

In the

Supreme Court of the United States

RICHARD JOHN McCARTY,

APPELLANT,

V.

PATRICIA ANN McCARTY

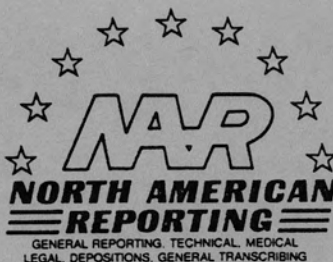
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March 2, 1981

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IN THE SUPREME COURT OF THE UNITED STATES

RICHARD JOHN McCARTY,

Appellant,

v.

PATRICIA ANN McCARTY

No. 80-5

Washington, D. C.

Monday, March 2, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:09 o'clock p.m.

APPEARANCES:

MATTANIAH EYTAN, ESQ., Kaplan, Russin, Vecchi, Eytan & Collins, 332 Pine Street, Suite 400, San Francisco, California 94104; on behalf of the Appellant.

WALTER T. WINTER, ESQ., 100 Bush Street, 20th Floor, San Francisco, California 94104; on behalf of the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in McCarty v. McCarty.

Mr. Eytan, I think you may proceed when you are ready.

ORAL ARGUMENT OF MATTANIAH EYTAN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. EYTAN: Mr. Chief Justice, and may it please the Court:

Richard John McCarty, the husband in a California divorce action, appeals the decision of the California Court of Appeal, First Appellate District; which we've had affirmed a Superior Court determination that the husband's expectancy in receiving Army retired pay should be awarded in part to his ex-spouse. The Court of Appeal took the position that the Superior Court had properly applied California law -- and that's a crucial matter in this entire case -- and that having applied California law the expectancy in retired pay was indivisible and then divided the Army retired pay pursuant to established California formula.

The husband contended then and contends now that federal law prohibits such a result, and federal law not only applies but preempts California from making such a determination.

The facts in the case can very briefly be summarized.

1 The parties were married in Oregon in 1957 and were divorced
2 in California, or at least they were separated in California,
3 in 1976. When the parties were married the husband was in
4 medical school in Oregon. He was a domiciliary of Oregon, as
5 was his wife. In his fourth year of medical school, the hus-
6 band joined the Army and remained in the Army for the entire
7 period up until the divorce.

8 After spending one year in Oregon he was transferred
9 by the military to Pennsylvania, the District of Columbia,
10 Texas, Hawaii, California, staying in each place for a number
11 of years.

12 Before the Superior Court the husband contended that
13 he was an Oregon domiciliary and that California could not
14 apply its quasi-community property regime, which is encom-
15 passed in Section 4803 of the California Civil Code. That's
16 a somewhat unusual provision which provides that property
17 which is acquired by either party to a marriage while domi-
18 ciled outside of California shall be treated as community
19 property if the party would have been domiciled in California
20 at the time of the acquisition of the property.

21 Once property is classified as quasi-community pro-
22 perty, it then is treated as community property.

23 The issue before this Court is not the distinctive
24 to community property matters. The issue comes up in a wide
25 variety of contexts whenever a community property state or

1 another state that under equitable division of property, in
2 the context of a divorce seeks to divide Army retired
3 pay.

4 Now there is a threshold jurisdictional issue in
5 this case, and by explaining what happened before the lower
6 courts I can deal with that as a preliminary matter. Before
7 the Superior Court the husband submitted the decision in
8 Hisquierdo v. Hisquierdo of the California Court of Appeals.
9 That decision was not terribly dissimilar from the decision of
10 this Court in the same case, which came out sometime later.

11 QUESTION: Under California law, assume hypotheti-
12 cally that he had been a physician for General Motors or
13 Du Pont all this time and had precisely the same experience.
14 Ultimately, would his pension be subject to division under the
15 California community property law?

16 MR. EYTAN: Yes. What makes this case so distinc-
17 tive is that the California Court here improperly assumes that
18 California law applies of its own force. In your example,
19 Mr. Chief Justice, there should be no question that California
20 law has everything to say and federal law has nothing to say
21 about the matter. Federal law tells us nothing about the pen-
22 sion rights of someone who works for General Motors. What we
23 have here, however, is a very major federal interest. We
24 have here the exercise by the Congress of elaborate legisla-
25 tion pursuant to congressional war power authorities to raise

1 and support armies. Article I, Section 8, Clause 12.

2 The Congress has passed legislation which covers in
3 great detail all elements of Army pay, Army retired pay,
4 various annuity programs, and the like.

5 QUESTION: Mr. Eytan, supposing that this is ten
6 years prior to the divorce in this case and the husband is in
7 the military. He brings home his paycheck, it's deposited in
8 the bank account, and a house is bought with it and paid for
9 by the time of the divorce. Would it be your contention that
10 that wouldn't be subject to equitable division under the
11 California formula?

12 MR. EYTAN: No, I would not so contend.

13 QUESTION: So that it's just the in-the-future
14 retirement pay and not the past accumulations that you're
15 arguing about?

16 MR. EYTAN: Well, I would argue, of course, that
17 the future element of it is very significant, but of course
18 my argument goes way beyond that. And if I can move then
19 to what I consider to be the main part of the argument it will
20 more fully answer your question. Unlike --

21 QUESTION: Excuse me. Just one more before we go on
22 to that. Then you implied that the Congress had established
23 this elaborate scheme of compensation, which in part was to
24 draw physicians into the service?

25 MR. EYTAN: Yes. And others.

1 QUESTION: And other services too, but we're dealing
2 with a physician here now. Congress certainly must not be
3 unaware that most physicians coming in would have wives accom-
4 panying them.

