

Semper Disqualified: The Incongruity Between Federal and State Suffrage Protections for Certain Military Voters Seeking to Vote in State and Local Elections, and A Possible Legislative Remedy.

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I. Introduction

It is axiomatic that members of the United States military forces at all levels and throughout the course of the nation’s history have fought for the essential freedoms which underlie the constitution – key among them the suffrage right. The suffrage right is, of course, a fundamental right under the federal constitution and the constitutions of all states in the United States.¹ Over the course of its history, the suffrage right has seen controversy and change, which mirrored the social and political issues and changed realities of the country. As the right to vote has been extended to encompass more citizens, so too has the ability to serve one’s country as part of the military.

In recognition of the importance of the right to vote, and the importance of serving as a member of the military, the absentee ballot has been embraced as a way to ensure that members of the military who have an established home can vote for federal officers while stationed overseas² and at bases which are not in their home state.³ This method of voting has further been applied to military families stationed overseas and away from their homes.⁴ Indeed, recent federal legislation has provided members of the armed services and their families with further guarantees that the states where they are otherwise eligible to vote will timely provide them with absentee ballots for federal

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¹ See *infra* Parts II, IV. See also *Carrington v. Rash*, 380 U.S. 89 (1965).

² See *infra* Parts II, III.

³ See *infra* Parts II, III.

⁴ See *infra* Parts II - IV.

elections,⁵ and has provided states with a set of procedures which must be followed to ensure that each military ballot is properly processed in time to be counted for the relevant election.⁶ Despite the federal and state constitutional and statutory protections guaranteed to members of the United States military and their families, there is at segment of the military population which is a risk of being disenfranchised.⁷ It is this segment of the military population that this article addresses.

Part II of this article discusses the federal and state constitutional provisions relating to military voters.⁸ It highlights the split in state constitutional law between states which specifically protect or disenfranchise military voters,⁹ and states which do not address the issue.¹⁰

Part III discusses the federal statutes which protect members of the military in their voting rights,¹¹ and then turns to a discussion of the various state statutes which address military voting rights,¹² as well as the requirements to establish residency in the various states.¹³ After discussing the relevant constitutional and statutory provisions, Part IV discusses federal and state case law construing the suffrage rights of members of the military.¹⁴

Part V sets forth the crux of this article – that federal and state protections are not sufficient to protect a segment of the military population.¹⁵ This population is not large,

⁵ See *infra* Part III.

⁶ See *infra* Part III.

⁷ See *infra* Part V.

⁸ See *infra* Part II.

⁹ See *infra* Part II.

¹⁰ See *infra* Part II.

¹¹ See *infra* Part III.

¹² See *infra* Part III.

¹³ See *infra* Part III.

¹⁴ See *infra* Part IV.

¹⁵ See *infra* Part V.

however that it exists is troubling given the importance of voting after recent election issue, the current war, and the growing trend of voter apathy and non-voting. Part V further provides a way to remedy this issue and ensure uniformity in the residency requirements and voting eligibility of the affected military population for voting in state and local elections, while at the same time easing the burden on local officials to render decisions on voting eligibility for military personnel and to fight court cases based on these decisions.¹⁶

Finally, Part VI summarizes the laws, issues, and possible solutions presented in this article, and highlights the importance of this issue for constitutional law and fairness principles in general.¹⁷

II. Federal and State Constitutional Suffrage Protections

A. Federal Provisions.

The fourteenth amendment of the United States Constitution guarantees the suffrage right to properly qualified United States citizens.¹⁸ Subsequent amendments extended the right to vote to former slaves and all African Americans,¹⁹ extended the right to vote to women,²⁰ and lowered the voting age from a discretionary twenty-one years of age to a mandatory eighteen years of age.²¹ These amendments mirrored the societal and legal changes which occurred in the U.S. at the time of their passage.²²

¹⁶ See *infra* Part V.

¹⁷ See *infra* Part VI.

¹⁸ U.S. CONST. AMEND. XIV.

¹⁹ U.S. CONST. AMEND. XV.

²⁰ U.S. CONST. AMEND. XIX.

²¹ U.S. CONST. AMEND. XXVI.

²² The extension of the suffrage right federally began with the inclusion of citizens regardless of race or creed, continued to include qualified women as voters, did away with wealth tests for voters through the elimination of the poll tax, and, most recently, has included qualified citizens age eighteen and older within

These amendments also illustrate that the suffrage right is not only a fundamental right under the tenets of constitutional law, but also is indicative of the importance of the right to vote in terms of the overall sense of the country's societal and legal concepts of its principles.

B. State Constitutional Provisions.

All state constitutions guarantee qualified citizens the right to vote in state and local elections, in addition to federal elections as provided in the U.S. Constitution. Within these provisions, however, there are clusters of provisions addressing military voting.

The first cluster makes no mention of military voters or presence in the state because of military service,²³ and often tasks the state legislature with developing and implementing voter registration qualifications and disqualifications.²⁴ Thus, in these states, the right to vote is only as good as federal law and legislatively promulgated requirements and restrictions allow.

the suffrage right. The lowering of the age requirement was achieved after a longstanding debate in many states as to whether the voting age should be lowered to reflect the ability of eighteen year olds to engage in other adult activities but not vote.

²³ ALA. CONST. AMEND. 579 (2006); ALASKA CONST. ART. V § 1 (2006); ARIZ. CONST. ART. VII § 2 (2006); ARK. CONST. ART. 3 § 1 (2006); CAL. CONST. APPX. I ART. II § 1 (2006); COLO. CONST. ART. VII § 1 (2005); FLA. CONST. ART. VI § 4 (2006); GA. CONST. ART. II § I para. II (2006); HAW. CONST. ART. II § 1 (2006); ID. CONST. ART. VI § 4 (2006); ILL. CONST. ART. III § 1 (2006); IND. CONST. ART. 2 § 2 (2006); IOWA CONST. ART. II § 1 (2005); KAN. CONST. ART. 5 § 1 (2006); KY. CONST. § 145 (2005); MD. CONST. ART. I § 1 (2006); MASS. CONST. PT. 2 CH. II. § I ART. III (2005); MICH. CONST. ART. II § 1 (2006); MINN. CONST. ART. VII § 1 (2005); MISS. CONST. ART. 12 § 241 (2006); NEV. CONST. ART. 2 § 6 (2006); N.H. CONST. PT. 1 ART 11 (2006); N.M. CONST. ART. VII § 1 (2006); N.C. CONST. ART. VI § 2 (2006); N.D. CONST. ART. II § 1 (2006); OHIO CONST. ART. V § 1 (2006); OR. CONST. ART. II § 2 (2006); PA. CONST. ART. 7 § 6 (2005); R.I. CONST. ART. II § 1 (2006); TENN. CONST. ART. I § 5 (2006); TEX. CONST. ART. VI § 2 (2006); VT. CONST. § 42 (2006); VA. CONST. ART. II § 1 (2006); WY. CONST. ART. 6 § 2 (2006) (providing generic age and residency requirements as voting qualifications).

²⁴ ARK. CONST. ART. 3 § 1 (2006); GA. CONST. ART. II § I para. II (2006); ID. CONST. ART. VI § 4 (2006); ILL. CONST. ART. III § 1 (2006); IND. CONST. ART. 2 § 2 (2006); IOWA CONST. ART. II § 1 (2005); KY. CONST. § 147 (2005); MD. CONST. ART. I § 3 (2006); MONT. CONST. ART. IV § 3 (2006); NEV. CONST. ART. 2 § 6 (2006); N.H. CONST. PT. 1 ART 11 (2006); N.M. CONST. ART. VII § 1 (2006) (allowing the legislature to promulgate laws relating to both standard voting procedures and absentee ballots); N.D. CONST. ART. II § 1 (2006); PA. CONST. ART. 7 § 6 (2005); R.I. CONST. ART. II § 1 (2006); TENN. CONST. ART. I § 1; TEX. CONST. ART. VI § 2 (2006); VA. CONST. ART. II § 1; WY. CONST. ART. 6 § 12.

