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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-221190

DATE: February 11, 1986

MATTER OF: Lieutenant Colonel William A. Smith, Jr., USA
(Retired)

- DIGEST:**
1. It is not the function of the Comptroller General to decide the constitutionality of statutes. Consequently, arguments by a retired military member that the Uniformed Services Former Spouses' Protection Act unconstitutionally deprived him of his due process and equal protection rights will not be considered.
 2. Absent facial invalidity of the court order, the Government is not liable with respect to any payments made in conformity with a state court order under authority of the Uniformed Services Former Spouses' Protection Act. Therefore, the Department of the Army is obligated to apportion the military retired pay of a retired officer in accordance with a Washington state court divorce decree, notwithstanding the officer's contention that the court order did not conform to Washington statutes.

Lieutenant Colonel William Smith, Jr., USA (Retired), claims restoration of payment in full and reimbursement of military retired pay withheld by the Department of the Army under a Washington state court order apportioning the retired pay between him and his former spouse as community property. We deny his claim.

Background

In 1981 the United States Supreme Court held that in the absence of specific authority granted by Federal statute, state courts could not properly treat military retired pay as marital community property in divorce proceedings. McCarty v. McCarty, 453 U.S. 210.

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The Congress responded in 1982 by passing the Uniformed Services Former Spouses' Protection Act.^{1/} This act added section 1408 to title 10 of the United States Code, which grants state courts the authority under certain specified conditions to treat military retired pay either as property solely of the retired service member or as property of the member and his spouse, in accordance with the law of the jurisdiction of such court. 10 U.S.C. § 1408(c). Section 1408 provides further that the Secretary concerned shall pay to the former spouse from the retired pay of the member any part of the amount payable to the former spouse under the property division upon effective service of a final court order. 10 U.S.C. § 1408(d)(5). In addition, subsection 1006(b) of the Act provides that for court orders issued prior to June 26, 1981, payments may be made in accordance with the order as in effect on that date. 10 U.S.C. § 1408 note.

Colonel Smith was divorced in the State of Washington in 1974. Under the terms of the dissolution decree, he was directed to pay 38.6 percent of his military retired pay as he received it to his former wife in order to satisfy the community property apportionment between them. He suggests the Washington state court order and the Department of the Army's compliance with the order are improper for three reasons. First, he claims that the Uniformed Services Former Spouses' Protection Act is unconstitutional in that it denies his right to due process and equal protection under the law. Second, he claims that his retired pay is current compensation for reduced services and that, characterized as such, the pay is separate property and therefore not eligible for lifelong division with his former spouse. He asserts that Congress has improperly redefined military retired pay as deferred compensation in the new Act. Third, he suggests that under the laws of the State of Washington the decree issued by the state court was improper.

Discussion

With respect to Colonel Smith's suggestion that the Act is unconstitutional, we note that in the McCarty decision,

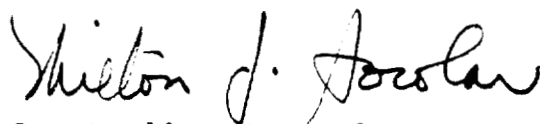
^{1/} Title X, Pub. L. No. 97-252, approved September 8, 1982, 96 Stat. 730, 10 U.S.C. § 1401 note.

mentioned above, the Supreme Court expressed the view that Congress did have the constitutional authority to permit the treatment of military retired pay as divisible property. However, it is not the function of our Office to decide the constitutionality of statutes; rather, it is a matter for the Federal courts.^{2/} Hence, we may not consider or decide arguments concerning the constitutionality of the Act, and we will accept it as valid until the courts rule otherwise.

As to Colonel Smith's suggestion that military retired pay is current compensation rather than a pension for past services, we note that the Act in no way redefines retired pay but merely allows state courts to treat this current compensation as divisible property if permissible under state law.

Colonel Smith suggests finally that the Washington state court erred in treating his retired pay as divisible property because he claims such a division is impermissible under Washington state statutes. Copies of state court actions in our file show that this matter has been litigated and the issue resolved adversely to him by the state courts. In any event, the order requiring payment to Colonel Smith's former spouse appears valid on its face and therefore the Army Finance Center is obligated to make payment. Absent facial invalidity, the Government is not liable with respect to any payment made under authority of this Act. 10 U.S.C. § 1408(f)(1).^{3/}

Accordingly, the claim is denied.

for 
Comptroller General
of the United States

^{2/} Laurie M. Brown, B-217565, June 27, 1985.

^{3/} See also Technical Sergeant Harry F. Mathews, USAF, 61 Comp. Gen. 229 (1982), and United States v. Morton, U.S. 104 S. Ct. 2769 (1984).