5 MR. EYTAN: Yes, Congress has directed its attention
6 specifically on several occasions to the question, how to deal
7 with the needs of wives. It has done so on three occasions
8 which resulted in legislation. In 1957 Congress addressed
9 this problem and decided that Army personnel should be put
10 under social security. Until then they weren't, and of
11 course the federal Civil Service and Foreign Service are not.

12 So that since 1957 Army personnel have been subsumed
13 under social security in the way that when the Army man gets
14 his paycheck, there's a subtraction for social security and
15 if the wife never works a day in her life and never accumu-
16 lates any credits whatever toward social security benefits
17 in her own right, she collects benefits, the ex-wife collects
18 benefits --

19 QUESTION: But she collects only a widow's benefit,
20 not the benefit of a retired worker under social security?

21 MR. EYTAN: Oh, no, under social security she col-
22 lects the same benefits as the spouse.

23 QUESTION: Which is a widow's benefit, not that of
24 the person who has worked, which are quite different.

25 MR. EYTAN: No, I don't think that's correct, if I

1 may respectfully dissent. When he reaches the appropriate age
2 there is a benefit to his spouse. He doesn't have to die for
3 his spouse to get a benefit, nor does he have to die for his
4 ex-spouse to get a benefit. The only requirement in that
5 regard is that they must have been married for ten years.

6 In addition, there are separate benefits, of course, for the
7 widow. And with respect to social security widow's benefits
8 there is an offset configuration which applies to other pro-
9 grams that operate in conjunction with social security and
10 those are the annuity programs that I believe you had in mind.

11 There are annuity programs. There is also social
12 security for the widow, and there's a combination, and at the
13 top level if the widow gets the maximum amount of the annuity,
14 she doesn't get social security by an offset and she doesn't
15 get the maximum amount of the annuity she gets from social
16 security.

17 But interestingly, there's no offset as against the
18 ex-spouse at all. The offset is only as against the widow.
19 And the annuity program, you're correct, is only to the widow.
20 Social security is not.

21 Now, the main point in all this, if one can cut
22 through the heart, is that obviously California law cannot
23 apply of its own force and effect. This is a program estab-
24 lished by Congress. This is a federal entitlement. There
25 are very important considerations both to the national program

1 involved. There are very practical, direct consequences, and
2 as Hisquierdo taught us and perhaps, more importantly, as we
3 know from Clearfield Trust and its multiple progeny, that
4 where important federal programs, important interests of the
5 federal government are implicated, are involved, we look to
6 federal law.

7 Now what does federal law tell us in this case?
8 If we had a civil service situation here, if we had a civil
9 service husband, we would have direct federal law telling us
10 what to do because the Congress has in Title V, Section
11 8345(j)(1) told us that you defer to the states and whatever
12 the state rule is, you apply it.

13 The same thing is now true for the Foreign Service.
14 But the Congress has not done that for the military. They
15 have not passed a direct statement of their intention as to
16 what federal law ought to apply and I would submit to you, the
17 husband would submit to you, that the formula that the Con-
18 gress has adopted for civil service cannot apply to the mili-
19 tary, and I don't think I'm overreaching by saying I don't see
20 how the Congress could pass such a law.

21 And the reason for that is that the husband's status
22 as a retired Army man doesn't mean that he's resigned his com-
23 mission. An Army man who retires remains a commissioned of-
24 ficer in the Army. The consequences of that is that he's sub-
25 ject to the Code of Military Justice forever.

1 QUESTION: Well, but, the Congress passed the Code
2 of Military Justice, didn't it?

3 MR. EYTAN: Yes, but the point that I'm trying to
4 make, Mr. Justice, is that Congress could not -- I don't be-
5 lieve it could -- I am making the argument to you that it
6 could not pass the same kind of a formula enactment as it did
7 to the civil service because the consequences for the Army,
8 for the Army retirees, would be far different than for civil
9 servants --

10 QUESTION: You mean that a sensible Congress
11 wouldn't pass it, not that it doesn't have the power to pass
12 it?

13 MF. EYTAN: Oh, of course, it has the power to do
14 anything it wants. The point that I'm trying to make is that
15 it could not follow that same formula. Let me show you why.

16 We know that an Army retiree remains subject to re-
17 call at any time, and any time means any time. It doesn't
18 mean national emergency, it doesn't mean war, it means any
19 time that the Secretary of the service says so. And apropos
20 of that, on December 12, 1980, the Congress reaffirmed this
21 insistence that the Army retiree can be called up at any time.
22 I've mentioned in the reply brief that there is new legisla-
23 tion, so we're not talking about any 'porey' scheme going back
24 a long time or some disused statute.

25 Now, at any time means that despite the fact that

1 we have an all-volunteer Army today, as to the Army retiree
2 the impact of this statute is conscriptive. He has to go,
3 and the reason he has to go is because he is still an officer
4 in the Army. If the Congress now were to pass a law --

5 QUESTION: Mr. Eytan, may I ask you a question,
6 Mr. Eytan? Supposing the retiree resigns his commission,
7 does he lose his pension?

8 MR. EYTAN: Yes.

9 QUESTION: He does lose his pension. He loses --
10 well, may I correct you and call it retired pay?

11 QUESTION: He loses his retirement pay?

12 MR. EYTAN: Yes. Now, the reason he loses his re-
13 tired pay is because retired pay is not pay for, it's not
14 deferred payment for past services. The federal rule, un-
15 enunciated in some 16 cases which I call to the Court's at-
16 tention, including five opinions of this Court, is that re-
17 tired pay is current pay. It's reduced pay for reduced ser-
18 vices. And that's really the whole point, what did California
19 do? What does California always do? It said that whatever
20 the retirement benefits are, those are deferred payments for
21 past services; and once it makes that decision, it treats
22 Army pay the way it does the General Motors official.