The second cluster provides state residents serving in the military with the ability to qualify as a registered voter in the state even when stationed outside of the state on the day of an election.²⁵ Some of the states in this cluster also specifically provide for the use of absentee ballots in situations where residents are out of state due to military service or absence in general.²⁶

The third cluster contains state constitutions which specifically prohibit a person from gaining status as a qualified voter solely because the voter is a member of the military who is stationed at a military installation located in the state.²⁷

III. Federal and State Statutory Provisions

A. Federal Statutory Provisions

In recent years, Congress has enacted two acts which address, at least in part, the ability of troops, and their families, who are stationed overseas or away from their designated residences to vote. Indeed, this group of voters is among those sought to be protected in the Help America Vote Act (“HAVA”),²⁸ enacted in the aftermath of the 2000 presidential election, when the proper counting of military ballots became a contentious and litigious issue for candidates and local governments alike.²⁹

²⁵ MO. CONST. ART. VIII § 2 (2006); NEB. CONST. ART. VI § 3 (2005); N.J. CONST. ART. II § 1 para. 4 (2006); S.D. CONST. ART. VIII § 2 (2006) (“An elector shall never lose his residency for voting solely by reason of his absence from the state.”); UTAH CONST. ART. IV § 17 (2006); W. VA. CONST. ART. IV § 1 (2006) (stating, in relevant part, “no person in the military, naval, or marine service of the United States shall be deemed a resident of this state by reason of being stationed therein”).

²⁶ N.J. CONST. ART. II § 1 para. 4 (2006); UTAH CONST. ART. IV § 17 (confining the ability to use an absentee ballot to “[s]oldiers in time of war”).

²⁷ DEL. CONST. ART. V § 2 (2006); MAINE CONST. ART. II § 1 (2005); WIS. CONST. ART. III § 5 (2006) (setting forth the former prohibition, “[m]ilitary stationing does not confer residence.” Although this provision has been repealed, it has not been replaced with any language to the contrary).

²⁸ Help America Vote Act, H.R. 3295 § 711 (enacted 2002).

²⁹ See *Bush v. Hillsborough County Canvassing Board*, 123 F.Supp. 1305, 1307-08 (N.D. Fla. 2000) (providing a history of recent legislative actions relating to absentee voting and providing the backdrop for HAVA’s enactment).

One act was the 1986 Absent Uniformed Services Voters and Overseas Voters Act (“Overseas Voting Act”).³⁰ This Act defines an “absent uniformed services voter” as

(A) a member of a uniformed service on active duty who, by reason of such activity duty, is absent from the place of residence where the member is otherwise qualified to vote; (B) a member of the merchant marine who, by reason of service in the merchant marine, is absent from the place of residence where the member is otherwise qualified to vote; and (C) a spouse or dependent of a member referred to [in the Act] . . . who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote.³¹

The Overseas Voting Act provides that persons falling under this definition may not be disenfranchised in federal elections because the state officials processing their absentee ballots have time-related problems with the submission of the ballots.³² The Overseas Voting Act allows an absent military voter to request that his registration as such be good for two years, subject only to revision and reconsideration if the voter in some way changes his state of residence³³ or no longer requires an absentee ballot.³⁴ Further, the Overseas Voting Act requires state officials to accept, process, and count all military absentee ballots for federal elections unless there is an issue regarding the

³⁰ 42 U.S.C. § 1973ff-6 (1) (2006).

³¹ *Id.*

³² *Id.* § 1973ff-3. The primary focus of the Overseas Voting Act is in absentee military voters whose absentee ballots are received by the local board of elections before the designated period for returning absentee ballots has opened. *See id.*

³³ *Id.*

³⁴ *Id.*

eligibility of the absent military voter to vote for some reason apart from his status as absent from his home state due to his military service.³⁵

Similarly, provisions of the HAVA protect the ability of overseas military voters to have their absentee ballots processed and counted by the applicable local board of elections.³⁶ HAVA further tasks the Department of Defense and each individual branch of the armed forces with providing troops and their families who are stationed overseas at the time of an election with information on how to request absentee ballots from their home states³⁷ and properly use them so that their ballots will be counted without contest.³⁸ However, neither HAVA nor the Overseas Voting Act address the ability of troops to have their residency in a state established for the purposes of voting.

B. Military Voting Rights and Residency Requirements Across the U.S.

1. Military Voting Rights

State statutes are replete with provisions relating to the ability of military voters to vote in their home states. Some states have explicitly adopted provisions of the Overseas Voting Act as it relates to absent military voters in addition to provisions addressing the general right of military voters to have absentee ballots when they are away from their home states because of their military service.³⁹ Additionally, many states simply codify the right of absent military voters to have absentee ballots sent to them, provided that

³⁵ *Id.*

³⁶ Help America Vote Act, H.R. 3295 § 711 (enacted 2002).

³⁷ *Id.*

³⁸ *Id.*

³⁹ See ARIZ. REV. STAT. § 16-543 (2006); IND. CODE ANN. § 3-11-4-5.5 (Michie 2006); LA. REV. STAT. ANN. § 18:1308 (West 2006); N.J. STAT. ANN. § 19:59-2 (West 2006); OHIO REV. CODE ANN. § 3511.02 (Anderson 2006); R. I. GEN. LAWS § 17-20-6.1 (West 2006); VA. CODE ANN. § 24.2-702.1 (Michie 2006); W. VA. CODE § 3-3-5b (2006); WIS. STAT. § 6.36 (2006) (adopting the same definition of “military elector” as used in the Overseas Voting Act to define “absent military voter.”).

these voters are qualified as residents within the state.⁴⁰ States uniformly allow absent military voters to use special write in ballots for federal and state elections.⁴¹ The majority of states also have codified basic procedures for state and local election officials to follow when rendering decisions as to whether to provide a military voter with an absentee ballot,⁴² as well as how such a ballot is to be processed when it is validated.⁴³

When a state decides to deny a military voter an absentee ballot, many state statutes require that the military voter is informed of this decision promptly.⁴⁴ As

⁴⁰ See ALA. CODE § 17-10-5 (2005); ARK. CODE ANN. § 7-5-406 (Michie 2006); CONN. GEN. STAT. § 9-153e (2006) (allowing military spouses and dependents stationed away from the state to use absentee ballots as well); DEL. CODE ANN. TIT. 15 § 1904 (2006); FLA. STAT. ANN. § 97.0535 (West 2006); 10 ILL. COMP. STAT. 5/6-67/01 (West 2006); KAN. STAT. ANN. § 25-1215 (2006); KY. REV. STAT. ANN. § 117.079 (2006); MICH. COMP. LAW § 168.759a (2006); MISS. CODE ANN. § 23-15-673 (2006) (providing that military spouses and civilians affiliated with the military are entitled to the same absentee ballot guarantees as military voters themselves); MO. REV. STAT. § 115.292 (2006); NEV. REV. STAT. ANN. 657:10-a (Michie 2006); N.C. GEN. STAT. § 163-245 (2006) (providing that military voters and their spouses can receive absentee ballots); R. I. GEN. LAWS § 17-20-2 (2006); S.C. CODE ANN. § 7-15-460 (Law. Co-op. 2005); R.I. GEN. LAWS § 17-20-9.2; UTAH CODE ANN. § 20A-3-408 (2006); W. VA. CODE § 3-3-5b (2006).

