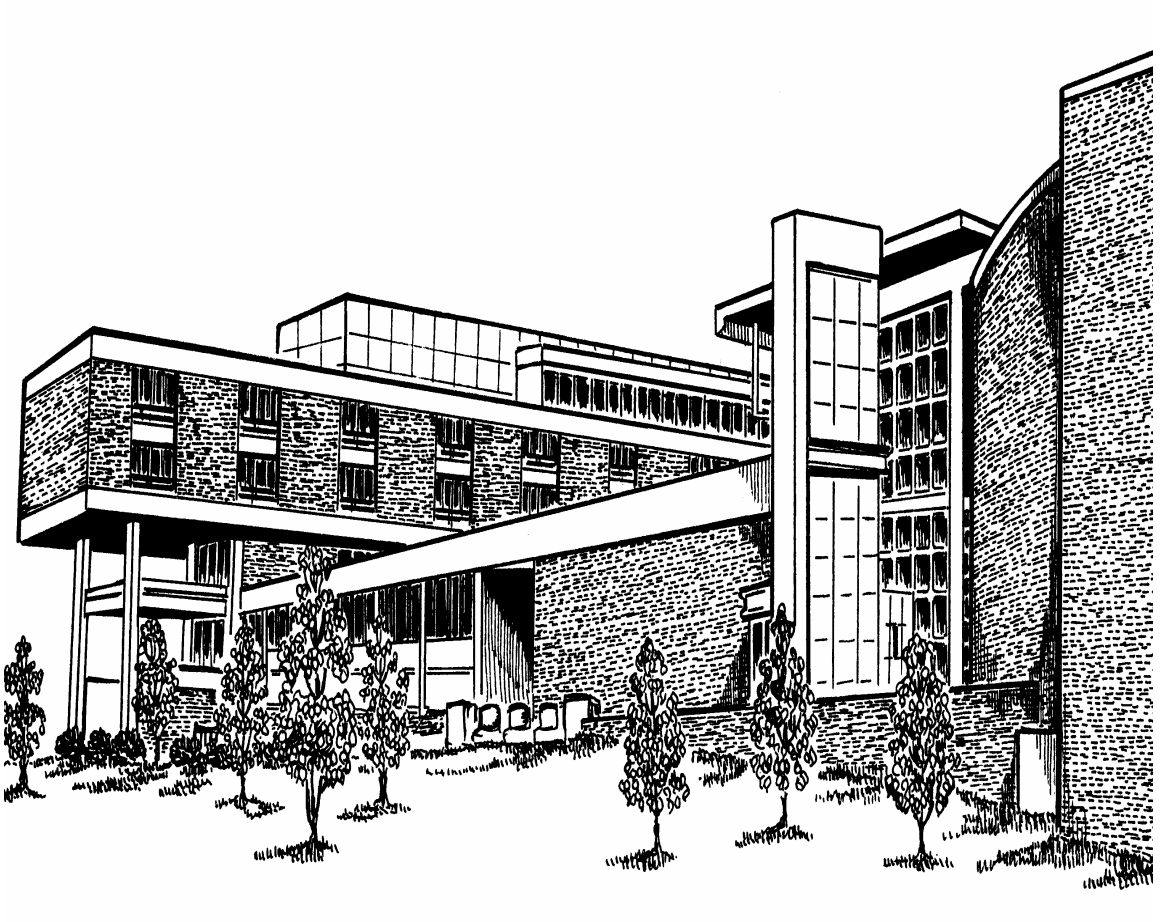
Uniformed Services Former Spouses' Protection Act



Legal Assistance Branch
Administrative and Civil Law Department
The Judge Advocate General's Legal Center and School
United States Army
Charlottesville, Virginia
22903-1781

JA 274 November 2005

Report Documentation Page

Form Approved
OMB No. 0704-0188

1. REPORT DATE	2. REPORT TYPE	3. DATES COVERED
03 AUG 2006	**N/A**	**-**

4. TITLE AND SUBTITLE	5a. CONTRACT NUMBER
Uniformed Services Former Spouses' Protection Act	5b. GRANT NUMBER
	5c. PROGRAM ELEMENT NUMBER
6. AUTHOR(S)	5d. PROJECT NUMBER
	5e. TASK NUMBER
	5f. WORK UNIT NUMBER
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) **TJAGLCS, ATTN: ALCS-ADA-PA, 600 Massie Road, Charlottesville, VA 22903-1781**	8. PERFORMING ORGANIZATION REPORT NUMBER **JA 274, Uniformed Services Former Spouses' Protection Act, November 2005, 139 pages**
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)	10. SPONSOR/MONITOR'S ACRONYM(S)
	11. SPONSOR/MONITOR'S REPORT NUMBER(S)

