

**LAW REVIEW<sup>1</sup> 19060**  
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## **Where does Congress Get the Authority To Overrule a Supreme Court Decision**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

### 5.1— Division of Military Benefits Upon Divorce

***McCarty v. McCarty, 453 U.S. 210 (1981).***

**Q: I am a retired Army Reserve Colonel and a life member of the Reserve Officers Association (ROA). I read with interest your Law Review 19058 (June 2019). In that article you wrote that in 1981 the Supreme Court held that the states were precluded from dividing military retired pay in marriage dissolution cases, but in 1982 the Congress “overruled” this Supreme Court decision. How does Congress have the power to overrule a Supreme Court decision?**

**A:** When the Supreme Court finds that a federal statute is inconsistent with the United States Constitution, the Supreme Court has the power and the responsibility to strike down the federal statute as unconstitutional.<sup>3</sup> But the Supreme Court did not hold that it was unconstitutional to

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<sup>1</sup>I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup>BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

<sup>3</sup>*Marbury v. Madison*, 5 U.S. 137 (1803).

apply California's community property law to military retired pay. Rather, the Supreme Court held that applying California's community property law to military retired pay to military retired pay was inconsistent with the federal statute that provides for military retired pay, and under the Supremacy Clause a federal statute trumps conflicting state laws and state constitutions.<sup>4</sup> The *McCarty* majority decision includes the following paragraph:

We conclude, therefore, that there is a conflict between the terms of the federal [military] retirement statutes and the community property right asserted by appellee here [the wife]. But "a mere conflict in words is not sufficient"; the question remains whether the "consequences of that property right sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo*, 439 U.S. at 581-583. This inquiry, however, need only be a brief one, for it is manifest that the application of community property principles to military retired pay threatens grave harm to "clear and substantial" federal interests. *See United States v. Yazell*, 382 U.S. at 352.<sup>5</sup>

The Supreme Court held that applying community property principles to military retired pay was inconsistent with a federal statute. It was well within Congress' prerogative to remove the inconsistency by amending the federal statute. That is exactly what Congress did when it enacted the Uniformed Services Former Spouse Protection Act (USFSPA) in 1982.

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<sup>4</sup>U.S. CONST., art. VI, cl. 1.

<sup>5</sup>*McCarty*, 453 U.S. at 232.

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Reserve Officers Association  
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