

## LAW REVIEW<sup>1</sup> 21073

November 2021

### Domicile Discussion for the Military Legal Assistance Attorney

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Second Lieutenant Lauren Walker, USMCR<sup>3</sup>

4.5—SCRA Protection Against State and Local Tax Authorities

7.2—Service member or military spouse voting and domicile

**Q: I am a Captain in the Marine Corps and a judge advocate, currently stationed at Marine Corps Base 29 Palms, California.<sup>4</sup> I have read with great interest several of your “Law Review” articles about the Servicemembers Civil Relief Act (SCRA) and military voting rights and the unavoidable relationship between the State where the active-duty service member votes and the State that can lawfully tax his or her military income and personal property. Specifically, I have read Law**

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<sup>1</sup>I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup>BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

<sup>3</sup>Lauren is in her third year at Baylor Law School and is a Second Lieutenant in the Marine Corps. After she graduates from law school and passes the Texas bar exam, she will go on active duty in the Marine Corps. The mention of the military rank of Captain Wright and Second Lieutenant Walker is for identification only. The views expressed in this article are the views of the authors and should not be attributed to the Navy, the Marine Corps, the Department of the Navy, the Department of Defense, or the United States Government.

<sup>4</sup>The factual set-up for this article is hypothetical but realistic.

Review 19078 (September 2019), Law Review 18092 (September 2018), Law Review 18020 (February 2018), Law Review 18016 (February 2018), and Law Review 16048 (June 2016).

In addition to other duties, I am assigned to give legal assistance to Marines and sailors at this base concerning civilian legal issues, including questions about voting and State income tax and personal property tax liability. Recently, I met with an enlisted Marine (let us call him Lance Corporal Joe Jones). He had a complicated situation and lots of questions. I told him that I needed to take a couple of days to review the law and that I would get back to him. I would like to review with you the advice that I propose to give to Lance Corporal Jones.

Jones was born and raised in Boston, Massachusetts. In 2019, he graduated from high school and enlisted in the Marine Corps. After boot camp and initial military specialty training, he was assigned to duty here at 29 Palms. He lives in military housing on base.

Massachusetts is recorded as Jones' State of domicile in his Marine Corps personnel record, and Massachusetts State income tax is withheld from his military pay. He wants to change his domicile to Florida or one of the other eight States that do not have State income tax.<sup>5</sup> He also wants to vote in the mid-term elections next year, and he asked me where and how he should register to vote, and whether he should vote by absentee ballot back home in Boston. Please help me figure out how I should advise Lance Corporal Jones.

A: When a civilian (a person who is not presently on active duty) moves from State A to State B, he or she immediately loses his or her domicile in State A and becomes a domiciliary of State B, unless the absence from State A and presence in State B is for a temporary purpose measured in weeks. As an active-duty service member, Lance Corporal Jones is exempted from the application of this general rule.

Jones lived in the house or apartment owned or rented by his parents during his childhood and until June 2019, when he graduated from high school, enlisted in the Marine Corps, and left home to report to boot camp at Parris Island, South Carolina. Jones' *domicile of origin* is at the address of that house or apartment. Jones can maintain that domicile of origin for the entire time that he is on active duty, even for a full career of 20 years or more.

Jones can maintain that domicile of origin at the address where he was living with his parents when he left to report to boot camp even if his parents have since moved away or passed away. Jones' domicile is the place where *he lived* and was domiciled just before he entered active duty.

Jones' 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:

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<sup>5</sup>New Hampshire and Tennessee tax only interest and dividend income, not salary or wages. Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming have no State income tax. See *9 States With No Income Tax*, Jim Probasco, INVESTOPEDIA, <https://www.investopedia.com/financial-edge/0210/7-states-with-no-income-tax.aspx> (last updated Mar. 16, 2021).

§ 4001. Residence for tax purposes

- **(a) Residence or domicile**

**(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. ...*

- **(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....*
- **(d)** Personal property.