12. DISTRIBUTION/AVAILABILITY STATEMENT
Approved for public release, distribution unlimited

13. SUPPLEMENTARY NOTES
Revised

14. ABSTRACT
This is an updated edition of JA 274, Uniformed Services Former Spouses' Protection Act, dated November 2005. This revision provides information on the history, state courts' jurisdiction to divide retired pay, divisibility of retired pay, the issue of disability compensation, direct payment to former spouse, addtional benefits for former spouses, USFSPA and domestic abuse cases, USFSPA and Separation incentives and bonuses, and the Survivor Benefit Plan.

15. SUBJECT TERMS
uniformed Services Former Spouses, Protection Act, the history, state courts' jurisdiction to divide retired pay, divisibility of retired pay, the issue of disability compensation, direct payment to former spouse, additional benefits for former spouses, USFSPA and domestic abuse

16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT	b. ABSTRACT	c. THIS PAGE			
unclassified	**unclassified**	**unclassified**	**UU**	**139**	

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

Table of Contents

Appendices:

MAJ John Jurden
John.Jurden@hqda.army.mil

JA 274

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

OUTLINE OF INSTRUCTION

I. REFERENCES AND WEBSITES.

A. Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (2000) [hereinafter USFSPA].

B. www.dod.mil/dfas (DFAS website).

C. *Military Retirement Benefits in Divorce*, Marshal S. Willick (1998) (Excellent discussion of the interplay between military retired pay and disability payments; jurisdictional issues in dividing retired pay; and litigation techniques).

D. *Dividing Pensions in Divorce*, Gary A. Shulman & David I. Kelley (2000).

II. USFSPA IN A NUTSHELL.

A. What the USFSPA does. The USFSPA **allows**, but does not **require**, states to treat **disposable military retired** pay as marital or community property upon divorce. While the USFSPA is permissive, the practical effect is that all 50 states and the District of Columbia do treat military disposable military retired pay as divisible. Puerto Rico remains an exception, as it does not allow the division of military retired pay.

1. The USFSPA permits courts to divide disposable retired pay as **child support**, **alimony**, and / or **marital property** as part of the divorce.

2. Where courts adjudge a division of retired pay as part of a **property settlement**, former spouses whose marriage to the service member overlapped with **10 years** of the service member's military service may receive their share of military retired pay **directly from DFAS**: they do not have to count on receiving it by mail, electronic transfer, etc. from the service member. This has advantages for the retired service member, as well. In cases where DFAS provides direct payments to the former spouse, DFAS will prepare separate wage and earnings statements for both the retiree and the former spouse, so there is no question as to the taxable nature of each person's share of the retired pay.

3. The USFSPA permits some former spouses to **continue to receive military benefits** (commissary and PX/BX privileges as well as health care) even after the divorce. The two primary classes of these former spouses are "20/20/20" spouses, and "20/20/15" spouses.

4. The USFSPA permits former spouses to be designated as **Survivor Benefit Plan (SBP) beneficiaries**. This typically occurs as part of the court order for divorce, in which the court orders the service member to designate to DFAS the former spouse as his or her SBP beneficiary. If the service member fails to do so, the former spouse has one year from the date of the divorce to notify DFAS and to submit the application. Where the spouse is forced to go this route, this is called a "Deemed Election."

B. <u>What the USFSPA does not do</u>. The USFSPA does not require courts to divide military retired pay. It also does not establish a blanket formula for dividing retired pay, or award a predetermined share of military retired pay to former spouses: this task is left up to each individual state according to the states' own pension division rules and formulas. (However, as discussed *infra*, Chapter V, DFAS provides **recommended formulas** for the division of retired pay, which may be included in the different states' court orders). Finally, and contrary to common misconceptions, the USFSPA does **not** require a minimum overlap of military service and marriage as a prerequisite to the <u>division</u> of military retired pay as property. (As discussed *infra*, Chapter VII, this "minimum overlap" – or the "10-year overlap rule" – applies to DFAS's **direct payment** of military retired pay as part of a court-ordered **property settlement** to the former spouse).

