

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: GERALD E. MANSELL, Appellant V. GAYE (MANSELL;
FORBES

CASE NO: 87-201

PLACE: WASHINGTON, D.C.

DATE: January 10, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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GERALD E. MANSELL, ;
 Appellant ;

 v. ; No. 87-201

GAYE (MANSELL) FORBES ;
-----x

Washington, D.C.
Tuesday, January 10, 1989

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:45 o'clock a.m.

APPEARANCES:

DOUGLAS B. CONE, ESQ., Merced, California; on behalf of
the Appellant.

DENNIS A. CORNELL, ESQ., Merced, California; on behalf
of the Appellee.

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P R O C E E D I N G S

(11:45 a.m.)

CHIEF JUSTICE REHNQUIST: we'll hear argument next in No. 87-201, Gerald E. Mansell v. Gaye (Mansell) Forbes.

Mr. Cone, you may proceed whenever you're ready.

ORAL ARGUMENT OF DOUGLAS B. CONE
ON BEHALF OF THE APPELLANT

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

The question is whether California may divide Major Mansell's VA disability benefits as community property just because he is -- was a military retiree as opposed to civil service or some other kind of retiree.

And the question arises because of the unique way the Federal government treats military and other uniformed service retirees concerning the VA disability benefits.

The military, and other uniformed members, are required to waive a portion of their longevity retirement in order to receive VA disability. In effect, the military retiree is required to purchase his own VA benefits with part of his longevity pay.

No other class of federal employees is

1 required to make that selection. So we're dealing with
2 a problem that's unique to the military services here.

3 Concerning the facts of the case, the parties
4 were married in 1954, and Major Mansell was commissioned
5 two years later in '56. They had six children and he
6 retired in 1976. At the time of retirement, he applied
7 for a VA disability rating, and he received that.

8 In 1977, the parties separated and the
9 children remained with Major Mansell but no child
10 support order was made from the mother. Spousal support
11 was ordered and the amount was equal to half the VA and
12 half the retirement amount.

13 Two years later a judgment of dissolution was
14 entered. Once again Major Mansell received custody of
15 the -- then one remaining minor child. But once again,
16 the mother was not required to pay any child support.

17 The husband agreed to divide the retirement
18 and VA disability, in essence continuing the same level
19 of spousal support, this time in the form of a property
20 division. The court retained jurisdiction over
21 distribution of those retirement benefits and the VA
22 benefits.

23 After this Court issued the McCarty decision,
24 Major Mansell went back to court with a motion to modify
25 the judgment, to delete the paragraph that referred to

1 division of VA disability and longevity retirement.

2 That motion was denied. The decision was
3 affirmed in the court of appeal. The state supreme
4 court refused to hear the case, and this Court noted
5 probable jurisdiction.

6 The basic heart of the problem in this case
7 is the way California treats military retirement. They
8 can --

9 QUESTION: Before you even get into that, the,
10 the -- the appellee has raised an argument in, in reply
11 to the government's second brief.

12 If I understand it correctly it's that this is
13 res judicata, and that we really don't have to get into
14 what, what the law meant after McCarty or after the
15 statute in response to McCarty was enacted, that the
16 California courts have passed on it before McCarty was
17 decided, and the, the matter's closed.

18 Is, is this the first time that argument's
19 been raised? It wasn't in the principal brief --

20 MR. CONE: Well, no it's not. As a matter of
21 fact, Your Honor, the res judicata argument and some
22 associated collateral estoppel arguments as well have
23 been raised by the appellee at every stage, the trial
24 court, the court of appeal, and as a matter of fact the
25 appellee's brief specifically refers to the fact that he

1 dic raise these issues in all of the courts below and
2 they were rejected.

3 In other words, the California Court of Appeal
4 for the Fifth District reviewed his collateral estoppel
5 and res judicata claims and determined as a matter of
6 state law that it was required to reach the merits of
7 the case.

8 Under California law, there is a procedural
9 device for a motion for modification -- or to vacate and
10 enter a new and different judgment. And that's the
11 procedure that the court of appeals took this case to
12 be.

13 Furthermore, the original judgment reserved
14 jurisdiction over the distribution of the assets we're
15 talking about here, so that the res judicata wouldn't
16 apply because the court had reserved jurisdiction to
17 make further orders on it. California -- a law --
18 allows the type of motion we've brought here.

19 And furthermore even, even if this were a
20 final judgment with no jurisdiction reserved, and res
21 judicata would normally apply, it wouldn't apply to this
22 case because we're talking about application of a state
23 law that's preempted by federal law. It's void, it's of
24 no effect, and can be collaterally attacked at any
25 time.

1 Furthermore, this Court's own precedents allow
2 for this kind of case. For example, the Ridgway case, a
3 portion of a stipulated family law judgment was vacated
4 by this Court even after the military retiree died.

5 So the res judicata arguments have been raised
6 at every level below, and rejected at every level below,
7 principally relying on state law. And it set out in the
8 jurisdictional statement, in the opinion, I believe,
9 it's pages D5 and D6, where the Court addressed the
10 issue and found that it was required under state law to
11 arrive at the merits of this case.

12 Now, returning, the heart of the problem
13 centers around the way California treats military
14 retirement. They consider military retirement to be
15 deferred compensation for past services, and therefore
16 vested property right, subject to division.

17 And they -- they hold this in spite of the
18 fact that this Court, and every other federal court who
19 has ever addressed the issue, has held that military
20 retirement pay is current reduced compensation for
21 current reduced services.

22 The problem is further compounded by the fact
23 that California refuses to recognize the fact that the
24 retirement pay is waived. It no longer exists for -- if
25 the veteran is disabled and takes the disability

1 election.

2 So that California is dividing a non-existent
3 asset, giving half of it to the former spouse and
4 forcing the service member to pay it out of whatever
5 assets might be left.

6 QUESTION: Well, certainly, under the savings
7 clause of the federal act, the wife's proposed
8 interpretation is certainly an arguable one here.

9 California may indeed have the right, as other
10 states do, to determine the nature of the community
11 property interest and to make a division, even though it
12 can't be garnished out of the disability benefits.