⁴¹ COLO. REV. STAT. § 1-8-116 (2005); FLA. STAT. ANN. § 101.6951 (West 2006); GA. CODE ANN. § 21-2-381.1 (2006); N.M. STAT. ANN. § 1-6-4.2 (Michie 2006) (applying to both federal and state write in ballots); N.D. CENT. CODE § 16.1-07-08.1 (2006) (providing absent military voters with the ability to use both state and federal write in ballots); OR. REV. STAT. § 3511.09 (2006); UTAH CODE ANN. § 20A-3-404 (2006); VA. CODE ANN. § 24.2-702.1 (Michie 2006) (providing the requisite procedure for a military voter to use a federal write in ballot); W. VA. CODE § 3-3-5b (2006); WIS. STAT. § 6.25 (2006).

⁴² See DEL. CODE ANN. TIT 15 § 1904; 1 ILCS 5/4-23; IND. CODE ANN. § 3-11-4-17.5 (Michie 2005); KAN. STAT. ANN. § 25-1216 (2006); LA. REV. STAT. ANN. § 18:1115 (West 2006); MINN. STAT. §§ 203B.16, 203B.17 (2005); MO. REV. STAT. § 115.279 (2006); N.J. STAT. ANN. §§ 19:57-12, 19:57-24 (West 2006); N.C. GEN. STAT. §§ 163-248, 163-249 (2006); OHIO REV. CODE ANN. § 3511.09 (Anderson 2006); TEX. ELEC. CODE ANN. § 105.002 (Vernon 2005); W. VA. CODE § 3-3-5b (2006); WIS. STAT. § 6.865 (2006) (providing the requisite procedure for an absent military voter to request, and a state to in turn provide, federal absentee ballots).

⁴³ See DEL. CODE ANN. TIT. 15 § 1904 (2006); IND. CODE ANN. § 3-7-33-45 (Michie 2005); LA. REV. STAT. ANN. § 18:1115 (West 2006); N.J. STAT. ANN. § 19:57-24 (West 2006); N.C. GEN. STAT. § 163-249 (2006); OHIO REV. CODE ANN. § 3511.09 (Anderson 2006).

⁴⁴ See N.J. STAT. ANN. §§ 19:57-25, 19:75-3 (West 2006) (allowing military voters to count their time of service in the military towards the 30 days residency requirement to vote in New Jersey, provided that there was a claim to residence in New Jersey sufficient to allow the service member to vote prior to his deployment); 25 PA. CONS. STAT. § 1102 (2006) (defining “military elector”); WIS. STAT. § 6.865 (2006) (“If the municipal clerk or board of election commissioners rejects a request for an absentee ballot from a military elector or an overseas elector, the clerk or board of election commissioners shall promptly inform the elector of the reason for the rejection.”).

discussed in Part IV, such declinations have been at the heart of many state and federal court cases.⁴⁵

2. Residency Requirements

Most states explicitly state their residency requirements for voting rights in statutes, and some also state the specific requirements for military voters to be eligible to vote.⁴⁶ Additionally, many state statutes uniformly provide that presence in the state because of military service is insufficient to confer residency for voting purposes on a member of the military without satisfying additional residency criteria,⁴⁷ and, conversely, that absence from the state due to service in the military will not automatically result in an otherwise qualified member of the military forfeiting her right to vote in the state.⁴⁸

Thus, a member of the military who has moved to one of the states which have such statutes must examine the other residency factors provided by law to determine whether

⁴⁵ See *infra* Part IV.

⁴⁶ See MD. ANN. CODE OF 1957 § 3-102 (2006); N.J. STAT. ANN. § 19:57-2 (West 2006) (defining a “military service voter” to include military spouses and civilians attached to the military and absent from the state as a result of this military attachment); UTAH CODE ANN. § 20A-3-405 (2006) (“Any military voter who is a legal resident of Utah but is stationed outside Utah and who is not otherwise registered to vote in Utah . . . may register in the manner provided”); VT. STAT. ANN. TIT. 17 § 2103 (defining the category of “military service early or absentee voter” as including members of the military, their spouses, and civilians attached to the military who will be away from their “regular polling place” on election day due to their military service or the military service of their spouse); WIS. STAT. § 6.22 ((2006) (“A military elector shall vote in the ward or election district for the address of his or her residence prior to becoming a military elector, except that: 1) a military elector voting in this state who is the spouse of another military elector and who did not maintain a residence in this state prior to becoming a military elector shall vote in the ward or election district for the address of his or her spouse; 2) a military elector voting in this state who is the dependent of another military elector and who did not maintain a residence in this state prior to becoming a military elector shall vote in the ward or election district for the address of the individual providing his or her support....”).

⁴⁷ See ALASKA STAT. § 15.05.20 (Michie 2006); COLO. REV. STAT. § 1-2-103 (2005); DEL. CODE ANN. TIT. 15 § 1701 (2006); HAW. REV. STAT. § 11-13 (2006); ME. REV. STAT. ANN. TIT. 21-A § 112 (West 2005); MONT. CODE ANN. § 13-1-112 (2006); N.M. STAT. ANN. § 1-1-7 (D), (E) (Michie 2006); N.Y. ELEC. L. § 5-104 (McKinney 2006) (1); Tenn. Code Ann. S 2-2-122 (7), (8); Utah Code Ann. §20A-2-105 (4)(d); Wis. Stat. § 6.10(6) (McKinney 2006); WY. STAT. ANN. § 22-1-102 (XXX) (Michie 2006).

⁴⁸ See ALASKA STAT. § 15.05.20 (Michie 2006); COLO. REV. STAT. 1-2-103 (2005); DEL. CODE ANN. TIT. 15 § 1701; HAW. REV. STAT. § 11-13 (2006); ME. REV. STAT. ANN. TIT. 21-A § 112 (West 2005); MONT. CODE ANN. § 13-1-112 (2006); N.M. STAT. ANN. § 1-1-7 (D), (E) (Michie 2006); N.Y. ELEC. L. § 5-104 (McKinney 2006) (1); Tenn. Code Ann. S 2-2-122 (7), (8); Utah Code Ann. §20A-2-105 (4)(d); Wis. Stat. § 6.10(6) (McKinney 2006); WY. STAT. ANN. § 22-1-102 (XXX) (Michie 2006).

he and, if applicable, his family has attained residency in the state sufficient to be afforded the right to vote in state and local elections. Similarly, a resident of State A who relocates to State B because of his military service must consult the statute of State A to determine whether she still qualifies as a voter in that state.

Those members of the military consulting state statutes to determine whether they qualify to vote based on residency will, by and large, find variants on the same residency requirement themes. Voters are required to have a physical residence in the state where they wish to vote, and cannot intend to change that physical location (other than to an address within the same election district) in the known future.⁴⁹ Voters are required to have the intent to remain in the state indefinitely,⁵⁰ and a voter may only have one state of residence for voting purposes.⁵¹ Otherwise qualified voters who are temporarily away from the state will still be able to avail themselves of the right to vote in the state, provided they retain their intent to return to the state at the conclusion of the obligation requiring them to be away from the state, and that when they return, they intend to remain

⁴⁹ See ALASKA STAT. § 15.05.20 (Michie 2006); ARK. CODE ANN. § 7-5-201 (Michie 2006); HAW. REV. STAT. § 11-13 (2006); IOWA CODE § 48A.5 (2005); ME. REV. STAT. ANN. TIT. 21-A § 112 (West 2005); MONT. CODE ANN. § 13-1-112 (2006); N.M. STAT. ANN. § 1-1-7 (A) (Michie 2006); OR. REV. STAT. § 247.035 (2006) (“The person’s residence shall be at the place in which habitation is fixed and to which, when the person is absent, the person intends to return.”); TENN. CODE ANN. S 2-2-122 (1), (3) (2006) (“A person does not become a resident of a place solely by intending to make it the person’s residence. There must be appropriate action consistent with this intention.”); UTAH CODE ANN. § 20A-2-105 (3)(a)(i), (4) (b) (2006); WIS. STAT. § 6.10(1) (2006).

