50 U.S.C. App. § 571 discussing residence for tax purpose can be found at 50 U.S.C. § 4001.

50 U.S.C. App. § 595 discussing the guarantee of residency for military personnel and spouses of military personnel can be found at 50 U.S.C. § 4025.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved.*[4]

[3]*The Servicemembers Civil Relief Act (SCRA),* THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra (last visited Mar. 10, 2022).
[4]Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

Spouse of active-duty service member

On December 21, 2018, President Trump signed into law the Veterans benefit and Transition Act of 2018.[5] 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.[6] 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.

Let us reconsider your situation. Under the amendment, it *would* be lawful for you to vote absentee ballot in Florida if you change your domicile from Virginia to Florida. You may change your domicile to Florida, even though you have never lived in Florida, simply because your husband is a domiciliary of Florida. This would likely be beneficial for you because you will be able to avoid paying Virginia state income tax. It should be noted, if you decide to change your domicile to Florida, you will also need to register to vote in Florida. You cannot be a Virginia domiciliary for voting purposes and a Florida domiciliary for tax purposes. Of course, this is not a requirement. You can choose to be a domiciliary of Virginia since you meet the physical presence and intent requirements.

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.

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[5]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).

[6]Veterans Benefits and Transition Act § 302(a).

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:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002