13 MR. CONE: Well, to, to begin with, number
14 one, it's not a property right, it's income earned after
15 the termination of active service. But the --

16 QUESTION: Well, California law controls that,
17 I assume. Does California say it's not a property
18 right?

19 MR. CONE: I don't think so.

20 QUESTION: Does California say it's not a
21 property right?

22 MR. CONE: California says it is a property
23 right --

24 QUESTION: All right. So then --

25 MR. CONE: No federal law --

1 QUESTION: So then the question is whether or
2 not it is.

3 MR. CONE: That's exactly right. This Court
4 ruled specifically in U.S. v. Tyler that it was current
5 compensation, not deferred compensation for past pay.

6 QUESTION: Well, but when, when Congress took
7 another stab at this, and enacted the act that we're
8 asked to interpret here, it certainly was their
9 intention to overrule McCarty and to leave a role for
10 the states in determining marital property questions.

11 MR. CONE: A couple of responses. In the
12 first place, I, I don't think they overruled the, the
13 decisions of this Court. They may have passed new
14 laws --

15 QUESTION: They effectively overturned it.
16 They, they enacted this law to overcome what this Court
17 had said in McCarty. Would you concede that much?

18 MR. CONE: That was -- that was their intent.
19 And I think they accomplished what they intended to
20 accomplish, and that is they intended to allow some
21 portion of the military retirement to be treated as
22 property in certain instances.

23 And, and the act doesn't say anywhere that it
24 is a property right. It says the states may treat. And
25 then they set forth the conditions under which it may

1 treat.

2 QUESTION: Well, what do you think the savings
3 clause reserved for the states?

4 MR. CONE: I think that's addressed in the
5 congressional record, where they described the purpose,
6 the section by section analysis, where it says that that
7 is specifically to preserve existing non-preempted
8 remedies. And that's discussed in my brief at some
9 length.

10 QUESTION: We certainly invited Congress to
11 pay attention to the McCarty situation, in the McCarty
12 opinion.

13 MR. CONE: Yes, you did. And they had some
14 options. There had been some, some other areas of the
15 law where this same kind of question came up.

16 For example, the CIA retirement statute has,
17 has a similar set of problems with retired spouses, and
18 they have their own retirement -- spouse's protection
19 plan, if you will.

20 And the system that was chosen for the CIA is
21 described in 50 United States Code Section 403, I
22 believe. In the legislative history, in talking about
23 the enactment, it's very similar to the kinds of
24 problems that were addressed in the McCarty decision,
25 and in the amici and the appellee's brief here.

1 And Congress said about that, concerning
2 specifically the former wife, both their support of the
3 CIA employee spouse and their direct contribution -- and
4 Congress was referring to the agency -- often prevented
5 the former spouse from acquiring marketable job skills
6 and pension rights and imposed familial pressures and
7 tensions which often contributed to the breakdown of the
8 marriage.

9 Now, their solutions to that problem, which is
10 the same problem we have here, was to enact 50 USC
11 Section 403 that provides a retirement benefit for the
12 former spouse equal to 50 percent of the agent's
13 retirement, but paid for out of the retirement fund, not
14 out of the agent's retirement money.

15 Congress also had another possibility in front
16 of it when it was considering the Former Spouses
17 Protection Act, and that was Senate bill 1453. And the
18 title of that bill was, Non-preemption of State Law.
19 And it was a one-sentence statute. And what it would
20 have said was, in essence, the state law shall be
21 dispositive of all matters pertaining to retirement
22 pay.

23 So it had these two extremes. They could pay
24 the former wife out of the treasury, like they did for
25 CIA agents, or they could pass a one-sentence law that

1 says, the federal government doesn't want to be
2 involved.

3 They didn't pick either one of those options.
4 What they did was design a very precise, carefully
5 managed system for disposable retired income. And they
6 defined disposable to exclude a number of things.

7 And among the things that it excluded is VA
8 and the taxes and a number of other things that I can
9 set out forth a whole list, if you'd like.

10 But, but the answer is that this Court invited
11 Congress to provide more protection, if Congress thought
12 the former spouse should have some. And they had some
13 options in front of them, various ways they'd done
14 things in the past. And they selected this one as
15 opposed to any other.

16 So I think, just reading the plain meaning of
17 the law that they did pass demonstrates that they only
18 meant to allow disposable retired pay to be divided, as
19 opposed to these other things they could have done that
20 were before them at the time.

21 Starting with the language of 3101, which is
22 the -- the anti-attachment statute though, I think just
23 analyzing the language of that shows that those benefits
24 can't be reached.

25 In the first place, it says the benefits are

1 not assignable, except to the extent specifically
2 authorized by law. There's nothing in any statute
3 anywhere specifically authorizing VA disability to be
4 attached or in any way levied on or court-ordered
5 allotments like we have in the present case, or for any
6 other purpose.

7 The statute also says that the benefit shall
8 be exempt from taxation and the claims of creditors.
9 Well, what we have here is a property division claim,
10 not alimony, not child support. So it's just a
11 creditors' claim. The statute says specifically that
12 the benefits are exempt from creditors' claims.

13 The statute also says that the benefits shall
14 not be liable for attachment, levy, or seizure by any
15 process, either legal or equitable.

16 Now, the ex-wife is arguing that California is
17 doing nothing to the VA disability benefits.
18 Nevertheless, the order in the present case requires
19 Major Mansell to initiate an allotment directing the
20 federal government to pay the money directly to the
21 former wife.

22 It's, in essence, a constructive trust, if you
23 will, and the government is the trustee paying the money
24 directly to the wife. Well, that's a seizure. The
25 court has ordered that --

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QUESTION: We'll resume there at 1:00 o'clock,

Mr. Cone.

MR. CONE: Thank you.

(Whereupon, at 12:00 p.m. the Court was
recessed, to reconvene at 1:00 p.m. this same day.)

1 AFTERNOON SESSION

2 (12:59 p.m.)

3 QUESTION: We'll resume where we left off, Mr.
4 Cone.

5 MR. CORNELL: Thank you, Mr. Chief Justice.
6 Just to clarify what we're talking about, on the
7 veterans' disability benefits, they're based solely on
8 the percentage of disability and have nothing to do with
9 the length of service of the member or his rank.