23 QUESTION: Well, Mr. Eytan, supposing on a divorce
24 order to show cause for temporary provisions pending a final
25 decision, the wife asks for \$300 alimony. The husband is an

1 Army colonel. Do you say that California can't apply its own
2 law there?

3 MR. EYTAN: Certainly it can, and Congress has per-
4 mitted that in express terms. What the Congress did in that
5 regard was really quite drastic, because in 1975 the Congress
6 changed the whole scheme of things. And had you asked me the
7 question, what could the wife have done prior to 1975,
8 I would have said that the wife would have a very tough time
9 enforcing any California support order. But, look, in 1975
10 the Congress said that when it comes to support, any kind of
11 support -- and there's a long list in the statute; I'm talking
12 about Title 42 of the Code, Section 659(a) and especially
13 Section 662(c). What the Congress said there was that when
14 it comes to support payments, the wife armed with a state
15 court award may proceed to garnishee the funds directly from
16 the financial officer of the appropriate federal agency.
17 And ever since then we've had wives from California and else-
18 where doing just that, and elaborate regulations implementing
19 that statute have now been published. So that matter has
20 been taken care of by Congress in the very limited area of
21 support. And what the Congress did, just so that no one could
22 mistake it, it distinguished carefully between support and
23 property interest. It stated in Section 662(c) of that
24 legislation that when we say support, we mean alimony, alimony
25 pendente lite and all the rest of it, child support

MILLERS FALLS
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1 payments, but we don't mean community property awards, we
2 don't mean property divisions pursuant to the decrees of state
3 courts that have equitable division; a very careful distinc-
4 tion.

5 So that, as we look at what the Congress did in 1975
6 you see that there as well as in social security amendments it
7 had the spousal interest in mind. Hisquierdo put it this way:
8 when the Congress provided for a spousal award for the railroad
9 retiree, it had something like a community concept in mind.
10 Indeed, I may point out a third instance where the Congress
11 had support, and only support, in mind. There is legislation
12 that says that the Army man may make an allotment. Again,
13 for support purposes. Everything deals with support, not
14 property.

15 And what is the distinction? We're talking here
16 about property rights, property rights that have no connec-
17 tion whatever with need. My opponent essentially makes the
18 argument, as do the amicus briefs, that spouses, ex-spouses
19 have great need. Their social security payments may come
20 late, they have to wait a long time. They need more; they
21 get the runaround, or whatever.

22 But that's a question of need, again, that's a
23 question of support. The Congress has directed its attention
24 to that several times and it's come out with a formula.
25 That formula now gives the spouse more than she ever had,

MILLERS FALLS
1 because the Congress went so far as to allow the United States
2 to be sued directly.

3 But let me come again to what I consider to be the
4 control issue. This case is much simpler than Hisquierdo
5 ever was, because in this case if we apply federal law as the
6 California courts should have, the California courts should
7 have stated that under federal law Army retired pay is current
8 wages, reduced current wages for reduced services. If that
9 is so, the whole conceptual underpinning for the community
10 property position evaporates, it doesn't exist.

11 Now, what does the California court do? It stub-
12 bornly applies California law in the sense that it says, let
13 us see whether there is any express statement by Congress that
14 bars us from first characterizing the property and then
15 dividing it and deciding to do anything we want to do with
16 respect to that property.

17 Now, that's not the right rule. The right rule
18 has to be, what does federal law tell us that the appropriate
19 rule should be? I would concede that the federal rule might
20 well be that courts should defer to state law. That might be
21 the correct rule, but that would then be a federal rule.
22 In our case the federal rule is clear beyond peradventure,
23 because we had this Court speaking five times and for a hun-
24 dred years. The first decision on this was in 1881, and it
25 stated very clearly that an Army man who was retired still

1 wears the uniform, is still subject to the Code, the Code of
2 Military Justice. He gets his pay for staying in the service
3 and jumping to attention and going back into the service when
4 he's directed.

5 Now, if the California court had done that, that
6 would have been the end of the matter. And I wouldn't be here
7 talking about the anti-assignment statute, the Social Security
8 Act amendments, the spousal awards, and all that. What the
9 California court does, however, is it ignores the federal law,
10 it gives it the back of the hand. There is not a single
11 intelligent analysis in any community property state as to
12 the large body of federal law that says, look, this is not
13 deferred compensation for past services; this is compensation
14 for your staying eligible for recall. It's your compensation
15 for doing all kinds of other things, which are set out in the
16 brief.

17 I'd like to reserve the balance of my time.

18 QUESTION: As an economic matter, laying
19 aside your statute --

20 MR. EYTAN: Yes?

21 QUESTION: Isn't every pension a form of deferred
22 compensation?

23 MR. EYTAN: I of course would agree with you for
24 those pensions which do not require current services and most
25 important those which do not have current liabilities.

MILLERS FILES

1 Your question can't be answered uniformly for the military
2 retiree because the Congress has spoken to that point, and
3 this Court has spoken, and the Court of Claims has spoken.
4 There is no authority to the contrary. And if it were so that
5 I could agree with you for Army retired pay, then and only
6 then would we come to the question whether, despite the fact
7 that this is a pension, aren't there other economic considera-
8 tions? Aren't there considerations concerning the operation
9 of the Army? Those are set out in the briefs at length.
10 Doesn't the community property division or any equitable
11 division really substantially disrupt the Army? And of
12 course, the answer to that is, yes.