III. HISTORY OF THE USFSPA.

A. *McCarty v. McCarty*, 453 U.S. 210 (1981), the seminal Supreme Court case involving the divisibility of military retired pay, found no language in the then-current federal statute governing military retired pay that would allow states to divide military retired pay as marital property upon divorce. The Supreme Court determined that congressional silence on this issue in the military pension statute – as opposed to other federal employee statutes in which it **did** specifically permit the division of retired pay – indicated congressional intent that former spouses **not** be entitled to a share of their service member-spouse's military retired pay upon divorce.

B. The Uniformed Services Former Spouses' Protection Act (USFSPA). Pub. L. 97-252, 96 Stat. 730 (1982), as amended, and codified at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, & 1451 (2000). The USFSPA legislatively overruled the Supreme Court decision in *McCarty*, and authorizes – but does not require – states to treat disposable military retired pay as divisible upon divorce. As noted *supra* Chapter II, all states and the District of Columbia do treat military retired pay as divisible upon divorce.

C. 32 C.F.R. Pt. 63 expounds on the rules regarding direct payment from military finance centers. In essence, 32 C.F.R. Pt. 63 governs the rules for payment that DFAS follows.

D. Gross Retired Pay vs. Disposable Retired Pay. What pay is divisible—gross retired pay or disposable retired pay?

1. *Mansell v. Mansell*, 490 U.S. 581 (1989). Retired soldiers who are disabled can receive disability payments. In order to receive these disability payments, however, military retirees must first waive an equivalent amount of military retired pay. These disability payments are not taxable to the recipient. The disability payments are not retired pay or "disposable retired pay." 10 U.S.C. §1408 (a)(4). The retired pay that the retiree waives in order to receive the disability payments is excluded from the term "disposable retired pay." In *Mansell*, Major Mansell divorced his wife in California prior to the *McCarty* decision. After 23 years of marriage and service, the trial court split the military retirement 50/50. When MAJ Mansell retired, he elected to receive VA disability pay, and therefore he waived a portion of his military retired pay. Following enactment of the USFSPA, Major Mansell went to court trying to use the act to limit the amount paid to his former spouse. U.S. Supreme Court Holding: The language of 10 U.S.C. § 1408(c)(1) **prohibits states from dividing the value of the waived military retired pay**, because it is not "disposable retired pay" as defined by the statute.

2. 10 U.S.C. § 1408(c)(1) provides that "a court may treat **disposable retired pay** . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

3. 10 USC § 1408(a)(4) defines **disposable retired pay** in part as the total monthly retired pay to which a member is entitled, less the following amounts:

   a. Amounts owed by the service member to the U.S. for previous overpayments of retired pay and for recoupments;

   b. Amounts deducted from retired pay due to forfeitures ordered by court-martial or due to **waiver of retired pay required in order to receive disability compensation**;

   c. Amounts deducted in order to provide an annuity to a spouse or former spouse to whom a payment is being made pursuant to a court order (the SBP designation); and

d. Amounts of the service member's retired pay computed using the percentage of the member's disability on the date when he was retired, or placed on the temporary disability retired list.

4. What is the Significance of the "Gross" v. "Disposable" Distinction? Practically speaking, the biggest issue relates to service members' waiver of a portion of their retired pay, in order to receive **non-taxable disability compensation**. Traditionally, when service members waived a portion of their retired pay in order to receive an equal amount of (non-taxable) disability compensation, the result was that the former spouse received a smaller amount of retired pay.

The following Table illustrates the potential effect on a former spouse, who has been awarded a portion of her service member husband's military retired pay, when he opts to waive a portion of that retired pay in order to receive Veteran's Administration (VA) disability compensation. In the following Table, assume the court order has divided military retired pay equally (50% - 50%), and that neither party has any other income or is claiming any withholding exemptions.

	Retiree	Former Spouse
Gross Retired Pay	$ 2,000	
VA Disability Pay (VA Disab. Pay)	$362	
Waived retired pay	- ($362)	
Disposable retired pay (D.R.P)	= **$1,638**	
Division of D.R.P	$819	$819
Tax (15% rate)	($123)	($ 123)

Net after taxes	**$ 1,058** (V.A. Disab. Pay + Division of D.R.P. – Tax)	**$696** (Division of DRP – Tax)

As is obvious in this example, the retiree's waiver of a portion of his retired pay, in order to receive some non-taxable disability pay, will reduce his former spouse's share of the remaining, divisible retired pay.

State courts' treatment of this "disability offset" issue is discussed *infra*, Chapter VI.