10 For instance, a recruit could be injured on
11 his first day of basic training, so he's got one day in
12 service, and if that injury resulted in some disabling
13 incapacitating type disability, he could be retired that
14 day, with one day in service.

15 So we're not talking about something that you
16 have to get 20 years into service to get. We're talking
17 about a compensation for injuries in the line of duty.

18 QUESTION: Do you still have to pay for them,
19 or buy them, so to speak?

20 MR. CONE: You do have to buy them, if you
21 happen to have served long enough to be entitled to a
22 longevity retirement pay, so that if you serve your 20
23 years and also have a disability you have to give up a
24 portion of your retirement pay equal to the amount of
25 the disability pay.

1 So in essence, the answer is yes, military
2 retirees have to purchase their disability benefits.

3 QUESTION: But your hypothetical recruit,
4 injured on the first day, of course, would not have had
5 -- be entitled to retirement pay, so he just gets VA
6 benefits.

7 MR. CONE: That's exactly right, as
8 compensation for the injury. There seems to be a, a
9 feeling --

10 QUESTION: What's the advantage of taking it
11 in disability benefits instead of taking it in
12 retirement pay? Is there --

13 MR. CONE: There are a number of really
14 significant advantages, all of them provided by
15 Congress, and some -- all of the major ones, the federal
16 ones by Congress.

17 For example, the disability pay is exempt from
18 federal, state, and local taxation. But that's just the
19 tip of the iceberg. There are a lot of other reasons.
20 Perhaps more --

21 QUESTION: Apart from avoiding state -- state
22 support payments, that's all --

23 MR. CONE: No. As a matter of fact, a person
24 who qualifies for a rating as a disabled veteran is
25 entitled to substantial cash benefits for his children,

1 in his children's own name. And if he happens to still
2 be married there's the spousal benefit as well.

3 Of course, if the marriage has dissolved, the
4 spousal benefit terminates. But the child's benefit
5 does not terminate, so that if you just go on with your
6 longevity benefit the child gets nothing. So there's
7 that incentive.

8 Also, if the disabled veteran is unable to
9 work because of that disability, then there are major
10 educational benefits under the federal law for the child
11 that would not otherwise be available.

12 In California, there's a, a large bundle of
13 state benefits available to the dependent children of
14 disabled veterans. But the key, the qualifying event,
15 is obtaining the VA disability rating.

16 And for example, they get first priority in
17 farm and home loans at way below market interest rates,
18 but you have to have a VA disability rating to get
19 that.

20 Also, children of disabled veterans in
21 California, if they have a VA disability based on
22 unemployability, are entitled to free tuition at the
23 state colleges and universities in California. So
24 there's a lot more to it than just doing your wife out
25 of half the retirement.

1 When all these consequences have --

2 QUESTION: (Inaudible)

3 MR. CONE: No, not necessarily, because
4 remember the retirement is not a property right, it's
5 pay for reduced services. It's not a property right at
6 all.

7 Now, California treats it at a property right,
8 and under the new Former Spouses Protection Act Congress
9 allows the states to do that for the disposable portion
10 of it. However, the statute defines disposable to
11 specifically exclude the VA disability as well as tax on
12 a number of other things.

13 So when all the --

14 QUESTION: But the statute does not
15 specifically, in so many words, prevent the states from
16 considering the value of the disability pay in
17 calculating what's owing to the spouse.

18 MR. CONE: That's correct. But a statute that
19 was identical to the 3101, word for word identical, was
20 considered in the Wissner case.

21 And what this Court said in Wissner was,
22 whether directed at the very money received from the
23 government, or an equivalent amount, the judgment below
24 nullifies the deliberate choice of Congress, and it
25 cannot stand. Well, that's exactly what we have here.

1 And the statute, 3101, like I say, is identical to that
2 language.

3 Similar language was also considered in your
4 case of Free v. Bland, and what you said was, viewed
5 realistically the state has rendered the award of title
6 meaningless. Therefore it cannot stand.

7 QUESTION: In -- in veterans' disability,
8 statutory provisions that protect the benefit from
9 alienation, generally the rule is the recipient cannot
10 alienate it, subject to execution, et cetera.

11 Here he has the option. What -- what's the
12 purpose of giving him the option?

13 MR. CONE: Frankly, I don't know why the
14 Congress made it optional when at the same time they
15 made it so attractive for not only the veteran but so
16 attractive for his family that no reasonable person
17 would go the other way. I know of no case where anyone
18 has ever not elected it.

19 The cases in --

20 QUESTION: Well, excuse me, I think the
21 explanation may well be that it was put in terms of an
22 -- in terms of an election to solve the problem of
23 people who already had some retirement benefits at the
24 time the law was passed.

25 So, you, you -- that is, they'd already earned

1 it, so you say, well, we don't want you to be
2 double-dippers. We don't want to give you retirement
3 benefits plus disability benefits.

4 Instead of just passing a law saying, we're
5 going to cancel your retirement benefits, we will phrase
6 it as a waiver, in order to get the retirement benefits,
7 or the disability benefits, you have to waive.

8 It seems to me that would make a lot of
9 sense. Congress --

10 MR. CONE: Perhaps that -- that's the way it
11 came along.

12 The earliest versions of the statute, it was
13 an either/or version. If you were receiving any form of
14 disability you could not receive longevity retirement.
15 And so that people wound up with a, with a five percent
16 disability rating were being knocked out of their entire
17 retirement benefits.

18 And so eventually this 3105, which is the dual
19 receipt statute, was passed, and perhaps it was done for
20 just that reason.

21 For the cases interpreting language, both
22 similar and in other statutes identical to the language
23 in this 3101, said that that language clearly prohibits
24 offsets. And that's what we're dealing with here is an
25 offset. And I'd like to reserve the remainder of my

1 time.

2 QUESTION: Thank you, Mr. Cone. We'll hear
3 now from you, Mr. Cornell.

4 GRAL ARGUMENT OF DENNIS A. CORNELL
5 ON BEHALF OF THE APPELLEE

6 MR. CORNELL: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 I think it is important to understand what
9 this case is and what it is not. There was a stipulated
10 agreement by both sides in 1979, both sides represented
11 by counsel, that resulted in a stipulated judgment, both
12 sides represented by counsel, in 1979.

