



UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

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OFFICE OF GENERAL COUNSEL

B-188362

MAR 16 1977

The Honorable Barbara Allen Babcock  
Assistant Attorney General  
Civil Division  
Department of Justice

Attention: Frances L. Wynn, Attorney  
Court of Claims Section

Dear Ms. Babcock:

Subject: \_\_\_\_\_ v. United States  
Ct. Cl. No. 73-77

Reference is made to statutory call form dated February 8, 1977, requesting a report on the petition filed February 3, 1977, in the above-entitled case wherein the plaintiff seeks judgment in the amount of \$122,098.13, together with costs, or in the alternative \$51,832.82, plus interest at 10 percent per year on Uniformed Services Savings Deposit Program (USSDP) funds from the date of deposit to date, and for such other relief as the Court deems just. The foregoing claim is alleged to arise out of the plaintiff's status as a United States Air Force officer held as a prisoner-of-war by the North Vietnamese during the period October 22, 1965, until February 12, 1973.

There is no record of any claim having been filed by the plaintiff with the General Accounting Office on account of the matters set forth in the petition and we have no information as to the facts involved other than the allegations presented therein. We presume you will receive a full report on the matter from the Department of the Air Force.

The petition contains allegations relating to the disposition of the plaintiff's pay allowances, savings, etc., by "emergency" payments made to his wife at her request by the Department of the Air Force during the period he was held prisoner by the North Vietnamese. Briefly stated, the plaintiff's cause of action stems from his allegations (Nos. 11 and 12, pages 5-6 of the petition) that during that time, his wife was living in adultery with and supporting another man on the plaintiff's pay and allowances, and

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that his funds were being used for a purpose contrary to his best interest. The thrust of the petition is that the Department of the Air Force acted in an arbitrary and capricious manner in making payments to the plaintiff's wife from his savings program (USSDP) and pay and allowance allotments. As far as we know, this is a case of first impression in the Court of Claims.

At the outset, the law authorizing the allotment of pay to the Uniformed Services Savings Deposit Program (USSDP) of a member in a missing status (which includes prisoners-of-war) contained in the act of November 3, 1967, Public Law 90-122, 81 Stat. 361, 10 U.S.C. 1035(e), provides:

"(a) The Secretary concerned, or his designee, may in the interest of a member who is in a missing status (as defined in section 551(2) of title 37) or his dependents, initiate, stop, modify, and change allotments, and authorize a withdrawal of deposits, made under this section, even though the member had an opportunity to deposit amounts under this section and elected not to do so. Interest may be computed from the day the member entered a missing status, or September 1, 1956, whichever is later.

In view of the foregoing, it would appear that the Secretary of the Air Force was acting under statutory authority in making payments from the plaintiff's USSDP savings to his dependant wife in the circumstances set forth in the petition. Whether an abuse of administrative discretion or arbitrary and capricious action in making such payments exists under the facts in this case is for the Court to decide.

Concerning the plaintiff's allegations in the petition about deprivation of his pay and allowances without due process under the fifth amendment to the United States Constitution, the Court of Claims set out a comprehensive review of this amendment as applied to matters relating to military pay and allowances in the case of 1 v. United States, 183 Ct. Cl. 41 (1968).

As to the plaintiff's allegations that sections 551-556 of title 37 are unconstitutional, the Court of Claims in construing the provisions of the Missing Persons Act of March 7, 1942, ch. 166, 56 Stat. 143, as amended, now codified in 37 U.S.C. 551-557, relating to determinations

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made by the Secretary of the department concerned, has held that such determinations under the act are conclusive unless they are shown to be arbitrary. See           v. United States, 132 Ct. Cl. 422 (1955), and           v. United States, 118 Ct. Cl. 30 (1950), cert. denied, 342 U.S. 814 (1951). However, it is to be noted that in the recent case of           v.          , 371 F. Supp. 831 (S.D. N.Y.) (1974), aff'd, 419 U.S. 987 (1974), a three-judge Federal court held that 37 U.S.C. 555 and 556 are constitutionally defective since the next-of-kin of American servicemen carried in a missing status have a constitutionally protectable property interest in entitlements granted to them under laws relating to missing persons and they must be accorded procedural due process in administrative proceedings when adjudications of fact are made.

The            court, however, neither decided nor addressed the allegation of the plaintiff in this case that he was deprived of his property without due process of law. In this respect, it is difficult to conceive of a method applying the concept of "due process" to the plaintiff's situation in this case. The elements of due process in the            case are directed to the rights of dependents of service personnel. Cf.           et al. v. United States, Court of Claims No. 293-74 (slip opinion), decided July 9, 1976.

In the final analysis, if the plaintiff's claim is premised on acts or omissions of employees of the Government in managing his funds, it would appear to be excluded from coverage under the Tort Claims Act. See 28 U.S.C. 2680(a) (1970); Clark v. United States, 198 Ct. Cl. 593 (1972), cert. denied, 409 U.S. 1028 (1972).

No record has been found in this Office of any claim or demand which might furnish the basis for a cross action against the plaintiff in this case.

Further inquiry in this matter may be addressed to Mr. Irwin Richman, telephone number 275-5422.

Please keep us advised of the progress of this case.

Sincerely yours,

Edwin J. Monsaa

Edwin J. Monsaa  
Assistant General Counsel