IV. STATE COURTS' JURISDICTION TO DIVIDE RETIRED PAY.

A. Courts that can divide military retired pay. Before discussing various methods that state courts use to divide retired pay, it is necessary to determine whether states actually have **jurisdiction** to divide the service member's retired pay. As previously discussed, USFSPA provides state courts the authority to divide military retired pay. However, states still must have jurisdiction over the service member and his pension.

1. A court of competent jurisdiction of any state, DC, PR, Guam, Am. Samoa, the Virgin I., N. Mariana I., & the Trust Terr. of the Pacific.

2. Any federal court of competent jurisdiction.

3. Any foreign court of competent jurisdiction IF there is a treaty requiring the U.S. to honor court orders of such nation. However, no such treaty is in force regarding court orders of any nation.

B. Special Jurisdictional Requirements. In order for states to divide the service member's retired pay as marital property (as opposed to alimony or child support), USFSPA requires state courts to show jurisdiction over the service member (and, thus, his pension) by one of three means: **Domicile**, **Residence**, or **Consent**. Thus, state "minimum contacts" tests or other state methods to assert jurisdiction over a non-resident for divorce purposes may not suffice to establish jurisdiction over the member's military retired pay. (Note that this three-part jurisdictional requirement that USFSPA imposes applies only where states are to divide military retired pay as property – not as part of an alimony or child support division).

1. **Domicile** in the territorial jurisdiction of the court (*i.e.*, at the time the action was commenced, the service member had made that state his true, fixed, and permanent home and intended to return to it), or

2. **Residence** within the state other than because of military assignment (*i.e.*, the member was personally present within the state other than due to military assignment, at the time the action commenced), or

3. **Consent** to jurisdiction.

   a. Many states hold that a member's general appearance constitutes "consent;" the member need not specifically consent to the state's jurisdiction over his military retired pay to divide the pension. *See*, *e.g.*, Kildea v. Kildea, 420 N.W.2d 391 (Wis. Ct. App. 1988).

   b. Other states hold that the failure of a non-resident, non-domiciliary service member to contest personal jurisdiction over him does not amount to the "consent" that USFSPA requires in order to determine division of the military pension. *See, e.g.*, In re Marriage of Akins, 932 P.2d 863 (Colo. Ct. App. 1997). This is so even though the member's failure to contest personal jurisdiction may be sufficient to grant the court jurisdiction to decide the divorce, support, and other property division issues.

c. Other states have asserted jurisdiction over the member's retired pay when the member made an appearance by responding to divorce petitions by praying for some relief, himself (*e.g.*, division of property other than the military pension) while attempting to reserve the issue of division of military retired pay. *See, e.g.*, In re Marriage of Parks, 737 P.2d 1316 (Wash. Ct. App. 1987); Blackson v. Blackson, 579 S.E.2d 704 (Va. Ct. App. 2003) (holding that, where a nonresident, nondomiciliary service member who was served with divorce papers in Virginia filed a cross-complaint which sought to apportion all property except his military retired pay, he made a general appearance which permitted the Virginia court to exercise jurisdiction over his military retired pay).

d. However, at least one state court has permitted a non-resident, non-domiciled retiree to consent to jurisdiction to resolve only divorce, custody, child support, and some property division issues (*i.e.*, to enter a "special appearance"), but to reserve the right not to consent to division of his military retired pay. *See* Tucker v. Tucker, 226 Cal. App. 3d 1249 (1991) (holding that a non-resident, non-domiciliary service member did not consent to California jurisdiction to divide military pension even though he consented to the court deciding dissolution, child support, and other property issues); *see also* Wagner v. Wagner, 768 A.2d 1112 (Pa. 2001) (upholding the right of a nonresident, nondomiciliary service member to contest the state court's jurisdiction to divide military pay, although the member does not contest jurisdiction to resolve other property rights; secures counsel who enters a written appearance and represents him during discovery; and answers interrogatories).

e. Continuing jurisdiction may also constitute "consent." *See, e.g.*, Bumgardner v. Bumgardner, 521 So.2d 668 (La. Ct. App. 1988) (finding continuing jurisdiction to partition military retired pay several years after the divorce that took place in the same state). However, at least one state has found that a service member did not give "implied consent" for a court to divide his retired pay when his wife sought to re-open the issue, even though – several years earlier – **he** was the original divorce petitioner in that same state! *See* Flora v. Flora, 603 A.2d 723 (R.I. 1992).