⁵⁰ See ALASKA STAT. § 15.05.20 (Michie 2006); ARK. CODE ANN. § 7-5-201 (Michie 2006); HAW. REV. STAT. § 11-13 (2006); ME. REV. STAT. ANN. TIT. 21-A § 112 (West 2005); N.M. STAT. ANN. § 1-1-7 (A) (Michie 2006); OR. REV. STAT. § 247.035 (2006); TENN. CODE ANN. S 2-2-122 (1), (3) (2006); UTAH CODE ANN. § 20A-2-105 (3)(a)(i), (4) (g – h) (2006) (stating that “[i]f a person removes to another state with the intention of making it his principal place of residence, he loses his residence in Utah; [i]f a person moves to another state with the intent of remaining there for an indefinite time as a place of permanent residence, he loses his residence in Utah, even though he might return at some future time”).

⁵¹ See IOWA CODE § 48A.5 (2005); N.M. STAT. ANN. § 1-1-7 (C) (Michie 2006); UTAH CODE ANN. § 20A-2-105 (4)(j) (2006).

in the state indefinitely as residents.⁵² However, otherwise eligible voters who have been absent from the state are, for the most part, unable to successfully assert their right to vote in the state if, during the period of their absence, they have voted in another state.⁵³

Residents of temporary housing are generally not afforded the right to vote in the state in which the temporary housing is located.⁵⁴ Also, there is a standard statutory presumption that a voter is a resident of the state and election district where her family and/or spouse resides unless specific actions are taken by the voter to rebut this presumption.⁵⁵

Additionally, some states provide statutory factors for evaluating whether a person is a resident.⁵⁶ Standard factors include 1) whether the person has property located in the state⁵⁷; 2) whether the person's occupation or means of making a living is located within the state⁵⁸; 3) the state to which the person pays taxes⁵⁹; 4) the state in

⁵² See ALASKA STAT. § 15.05.20 (Michie 2006); ARK. CODE ANN. § 7-5-201 (Michie 2006); MONT. CODE ANN. § 13-1-112 (2006); OR. REV. STAT. § 247.035 (2006); see also N.M. STAT. ANN. § 1-1-7 (G) (2006) (providing that a person temporarily residing in New Mexico does not automatically acquire residency).

⁵³ See ALASKA STAT. § 15.05.20 (Michie 2006); HAW. REV. STAT. § 11-13 (2006); N.M. STAT. ANN. § 1-1-7 (H) (2006) (providing a slight reprieve for voters who have returned to the state and reestablished residency after voting in another state); OR. REV. STAT. § 247.035 (2006); WIS. STAT. § 6.10(10) (2006).

⁵⁴ See, e.g., WIS. STAT. § 6.10(2) (2006).

⁵⁵ See ARK. CODE ANN. § 7-5-201 (Michie 2006); HAW. REV. STAT. § 11-13 (2006); MONT. CODE ANN. § 13-1-112 (2006); N.M. STAT. ANN. § 1-1-7 (B) (2006); TENN. CODE ANN. § 2-2-122 (5) (2006). Divorcing a spouse or moving away from one's parents' home for reasons other than temporary occupations or schooling would presumably rebut this presumption if properly established.

⁵⁶ See ME. REV. STAT. ANN. TIT. 21-A § 112 (West 2005) (adding the following factors to the determination of residency: 1) statements made by the person himself regarding residency; 2) where the person currently lives; 3) address shown on income taxes; 4) residence on hunting or fishing licenses; 5) receipt of public assistance in the state); N.Y. ELEC. L. § 5-104 (McKinney 2006) (providing, in addition to the below factors, that an election official may take into account the following factors: 1) the person's stated intent to be or not to be a resident; 2) the person's conduct viz a viz residency; 3) "the applicant's financial independence"; 4) age; 5) "marital status"; 6) "residence of parents, spouse, and children"; 7) "and other such factors that it may reasonably deem necessary to determine the qualification of an applicant to vote in an election district within its jurisdiction."); OR. REV. STAT. § 247.035 (2006) (providing that, in addition to the factors set forth below, "where the person receives personal mail," "where any immediate family members of the person reside," and "the address from which the person pays for utility services," are factors to be considered in establishing whether residency exists); TENN. CODE ANN. § 2-2-122 (b) (2006).

⁵⁷ See N.Y. ELEC. L. § 5-104(b) (McKinney 2006); TENN. CODE ANN. § 2-2-122 (b) (2006).

⁵⁸ See N.Y. ELEC. L. § 5-104(b) (McKinney 2006); TENN. CODE ANN. § 2-2-122 (b) (2006).

⁵⁹ See N.Y. ELEC. L. § 5-104(b) (McKinney 2006); OR. REV. STAT. § 247.035 (2006); TENN. CODE ANN. § 2-2-122 (b) (2006).

which the person is licensed to drive⁶⁰; 5) the state in which the person has registered his vehicle⁶¹; and 6) the level of community involvement evinced by the person at issue.⁶² These factors are subjective both in their ability to be quantified and in their weight, as none of the states which have statutes establishing such a factor-based test included guidance on how to weight the factors or how many factors must be fulfilled in favor of conferring residence before a person can validly be deemed a resident of the state. The factor-based test is conducted by local election officials, and none of the statutes enumerating factor-based tests require or provide for uniformity among local election officials when applying the factor-based test. Thus, local election officials are tasked with conducting a highly subjective residency analysis without guidance or oversight absent a motivated voter who is willing to take these officials to court if denied.

IV. Federal and State Cases Interpreting the Ability of Military Voters to Qualify as Residents for Voting Purposes.

Voting rights cases have been a consistently litigious area of federal and state constitutional law. This is perhaps neither inappropriate nor surprising given the constitutional and societal gravity of citizens being enfranchised and disenfranchised, and given the prominent role of voting rights in federal and state constitutions. However, despite the many state and federal cases addressing the ability of military voters to cast ballots in state as well as federal elections, there is still no clear standard for either local election officials or state and federal courts to use in their interpretations as to whether

⁶⁰ See OR. REV. STAT. § 247.035 (2006); TENN. CODE ANN. S 2-2-122 (b) (2006).

⁶¹ See N.Y. ELEC. L. § 5-104(b) (McKinney 2006); ME. REV. STAT. ANN. TIT. 21-A § 112 (West 2005); OR. REV. STAT. § 247.035 (2006).

⁶² See, e.g., N.Y. ELEC. L. § 5-104(b) (McKinney 2006).

the military voter at issue should qualify to vote in the particular state and election district at issue.

A. Federal Military Residency Cases.

The seminal United States Supreme Court (“Supreme Court”) case addressing the constitutionally permissible scope of state residency restrictions for military voters is *Carrington v. Rash*.⁶³ In *Carrington*, the Supreme Court was presented with a Texas statute which created an irrebutable presumption of non-residency for all military voters coming to the State of Texas unless they were qualified to vote in the State prior to joining the military.⁶⁴ Critical to the Supreme Court’s analysis was the inability of military voters to achieve residency for the purposes of voting in Texas even if they would otherwise meet the residency requirements imposed on civilians living in the State but for their military status.⁶⁵ Despite roundly condemning the State of Texas for barring those serving their country from ever gaining residency sufficient to vote in an election,⁶⁶ the Supreme Court stopped short of establishing a test for states to use when evaluating the residency of military voters.⁶⁷ Although the Supreme Court did endorse the use of factor-based residency criteria such as those illustrated in Part III above,⁶⁸ it did not endorse specific factors to be used in the consideration of a military voter’s residency and did not state whether any particular factors should be either dispositive or weighted above or below other factors. Thus, state and federal courts and state election officials were

⁶³ 380 U.S. 89 (1965).