13 MR. CHIEF JUSTICE BURGER: Very well. Mr. Winter.

14 ORAL ARGUMENT OF WALTER T. WINTER, ESQ.,

15 ON BEHALF OF THE APPELLEE

16 MR. WINTER: Mr. Chief Justice; may it please the
17 Court:

18 I would like to ask the Court's indulgence for one
19 moment while I read to you one short sentence quoting
20 Mr. Justice Gardner, from the case of In re Marriage of
21 Brantner, when he said,

22 "A woman is not a breeding cow to be nurtured
23 during her years of fecundity, then conveniently and
24 economically converted to cheap steaks when past
25 her prime."

MILLERS FALLS
E Z B A S S
EXHIBIT CONTENT

1 I think nothing is more appropriate than this par-
2 ticular phrase, when we are talking about the plight of the
3 military wife, because the military wife's situation is
4 unique. Unlike her sisters who are not military wives, she
5 not only is supposed to be the companion, the homemaker,
6 to bear and raise children, but the military wife has a very
7 unique position in the military. From the moment that she
8 marries a military man, she becomes part of the military as
9 much as if she herself were wearing that uniform. She assumes
10 the role of her husband. If her husband is a lieutenant,
11 she is the wife of a lieutenant. She for all intents and
12 purposes has to be subservient to the wife of the colonel.

13 And so it goes. This is a very --

14 QUESTION: You would say the same thing about a
15 military husband these days?

16 MR. WINTER: Pardon me?

17 QUESTION: Would you say the same thing about a
18 military husband these days?

19 MR. WINTER: Yes, I think it is, it is very defi-
20 nitely so. But I think that what we have to do at the pre-
21 sent time, Mr. Justice, is we have to recognize the fact
22 that these women do serve and they are expected to serve,
23 they are expected to participate in social functions. They
24 are even given guides, "how to be a good military wife."
25 They are left alone for months at a time; they lead nomadic

1 lives; their moves are approximately two years apart, and
2 this is extremely important.

3 So they cannot develop their own careers, they can-
4 not develop their own potential. They are required to stabi-
5 lize the children, because I think we all know and recognize
6 that the children of military families do have peculiar
7 problems, they cannot have any continuity. So this is part
8 of their function again. And they cannot fulfill, Justices,
9 the American dream of owning a home, their own home, because
10 for all intents and purposes when you have to get up and move
11 every couple of years, forgetting for a moment the fact that
12 their incomes are extremely low, they simply do not have the
13 time or the opportunity to purchase a home.

14 They have a lower standard of living. For example,
15 Dr. McCarty, who was a Board-certified cardiologist, had an
16 income of \$2,596.51 a month, \$30,000 a year. And I think we
17 all know that cardiologists can earn upwards of \$150,000
18 a year. These people are giving up something for the future.
19 They are working today for the future. You may recall
20 -- if I may direct your attention to the fact that after
21 almost 20 years of marriage, what did Dr. and Mrs. McCarty
22 actually accumulate? \$13,000 in assets. Two automobiles,
23 \$200 in the bank, and a couple of thousand dollars that some-
24 body owed to them. That is what they acquired after almost
25 twenty years of marriage.

MILLERS FALLS
EX-21
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1 Why do people do this? Why? Well, patriotism,
2 perhaps. But actually I think we all know why they do it.
3 They're in the military because they know that from the moment
4 that they start, twenty years later they are going to have an
5 income for life. This is the true asset of the marriage.
6 And I don't think that we can possibly ignore that.

7 QUESTION: Well, how in the world are there so many
8 of them that don't stay in twenty years? Are they stupid?

9 MR. WINTER: No, I don't think they're stupid.
10 Perhaps they don't want to put up with it, Mr. Justice, and
11 that's precisely --

12 QUESTION: Well, but I mean, you said it's for the
13 money that you get.

14 MR. WINTER: Pardon me?

15 QUESTION: You said, it's for the retirement money.

16 MR. WINTER: I think that anyone who goes into the
17 service and stays in the service, Mr. Justice, stays in it
18 because they anticipate that retirement. And that's some-
19 thing they all know about.

20 QUESTION: What does that have to do with this case?

21 MR. WINTER: Pardon me?

22 QUESTION: What does that have to do with this case?

23 MR. WINTER: Well, Mr. Justice, it has everything to
24 do with this case simply because what we're talking about is
25 the supremacy requirement. Now, I might add, if I may, just,

1 Mr. Justice, that in the first place, there's a big question
2 of dedication here.

3 QUESTION: Do you want us to take judicial notice
4 that military people and their wives are devoted people,
5 period? Do you want us to take judicial notice of that?

6 MR. WINTER: Your Honor, I'd be delighted if you
7 would take judicial notice --

8 QUESTION: Do you want us to do any more than that?

9 MR. WINTER: Yes, sir. I really do. And if I may
10 just point this out to you, there are two requirements of supre-
11 macy. And you see, this is not their entire argument. In the
12 first place, they never actually raised the statute at the
13 time that we were in court previously. The first time that
14 the appellant here raised the unconstitutionality of the stat-
15 ute was when he filed this particular brief. He never men-
16 tioned it before.