C. Satisfying the Jurisdictional Requirement. Court orders should state that the court has jurisdiction under both the applicable state law and the USFSPA, by one of the three above reasons (domicile, residence or consent).

D. The Effect of Failing to Establish Jurisdiction over the Member's Retired Pay at the Time of Divorce. Where the divorce fails to resolve the division of retired pay as marital property, the former spouse must next find a court of competent jurisdiction over the member, based on the member's **domicile**, **residence**, or **consent**.

V. DIVISIBILITY OF RETIRED PAY.

A. What Law Controls? It is critical to remember that USFSPA creates **no** federal right to apportion retired pay. USFSPA leaves it to the states to determine both **whether** and **how much** to divide military retired pay. State law thus will determine any division of retired pay in order to satisfy **child support** obligations, **alimony**, and / or **property settlement**. Every state and the District of Columbia, either through codification or judicial ruling, currently divides military retired pay for property settlement purposes (as well as alimony and child support in appropriate cases). Puerto Rico, however, does not divide military retired pay upon divorce. *See* Delucca v. Colon, 119 P.R. Dec. 720 (1987).

B. Vesting of Retired Pay. "Vesting" of retired pay for Active Duty service members occurs when they attain 20 years of creditable service. At that point, they have "vested" their retired pay and are eligible to draw retired pay upon retirement. What is the significance of "vesting" in the USFSPA context?

1. In a very few states, vesting is a prerequisite to the courts' division of the retirement pension, in the first place. In other words, if the service member has not vested his retired pay **at the time the divorce is finalized**, the state will not divide the retired pay between the service member and the former spouse. *See, e.g.*, Durham v. Durham, 708 S.W.2d 618 (Ark. 1986); Dowden v. Allman, 696 N.E.2d 456 (Ind. Ct. App. 1998).

2. A great majority of states divide pensions that are not yet vested at the time the divorce is finalized. However, in a very few states, state law requires a minimum overlap between the marriage and the accumulation of retirement. *See, e.g.*, Alabama Code § 30-1-51 (providing that "a spouse may have a vested interest in [retirement benefits of the other spouse] . . . *provided that . . .[t]he parties have been married for a period of 10 years* during which the retirement was being accumulated") (emphasis added).

C. Formulas and Theories for the Division of Retired Pay. Formulas for dividing retired pay are distinctly a creation of each state's law. There is no federal formula. Nevertheless, many state courts follow DFAS-suggested formulas for division, which are discussed *infra*.

1. USFSPA Requirements for All Court Awards. USFSPA requires that all awards of retired pay be expressed in either a **fixed dollar amount** or as a **percentage of disposable retired pay**. DFAS will reject any court orders that do not express awards in one of these two manners.

a. Fixed Dollar Amount Awards. Former spouses receiving retired pay pursuant to court orders that order a Fixed Dollar Amount – as opposed to a Percentage – will not enjoy Cost of Living Adjustments that apply to the service member's retired pay.

b. Percentage Awards. DFAS, in accordance with *Mansell* (*see supra*), construes all Percentage Awards as a Percentage of **Disposable Retired Pay**.

2. DFAS-Proposed Formulas. Keeping in mind that state courts are free to divide military retired pay pursuant to state laws, DFAS has suggested several formulas for inclusion in state court orders, regarding how to divide military retired pay. These DFAS-suggested formulas were, at one time, proposed Federal Rules. However, they were never ultimately codified in the C.F.R. DFAS produces a product on the DFAS website (www.dod.mil/dfas) entitled *Attorney Instructions for Dividing Retired Pay and Sample Court Orders*, which all practitioners should read and retain. Several of the most common formulas, reproduced in the DFAS pamphlet, are discussed below. **The DFAS Attorney Instructions are at Appendix F of this Outline.**

a. Formula Awards While Member is on Active Duty. When the service member remains on active duty at the time of the divorce and award of retired pay, it is difficult to apportion the former spouse's percentage, because the service member's ultimate retirement date (and, hence, total amount of years on active duty) is not known at the time of divorce. Thus, DFAS recommends a formula that allows the former spouse a percentage, based on the following formula:

$$1/2 \times \frac{\text{Length of overlap of marriage and service}}{\textit{Time in service}} \times 100 = \%$$

For example, if COL and Mrs. Jones were married for 20 years of COL Jones' total 30 years of military service, her percentage would be:

$$1/2 \times \frac{(240 \text{ months})}{(360 \text{ months})} \times 100 = 33\%$$

DFAS then recommends that the court order state: **"The former spouse is awarded a percentage of the member's disposable retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is ____ months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service."**

b. Formula Award for Reserve Component Members. DFAS recommends substituting "points earned" in the numerator and denominator, in place of years (or months) of marriage and years of service.

