

Yes, You Have the Right to Vote under UOCAVA

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

Q: I am a Lieutenant Colonel in the Army Reserve and a life member of the Reserve Officers Association (ROA). I live in Switzerland with my wife, who is a citizen of Switzerland, and my daughter, who has dual citizenship of the U.S. and Switzerland.

I was born and raised in Boston and graduated from high school in 1983. A few weeks later, I reported to the United States Military Academy (USMA) at West Point, New York. In May 1987, I graduated and was commissioned a Second Lieutenant. I served on active duty for six years, including service in the First Gulf War. I was released from active duty in May 1993 and affiliated with the Army Reserve.

After I was commissioned and after some military training, I reported for duty at Fort Hood in Texas and was assigned there from November 1987 to November 1990, when I deployed to Southwest Asia for Operation Desert Storm (ODS). After ODS, I reported for duty in Germany and remained there until I left active duty in May 1993.

While on active duty in Germany in the early 1990s, I met the woman who is now my wife. We were married in March 1993, shortly before I left active duty. In May 1993, when I left active duty, I moved with her to Switzerland instead of returning to the United States. I have a good job in Switzerland, working for a Swiss company.

While stationed at Fort Hood in 1988, I decided to give up my domicile in Massachusetts and become a Texan. I registered to vote in Texas and obtained a Texas driver's license and Texas license tags for my automobile. It helps that Texas has no state income tax, while Massachusetts has one of the highest state income tax rates. By becoming a Texan, I avoided having to pay Massachusetts state income tax for the remainder of my active duty period and possibly beyond.

I have read with great interest your "Law Review" articles about military voting rights. As an Army Reservist, I spend many days per year on various forms of military duty, but for the majority of the days each year I am not in an active military status. Some election years, Election Day may happen to fall on a day when I am in an active military status, but most

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

² Captain Wright was the Director of ROA's Service Members Law Center from June 2009 through May 2015.

years I am not in an active military status on Election Day. Am I eligible to vote by absentee ballot, under federal law, when I am not in an active military status on Election Day?

A: Yes, under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)³ you are eligible to vote as an “overseas voter” without regard to your military status or lack thereof. UOCAVA accords the right to vote by absentee ballot in primary, general, special, and runoff elections for federal office (President, U.S. Senator, and U.S. Representative) to “absent uniformed services voters” and to “overseas voters.”⁴ UOCAVA defines the term “overseas voter” as follows:

(5) "overseas voter" means--

(A) an absent uniformed services voter who, by reason of active duty or service is absent from the United States on the date of the election involved;

(B) a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or

(C) a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States.⁵

Q: Am I to vote in Boston, where I was born and spent my childhood and where my parents still live, or am I to vote in Harker Heights, Texas, where I lived while I was stationed at Fort Hood and where I registered to vote in 1998?

A: You must vote in Harker Heights. While you were on active duty and stationed at Fort Hood, you made a *bona fide* change of your domicile from Massachusetts to Texas. Up until that point, you were domiciled in Massachusetts, at the place where you lived and were domiciled just before you reported to the USMA in 1983. You were domiciled at that address in Harker Heights when you left the United States, so Harker Heights is where you are eligible to vote by absentee ballot under UOCAVA.

An active duty service member starts active duty with the *domicile of origin*—the place where he or she lived and was domiciled immediately before entering active duty. Some service members maintain the domicile of origin for many years on active duty, even a full career of 20 years or more.

You can change your domicile while you are on active duty, and you did so. To change your domicile while on active duty, you must *simultaneously* have a physical presence in the place to which you wish to change and the *intent* to make that place your domicile (permanent home). Neither intent alone nor physical presence or absence alone is sufficient to bring on a new

³ Please see Law Review 15024 (March 2015) for a detailed discussion of UOCAVA.

⁴ 52 U.S.C. 20302(a)(1). This citation refers to subsection (a)(1) of section 20302 of title 52 of the United States Code.

⁵ 52 U.S.C. 20310(5).

domicile or to destroy a pre-existing domicile. You cannot change your domicile to Texas while stationed in Germany. You changed your domicile to Texas while you were physically present in Texas for a significant time. You did this right. You have been a Texan since you changed your domicile in 1988. You maintained your Texas domicile while you were serving on active duty in Southwest Asia and then in Germany, through May 1993.