⁶⁴ *Id.* at 90.

⁶⁵ *Id.* at 91 – 92.

⁶⁶ *Id.* at 97.

⁶⁷ *See id.* at 92 fn. 3.

⁶⁸ *See id.*; *id.* at 91 (“There can be n doubt either of the historic function of the State to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise.”).

given free reign by the *Carrington* court to create systems of evaluating and weighting factors which the states deemed to be vital to establishing residency with the sole proviso that these factors and evaluation processes must be reasonable.⁶⁹

In the aftermath of *Carrington*, both state and federal courts struggled with both the concept and application of factor-based residency tests, not only for military voters, but also for other such “transient” groups, for example, college students.⁷⁰ Federally, there is a seeming lack of consistency in the way in which *Carrington*’s scope and intent should apply to factor-based residency requirements.⁷¹ Although the residency statutes underlying challenges brought in the aftermath of *Carrington* have differed, causing federal courts sitting in different states to be confronted with subtle variants in statutory language and requirements,⁷² these variants are ultimately only slight.⁷³ To date, no Supreme Court case since *Carrington* has clarified this issue.

B. State Court Interpretations of Military Residency Requirements.

As the federal courts have struggled to maintain uniformity in their decisions regarding the constitutionality of state residency tests as applied to military and other voters, so too have state courts struggled to police both the state legislatures which enact such residency tests and the local election officials tasked with carrying out residency

⁶⁹ *Id.* at 91.

⁷⁰ *See, e.g.*, *Pate v. El Paso County, Texas*, 337 F.Supp. 95 (W. D. Tex. 1970); *Wilson v. Symm*, 341 F.Supp. 8 (S.D. Tex. 1972); *Levy v. Scranton*, 780 F.Supp. 897 (N.D.N.Y. 1991).

⁷¹ *See Pate*, 336 F.Supp. at 95 (limiting the way in which *Carrington* is applied viz the reasonability of the application of factor-based tests based on *Carrington* dicta); *see also Wilson*, 341 F.Supp at 8 (holding that *Carrington* only applied when the statute at issue constituted an absolute or near absolute bar on voting by the targeted group). *But see Levy*, 780 F.Supp. at 897 (holding that the blanket application of New York’s factor-based residency test to students without examining the individual circumstances and qualifications of each voter at issue was a violation of the equal protection clause and violative of the spirit of *Carrington*)

⁷² *See id.*

⁷³ *See id.*

decisions using state statutory requirements.⁷⁴ Indeed, while state courts have uniformly upheld the ability of military voters to obtain absentee ballots when these voters are stationed away from their homes,⁷⁵ the subject of which military voters are eligible to receive these ballots has achieved much less uniformity or cohesion.⁷⁶

By way of example, an examination of the trends of New York State Courts viz a viz the constitutionality of applying New York's residency factors⁷⁷ to military voters is particularly illustrative.

While it may seem contrary to the spirit of the suffrage right to disqualify a member of the military from voting in New York when he grew up in the State, the seminal case of *Altimari v. Meisser*⁷⁸ illustrates when this situation can in fact happen in New York State and still be in compliance with the requirements of Article II § 4 of the New York State Constitution,⁷⁹ which provides that a New Yorker may not lose his status as an eligible New York voter when he joins the armed forces,⁸⁰ as well as the applicable provisions of the New York State election law.⁸¹

⁷⁴ See e.g., *Carpenter v. Hammond*, 667 P.2d 1204 (Alaska Sup. Ct. 1983) (discussing a State of Alaska apportionment provision requiring members of the military stationed in Alaska to complete a questionnaire prior to a local official determining whether to count them as voters for reapportionment purposes); *Arapajolu v. McMenantin*, 249 P.2d 318 (Ca. Dist. Ct. of App., 1st Dist, 2d Div. 1952) (holding that, for voting purposes, the military base in question was subject to both federal and State of California jurisdiction, thus allowing otherwise eligible military voters to vote in local elections); *Township of New Hanover v. Kelly*, 296 A.2d 554 (N.J. Super. Ct., Law Div. 1952) (declaring that members of the military may vote in state and local elections when stationed in New Jersey as long as these voters would qualify as residents); *Rothfels v. Southworth*, 356 P.2d 612 (Sup. Ct. Utah 1960); *Casarez v. Val Verde County*, 957 F.Supp. 847 (W.D. Tex. 1997) (discussing the many military and residency based cases which have grown out of Texas election law).

⁷⁵ See e.g., *State of Ohio ex rel. Andrew R. Ingerson v. Berry*, 14 Ohio St. 315 (Sup. Ct. Ohio 1863) (allowing the counting of military absentee ballots).

⁷⁶ See *supra* note 73.

⁷⁷ See N.Y. Elec. L. § 5-104(b) (McKinney 2006).

⁷⁸ *Altimari v. Meisser*, 45 Misc.2d 1008 (Sup. Ct. Nassau Cty 1965), *rev'd* 16 N.Y.2d 629 (1965).

⁷⁹ N.Y. CONST. ART. II § 4.

⁸⁰ *Id.*

⁸¹ *Id.*

. In *Altimari*, rival political candidates brought court challenges to several absentee ballots cast in a contested election after one candidate, petitioner Altimari, was declared the winner of this election by a mere 6 votes.⁸² Several challenged absentee ballots were at issue in the dispute over the outcome of the election and were brought before the New York courts, however, for the purposes of this article, the most interesting absentee ballots in question belonged to Captain and Mrs. Stetson.⁸³ Captain Stetson, a member of the U.S. military, had been raised in New York until his parents moved to Connecticut.⁸⁴ Following his parents' move, Stetson transferred typical indicia of residence (for example, his car registration, mailing address, and the address at which he filed tax returns) to his parents' home in Connecticut, while he was a member of the military and stationed elsewhere.⁸⁵ Both Captain Stetson and his wife, who had at no point in her life resided in New York, had attempted to vote in Connecticut prior to their application for and receipt of absentee ballots from Nassau County in New York State.⁸⁶ The New York State Supreme Court, Appellate Division, Second Department, examining the Stetson's actions in and affiliations with the states of New York and Connecticut, found that, despite the provisions of Article II § 4 of the New York State Constitution, "it is unthinkable that the absentee ballots attempted to be cast by these two nonresidents should be counted and permitted to determine the successful candidate for a local public office in this State."⁸⁷

⁸² *Altimari*, 45 Misc.2d at 1008.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Altimari v. Meisser*, 23 A.D.2d 865 (2d Cir. 1965).

The facts of *Altimari* relating to how local officials in Nassau County held the Stetsons to be eligible to vote in New York indicate that the military service exception to voter disqualification based on residence can be plagued by subjectivity at both the local board of elections level and the court level because there are so many factors allowed to be taken into consideration by any entity making the analysis as to whether the military service exception should apply,⁸⁸ and none of these factors has been held to be dispositive of the issue.⁸⁹

A case on the opposite end of the spectrum, *Kashman v. Board of Elections, Onondaga County*,⁹⁰ illustrates a situation where a New York court has found that a member of the military clearly established residency in the State of New York for the purposes of voting in a local election.⁹¹ In *Kashman*, petitioner Kashman was a lawyer who had worked for a district attorney in the State of Arizona before entering the military and moving to New York with his wife.⁹² The facts in *Kashman* establish that Kashman had requested to be stationed in the Onondaga County area of Western New York when he entered military service, and that Kashman had resigned his post with the district attorney in Arizona upon entering the military because he wished to stay in New York at the end of his military service.⁹³ A challenge to the Kashmans' right to vote in New York was made on the grounds that they were residents of a military base, and thus did not meet the residency requirements under the provisions of the New York State Constitution or New York State election law.⁹⁴ Nevertheless, the Supreme Court, Onondaga County

⁸⁸ See N.Y. ELEC. L. § 5-104(b) (McKinney 2006).