13 In 1981 this Court rendered its decision in
14 the McCarty case. February 1st of 1983 was the
15 effective date of the new congressional act that we call
16 FUSFSPA. And then after that, Major Mansell brought the
17 motion to modify.

18 The motion to modify was then denied, without
19 statement of reasons in the trial court. Motion for
20 reconsideration was denied without reasons in the trial
21 court.

22 That motion for reconsideration and motion for
23 modification were then appealed to the Court of Appeal
24 of the Fifth District in California, which rendered a
25 decision on the merits.

1 And in that decision on the merits they did
2 not reject the res judicata. what they rejected was the
3 argument that the motion itself was not appealable.

4 QUESTION: Did they speak of res judicata in
5 that opinion?

6 MR. CORNELL: No. Let's make it very clear
7 that what Major Mansell is seeking to protect here is
8 not his disability benefits, but the rest of his
9 estate.

10 California law does not allow the attachment
11 of disability benefits. California law does not allow
12 the alienation or in any way affecting the receipt of
13 disability benefits.

14 What California law does allow is a
15 calculation of longevity benefits to include that
16 portion that is waived. The reason for that is very
17 simple. They're not going to let one spouse take what
18 is otherwise a community asset, and then through that
19 spouse's sole control change the asset into something
20 else to deny the rights of the out spouse.

21 QUESTION: Of course, that would happen if
22 there were no waiver provision here, if Congress simply
23 gave somebody a disability, or the, the military person
24 who's injured the first day on the job. He would waive
25 nothing.

1 MR. CORNELL: That -- that's correct.

2 QUESTION: And the law would be clear that
3 California couldn't get the rest of his estate, in, in,
4 in -- just set off the disability benefits against the
5 rest of his estate.

6 MR. CORNELL: That's correct. That is a
7 correct statement of California law.

8 California law does not seek to divide
9 disability benefits, whether before or after you've
10 reached a longevity portion.

11 QUESTION: So it's, it's not an absurd
12 situation that, that you're painting that someone who
13 has disability benefits should have the guaranteed
14 cushion that California allows, plus his disability
15 benefits. That would normally be the case, if, if, if
16 he hadn't waived something in order to get the
17 disability benefits.

18 MR. CORNELL: If the guaranteed cushion that
19 you're speaking of -- yes, you're correct. If the
20 guaranteed cushion you're speaking of is the disability
21 benefits themselves, because they're guaranteed to the
22 recipient. And we cannot get those.

23 However, if the person has another estate of
24 non-exempt assets, then we are entitled to get them to
25 satisfy the complete community property estate. Let me

1 give you an example of, of, I think, something that will
2 make it very clear.

3 If there's a community property automobile,
4 and one of the spouses takes that automobile and sells
5 it, and takes the proceeds and sticks it into a separate
6 property account, can that person now say that the out
7 spouse is not entitled to consider that separate
8 property account available when determining the nature
9 and extent of the community estate? Of course they
10 can.

11 QUESTION: So you're saying that when a
12 military retiree converts part of his longevity benefits
13 to disability benefits, the same principle applies?

14 MR. CORNELL: Yes. That's exactly the way
15 California law interprets --

16 QUESTION: But I -- here you've got a problem,
17 it seems to me, with federal law.

18 MR. CORNELL: Well, the problem -- we don't
19 have a problem with federal law, because in this
20 particular case there was no attempt to try to do
21 anything that contravenes 3101.

22 And in fact that was brought out by the
23 Solicitor General in both briefs, that that particular
24 argument should fall by the wayside, is that we're not
25 attempting to attach or do anything of that nature.

1 what we're attempting to do is when we
2 determine the nature and extent of the community estate,
3 we commit -- we consider only the longevity benefits,
4 not the disability.

5 But we consider all of the longevity benefits
6 to which the person is entitled to receive, not just
7 those longevity benefits left over after the person has
8 unilaterally converted them to their own estate.

9 So the protection that Congress thought of --
10 let's look at exactly what the policy of Congress is
11 thinking about at this point.

12 QUESTION: Why didn't -- why didn't we reject
13 that in Wissner?

14 MR. CORNELL: You didn't reject it in Wissner
15 because in Wissner there was a claimed property right in
16 the insurance benefits, and there was an offset. This
17 is not an offset, because there is no claimed property
18 right in the disability benefits.

19 This is not an offset, because we're not
20 saying that you're entitled to all your disability
21 benefits and then we get everything else. That's not
22 what's happening.

23 What we're saying is, here's the community
24 estate, including the car and the proceeds from the
25 car. Okay, you cut off a corner of this, but we still

1 consider this the community estate.

2 Now we're going to satisfy the obligations to
3 pay the portion of the community estate through state
4 law. We're not going to seek to attach any federal
5 benefits.

6 Let me give you the, the extreme example which
7 will show you how much protection the veteran has.
8 Let's say that the only estate the veteran has is a
9 disability benefits, and it's achieved through receiving
10 disability benefits or a complete waiver of a longevity
11 retirement. So there's no longevity retirement left.
12 And under my facts, the out spouse is out.

13 Well, under those facts, then the out spouse
14 would get nothing, because under California law we can't
15 divide the, the disability benefits, you can't execute
16 on disability benefits, you can't do anything to get to
17 them.

18 So the veteran is still protected. And the
19 governmental interest that Congress set up when they
20 established veterans' benefits was to try to compensate
21 the veteran who has been injured, and as a result of
22 that injury is now less employable, less able to earn an
23 income. That is still guaranteed under the approach of
24 California law, because the money is still guaranteed to
25 him.

1 The only thing we get is if there's other
2 wealth. And the fact that Congress did not intend to
3 protect the other wealth is reflected by the fact that
4 they require a waiver of a longevity pension.

5 It was not expected when you got a disability
6 pension that you would have another pension. When the
7 person applied for disability benefits they did not
8 expect to have other wealth.

9 Congress, when they created the system, did
10 not expect that there would be other wealth. They were
11 trying to compensate for the lack of the ability to get
12 other wealth.

13 QUESTION: Well, they only eliminated other
14 federal wealth. I think it's a double dipping
15 provision, rather than saying we're not going to give
16 you disability benefits if you have other wealth.

17 There's, there's no means test for the
18 disability benefits. You're entitled to them even if
19 you're a millionaire, aren't you?

