

## **Federal Only or All Offices Voting from Overseas?**

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

7.2—Service member or military spouse voting and domicile

**Q: I have enjoyed reading your “Law Review” articles about military voting and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Am I eligible to vote under this law?**

**I was born in 1950, in Alabama. I graduated from college in 1972 and was commissioned a Second Lieutenant in the Army, via the Reserve Officers Training Corps (ROTC). I served on active duty for four years and was released in 1976. At that time I moved to Wisconsin to take a job for a major corporation. I affiliated with the Army Reserve and retired in 2002 as a Colonel. In 2010, I turned 60 and started drawing my reserve retired pay.**

**I remained in Wisconsin until 2005, when the corporation sent me to the Republic of the Philippines (RP) to head the corporate operations there. When I left Wisconsin, my intent was**

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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).

**to spend the last five years of my corporate career in the RP and then return to Wisconsin. However, when I turned 60 and retired I decided to stay in the Philippines—my retired pay goes much further here. I will likely live here for the rest of my life.**

**A:** You are eligible to vote under UOCAVA, but as an “overseas voter” and not as an “absent uniformed services voter.” These terms, and many other terms used in UOCAVA, are defined in 42 U.S.C. 1973ff-6. An absent uniformed services voter is a member of the uniformed services *on active duty* or the voting-age spouse or dependent of such a member. You do not qualify because you are not on active duty. 42 U.S.C. 1973ff-6(1).

UOCAVA also accords the right to vote to U.S. citizens who are outside the United States *temporarily or permanently*. 42 U.S.C. 1973ff-6(5). You are eligible to vote in Wisconsin, by absentee ballot, in primary, general, special, and runoff elections for federal office (President, United States Senator, and United States Representative), so long as you remain in the RP or elsewhere outside the United States, without regard to how long you have been away from Wisconsin and even if you have a firm intention never to return there. 42 U.S.C. 1973ff-1(a)(1).

**Q: Am I only eligible to vote for federal offices? What about state and local offices?**

That depends on your *intent* to return to Wisconsin. During the five years that you were in the RP on assignment to the major corporation, and when you intended to return to Wisconsin upon completion of that five-year assignment, you were probably eligible to vote in Wisconsin by absentee ballot for *all* offices. When you changed your mind and decided to stay in the RP long-term after retiring from the corporation, you probably lost the right to vote in Wisconsin for non-federal offices.

The traditional rule is that to be eligible to vote in a place you must be *domiciled* in that place. You can maintain your domicile in Wisconsin while absent from the state, even for a period of years, so long as you *intend to return* to that state. But to be eligible to vote by absentee ballot *for federal offices only* under UOCAVA you need not be domiciled in Wisconsin. It is sufficient that you *were domiciled* in Wisconsin before you moved to an overseas location. You may spend the next 35 years in the RP and die there in 2046, but so long as you do not renounce your U.S. citizenship you are eligible to vote in Wisconsin by absentee ballot, for federal offices, under UOCAVA.

**Q: Does my voting by absentee ballot have any effect on my liability to pay Wisconsin state income tax? During my last five years with the corporation, while I was living and working in the RP, I continued**

**paying Wisconsin state income tax, through withholding from my salary. I also filed a Wisconsin state tax return for each year through 2010. When I retired from the corporation and starting drawing my corporate retired pay, in late 2010, I did not arrange for withholding of state income tax from my retired pay. I did not pay Wisconsin state income tax or file a**

**return for 2011 or so far in 2012. In January 2011 I sent a letter to Wisconsin's tax department, informing them that as of the end of 2010 I was no longer domiciled in Wisconsin and that I would not be paying any further Wisconsin taxes. The tax department has not responded to or acknowledged my letter.**

**A:** UOCAVA specifically provides: "The exercise of any right *under this subchapter* shall not affect, for purposes of any Federal, State, or local tax, the residence or domicile of a person exercising such right." 42 U.S.C. 1973ff-5 (emphasis supplied).

Thus, if you vote *for federal offices only* under UOCAVA, Wisconsin cannot use the fact of your vote as evidence establishing your liability to pay Wisconsin state income tax. This does not mean that you are automatically exempt from having to pay Wisconsin 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 of Wisconsin 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).<sup>3</sup>

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

**Q:** I have been voting by absentee ballot in Wisconsin in every federal election since I arrived here in the RP in 2005. I have been using the excellent wizard on the Federal Voting Assistance Program (FVAP) website, [www.fvap.gov](http://www.fvap.gov) to complete the Federal Post Card Application (FPCA). That website asks me a series of questions and then gives me a completed form that is complete, correct, and legible, and it also provides me with the address of my local election official in Wisconsin. I sign the form and mail it in.

When I filled out my form to vote in the 2012 primary in Wisconsin (for President and for U.S. Representative only), I noticed that the FPCA form on the website has changed. Formerly, there were two categories on the form for overseas civilian voters like me: "U.S. citizen outside the United States temporarily" and "U.S. citizen outside the United States indefinitely." On the new form, the two categories are "U.S. citizen outside the United States and I intend to return" and "U.S. citizen outside the United States and I do not intend to return." Why was this change made? Who is responsible for this form? Which box should I choose? What effect does my choice of the box have on my receiving a full ballot as opposed

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<sup>3</sup>Maryland's Court of Appeals is the state's high court.

**to a ballot for federal offices only? What effect does my choice of the box have on my potential liability to pay Wisconsin state income tax?**

**A:** Congress enacted UOCAVA in 1986, replacing two earlier laws. UOCAVA assigns important responsibilities to the “presidential designee” and one of those responsibilities is to design and revise the FPCA and other forms provided for by this law. In early 1988, as UOCAVA was going into effect, President Ronald Reagan designated the Secretary of Defense (SECDEF) as the “presidential designee.” That designation remains in effect because no subsequent president has chosen to change it.

In early 1988, SECDEF Frank Carlucci delegated all of the “presidential designee” powers, responsibilities, and discretion to the Director of the Federal Voting Assistance Program (FVAP), and that delegation is also still in effect.

This year, the FVAP Director chose (properly in my view) to exercise his authority and change the FPCA. I think that the distinction between “intend to return” and “do not intend to return” is more readily understandable than the inherently vague distinction between “temporarily” and “indefinitely.” But however the form is worded, there will be some who are confused and uncertain. It is not possible to put paragraphs of explanation on the form. The whole point is to make the form concise.

Since it is now your position that you intend not to return to Wisconsin and that you do not owe state income tax to Wisconsin, I suggest that you check the “do not intend to return” box. If you check that box, you should receive a ballot that is limited to federal offices. If you check the “intend to return” box you will likely receive a full ballot.

**Update – April 2022**

The location of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) within the United States Code changed. UOCAVA was previously cited at 42 U.S.C. §§ 1973ff—1973ff-7. After an editorial reclassification, the UOCAVA is now codified at 50 U.S.C. §§ 20301—20311. The changes in codification have not changed the substance or application of the sections.

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

42 U.S.C. § 1973ff-6 discussing the definitions can be found at 50 U.S.C § 20310.

**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.

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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