⁸⁹ See *id.*

⁹⁰ *Kashman v. Bd. of Elecs., Onondaga Cty*, 54 Misc.2d 543 (Sup. Ct. Onondaga Cty 1967).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

examined the facts of the Kashman's bank account registry and other indicia of residency, as well as Mrs. Kashman's employment as a teacher at a local school and Mr. Kashman's having given up his job in Arizona in order to remain in New York after his military service, and found that the Kashman's had indeed created sufficient indicia of residency to allow them to vote in New York.⁹⁵

In between the two extremes of case law lies a grey area in which military personnel and their families cannot know whether they are in fact eligible to vote in New York and must rely on findings of a local election official who, through the subjective application of arguably dated factors, has the ability to disenfranchise them. Specifically, regardless of the state, many of the cases relating to military voting rights were decided in an era when women were not active members of the military.⁹⁶ Given the current war in Iraq, as well as the deployment of military men and women around the globe, and the existence of families in which both spouses are members of the military, this will likely become a more important issue in voting rights law in the future.

Even in more traditional military family settings, there is still uncertainty as to how a factor-based residency test will be applied. The *Kashman* Court looked to the facts of Mrs. Kashman's occupation within Onondaga County to bolster the claim that she and her husband were residents.⁹⁷ The *Altimari* Court looked to Mrs. Stetson's place of birth, places of residence, and ultimately where she and her husband classified their home in determining her voting status, and also to disprove Captain Stetson's claim that he was still a New York resident who was eligible and entitled to vote in New York State.⁹⁸

⁹⁵ *Id.*

⁹⁶ *See, e.g.,* *Altimari v. Meisser*, 45 Misc.2d 1008 (Sup. Ct. Nassau Cty 1965).

⁹⁷ *Kashman v. Bd. of Elecs., Onondaga Cty*, 54 Misc.2d 543 (Sup. Ct. Onondaga Cty 1967).

⁹⁸ *Altimari*, 45 Misc.2d at 1008.

V. Semper Disqualified.

A. Hypothetical Situations.

In light of the above, consider the following hypothetical situations with regard to the constitutional law guarantee of equal protection, the ultimate benefit to the local community, and basic principles of fairness.

1. Sergeants Smith and Jones.

Sergeant John Smith, born in California, is a member of the United States Army.⁹⁹ As a young man, Sergeant Smith joined the ROTC, attended college in his native Los Angeles, and then entered the Army. Since the time he joined the Army, he has been stationed at different military bases and camps across the nation and in Germany. A bachelor, who planned to return to his parents' home in California to visit them when on leave, and possibly at the conclusion of his military career, Sergeant Smith decided to maintain his California bank account for convenience, especially because his California bank allowed him to use his ATM card anywhere in the world. He receives his mail at whatever military base he is stationed at, and does not own a car. Up until his marriage, he was a classic bachelor and did not have many personal belongings or furniture. When Sergeant Smith became eligible to vote at age 18 it was not an important election year and he was very busy adjusting to the pressures of college life; hence he forgot to register to vote in the California town where his parents lived.

⁹⁹ All information regarding the location of U.S. Army bases and installations is available at <http://www.army.mil> (last visited Aug. 5, 2006). The locations chosen for this hypothetical were randomly selected. To the best of the author's knowledge, the events described in this hypothetical have occurred at any location contained in the fact pattern.

Sergeant Jane Jones, born in New York City, is also a member of the United States Army. She attended public school in New York City, and graduated from the a college in New York City. Because she attended college near her parents' home, Sergeant Jones lived with them until she joined the military. Sergeant Jones' father, Dad Jones, an employee of the New York/New Jersey Port Authority, maintained his bank accounts in a credit union in New Jersey. Sergeant Jones, a busy young woman when she was in college, decided to use her father's credit union in New Jersey as her bank. Since she was familiar with the account options offered by the bank, she could get money from the account through ATMs in New York, and her various jobs throughout college allowed her to use the direct deposit option. As a resident of New York City, Sergeant Jones had no need for a car and never purchased one. Since Sergeant Jones lived with her parents during college, and Dad Jones encouraged her to save her earnings from her various jobs, all of Sergeant Jones' furniture was purchased by her parents and remained at their home when she joined the military.

Sergeants Jones and Smith met and married while they were stationed in Germany. Their parents attended the wedding and became very good friends. After the wedding, the Sergeants were reassigned to Fort Drum in Watertown, New York, where they lived on the Army base in Army provided housing for married couples and families. Simultaneously, their parents decided that they would all retire and move to Florida, buying adjoining properties in West Palm Beach in the hopes that someday their children would either join them in Florida or visit them in Florida for vacations. Due to their schedules, however, at no point prior to the election at issue in this hypothetical did the Sergeants visit Florida.

The Sergeants arrived in Watertown in June, and, after talking to some fellow personnel – who were from Plattsburgh – about a heated election in Plattsburgh, realized that they needed to register to vote. At the same time, the Sergeants, avid participants in winter sports after their time in Germany, decided that they liked the Watertown area and discussed the possibility of staying in the area once they left the military. However, both Sergeants were devoted to serving in the Army, and agreed that they would remain active in the military for a while before they would seriously think of leaving it. Prior to their reassignment to Fort Drum, Sergeant Smith had voted by absentee ballot in Los Angeles, and Sergeant Jones had voted by absentee ballot in New York City. The Sergeants went to the County Board of Elections, where they filled out the required paperwork to register to vote. However, both Sergeants were told that they would be unable to vote because, in the opinion of the County Board of Elections, they had not truly become residents of Watertown within the requirements of New York’s factor-based test. Neither of the Sergeants can vote in their former place of voting because their parents have moved to Florida and they fail to meet the other statutory requirements; they are married and do not live with their parents, thus they could vote in Florida if they attempted to.

2. Lieutenant Doe

Lieutenant Debbie Doe is an officer in the Navy¹⁰⁰ JAG. Lieutenant Doe, the daughter of a Navy officer father and homemaker mother, was born in Japan. Dad Doe was born in Nebraska, and remained there until he went to school in Annapolis, Maryland, where he met Mom Doe, a citizen of Switzerland, who was living in

¹⁰⁰ All information regarding the location of U.S. Army bases and installations is available at <http://www.navy.mil> (last visited Aug. 5, 2006). The locations chosen for this hypothetical were randomly selected. To the best of the author’s knowledge, the events described in this hypothetical have occurred at any location contained in the fact pattern.

Washington, D.C. at the time with her Swiss diplomat father and family. After Dad Doe graduated from Annapolis and became an officer, he was stationed abroad. On his first leave he returned to Washington, D.C. to marry Mom Doe. Because Dad Doe's parents did not approve of his being part of the military, he stopped speaking to them when he moved to Annapolis, and only exchanged perfunctory Christmas and birthday cards with them. During his vacations from school in Annapolis, Dad Doe resided in the basement apartment of Mom Doe's parents' Georgetown brownstone.

After their marriage, Mom and Dad Doe were stationed at various naval installations across the globe. Mom Doe remained a Swiss citizen to honor her family's heritage. Dad Doe, disenchanted by military decisions made by civilian politicians, never wanted to vote despite his love of the U.S. and its values, including voting rights. Lieutenant Doe lived with her parents in Japan until she was ten, when she moved with her parents and younger brother to Italy. Seeing many of her friends returning to the U.S. for college, Lieutenant Doe decided that she would like to do the same. Lieutenant Doe, a bright young woman, attended college at a prestigious Boston university and law school at a prestigious school in Pennsylvania. During the time that she attended school, she considered wherever her parents lived to be her home. She did not own a car, and continued to use the bank account she opened when she was in Italy because it was at an international bank with branches in the U.S. Because of the travel distance involved in her commuting to and from Italy, Lieutenant Doe did not have many items of personal property with her during school. She did, however, always maintain a keen interest in state and local politics in the communities where she attended school, and even attended

political events in law school. Lieutenant Doe did not attempt to register to vote during her academic career because she was unsure where she should vote.