20 MR. CORNELL: That's correct. That's
21 correct. But if that other estate is there, then
22 shouldn't the out spouse be entitled to go after those
23 assets to try to satisfy what was the community estate
24 before it was dipped into and converted?

25 QUESTION: So, so under your example, if you

1 have two different cases, in one veteran spouse has no
2 property, and the other he has \$50,000. In case number
3 two, I take it, if the community property were that
4 much, the wife could get the full \$50,000?

5 MR. CORNELL: No. Yes and no. If the full
6 \$50,000 is owed, they could get the full \$50,000. But
7 under the facts you would first --

8 QUESTION: So isn't -- so isn't that a penalty
9 being paid by reason of receiving your disability?

10 MR. CORNELL: No, it is not a penalty. And I
11 will explain.

12 What it is is if the entire estate is \$50,000,
13 plus a longevity pension, and let's say the longevity
14 pension waives \$1,000, there's a \$2,000 longevity
15 pension, and they waive \$1,000, leaving \$500, what
16 California would do would divide the \$50,000 in half,
17 each would get \$25,000.

18 Then they would divide the longevity pension
19 of \$2,000. Now, you come up short \$500 a month, because
20 \$1,000 of that has gone to disability benefits, all of
21 that is exempt from attachment.

22 So out of the remaining \$25,000 of the
23 community estate, the out spouse would be attempting to
24 try to collect the \$500 a month that the out spouse is
25 losing. There would be no attempt to try to award all

1 of the rest of the property, because there's a waiver of
2 longevity to get the disability.

3 Now, again, back to the concerns of Congress,
4 they're met most ably by finding for --

5 QUESTION: But you still have -- you still
6 have disparate -- disparate treatment of veterans,
7 depending on the amount of property in the community
8 property estate. Because if there's nothing, if there's
9 no community property, the veteran gets 100 percent of
10 his disability.

11 MR. CORNELL: Yes. The disparate treatment is
12 of the out spouse, because then the in spouse gets the
13 disability retirement while the out spouse's ability to
14 collect his or her portion of the longevity pension has
15 been stopped.

16 And that's solely within the control of the
17 person who is entitled to receive a longevity pension
18 and then waives a portion of that right to get some
19 disability pay.

20 The only person that's going to get guaranteed
21 payments under that fact situation is the disabled
22 veteran. The out spouse will get nothing.

23 Now, again, returning to the governmental
24 interests that are involved here. What if Gaye Mansell
25 prevails?

1 well, first, Congress' intent to provide for
2 the disabled veteran has been met. The disabled veteran
3 will still read -- receive his or her disabled
4 retirement benefits.

5 Those guaranteed payments will go to someone
6 who apparently, or presumably, has less earning power,
7 less employability.

8 what is the second interest? well, the second
9 interest is interest expressed by Congress in FUSFSPA,
10 and that is of the out spouse. By ruling in favor of
11 Gaye Mansell you will have met that concern, because she
12 will have considered in the property division, as set
13 forth by the states, the longevity pension completely,
14 regardless of how much that longevity pension has been
15 converted.

16 QUESTION: (Inaudible) this would be the same
17 argument if in a case where a husband and wife get
18 divorced and prior to that time he's given up part of
19 his retirement pay to get disability.

20 MR. CORNELL: I'm sorry, I don't quite
21 understand the question.

22 QUESTION: Well, suppose there was a divorce
23 today and the, the officer, the retired officer, had
24 been getting -- had been getting retirement pay but he
25 had already given up part of it in order to get

1 disability, so he's getting both disability and
2 retirement at the time of the divorce.

3 MR. CORNELL: Yes.

4 QUESTION: The wife would be able to get one
5 half of his retirement pay just as though he hadn't
6 given up any of it?

7 MR. CORNELL: She would be entitled to get one
8 half of the longevity pay --

9 QUESTION: Right.

10 MR. CORNELL: Of the net longevity pay still
11 available, and then she would have to seek to collect
12 the remainder of her one half of the longevity pay
13 through other assets.

14 The veteran would get all of his disability
15 benefits, because that cannot be detached.

16 QUESTION: Yes, I understand, I understand.
17 But -- so as far as -- he just doesn't get his -- he
18 just wouldn't get his child support payments, or the --
19 he just wouldn't benefit from the -- he just couldn't
20 get reduced, his wife's half of her -- of the estate.

21 MR. CORNELL: That's my argument, that he
22 should not be entitled to reduce her half of the estate
23 through something solely within his action. Yes, that
24 is my position in this case.

25 QUESTION: So that -- this case really doesn't

1 turn on the fact that there has already been a
2 settlement and they've -- things like that?

3 MR. CORNELL: I think it does turn on it,
4 because what I'm speaking about generally is a law of
5 the state of California.

6 But in this particular case we have a final
7 judgment that was adjudicated four years before there
8 was any attempt to set it aside. And we have a final
9 judgment that --

10 QUESTION: Well, should we decide that -- if
11 we just decided the case on that ground, we wouldn't be
12 deciding the case I just described to you.

13 MR. CORNELL: That's correct.

14 QUESTION: When you say it was, it was -- gee
15 a final judgment, are those -- are the matters such as
16 the one in question not subject to being reopened under
17 California law?

18 MR. CORNELL: They are not subject to being
19 reopened under California law. And in fact that
20 reservation of jurisdiction over distribution is an
21 enforcement clause, and it's common to many judgments.

22 And in fact the first time that particular
23 argument was raised by appellant here was in the final
24 brief filed before this Court. It was not raised in the
25 trial level, it was not raised in the court of appeal or

1 before the California Supreme Court.

2 That was an enabling statute. And so if the
3 -- for example, if you rule in favor of Major Mansell
4 you will not only be guaranteeing him his disability
5 benefits, because the relief he is specifically
6 requesting is that that entire enabling paragraph be
7 eliminated.

8 So Gaye Mansell would receive nothing. No
9 longevity, no disability. And he is asking that you do
10 this four years, now ten years after the entry of the
11 agreement and the judgment.

12 QUESTION: But why -- there doesn't seem to be
13 anything in the California decision saying that this
14 can't be reopened.