17 However, let's forget that for just a moment.
18 Let's treat this as if this were a sur pertition. We then
19 get involved in the supremacy requirement, because after all,
20 the only question here is, has the federal scheme actually
21 mandated that the state courts can no longer act over pen-
22 sions? And there are two requirements, Mr. Justice. One of
23 them is, there must be an actual conflict or unambiguous man-
24 date. Now, we don't have that here, because there is no
25 conflict at all. It is not even mentioned in any of the

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1 federal statutes, and there has to be some interference with
2 a federal interest. And Mr. Justice, this is precisely why
3 I think it's very important for the Court to understand that,
4 because, you see, they keep on saying that this country is
5 going to fall apart if the ladies, or the wives, or the
6 spouses are able to obtain their portion of the pension. And
7 nothing could be further from the truth. The fact of the
8 matter is, Mr. Justice, that it's exactly the opposite way
9 around.

10 QUESTION: I'd suggest you'd better address your-
11 self to the other eight, because they don't usually agree
12 with me. And you'd look cute talking to me.

13 MR. WINTER: I will address myself to the other
14 eight Justices then, if I may.

15 One of the points that is made and that is so often
16 made in this particular case by the appellant is the fact that
17 the military would allegedly fall apart, fall apart, the
18 moment that we give the wives their share of the retirement.

19 QUESTION: Mr. Winter, I don't really think that's
20 a fair statement of their position. Their position, as I
21 understand it is, that Congress has said that the pension
22 or the retirement pay should belong to the retired officer
23 to the same extent in every state in the United States.
24 You're saying that there's a different rule in community pro-
25 perty states.

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CONFIDENTIAL

1 MR. WINTER: No, Your Honor, I think that there are
2 two things, there are two portions to your question, if I may
3 address it. In the first place, insofar as what they have
4 said, I believe that it is their statement that they are talk-
5 ing about preemption, and it is our position that there has
6 not been a preemption because the Congress has not spoken
7 about it one way or the other.

8 Now, insofar as the second portion is concerned, I
9 believe that if the Congress wished to speak on that subject
10 and wished to have a separate rule for military divorces,
11 then Congress can certainly do that. There is absolutely no
12 constitutional prohibition saying that they may not have a
13 federal divorce law. But the fact of the matter is,
14 Mr. Justice, that there is no federal divorce law. Now --

15 QUESTION: But there is no railroad retirement
16 law either, and yet Hisquierdo came out the way it did. How
17 do you distinguish your case from that?

18 MR. WINTER: Very easily, Mr. Justice. One of the
19 -- in the first place, Hisquierdo had some very, very speci-
20 fic wording in that particular statute. They talk about, for
21 example, that there not, be not any assignment. And in the
22 present case, and in the military retirement cases, there is
23 a specific provision that there can be an assignment of an
24 officer's wages. The Hisquierdo statute talks about the fact
25 that it is not subject to attachment.

WILLERS FALLS
1 And in the present case there is a specific provi-
2 sion for attachment in the case of support, and Congress has
3 in fact aided the wife in that regard.

4 Third, in the Hisquierdo case they talk about the
5 legal process not being mentioned in the statute. In other
6 words, it is actually by case law only that we're talking
7 about legal process and, as far as we're concerned here --
8 in Hisquierdo it is not subject to legal process, but in the
9 present type of a situation the legal process is not even men-
10 tioned in the statute. So that, for all intents and purposes
11 Hisquierdo is easily differentiated.

12 And another thing, sir, is about anticipation of
13 payments, again in Hisquierdo. And again I'd like to point
14 out to this Court that it is not mentioned in the military
15 situation at all. So Hisquierdo is a very, very tightly
16 knit scheme which I believe is restricted solely to the
17 retirement scheme, the retirement benefits, and has abso-
18 lutely nothing to do with a military retirement.

19 QUESTION: When does the wife's interest in this
20 retirement pay arise?

21 MR. WINTER: That depends upon where they come from,
22 Mr. Justice.

23 QUESTION: Well, how about California?

24 MR. WINTER: In California, in the event that the
25 soldier comes to the State of California, our law with

1 reference to quasi-community property would only arise if
2 there were two very, very distinct requirements. One, both
3 have to be domiciled in the State of California, so the mere
4 fact that you come into the State of California does not in
5 any way transmute this interest --

6 QUESTION: But it does if you both move there?

7 MR. WINTER: They have to do more than that,
8 Mr. Justice.

9 QUESTION: They have to get divorced, don't they?

10 MR. WINTER: That's part of it, yes. That is a
11 secondary part --

12 QUESTION: The wife has no interest unless there is
13 a divorce, is that right?

14 MR. WINTER: Under quasi-community property, we
15 have to differentiate --

16 QUESTION: Well, I'm talking of this -- I don't
17 care about quasi-community property, I want to talk about
18 this pension. When does her interest rise in that pension?

19 MR. WINTER: The interest arises if they are
20 California residents or domiciliaries -- pardon me, and if
21 it -- then, well, if they start out in California and he
22 earns it in California and they start out there and they
23 stay there and get a divorce there, she's had this interest
24 all along.

25 QUESTION: Well, I know, but she doesn't have it if

1 they're not divorced?

2 MR. WINTER: Oh, yes, she does; she does unless it is
3 under the quasi-community property scheme.

4 QUESTION: Are you saying it's an inchoate inter-
5 est until there's some occasion like a divorce to take some
6 legal action about it?

7 MR. WINTER: Only if it is under the quasi-commu-
8 nity property. If they are residents or ~~an~~pardon me ~~lies~~
9 domiciliaries of another state, if they are domiciliaries of
10 another state, then what happens is that as far as California
11 is concerned, California will not touch that retirement be-
12 cause the laws of that particular state apply, Mr. Chief
13 Justice.

