

## The Service Member Has a Constitutional Right to Register and Vote in the Community where He or She Is Stationed

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

4.5—SCRA protection from state/local tax authorities

7.0—Military voting rights

*Carrington v. Rash*, 380 U.S. 89 (1965).<sup>3</sup>

### Right to register and vote where stationed

Carrington<sup>4</sup> was a career soldier in the United States Army, having enlisted in 1946 at age 18. At the time this case arose in the early 1960s, he was a Sergeant and was assigned to duty at the White Sands Proving Ground in New Mexico. He owned a home in El Paso, Texas and lived in it, commuting daily a few miles to his duty station in New Mexico. His automobile was registered in Texas and he paid Texas property tax on both his personal and real property. He considered

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<sup>1</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,400 "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.

<sup>2</sup> Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). He has been dealing with the federal reemployment statute for 33 years and has been dealing with military voting rights even longer. He has made the protection of the rights of service members the focus of his legal career. He developed the interest and expertise in reemployment rights during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

<sup>3</sup> This is a 1965 decision of the United States Supreme Court. The citation means that you can find the case in Volume 380 of *United States Reports*, starting on page 89.

<sup>4</sup> His first name is not mentioned in the opinion.

the El Paso house to be his home and domicile and expected to remain there indefinitely, even after retiring from the Army a few years later. He sought to register to vote in El Paso County, but the County Tax Assessor-Collector refused to process his voter registration application.<sup>5</sup>

The local voter registration official refused to permit Carrington to register to vote in El Paso County based on Article VI, Section 2 of the Texas Constitution, which at the time prohibited any member of the United States military who moved his home to Texas during the course of his military duty from ever voting in Texas so long as he or she was on active duty in the military. Carrington lived in Alabama when he enlisted in the Army in 1946.

Carrington brought an action in the Texas Supreme Court seeking a writ of mandamus commanding the local voter registrar to process Carrington's voter registration application and add his name to the list of registered voters. Carrington contended that the Texas Constitution was unconstitutional under the Equal Protection Clause of the 14<sup>th</sup> Amendment of the United States Constitution. The Texas Supreme Court upheld the constitutionality of Article VI, Section 2 and denied Carrington's request for mandamus relief.<sup>6</sup>

Carrington appealed to the United States Supreme Court, which agreed to hear his case. After briefs and oral argument, the Supreme Court almost unanimously (8-1) struck down Article VI, Section 2, stating:

The theory underlying the State's first contention is that the Texas constitutional provision is necessary to prevent the danger of a "takeover" of the civilian community resulting from concentrated voting by large numbers of military personnel in bases placed near Texas cities and towns. A base commander, Texas suggests, who opposes local police administration or teaching policies in the local schools might influence his men to vote in conformity with his predilections. ... We stress—and this is a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation. ... "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. The exercise of rights so vital to the maintenance of democratic institutions ... cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents. Yet, that is what Texas claims to have done here.<sup>7</sup>

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<sup>5</sup> In Texas at the time, and in most Texas counties even today, the Tax Assessor-Collector of the county administers voter registration, while the County Clerk administers other election functions, including absentee voting. This is a vestige of the "poll tax" days.

<sup>6</sup> 384 S.W.2d 304.

<sup>7</sup> *Carrington*, 380 U.S. at 93-94.

Near the end of the majority opinion, the following summary sentence appears: “The uniform of our country must not be the badge of disenfranchisement of the man or woman who wears it.”<sup>8</sup>

**The service member cannot have it both ways.**

As a matter of common law, and also under the Soldiers’ and Sailors’ Civil Relief Act (SSCRA),<sup>9</sup> active duty service members are exempted from the usual rule (applicable to civilians)<sup>10</sup> that moving from State A to State B necessarily means losing one’s domicile in State A and becoming a domiciliary of State B. For example, Joe Smith (a civilian) has lived in Dallas, Texas his whole life. His job is for Big Beer, Incorporated (BBI) at its regional office in Dallas. BBI transfers Joe to its international headquarters in New York City. Joe does not want to leave Texas, but he moves because he does not want to lose his job. Immediately upon moving into a house or apartment near his new BBI job, Joe loses his Texas domicile and becomes a domiciliary of New York.<sup>11</sup>

Mary Jones graduated from high school in Dallas and enlisted in the Coast Guard. After basic military training, she is assigned to a Coast Guard station in New York. She cannot perform her Coast Guard duties while living at the house in Texas where she lived and was domiciled just before she enlisted,<sup>12</sup> so she rents an apartment<sup>13</sup> near the Coast Guard station where she is assigned.