15 MR. CORNELL: There was nothing in the
16 California decision on -- yes, that said it could be
17 reopened. There was nothing there that said it could or
18 could not be reopened.

19 What the California Court of Appeal did was
20 rule on the appeal. They didn't say that it was barred
21 by res judicata. They didn't say it would not be barred
22 by res judicata.

23 QUESTION: You're really saying that there is
24 a way that you could win this case but on a ground the
25 court below didn't use.

1 MR. CORNELL: Yes.

2 QUESTION: Please affirm on the grounds of res
3 judicata.

4 MR. CORNELL: Yes. And if this Court rules
5 contrary to me, I believe I can return to that court and
6 have a ruling on that.

7 The fact that they did not rule on that basis
8 doesn't mean --

9 QUESTION: Well, the court below disposed of
10 it on -- disposed of it on this other ground, though,
11 that, that California can -- can -- needn't take that --
12 can disregard the waiver of the retirement pay.

13 MR. CORNELL: Yes.

14 QUESTION: Which really is a ruling on the
15 merits. You would think that, if the California Court
16 of Appeal thought that res judicata were appropriate,
17 they would not have reached the merits.

18 MR. CORNELL: I don't know. I can't speculate
19 as to why they did or did not.

20 QUESTION: Does California have a rule that
21 they do not reach federal or Constitutional questions
22 unless there's a necessity to do so?

23 MR. CORNELL: I'm not aware of such a rule.
24 There is a clear rule in California, the judgments final
25 before the effective date of McCarty are not reopenable,

1 and are subject to res judicata. And I have cited those
2 in the briefs.

3 QUESTION: In any case, that's a state law
4 question. Why should we decide the state law question
5 of whether this is res judicata or not? Why can't we
6 just decide the federal law question and, as you say, if
7 it is res judicata, the California court will say so,
8 when it's sent back.

9 MR. CORNELL: If there's an express
10 reservation to that effect in the opinion of the Court,
11 then I think it would be appropriate.

12 However, if there isn't, then what you've done
13 is say that all of the judgments that were entered prior
14 to the McCarty decision are now wide open and subject to
15 relitigation, and all agreements are set aside.

16 QUESTION: (Inaudible) if we decide on the
17 merits, you may win.

18 MR. CORNELL: I would certainly hope so, Your
19 Honor. That's why I'm here.

20 QUESTION: Did you argue res judicata to the
21 California Court of Appeal?

22 MR. CORNELL: Yes, I did.

23 QUESTION: And they said nothing about it?

24 MR. CORNELL: They said nothing about it.

25 Now, what is the third interest here that's before you

1 in these issues? And if you rule in Gaye Mansell, how
2 will it be treated?

3 The third interest, of course, is the
4 governmental interest. And that interest was very
5 eloquently set forth in the decision in McCarty.

6 And every one of those particular concerns
7 were addressed by the Armed Services Committee of the
8 United States Senate. And that body found evidence that
9 none of them were going to be violated by passing
10 FUSFSPA.

11 For example, they found no evidence that there
12 was any impugning of the ability to retain or recruit,
13 that there was any problem whatsoever with the personnel
14 management of the military. And in order to deal with
15 the other specific things, they crafted the law in such
16 a way as to make sure that it would be dealt with.

17 Now what if Major Mansell prevails? What do
18 you have? Well, you're going to have a situation where
19 couples that are identical in their property and in
20 their estate and in their facts are going to end up with
21 different estates divided on divorce and different
22 results. That is an unequal treatment.

23 For example, the person with a disability
24 pension of ten percent will have -- if Major Mansell
25 prevails then the out spouse will receive five percent

1 less of the longevity pension.

2 whereas if a person has a 15 or 20 percent
3 disability then the out spouse will receive 7.5 or 10
4 percent. People in identical situations get different
5 results.

6 QUESTION: Well, if you win on the merits, how
7 much -- for how much can you ask the federal government
8 to pay you?

9 MR. CORNELL: The maximum amount that the
10 federal government will allow to be garnished is 50
11 percent of the disposable retired longevity pay.

12 QUESTION: So that's -- so the only disposable
13 longevity payment that's left here is the original
14 amount less what was waived?

15 MR. CORNELL: Less the applicable taxes and
16 other matters, yes.

17 QUESTION: So you won't be able to levy, to
18 garnish the federal government for all that you think
19 you're entitled to?

20 MR. CORNELL: That's correct. And prior to
21 the enactment of FUSFSPA I couldn't attach anything. So
22 we had to satisfy solely out of other means and other
23 estates.

24 QUESTION: I understand it. So where -- so
25 where are you going to get the -- the rest?

1 MR. CORNELL: I would hope to find some --
2 part of an estate somewhere that I could get something
3 out of.

4 QUESTION: Yes. But you can't -- you can't
5 get it out of the remaining retirement pay.

6 MR. CORNELL: I cannot get it out of the
7 remaining retirement pay, because there's not enough
8 left.

9 QUESTION: Yes.

10 MR. CORNELL: Especially with the --

11 QUESTION: Well, you can't -- the most that
12 you can -- the most that you could garnish the federal
13 government for would be 50 percent of what's left.

14 MR. CORNELL: Fifty percent of the disposable
15 retired pay, yes.

16 QUESTION: Mr. Cornell, you're, you're
17 obviously quite right that you'll have different results
18 in two different estates where the assets are the same.
19 But the, the issue is whether there was not intended to
20 be two different results.

21 What is your explanation for the fact that in
22 the definition of disposable retired or retainer pay,
23 Congress specifies -- specifically excludes amounts that
24 are required by law to be and are deducted from the
25 retired or retainer pay?

1 MR. CORNELL: That statute --

2 QUESTION: And amounts waived? Why did
3 Congress make that exception?

4 MR. CORNELL: Because they wanted to be
5 consistent and guarantee to the disabled veteran that he
6 would actually receive those benefits. I think that's
7 entirely consistent with the scheme that's been set up
8 under FUSFSPA.

9 QUESTION: But you're saying he doesn't
10 receive it. You're saying that they'll be taken away
11 from him just the way retirement pay would have been
12 taken away from him?

