

Unconstitutional for State to Tax Federal Pensions while Exempting State and Local Pensions

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

6.0—Military service and tax laws

10.2—Other Supreme Court cases

Davis v. Michigan Department of the Treasury, 489 U.S. 803 (1989).³

Paul S. Davis was a retired federal civilian employee who lived in Michigan. Beginning in 1979, he paid Michigan state income tax on his federal pension, based on a Michigan statute⁴ that imposed the state income tax on most retirement income but exempted pensions received by retired employees of the State of Michigan and its political subdivisions.⁵ Davis sued the State Department of the Treasury in state court, claiming that this discriminatory treatment of federal retirees (as compared to state and local government retirees) violated federal statute and the United States Constitution.

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,400 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

² Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

³ This is a 1989 decision of the United States Supreme Court. The citation means that you can find this decision in Volume 489 of *United States Reports*, starting on page 803.

⁴ Michigan Compiled Laws Annotated, section 206.30(1)(f) (1988 pocket part).

⁵ Political subdivisions include counties, cities, school districts, etc.

Davis initiated his lawsuit in the Michigan Court of Claims, which rejected his arguments. He appealed to the Michigan Court of Appeals, the state's intermediate appellate court, which affirmed the decision of the Court of Claims.⁶ The Michigan Supreme Court denied his request for leave to appeal to that court.⁷

Davis then appealed to the United States Supreme Court, which noted probable jurisdiction.⁸ After extensive briefs and oral argument, the Supreme Court ruled 8-1 that the Michigan scheme of exempting state and local retirees while taxing federal retirees violated both federal statute⁹ and the intergovernmental tax immunity doctrine under the United States Constitution.

Near the end of his majority decision, Justice Anthony Kennedy wrote: "In this case, appellant's claim could be resolved either by extending the tax exemption to retired federal employees (or to all retired employees) or by eliminating the exemption for retired state and local government employees."¹⁰ Eventually, Michigan resolved the constitutional issue by taxing the pensions of the state and local government employees, not by expanding the exemption to include federal retirees. Most other states that had this same problem came up with the same solution.

In this case, the plaintiff (Davis) was a retired federal civilian employee, but this precedent also applies equally to federal military retirees. Many Reserve Officers Association (ROA) members received refunds for taxes paid in Michigan and other states under state statutes that were deemed unconstitutional. If you have not applied for a refund, you are far too late now, for the statute of limitations expired many years ago.

⁶ 160 Mich. App. 98, 408 N.W.2d 433 (1987).

⁷ 429 Mich. 854 (1987).

⁸ 487 U.S. 1217 (1988). Since the state court had rejected a claim that the state statute violated the United States Constitution, Davis had the right to an automatic appeal to the U.S. Supreme Court, but if the justices believed that his claim was clearly without merit they could have declined to "note probable jurisdiction."

⁹ 4 U.S.C. 111.

¹⁰ *Davis*, 489 U.S. at 818.