Mary is different from Joe, in that Mary is on active duty in the armed forces while Joe is not. Renting an apartment or even buying a house near her assigned duty station does not make Mary a domiciliary of New York, but when Joe moved into an apartment in New York, near his civilian job, that move changed his domicile from Texas to New York.

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<sup>8</sup> *Carrington*, 380 U.S. at 97.

<sup>9</sup> In 2003, Congress substantially amended and recodified the SSCRA, which dated from 1917. The new law is called the Servicemembers Civil Relief Act (SCRA). The provisions discussed here are substantially identical in the SSCRA and SCRA.

<sup>10</sup> For this purpose, a member of the National Guard or Reserve is considered to be a civilian except when he or she is on active duty.

<sup>11</sup> If his new house or apartment is in New Jersey or Connecticut, he would become a domiciliary of that state. Joe’s domicile is determined by where he lives, not where he works. If Joe is at the New York City headquarters for a short-term assignment measured in weeks or months, moving from Texas to New York does not change his domicile.

<sup>12</sup> Mary’s domicile is the place where *she lived* and was domiciled before she entered active duty. If Mary remains on active duty for a full career, it is likely that at some point her parents will move away or pass away. That would not change the fact that the place where Mary lived before enlisting is her domicile. It is not necessary that Mary have relatives living at that address or that she be able to receive mail at that address.

<sup>13</sup> The result would not be different if she bought a house.

Military service is different from a civilian job. If Joe does not want to move to New York, he can quit his BBI job. Mary cannot quit the Coast Guard, at least not until the end of her enlistment or the active duty period to which she committed herself. If Mary refuses to go to her new duty station in New York, she is guilty of the military criminal offense of unauthorized absence.

The SCRA provides:

§ 4025. Guarantee of residency for military personnel and spouses of military personnel

(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) [52 USCS § 30101]) 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 [52 USCS § 30101])) 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--

- (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>14</sup>

§ 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.

(2) Spouses. A spouse of 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 spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the

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<sup>14</sup> 50 U.S.C. 4025.

servicemember's military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse.

(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.

(c) Income of a military spouse. Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the jurisdiction solely to be with the servicemember 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.

(f) Federal Indian reservations. An Indian servicemember whose legal residence or domicile is a Federal Indian reservation shall be taxed by the laws applicable to Federal Indian reservations and not the State where the reservation is located.

(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>15</sup>

These provisions, taken together, mean that Mary Jones does not automatically become a New York domiciliary (for voting or tax purposes) solely because she rents an apartment or buys a house in New York in order to have a place to live that is within a reasonable commuting distance of her Coast Guard assignment. Mary physically resides in New York but is domiciled elsewhere. New York is precluded from taxing her military income or her personal (moveable) property.

Mary can change her domicile from Texas to New York while physically present in New York for a significant time. To change her domicile, she must *simultaneously* have the physical presence in the state to which she wishes to change plus the *intent* to make that place home. Neither intent alone nor physical presence or absence alone is sufficient to create a new domicile or to destroy a pre-existing domicile.

Let us assume that Mary remains on active duty in the Coast Guard for a career of 20 years or more. Mary can retain her domicile in Dallas, at the home she shared with her parents and siblings before she entered active duty, until she leaves active duty or until she establishes a new domicile elsewhere, whichever comes first.

It is likely that Mary will want to retain her domicile at the Dallas home where she lived before enlisting, because Texas is one of a handful of states that have no state income tax.<sup>16</sup> Mary cannot have it both ways. She cannot maintain her Texas domicile for tax purposes while establishing a New York domicile for voting purposes. If Mary registers to vote or votes in New York, she loses her exemption from New York state income tax and personal property tax.

"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). This holding of the Maryland Court of Appeals (Maryland's high court) has been cited with approval and upheld in eight later Maryland high court

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<sup>15</sup> 50 U.S.C. 4001.