13 MR. CORNELL: No, that's not --

14 QUESTION: So long as he has other assets.

15 MR. CORNELL: If he has an estate.

16 QUESTION: So long as he has other assets.

17 MR. CORNELL: But the actual pay will not be
18 taken away from him.

19 QUESTION: Well --

20 MR. CORNELL: And should he be entitled to
21 then convert the car to a bank account? Is that what
22 you're saying, is that he should be allowed to do that?

23 I don't think that's what Congress intended
24 when they enacted FUSFSPA. I don't think that carries
25 out the purpose of Congress to protect the non-military

1 spouse. That is a wrong approach.

2 QUESTION: Well, you acknowledge that that
3 would be the case with pure retirement pay, with pure
4 disability pay.

5 If he hadn't waived anything, that would be
6 precisely the result, wouldn't it? You wouldn't say,
7 well, he's converted the, the, the disability pay into
8 other assets and I can get the other assets. You'd say
9 no, despite the fact that he has other assets he's
10 entitled to keep that disability pay.

11 MR. CORNELL: That's exactly what I would
12 say. Because disability pay is not community property,
13 but longevity pay is, and the ability to convert it
14 should not be allowed.

15 Now, getting back to the federal Uniform
16 Services Former Spouse Protection Act, which Justice
17 Scalia referred to, I think the clearest indication of
18 what the Intent of Congress was when they enacted that
19 can be found in the analysis that was contained in the
20 House conference report by reference to the Senate Armed
21 Service Committee report, which says specifically at --
22 as follows on page 16.

23 The purpose of this provision is to place the
24 courts in the same position that they were in on January
25 26th, 1981, the date of the McCarty decision, with

1 respect to the treatment of non-disability military
2 retired or retainer pay.

3 The provision is intended to remove the
4 federal preemption found to exist by the United States
5 Supreme Court and permit state and other courts of
6 competent jurisdiction to apply pertinent state or other
7 laws in determining whether or not military retired or
8 retainer pay should be divisible.

9 However, there is no limit on a spouse's or
10 former spouse's right to deal with a portion of a
11 member's retired or retainer pay after the spouse, or
12 former spouse, receives that pay.

13 That is a quote. That is a clear indication
14 of congressional intent.

15 QUESTION: And it all talks about retirement
16 pay and none of it talks about disability pay.

17 MR. CORNELL: That's correct. But what the
18 significance of that section is is that it was an
19 intention to reflect that there was never an intention
20 on the part of Congress to preempt the state courts in
21 dealing with retirement pay in family law matters.

22 And once the state courts have started to do
23 that, preemption has been taken away, they should be
24 able to deal with it as they have always. And the law
25 in California, prior to the McCarty decision, was, as I

1 have explained it to you. And it has been for a number
2 of years. And there was a return to that after the
3 passage of FLSFSPA.

4 That is that a person who has a unique control
5 of a community property asset might not dissipate that
6 asset at the expense of the other spouse.

7 And that is what we're asking this Court to
8 find, that states should have the right to return to
9 pre-McCarty law, based on the enactment by Congress
10 showing a congressional intent, to allow the states then
11 to divide the benefits as the states feel are
12 appropriate under family law rules of the particular
13 states involved.

14 I think the entire scheme of FUSFSPA reflects
15 an intent on the part of Congress to make it a
16 garnishment statute and not merely to limit the
17 abilities of the state courts to divide pensions.

18 And in this respect, the second brief filed by
19 the Solicitor General shows that there are two
20 reasonable interpretations. However, there are a couple
21 of provisions that the attorney -- Solicitor General in
22 the second brief failed to, I think, take into account
23 properly.

24 And I think that they are found at the general
25 provision of allowing payments on judgments entered June

1 25th, 1981, and earlier, to be enforced.

2 well, the Solicitor General reflects that that
3 was merely an attempt to allow the garnishment, and was
4 not a -- reflective of an intent by the part of Congress
5 to show that there was never any preemption.

6 That doesn't make sense because the effective
7 date of the act was February 1st, 1983. If it was
8 intended to be, as the Solicitor General indicated, then
9 how can you apply it to pay that had already been paid
10 almost two years earlier? That pay has come and gone.
11 It cannot be garnished.

12 The only reason for that particular reflection
13 of a date in the statute was to show that Congress
14 specifically intended to remove the preemptive effect of
15 McCarty. There can be no other reason for it.

16 Also, I think there are specific provisions
17 contained in the act itself, one of which was referred
18 to by Justice O'Connor, and they can be found at Section
19 1408, subsection (e)(5) and (6).

20 Basically what they say is that if a person
21 submits a court order that is irregular on its face, or
22 shows that it should be paid more than the 50 percent
23 limit, that order will not be deemed in violation of the
24 act, and will still be followed and still be allowed.
25 And there will still garnishment go into effect, to the

1 extent of the limits of the act.

2 So that in essence saying that an appropriate
3 order, even if it says more than 50 percent of the
4 disposable retired pay, is still a valid state court
5 order, and in fact the rest of the act shall --
6 indicates that --

7 QUESTION: Let me get this right now as to
8 what you -- suppose there hasn't been -- suppose the
9 routine is this, a retired officer and his wife are
10 married, he has \$100 a month in retirement pay.

11 He then -- he then waives 20 to get
12 disability. That leaves a net of 80. They then get
13 divorced. Now, does she get 50 or 40?

14 MR. CORNELL: She would get -- in California
15 she would be entitled to receive \$50 a month. However,
16 she would only be able to collect 40 of that through the
17 federal mechanism.

18 QUESTION: All right.

19 MR. CORNELL: The remaining 10 she would --

20 QUESTION: And you think then under the --
21 under the -- you should be able to collect the balance
22 out of, under state law, out of any other assets?

23 MR. CORNELL: Yes.

24 QUESTION: But that was the kind of claim that
25 was rejected in Hisquierdo and McCarty, wasn't it?

1 MR. CORNELL: No, it wasn't, because there
2 there was a property right claimed, in a particular
3 asset, and then there was a direct offset.

4 For example, you get your retirement, you get
5 the house. And the person arguing Hisquierdo stood
6 right on front of this Court and said, that's exactly
7 what he wanted to wife to give, the house.