14 QUESTION: But, doesn't the husband have the right
15 to assign his retirement payments?

16 MR. WINTER: Well, again, the question then is --

17 QUESTION: Well, here, again, here are two people
18 married, and one of them is a retired Army officer, and
19 they're not divorced, they're living together. And he assigns
20 his retirement payments.

21 MR. WINTER: He can't do that under California law,
22 Mr. Justice. He cannot do that because the wife owns half
23 of it. You see, this is the part --

24 QUESTION: Well, that's what I wanted to know.

25 MR. WINTER: This is part of -- I'm sorry?

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1 QUESTION: I'm just trying to find out when her
2 interest arises.

3 MR. WINTER: Her interest arises as they earn it
4 because under the community property scheme the husband and
5 wife are working together. Our California courts recognize
6 the fact that the husband, when he works, actually does not
7 contribute any more to the benefit of the couple's life toge-
8 ther, the community, as it were, than the wife who's home
9 raising the children. And that's why this is so important.

10 QUESTION: So, she has -- under California law she
11 has an interest enough in the pension payments to keep him
12 from assigning the -- ?

13 MR. WINTERS: Yes, sir, I believe that she does.

14 QUESTION: Or from encumbering them? Or from their
15 being attached?

16 MR. WINTERS: Yes, sir. I believe that that is so
17 inasmuch -- and this is only, now, this is only in the
18 situation where we have a community property situation. If
19 it is quasi-community property, it's a completely different
20 situation because by the mere fact of entering into the
21 State of California, this in and of itself does not change
22 the property interest, but as far as California is concerned,
23 when you both worked for it, you're both entitled to it.
24 It's a property interest, Mr. Justice.

25 Now, of course, under quasi-community property we

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1 have a different situation because under quasi-community
2 property they both must be domiciled there and, of course, it
3 has to be in a divorce situation only. In other words, again
4 even though they both become domiciliaries, if they then
5 leave the State of California, California has no interest in
6 it anymore. And so I believe that it's very important for us
7 to differentiate in this type of a situation. And I think
8 it is still very important for us to consider the fact that
9 the wife is an equal partner and should be considered an
10 equal partner in this very important property right.

11 Now, I would like to make one very short statement
12 to this Court at this time, because yesterday when I came
13 here to Washington I visited Arlington Cemetery. And I
14 could not help but think of the millions of our brave fight-
15 ing men who sacrificed so much, and also the millions of
16 brave and patient women that they left behind, women who
17 spent their lonely and fearful days and nights waiting and
18 praying for their men to return home. These women provided,
19 Justices, for their men's homes, reared their men's children,
20 and most important, gave their men the courage and hope,
21 something to come home, something to fight for. We have
22 never turned our back on our fighting men. And I ask you at
23 this time, let us not now minimize the importance of their
24 courageous women.

25 QUESTION: Mr. Winter, in addition to the

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1 conventional preemption arguments, it seemed to me that your
2 brother on the other side made another argument, i.e., that
3 California has misconceived what the nature of this property;
4 that instead of it being a run-of-the-mill pension such as
5 was involved in Hisquierdo or such as would be involved in a
6 General Electric pension, this instead of being deferred
7 compensation for present services on active duty is actually
8 compensation for more limited services in retirement. And if
9 that's true, then it wouldn't even be the kind of property
10 that's subject to the community property laws, quasi-commu-
11 nity property or any other kind, would it?

12 MR. WINTER: Well, Mr. Justice --

13 QUESTION: Wait, am I right in my assumption?

14 MR. WINTER: Yes, to some degree, but perhaps not
15 to another degree, Mr. Justice. In the first place, I think
16 that we have to be somewhat realistic.

17 QUESTION: Of course we do. We always have to be
18 that.

19 MR. WINTER: The fact of the matter is, Mr. Justice,
20 that the retired military officer doesn't really have to do
21 anything any more.

22 QUESTION: Well, no, assuming that's true, I said,
23 assuming that's true?

24 MR. WINTER: Yes?

25 QUESTION: That what it is, what so-called --

1 retirement pay is, is compensation for the more limited ser-
2 vices for which he is liable in retirement, and rather than
3 being deferred compensation for his services performed during
4 active duty.

5 MR. WINTER: Yes.

6 QUESTION: Now, assuming that's true?

7 MR. WINTER: But I don't think that --

8 QUESTION: Let's not argue about whether or not it
9 is. Assuming it's true, then California would be quite mis-
10 taken in considering this property covered under its community
11 property doctrines, wouldn't it?

12 MR. WINTER: Well, I think that our community pro-
13 perty law covers that in this way, Mr. Justice. Under
14 community property law, once there has been a separation then
15 the earnings of each of the spouses then becomes his or her
16 separate property.

17 QUESTION: Their subsequent earnings?

18 MR. WINTER: Their subsequent earnings.

19 QUESTION: Right.

20 MR. WINTER: So that if we assume counsel's argu-
21 ment, the way that I can answer that is really simply this,
22 the minute that he gets back into the military and he actually
23 becomes part of the active duty again, then he is paid --

24 QUESTION: Full pay.

25 MR. WINTER: -- number one, he is actually paid for

1 his services, the services that he renders at that time.