<sup>16</sup> The states that have no state income tax are Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming. In addition, New Hampshire and Tennessee tax only interest and dividend income. See [www.govspot.com/know/incometax.htm](http://www.govspot.com/know/incometax.htm).

decisions: *Reeder v. Board of Supervisors of Elections of Queen Anne's County*, 269 Md. 261, 305 A.2d 132 (1973); *Knapp v. Comptroller of the Treasury*, 269 Md. 697, 309 A. 2d 635 (1973); *Bartell v. Bartell*, 278 Md. 12, 357 A.2d 343 (1976); *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979); *Wamsley v. Wamsley*, 333 Md. 454, 635 A.2d 1322 (1994); *Roberts v. Lakin*, 340 Md. 147, 665 A.2d 1024 (1995); *Blount v. Boston*, 351 Md. 360, 718 A.2d 1111 (1998); and *Oglesby v. Williams*, 372 Md. 360, 812 A.2d 1061 (2002). The Oklahoma Supreme Court has also cited *Lenderking* with approval and has followed it. See *Suglove v. Oklahoma Tax Commission*, 1979 OK 168, 605 P.2d 1315 (1979). It is very likely that other state courts will follow this line of reasoning.

Bob Williams graduated from high school in 2012, in Boston, Massachusetts. Shortly after graduation, he joined the Army, and he is still on active duty. He is currently serving at Fort Hood in Texas, and he lives in an apartment outside the main gate of the base. It is likely that he will change his domicile from Massachusetts to Texas while serving at Fort Hood.<sup>17</sup> Having changed his domicile from Massachusetts to Texas, he can maintain his new Texas domicile when he remains on active duty and reports to a new duty station in another state.

I invite the reader's attention to my Law Review 1142 (April 2011), titled "Where Do Military Personnel and Family Members Vote?" The article includes a chart showing the number of active duty service members and voting age family members who are domiciled and eligible to vote in each state. The two largest states in terms of the number of military voters are Texas and Florida. What these states have in common is a favorable tax policy (no state income tax) plus large military installations.

Most military personnel do not register and vote where they are stationed, except when they are stationed in states that have favorable tax policies. The presence of a large number of active duty service members who vote elsewhere and are not eligible to vote in the local community can really complicate matters in "one person one vote" litigation.<sup>18</sup>

## Summary

As an active duty service member serving within the United States, you have the right to establish a domicile and to register and vote at the place where you physically reside pursuant

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<sup>17</sup> Domicile must never be a gimmick to avoid state income tax, but in deciding where he wants to live Bob can legitimately compare the tax policies of his original home state and the state where he is currently stationed.

<sup>18</sup> In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court established that it is an Equal Protection violation if the value of some votes is much greater than the value of other votes, because of gross disparities in population from one district to another. The presence of a large number of non-resident service members may require that adjustments be made—that a count of *eligible voters* be used instead of a simple Census count of humans, without regard to their eligibility or ineligibility for the local franchise. See *Burns v. Richardson*, 384 U.S. 73 (1966) and *Davis v. Mann*, 377 U.S. 678, 691 (1964).

to military orders, but you may not want to do that. You will want to consider comparing the tax policy of your original home state with the tax policy of the state where you currently serve, but tax policy is not the only consideration. If you plan to leave active duty and attend college in a state university in your original home state, you may want to maintain your domicile in that state while you are on active duty, in order to be eligible for the “in state” tuition rate after you leave active duty.

Remember that you have one and only one domicile for all legal purposes. If you are confused or uncertain about where you are domiciled, where you are eligible to vote, and where you must pay taxes, you should schedule an appointment with a military legal assistance attorney to discuss this matter in detail.<sup>19</sup>

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<sup>19</sup> Go to <http://legalassistance.law.af.mil/content/locator.php>. This website is operated by the Air Force, but it includes military legal assistance offices for all five armed forces, even including the Coast Guard. You put in your zip code and the website shows you the locations and telephone numbers of nearby military legal assistance offices. You call and make an appointment—legal assistance attorneys will not (by policy) try to provide legal assistance by telephone. The office where you make an appointment need not be for your own service because military legal assistance is “purple.”