8 That is not what we're seeking here. We're
9 not seeking an over one half division of the remaining
10 assets. What we're seeking --

11 QUESTION: But you seek a covert --

12 MR. CORNELL: What we're seeking is the
13 ability to -- to garnish the remaining assets to
14 satisfy. But once --

15 QUESTION: To satisfy a property settlement?

16 MR. CORNELL: Yes. Let's go one step
17 further.

18 QUESTION: Read McCarthy, or McCarty -- I took
19 McCarty to be an elimination of the distinction between
20 garnishment and whether you can get -- whether you can
21 get, and, and I didn't agree with that in particular.

22 But it seems to me, all of your descriptions
23 have been talking about what the federal government
24 allowed to be garnished under the new statute. But the
25 fact is, by reason of McCarty, what can't be garnished

1 can't be divided either.

2 wasn't that -- wasn't that the lesson of
3 McCarty?

4 MR. CORNELL: Yes, it was.

5 QUESTION: And wasn't Congress proceeding on
6 the basis that that was the lesson of McCarty?

7 MR. CORNELL: Yes.

8 QUESTION: Well --

9 MR. CORNELL: Then they enacted FUSFSPA in
10 which they expressly said that we're overruling McCarty
11 to the extent they can. They didn't use that language.
12 They used the language --

13 QUESTION: They didn't say that in the
14 statute. All they did was change the rules about
15 garnishment. And to the extent they changed the rules
16 about garnishment, they also changed the rule about
17 division.

18 MR. CORNELL: And the only way that that
19 particular statute makes any sense is if you read it as
20 a complete removal of the holding of McCarty.

21 Because it doesn't -- the parts of the statute
22 make no sense, if you find it be a pure garnishment
23 statute. Why would there be reference to June 25, 1981,
24 the day before McCarty?

25 QUESTION: I agree with that.

1 MR. CORNELL: And I think in order to try to
2 clear up some of those things you have to look to the
3 congressional intent as expressed by the reports that
4 were issued.

5 And there's nothing specifically in the act
6 that indicates that state courts are limited to the
7 disposable retired pay when they treat it as property.
8 And in fact there's language in the act that say just
9 the opposite.

10 For example, the savings clause as mentioned
11 by Justice O'Connor. Nothing in this section shall be
12 construed to relieve a member of liability for the
13 payment of alimony, child support, or other payments
14 required by a court order on the grounds that payments
15 made out of disposable retired or retainer pay under the
16 section have been made in the maximum amount permitted.

17 QUESTION: Disposable retirement pay, which --
18 which is carefully defined to exclude any amounts that
19 have been waived.

20 MR. CORNELL: Yes. And as a garnishment
21 statute, that's appropriate, because that particular
22 asset is one that is inviolate by the United States
23 government, and we are not seeking to divide it.

24 But I think an important distinction should
25 also be made on the ruling of the offsets in

1 Hisquierdo --

2 QUESTION: You say you're not -- suppose in my
3 example, there hasn't been any divorce yet but there's a
4 -- he had 100, now he's got 80 in retirement pay. Now,
5 you say that if there's then a divorce California courts
6 may, may divide it on, on the basis of 100?

7 MR. CORNELL: Yes.

8 QUESTION: Well, aren't you then dividing
9 something Congress says you can't divide?

10 MR. CORNELL: No. Because what we're dividing
11 is the military retired pay of \$100. That's what was
12 there before the In spouse converted it.

13 QUESTION: Well, I know. But if you do that
14 it seems to me you're flatly contrary to the statute,
15 says that your disposable pay is, is -- excludes any
16 disability.

17 MR. CORNELL: That's presuming you're reading
18 that particular statute as being just a garnish --
19 excuse me --

20 QUESTION: No, no, no.

21 MR. CORNELL: Not just a garnishment statute.

22 QUESTION: This is the time where you're
23 sitting there and saying, how much, how much, how much
24 do I divide? You say you divide 100. Well, he hasn't
25 got 100 anymore because the statute says he hasn't.

1 MR. CORNELL: Yes --

2 QUESTION: He's just got 80.

3 MR. CORNELL: Yes. And that's all we're
4 entitled to get, is one half of that, on the garnishment
5 basis.

6 Reading the statute itself indicates that
7 there are other property rights which are entitled to be
8 received.

9 QUESTION: (Inaudible) statute as just a
10 garnishment statute, what we said in McCarty is that to
11 prohibit garnishment is to prohibit division. And now
12 you want us to, having adopted that in McCarty, and the
13 Congress was well aware that that's what we did, you say
14 that they didn't foresee that when they enacted this
15 statute we would say, what you can't garnish you can't
16 get?

17 I would think that that's what they would have
18 -- would have expected us to do.

19 MR. CORNELL: I'm not going to speculate
20 because I think the other language in the rest of the
21 statute and their statements, as reflected by their,
22 their reports, show that their intention clearly was to
23 restore the states to the condition they were in before
24 the McCarty decision.

25 Let me give you a practical example of the

1 result that's going to occur here, is that if you allow
2 a person to take longevity pay and convert it into
3 disability pay and thereby exempt from not only division
4 but consideration, which is what Major Mansell is
5 seeking, you're going to have a situation where the out
6 spouse may have a retirement of his or her own, through
7 some other method.

8 And then when the divorce occurs, he's going
9 to get all of his retirement. He or she is only -- and
10 he's going to get half of the other one's. That's not
11 the result that Congress --

12 QUESTION: All of his disability?

13 MR. CORNELL: Yes, if he's converted it. And
14 if it's 100 percent he'll get all of that, and half of
15 the other person's retirement. So in essence, he gets
16 75 percent of the available retirement.

17 That's not the intent that Congress was trying
18 to do. That's not what they were trying to protect.
19 That's not the interest of the spouse that they were
20 trying to protect when they enacted FUSFSPA. Thank
21 you.

22 QUESTION: Thank you, Mr. Cornell. Mr. Cone,
23 you have eight minutes remaining.

24 MR. CONE: Yes, I'm going to waive the
25 remainder, Your Honor.

1 CHIEF JUSTICE REHNQUIST: Very well. The case
2 is submitted.

3 (Whereupon, at 1:35 p.m., the case in the
4 above-entitled matter was submitted.)
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CERTIFICATION

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NO. 87-201 - GERALD E. MANSELL, Appellant V. GAYE (MANSELL) FORBES

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