Under section 20310(5)(B) of UOCAVA⁶ you are eligible to vote by absentee ballot “in the last place in which the person was domiciled before leaving the United States.” For you, that place is Harker Heights, Texas. When you complete the Federal Post Card Application (FPCA) and send it to the County Clerk of Bell County, Texas, you should list the address of the apartment where you lived in the late 1980s as your “permanent home address.”

I am sure that the apartment has been through at least 15 different tenants since you left in 1990, and no one will find your name on a mail box at that address. The old apartment building may even have been torn down in the intervening 25 years. None of that matters. That apartment address is the last place in the U.S. where you were domiciled before you left the U.S.

Q: Am I eligible to vote by absentee ballot for all offices, or just for federal offices?

A: Under UOCAVA, you are eligible to vote by absentee ballot in primary, general, special, and runoff elections for federal office. To be eligible to vote under UOCAVA, you need not *be* a domiciliary of that place (Harker Heights) in the U.S. where you last lived before departing our country. It is sufficient that you *were domiciled* in that place immediately before you left the United States. When you are 90 years old and have been outside the U.S. for 60 years, and have no intention of returning to the U.S., you are nonetheless eligible under UOCAVA to vote by absentee ballot for federal offices.

If you are *currently domiciled* in Texas, you are eligible, under state law, to vote by absentee ballot for *all offices and ballot questions*, not just federal offices. You are *currently domiciled* in Harker Heights, Texas if you *intend to return* there in the future. UOCAVA is a floor and not a ceiling on your voting rights.

Q: What effect, if any, does my voting by absentee ballot have on the determination of my residence or domicile for tax purposes?

A: UOCAVA provides: “The exercise of any right under this title shall not affect, for any Federal, State, or local tax, the residence or domicile of a person exercising such right.”⁷

Thus, if you vote *for federal offices only* under UOCAVA, the state where you vote cannot use the fact of your vote as evidence establishing your liability to pay state income tax to that state.

⁶ 52 U.S.C. 20310(5)(B).

⁷ 52 U.S.C. 20309.

This does not mean that you are automatically exempt from having to pay state income tax, but the state tax authorities will have to prove your domicile and your liability to pay the tax without regard to your having voted for federal offices under UOCAVA.

On the other hand, if you cast an absentee ballot for *all offices* the state would probably not be precluded from citing the fact of your having so voted as evidence of your domicile for state income tax purposes. The Maryland Court of Appeals has held: "Evidence that a person registered or voted is admissible and ordinarily persuasive when the question of domicile is at issue." *Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (1973).

If your position is that you are no longer domiciled in that particular state and that you do not owe state income tax, it would be prudent for you to limit your voting to federal offices, under UOCAVA.

Section 20309 of UOCAVA is very important to some overseas Americans. This provision is largely irrelevant to you because Texas has neither a state income tax nor a state inheritance tax.

Q: My daughter was born in Switzerland in 1999. She has both Swiss citizenship, based on having been born in Switzerland to a Swiss mother, and U.S. citizenship, based on the U.S. citizenship of her father (me). When she becomes an adult, she will need to choose between Swiss citizenship and U.S. citizenship, and I think that it is likely that she will choose U.S. citizenship.

My daughter has never lived in the U.S. and she has only visited once, in 2005, during our family vacation to Boston. If my daughter chooses U.S. citizenship when she turns 18 but does not move to the U.S., will she be eligible to vote by absentee ballot under UOCAVA?

A: No. Under section 20310(5) of UOCAVA⁸ a U.S. citizen who is outside the U.S. permanently or temporarily is eligible to vote by absentee ballot "in the last place in which the person was domiciled before leaving the United States." Because your daughter was never domiciled in the U.S., she is not eligible to vote under UOCAVA.

If your daughter moves to the U.S. for a period of time (perhaps to attend college) and establishes a domicile at the U.S. place where she lives, and then returns to Switzerland or moves to some other country, she would be eligible to vote under UOCAVA at that point.

⁸ 52 U.S.C. 20310(5).