**(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.*

**(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.

**(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.

**(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....
- **(g)** Definitions. For purposes of this section:

**(1)** Personal property. The term "personal property" means intangible and tangible property (including motor vehicles).

**(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.

**(3) Tax jurisdiction.** The term "tax jurisdiction" means a State or a political subdivision of a State.<sup>6</sup>

#### **§ 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--
  - (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.<sup>7</sup>

If Jones remains on active duty and does not establish a new domicile elsewhere, he is eligible to vote in Massachusetts, either in person or by absentee ballot, and he is eligible to vote for all offices and questions on the ballot, not just federal offices. He will be required to pay State income tax to Massachusetts regardless of where he is serving on active duty, within or outside the United States.

Jones can change his domicile while he is on active duty, but he cannot presently change his domicile to Florida or one of the other eight States that do not have a State income tax. To change his domicile while he is on active duty, Jones must *simultaneously* have a physical presence in the State to which he wishes to change and the *intent* to make that State his home. Neither intent alone nor physical presence or absence alone is sufficient to create a new domicile or to destroy an existing domicile.

Jones has a physical presence in California for a significant time. While stationed at 29 Palms, he can change his domicile from Massachusetts to California if he simultaneously has the intent to make California his home. He can demonstrate that intent by registering to vote and voting in California. Of course, if he does that, he will give up his right to vote in Massachusetts.

Changing his domicile to California will be in Jones' financial best interest, if he intends to remain on active duty for a full career. California domiciliaries on active duty are required to pay California State income tax *only while they are physically present in the State of California*. Jones will not be required to pay California State income tax in the years that he is serving in another state or outside our country.<sup>8</sup> As a California domiciliary, Jones will be required to pay California State

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<sup>6</sup>50 U.S.C. §4001 (emphasis supplied).

<sup>7</sup>*Id.* § 4025(a) (emphasis supplied).

<sup>8</sup>See *Is my military income taxable to California?*, TAXSLAYER, <https://support.taxslayer.com/hc/en-us/articles/360015709252-Is-my-military-income-taxable-to-California-> (last visited Sept. 24, 2021).

income tax during the years when he is stationed at 29 Palms or elsewhere in California, but he will be exempt from having to pay State income tax during the years when he is serving in another State or outside our country.

**Q: If Lance Corporal Jones is stationed in one of the no-tax States later in his career, can he change his domicile to that State at that time?**

**A:** Yes. An active-duty service member can change his or her domicile several times during an active-duty career of 20 years or more. To make the change, the service member must simultaneously have a physical presence in the State to which he or she wishes to change, for a significant time, and the intent to make that State home.

**Q: Another client who has consulted me is Lance Corporal Mary Smith. Like Jones, Smith graduated high school, enlisted in the Marine Corps, and left home to report to boot camp in 2019. She was born and raised in Miami, Florida and lived with her parents and siblings in a home in Miami until she departed in July 2019. She is domiciled in Florida, one of the States that have no State income tax.**

**Smith is on active duty and stationed here at 29 Palms. Her local boyfriend is running for the California Legislature in 2022. Smith wants to register to vote here in California so that she can vote for her boyfriend. Can Smith register to vote and vote in California and still maintain her domicile in Florida?**

**A:** No. Every human being, and every service member, has *one and only one domicile*. Smith cannot be a Californian for voting purposes and a Floridian for tax purposes. If Smith registers to vote or votes in California, she thereby gives up her precious Florida domicile and her SCRA protection from having to pay State income tax.

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."<sup>9</sup>

Lance Corporal Smith would be well advised to continue voting by absentee ballot in Miami and not to vote or register to vote in California. If she remains on active duty for a full career, maintaining her Florida domicile can save her tens of thousands of dollars in State income tax.

**Please join or support ROA**

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<sup>9</sup>*Comptroller of the Treasury v. Lenderking*, 303 A.2d 402, 405 (Md. 1973); see also *Suglove v. Okla. Tax Comm'n*, 605 P.2d 1315 (Okla. 1979).

This article is one of 1800-plus “Law Review” articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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