2 But furthermore, he also accrues further military retirement
3 benefits all of which will then benefit him. So --

4 QUESTION: We're really now arguing about whether
5 or not it is true, the assumption, aren't we?

6 MR. WINTER: I don't think so, but perhaps I mis-
7 understand you.

8 QUESTION: Perhaps I misunderstood you.

9 MR. WINTER: I don't think that we're arguing about
10 whether or not it's true. The question is whether or not
11 it would then be a property interest. And what I'm saying is
12 that you can't ignore one without the other. Now, it just
13 depends upon how far you really have to go. If he's really,
14 if he's factually only on limited duty, then I would have to
15 agree. But the fact of the matter is, and in one of our
16 cases the courts have addressed that issue.

17 QUESTION: Mr. Winter, do you agree with what your
18 opponent said, in the event the doctor had not merely retired
19 but had resigned his commission, would he not then have for-
20 feited any right to the retirement pay?

21 MR. WINTER: Yes, but that takes --

22 QUESTION: Would you not agree that he has the sole
23 discretion as to whether to do that, and the wife cannot veto
24 that decision?

25 MR. WINTER: I believe that he has that sole

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EXHIBIT
1 discretion or he should have that sole discretion, Mr. Justice.
2 However, I would like to point out to the Court that under
3 the California scheme, under the California law, that the
4 wife actually has no greater right to the retirement than the
5 husband, or, I should say, actually, the spouse. Of course,
6 I'm talking about wife and husband here, because from a prac-
7 tical standpoint it has been that situation in 99 percent of
8 the cases.

9 I might add parenthetically that now that we have
10 more and more women becoming part of the military, it could
11 easily cut the other way. But getting back to that for just
12 one moment, the wife in that particular situation has abso-
13 lutely no power at all to increase her right. In other words,
14 if the husband chooses to give the whole thing up, then cer-
15 tainly he can do that, and there is nothing that she can do
16 about it.

17 QUESTION: But it's not just -- if your opponent's
18 conception of the scheme is the correct one, it's not merely
19 giving something up, he also gets something when he resigns,
20 namely, he is no longer exposed to the risk of being called
21 into active duty and running the risk of the danger that's
22 associated with a military life.

23 MR. WINTER: Well, I'm not asking this Court to
24 state that the wife should have the right to tell him whether
25 or not he should remain in the service.

1 QUESTION: No, but this goes to the question whe-
2 ther it's in the nature of a pension or it's in the nature of
3 reduced pay for a limited type of service, namely, availabil-
4 ity to recall.

5 MR. WINTER: I believe that under these circum-
6 stances, Mr. Justice, I believe that this is nothing more than
7 a play on words. And while I agree that it isn't --

8 QUESTION: But there are a number of officers who
9 do resign for that very reason.

10 MR. WINTER: Yes. And in the event that they resign
11 then they for all intents and purposes will defeat their
12 spouse's interest, and that takes care of that, she's out.
13 And I recognize that, Mr. Justice. I certainly feel that
14 under those circumstances the Court should not have the power
15 to keep him in there, or to make him work, or do anything
16 that he doesn't want to do. This, of course, is part of the
17 overall scheme, this is part of the community property law.
18 And we recognize that.

19 I will say that there is one Court of Appeal deci-
20 sion that came down recently, that was mentioned in the reply
21 brief, in which the California Court of Appeal did go one
22 step further. I personally disagree with that particular
23 Court of Appeal decision. It never went on to the California
24 Supreme Court, and I assume that somehow or other that point
25 is going to be raised at a future time. But I don't think

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1 that that has anything at all to do with the situation as it
2 is here today, because essentially, Mr. Justice, what we're
3 talking about here is whether or not there has been a federal
4 preemption. That's really all we're talking about. Has the
5 federal law preempted? And the fact of the matter is that
6 it hasn't even been mentioned. Nothing has been said about
7 it at any time, one way or another. And I think it's every
8 bit as fair to say that when the federal law has not said
9 anything about it one way, then it certainly is every bit as
10 fair the other. Except that, under the law, under what is
11 required under the supremacy requirement, there actually has
12 to be an actual conflict. And this is something that they
13 have not been able to demonstrate. There is no conflict at
14 all between our California community property law and military
15 retirement benefits. There has not been an unambiguous
16 mandate. And there certainly has not been an interference
17 with the federal interest.

18 You see, this is the other requirement. You can't
19 just have this without a so-called damage provision. There
20 has not been any interference at all.

21 QUESTION: Mr. Winter, suppose you lose this case
22 here? Are you without remedy under California law? You have
23 alimony in California?

24 MR. WINTER: Yes, we do, Your Honor.

25 QUESTION: And that could be enforced against --

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1 well, his pension, once it is received by him, I suppose?

2 MR. WINTER: Yes, it may, Your Honor. However, if
3 I may point this out --

4 QUESTION: What you want is a direct share of the
5 pension? You want half?

6 MR. WINTER: Yes, Your Honor, because actually --

7 QUESTION: Payable by the United State Government?
8 Do you want the United States Government to pay her half
9 direct to your client?

10 MR. WINTER: Well, I'm afraid that under present
11 law that cannot be done. However, I would like to respond
12 insofar as the alimony -- you see, alimony has many, many
13 provisions, many requirements. And one of the requirements,
14 of course, is that immediately upon the remarriage of the
15 party who is receiving the alimony, the recipient, that auto-
16 matically then terminates the alimony.

17 Now, this is a property right we're talking about.
18 This is something that they earned, both of them together,
19 during a marriage, and it is not something that should termi-
20 nate. Because, after all, why should he get the windfall
21 merely because she remarries? Why should she have to then
22 worry about starting out all over again? This is something
23 that they have both worked for --

24 QUESTION: Of course, even that isn't true in all
25 states. But in any event, I understand your property argument

1 and I think I know what alimony is, but would your argument
2 about service wives -- I want to know whether they're without
3 remedy in case you lose this case. And I take it they are not
4 without remedy.