After becoming a Navy JAG officer, Lieutenant Doe was stationed in Florida. While she referred to her home as being wherever her parents were at the time, and intended to be a career officer like her father, she greatly enjoyed the local community in which she lived in Florida. Although she lived on the military base in order to save money, she regularly ran through the town surrounding the base, stopping at various coffee shops and other stores along the way. Lieutenant Doe, a very outgoing and friendly person, easily made friends in this town, as well as on the base. A year after arriving in Florida, Lieutenant Doe began to hear her local friends and military friends discussing the upcoming mayoral election, in which there was a candidate who Lieutenant Doe thought would be of great use to the town. At this point, Lieutenant Doe did not have any ideas as to where she would like to live after she left the Navy because she intended to be a career officer. In the back of her mind, she always thought that it might be nice to return to the town in Florida in retirement, although she kept this to herself and did not take any overt steps to advance this thought.

As the election drew closer, Lieutenant Doe – who voraciously read every bit of election-related news she could find, watched televised mayoral debates, talked to her local and military friends about the election, and made a small donation to her favored candidate’s campaign – decided that she needed to vote in this election. Accordingly, Lieutenant Doe filed a voter registration form with the local election clerk (who, unbeknownst to Lieutenant Doe was vehemently opposed to both the military and Lieutenant Doe’s favored candidate, and was aware of Lieutenant Doe’s support of the

candidate through local gossip). A week later, Lieutenant Doe received a letter from the election clerk stating that, applying the statutory residency factors required under state statute, she was not eligible to vote in the state and should seek to register in her home state. Unfortunately for Lieutenant Doe, her father's tenuous links to Maryland were such that he would not be allowed to vote there, which would also preclude Lieutenant Doe from asserting the dependent right to an absentee ballot from Maryland because of her father.

By the time that Lieutenant Doe consulted a local lawyer regarding the possibility of challenging the clerk's decision, the period for voter registration had expired. Disheartened, Lieutenant Doe watched the results of the election on television and was deeply upset to see that, in one of the lowest voter turnouts in the history of the town, her candidate lost by five votes. Speaking to other members of the military who had also been stationed at the base with her and were similarly informed that their voter registration applications had been denied because of a failure to meet the statutory factors required, Lieutenant Doe too late realized that, had she and these other military members been allowed to vote, her preferred candidate would have won the election. Several weeks later, Lieutenant Doe was angered to learn that ten members of the military who had vocally stated their opposition to the candidate favored by Lieutenant Doe, were allowed to register and vote in the mayoral race although many of them had arrived at the base after Lieutenant Doe.

3. Sergeants Roe and Low

Sergeants Roberta Roe and James Low were married members of the United States Air Force.¹⁰¹ Sergeant Low was born and raised in Virginia, attended school at the University of Virginia, and then joined the Air Force, where he met Sergeant Roe. Sergeant Low's parents maintained their home in Virginia until they moved to Arizona a year after the Sergeants were married in order to enjoy the climate. Sergeant Roe's parents were killed in an accident when she was a young girl. Before her parents' deaths, she lived with them in Utah. Afterwards, she lived with her grandmother in Colorado until her grandmother became unable to care for her and she moved to Michigan to live with her aunt. Sergeant Roe attended college at the University of Texas and then joined the Air Force. She was a keen voter, and voted in Michigan because she intended to return there on vacations to visit her aunt. However, shortly after Sergeant Roe joined the Air Force, Aunt Roe decided she wanted a change of scene and moved to Hawaii. Sergeant Roe, who loved her aunt but preferred northern climates, then decided that she no longer intended that her aunt's home also be hers. From that point on, she regarded "home" as wherever she was stationed and did not intend to return to any particular state when she left the military.

The couple remained married for two years, during which time they were moved to several locations across the country. Finally, they came to settle in California. However, Sergeant Roe was nearing the end of her enlistment and had decided that she

¹⁰¹ All information regarding the location of U.S. Army bases and installations is available at <http://www.af.mil> (last visited Aug. 5, 2006). The locations chosen for this hypothetical were randomly selected. To the best of the author's knowledge, the events described in this hypothetical have occurred at any location contained in the fact pattern.

wanted to join the Marines in honor of her father, who had been a Marine.¹⁰² This proposition did not sit well with Sergeant Low, and the couple divorced in California. Following the divorce, Sergeant Low remained in California, where he was allowed to vote because 1) when they were married the Sergeants had purchased a house off the base, which Sergeant Low kept after the divorce, 2) Sergeant Low had purchased a vehicle through a California bank, and 3) had registered the vehicle in California. Sergeant Roe, who had moved to Virginia, lived on the base. Her primary property was personal property in the form of furniture left to her by her parents and grandmother. Before leaving for Hawaii, Aunt Roe had placed all of these items together in a storage unit in Michigan, where it remained because Sergeant Roe decided to live on the base. Sergeant Roe was determined that she should become happy in her new community and make new friends following the divorce. She, like Lieutenant Doe, became interested in a local election and registered to vote with the county election commissioner. However, the county election commissioner stated in his letter to Sergeant Roe that, as she met none of the statutory factors for residency other than presence in the state, she was not qualified to vote in Virginia. Sergeant Roe, who had no intent to return to California and whose last contact with that state was through her divorce lawyer, similarly could not vote in California.

¹⁰² All information regarding the location of U.S. Army bases and installations is available at <http://www.usmc.mil> (last visited Aug. 5, 2006). The locations chosen for this hypothetical were randomly selected. To the best of the author's knowledge, the events described in this hypothetical have occurred at any location contained in the fact pattern.

B. Lessons from the Disenfranchised.

The above hypotheticals are important illustrations of the grey area into which military voters can fall through no fault of their own. Indeed, the problems identified in these hypotheticals are more than academic exercises – they are real problems awaiting potential military voters, as well as communities which benefit from having military bases within their boundaries or nearby, and could also benefit from having an increased number of well informed voters, especially in this age of voter apathy and lackluster attendance at the polls on election day.

In situation 1, both Sergeants Jones and Smith were unable to vote in the states of their birth at the time in question because their parents had moved from these states and because, as a married couple who did not intend to reside with their parents in the future and had no other connections to their states/localities of birth, they would fail any of the standard factor-based residency tests used by states/localities. Because the Sergeants lived on the base in Watertown, they did not own a home and therefore did not pay property taxes or even have a connection to a local bank through mortgage financing. Since the Sergeants did not have a car, they did not acquire New York State drivers' licenses and did not have to register a car in New York State. Further, since the Sergeants did not plan to retire from the military at a point in the near future and lacked control over how long they were to stay in Watertown, they could easily be found not to fulfill the intent requirement necessary to establish residency under any state residency test. Thus, although it is iniquitous to the Sergeants, and to the community in which the base was located because two earnest and interested voters who took the time to familiarize themselves with the issues involved in an election, were disenfranchised.

In situation 2, Lieutenant Doe had no choice over where her own parents were stationed, or the fact that she was legally born without a home state for residency purposes. The choice of Dad Doe not to register to vote effectively cut Lieutenant Doe off from voting in the U.S. as an overseas dependent, and even if Dad Doe had tried to register to vote, it is doubtful that either Maryland, Nebraska, or even the District of Columbia would have found him to be a qualified voter by using a factor-based residency test. Since most states which have the prohibition on military personnel presumptively gaining residence in a state through being stationed there also have the same prohibition in regards to students living in-state for the purposes of attending college, Lieutenant Doe would not have qualified to vote in Massachusetts or Pennsylvania. Indeed, even applying a factor-based test, Lieutenant Doe would likely not have been deemed a resident of either state. As with the Sergeants, Lieutenant Doe had no choice in her assignment to Florida and lacks control over when and where she will be reassigned for as long as she remains in the Navy JAG. Despite this, Lieutenant Doe formed friendships in the community and identified the community as an enjoyable one of which she was a part. However, a biased – or even unbiased – local election official applying his or her version of the factor-based residency test – which is the only way for this test to be applied under the statutory schemes of states across the board – could justifiably decide that she was not a resident for voting purposes due to her inability to fulfill the majority of the statutory factors.

Situation 3 contains many of the same issues as the other two situations, however it further illustrates the point that in an increasingly mobile world, where more men and women attend university, women are able to serve as active members of the military, and

divorce is both readily available at law and no longer taboo in society, the standard factors used by states in their factor-based residency determination for voting residency have not kept up with the times. In situation 3, Sergeant Low is the most likely of all persons presented to be able to vote in the town where he is stationed, as his divorce took place there, he owns a home there, and has a car which he registered in California. However, even in Sergeant Low's case, there is no guarantee that he will be allowed to register by the local election officials because he will likely fail at least the intention to remain indefinitely portion of this test. That he was illustrates the subjectivity of the factor-based test in application.

Situation 3 presents a scenario direr to Sergeant Roe's chances to vote in the Virginia election. She cannot claim residency in Virginia through her in-laws, even if she had remained close to them, because they had moved and no longer were residents of Virginia. Additionally, she could not assert residency in Utah, Colorado, Texas, or Hawaii because she has no connection to these communities sufficiently to allow her to fulfill the standard factor-based tests used by these states. Thus, despite her many residences, and her many attractive qualities as a voter – including her keen interest in the community and the issues presented in the election, her many experiences in different communities, and her service to the country – until she buys a house, declares her intent to remain, moves her personal property to Virginia, buys a car, and engages in similar practices, she will be unable to say with any degree of certainty that she will qualify as a voter. And, even were she to do that, Sergeant Roe faces the likelihood that she will be reassigned to another state, or even country, at any point and thus cease qualifying to vote in Virginia.

These situations, although invented for the purpose of this article, are nonetheless very possible and would have a detrimental effect on the societal and legal status and rights of military voters. Societally, these voters are functioning members of their communities, and in many cases the military bases upon which military voters live and work are the primary means of economic survival for the entire community. Legally and ethically, the ease with which military voters, who serve the country and increasingly are called on to risk their lives in the pursuit of furthering democracy and democratic values – including suffrage – are disenfranchised and deprived of their own fundamental rights is disturbing. Additionally, it must be pointed out that military voters are affected by state and local elections as much as any other citizen. The arguments in favor of restricting the ability of members of the military to vote which have been advanced over the history of court cases addressing military voting have clustered around the idea of military voters being transients and therefore not vested in the community.¹⁰³ However, in a society in which businesses frequently transfer their employees from state to state, and out of the country, limiting the ability of members of the military to vote due to the transient quality which necessarily attends military life is both nonsensical and violative of the equal protection clause. This problem is only furthered by the involvement of local election officials in the decision making process, as ability of a military voter to meet the statutory factors used for determining residency will vary under the discretion of thousands of local election officials across a state.

C. Fixing the Problem

While the Supreme Court has stated that the ability to reasonably exclude certain populations from enjoying the right to vote is allowed as long as a state does not violate

¹⁰³ See, e.g., *Carrington v. Rash*, 380 U.S. 89 (1965).

the Equal Protection Clause,¹⁰⁴ the time has come to re-evaluate whether the current military voting laws do in fact violate the fundamental rights of military voters. As has been illustrated above, the current factor-based standards used by local election officials do not take into account the current realities of American life in general and the composition of the military in particular. Additionally, these factors are evaluated in an entirely subjective manner by the local election officials tasked with making such determinations, and even when a decision regarding residency is challenged in court, courts necessarily examine the factors with the same degree of subjectivity.

Amidst the uncertainty and disparate application of the factors used in residency determinations, it is time for federal action to ensure that the same troops who are moved at the will of the federal government are not deprived of the rights which the federal government is charged with providing to and protecting for all qualified citizens under the constitution. Such involvement is not out of step with the recent trend of federal involvement in state electoral processes in order to ensure that voters are able to equally and fully enjoy the suffrage right regardless of the state of their residence.

Congress could enact a new act, perhaps entitled the “Domestic Military Voting Rights Act,” which would require states to eliminate the standard factor-based test and the charging of local election officials with determining the residency of military voters. Instead, Congress could mandate that an interested military voter who resided at a military installation for at least 30 days prior to an election be eligible to vote in the state and town where he or she is currently stationed or choose to vote in his or her home state and locality if he or she would be eligible to vote there and wanted to vote via absentee ballot in this state and locality. This solution would allow military voters who wish to

¹⁰⁴ *See id.*

maintain their connection to a home state to do so (and maintain their ability to vote in their home state in the future because they would not have to vote elsewhere while stationed away from their home state), while at the same time allowing those military voters who wish to vote in the place where they currently are stationed to do so without being at the mercy of an outdated and subjective set of factors and a local election official making the eligibility determination.

In the event that a state or locality believed that an overwhelming number of military voters who would not vote in the best interests of the community but were otherwise qualified to vote would sway an election, such an act could allow for an immediate appeal of the registrations along the same lines as current federal voting cases currently operate. However, in order to prevent misuse or overuse of this appellate process, the standard of review would have to be very high, more akin to strict scrutiny rather than an arbitrary and capricious standard.

The benefit of enacting legislation of this type is that it would put the onus on the military voter to take positive steps in order to vote in the place in which they are stationed, and would require them to decide whether to give up voting in their home state – if they have a home state – when deciding to do so. Such citizens would be rewarded for their civic-mindedness through such legislation, while citizens who wished to retain their home state affiliations would be free to do so. This type of legislation would take pressure off state and local election officials who currently have to make many decisions regarding voting qualifications overall, and would spare communities the expense of voter registration-based litigation. Such legislation would also ease the burden on federal and state court dockets by removing such cases from the litigational sphere for the most

part. Equitably, legislation of this type would free military voters from having to overcome some of the most basic elements of military life, such as the inherently transient quality of military service, the lack of family and spousal ties to confer jurisdiction upon members of the military, and the propensity of members of the military to live on a military base, in order to successfully assert the ability to register to vote.

VI. Conclusion.

Though an integral part of the United States, members of the military are faced with a daunting problem when it comes to exercising one of the most fundamental rights conferred upon all citizens of the United States – the suffrage right. Members of the military who enter the military as unquestionable residents of a particular state, and who intend to return there at the end of their military service, can, essentially, be assured that they will be able to vote in that state. However, when there is a question as to the ability of a member of the military to vote in the place where he or she is stationed, the situation is starkly different. Here, the otherwise qualified military voter is at the mercy of a subjective application of a factor-based residency test which was created when the facts of military and civilian life were vastly different than they are today, and which has never been subject to a mandate as to proper application.

To address this situation and guarantee that members of the military who fight for freedom are not disenfranchised, it is necessary for Congress to take action and enact legislation which makes a unified system for determining the residency of members of the military, while at the same time preserving the rights of states and localities to challenge the ability of members of the military en masse to vote in their jurisdiction.

Only in this way can the suffrage right be guaranteed to members of the military and their families, and allow the communities which support them to benefit from the many insights that members of the military bring to elections and voting. Without such legislation addressing this issue, all too many members of the military will find themselves forever disqualified while in the service of our nation.