5 MR. WINTER: They are without remedy, Mr. Justice,
6 because they are losing a very valuable property right, and
7 spousal support, as we call it, or alimony, I don't think is
8 the proper remedy. Because that is subject to many, many
9 conditions and it is not exactly the same thing as saying to
10 her that this is something they have and something that is to
11 be divided. It's something that he will keep, whether or not
12 he remarries. So why should he keep it and she then lose it?

13 MR. CHIEF JUSTICE BURGER: Very well.

14 MR. WINTER: Thank you.

15 MR. CHIEF JUSTICE BURGER: Do you have anything fur-
16 ther, Mr. Eytan?

17 MR. EYTAN: Yes.

18 ORAL ARGUMENT OF MATTANIAH EYTAN, ESQ.,
19 ON BEHALF OF THE APPELLANT -- REBUTTAL

20 MR. EYTAN: Mr. Justice Stevens, the wife can com-
21 pel the husband to pay her damages in the event he refuses to
22 resign. In the very recent case that my opponent mentioned,
23 a case that did not plough new ground at all, we had an Air
24 Force husband, Luciano v. Luciano, a 1980 case, where the Air
25 Force husband refused to resign from the Air Force and the

1 wife claimed that she had the right to collect her property
2 interest in his retired pay and never mind whether he wished
3 to actually start retired pay coming. He refused to resign.

4 QUESTION: You mean he refused to retire? Not to
5 resign?

6 MR. EYTAN: Yes, I'm sorry; retire. Thank you for
7 the correction.

8 The Court held that she could declare when her por-
9 tion of the retirement --

10 QUESTION: That is not involved in this case.

11 MR. EYTAN: I'm sorry?

12 QUESTION: That question isn't involved in this
13 case?

14 MR. EYTAN: That's correct. The California court
15 determined that it was up to her to decide when the retired
16 pay would come, and that idea was further amplified in a more
17 recent case cited in my reply brief, that said that the hus-
18 band who refuses to retire so as to trigger the retirement
19 benefits has to pay damages to the wife in an amount equal
20 to what she would have gotten as her property interest had she
21 retired.

22 QUESTION: Is that like palimony?

23 MR. EYTAN: Not at all. It's a property interest.
24 It's not like alimony at all. It's damages for someone
25 converting your property, someone depriving you of your

1 property. California has had this doctrine a very long time,
2 and it's fundamentally based upon the notion that if you have
3 something within your control, you can trigger a set of conse-
4 quences or not. And if you choose not to trigger them, then
5 the person who suffers thereby is entitled to damages from
6 you. The wife in this case, may I point out, is getting
7 alimony. She wants half the retired pay. She's getting
8 alimony. The husband has custody of the three minor children,
9 the husband pays everything, she's getting her alimony based
10 upon a court determination of her need. This case is not
11 about needs, and if she has greater need at any time, she
12 can always go back to the courts and get more alimony if she
13 can sustain her burden of proof on that.

14 QUESTION: Is it fair to assume that if you win this
15 case the court would reassess the alimony situation and per-
16 haps give her a little more?

17 MR. EYTAN: I think it's fair to say that she has
18 the right to do so and if she can show need, the answer is,
19 yes. But imagine this. Suppose she gets the money and then
20 she decides to pledge it to a financial institution or suppose
21 she decides to give it to her second husband if there is one,
22 never mind the specific fact here. The point is that once
23 you get into the property business you allow the states to
24 determine that the wives can dispose of it by testamentary
25 disposition. She could pledge it. Strangers start getting

1 the money. Look, you have a new case here, In re Miller, as
2 to which cert. is pending.

3 The Miller court from Montana decided that the
4 wife has such a marvelous property interest in this that she
5 can give this to any person she wants by testamentary dispo-
6 sition. Does anyone really believe that the Congress intend-
7 ed that the Army retireee, perhaps languishing in a nursing
8 home, is going to share his retired pay with a second husband
9 who secured it by testamentary disposition? Has anyone
10 really considered that the Army intended for Army retired pay
11 to be so abused as a property interest that husbands who have
12 their retired pay taken away from them in substantial portions
13 have to seek out bankruptcy relief? That's exactly what's
14 been happening. If you take a look at the reply memorandum
15 you'll see the cases cited there.

16 Most importantly, I think that the statement that
17 there's no anti-assignment statute here a la Hisquierdo is
18 rot. There clearly is an anti-assignment statute. It goes
19 back to the days before California entered the Union. The ex-
20 act text has changed from time to time but the essential
21 point is the same. There is ~~was~~ good an anti-assignment
22 statute here, as in Hisquierdo, and when you consider that
23 it's the United States Government that has all the benefits
24 in this area, the pay, the retired pay, the social security,
25 the annuity programs, obviously an anti-assignment statute

1 in these circumstances for Army pay which the Congress pro-
2 tected as much as it protected regular pay -- it's all in the
3 same statute -- cannot mean that someone can take active duty
4 pay, retired pay, because of state law. Federal law applies
5 here. Federal law is very clear; the wife has no interest.

6 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
7 The case is submitted.

8 (Whereupon, at 2:03 o'clock p.m. the case in the
9 above-entitled case was submitted.)
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CERTIFICATE

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No. 80-5

RICHARD JOHN McCARTY

V.

PATRICIA ANN McCARTY

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