DFAS recommends that the court order state: "**The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _____ reserve retirement points earned during the period of the marriage, divided by the member's total number of reserve retirement points earned.**"

c. Hypothetical Awards Based on the Member's Pay at the Time Court Divides Retired Pay. Many states use "hypothetical awards," in which they divide the retired pay based on the date of the divorce, and assume in their formula that the service member retired on the date of the divorce. This method does not provide the former spouse the financial benefit of any of the member's future military service (*e.g.*, promotions or accumulated years of service), after the entry of the order. For members entering military service after September 7, 1980 the hypothetical "retired pay base" is the average of the member's highest 36 months of basic pay prior to the hypothetical retirement date. (DFAS requires the service member's pay records to be included with a copy of the court order). DFAS then converts hypothetical awards to a percentage of the member's actual disposable retired pay.

DFAS recommends that hypothetical awards include the following language: **"The former spouse is awarded ____% of the disposable military retired pay the member would have received had the member retired with a retired pay base of _____ and with _____ years of creditable service."**

d. Hypothetical Awards Based on Pay Table in Effect at the Time a Member Becomes Eligible for Retired Pay. Courts sometimes may direct DFAS to calculate a hypothetical retired pay amount using the pay table in effect at the time the member becomes eligible to receive military retired pay, rather than the pay table in effect at the time of the court order. Courts must provide the percentage awarded to the spouse; the member's rank to be used in the calculation; and the years of creditable service used in the calculation. DFAS makes this hypothetical retired pay calculation using the basic pay figure from the pay table in effect at the member's retirement, for the rank and years of service given in the court order.

DFAS recommends that hypothetical awards of this nature include the following language: "**The former spouse is awarded ____ % of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the rank of ____ and with ____ years of creditable service.**"

For an example of this, *see* Kelly v. Kelly, 78 P.3d 220 (Wyo. 2003) (calculating the coverture formula for dividing retired pay as if the service member retired as a Major, even though the member attained higher rank after the divorce decree was entered).

VI. THE ISSUE OF DISABILITY COMPENSATION.

A. Recall from the discussion *supra* Chapter III that the USFSPA only permits the division of disposable retired pay. "Disposable" retired pay is only the portion of the retired pay remaining after, among other events, the service member elects to receive a dollar-for-dollar offset in the form of disability compensation, or the amount that is the difference between the service member's gross retired pay and his disability pay.

B. Military Disability Retired Pay and VA Disability Benefits.

1. Military Disability Retired Pay. This retired pay is available to service members who are so disabled that they cannot perform duties. If members have enough creditable service, they may be placed on the "disability retired list" and draw disability retired pay. Members who retire with military disability pay draw the higher of two different amounts of pay: their gross retired pay, or their disability pay based on their disability rating. To determine which amount they will draw is generally a two-step process:

a. First, determine the member's normal retired pay. This typically is accomplished by calculating the member's highest 36 months of basic pay prior to retirement. This typically is the last 36 months prior to retirement. For example, an average basic pay over the preceding 36 months may calculate out to $4,000.

b. Second, multiply the member's active duty base pay times the member's disability percentage rating. For example, $4,000 x 40% Disability Rating equates to $1,600.

c. The member would receive the higher of these two above amounts. However, only the difference between the two above amounts ($2,000 v. $1,600) is divisible between the two spouses. In the above example, then, the service member's spouse would be entitled to split the difference between $2,000 and $1,600, (or $400), giving her a total of $200.

2. VA Disability Offset. A second – and more prevalent – type of disability retirement benefit comes directly from the Department of Veterans' Affairs (VA). In these types of cases, service members are not qualified to receive military disability retired pay, although they have incurred some disability as a result of their military service. Such members are entitled to monthly payments directly from the Department of Veterans' Affairs, upon their retirement. These payments are tax-free. However, service members must waive an equal amount of their military retired pay, in order to receive the disability pay from the VA. The U.S. Supreme Court in Mansell v. Mansell held that, IAW USFSPA, former spouses may not be awarded any portion of the disability offset that the service member elects to receive.

C. Service members' ability to waive retired pay in order to receive disability pay creates problems of equity for state courts, who often express concern that the service member's election to receive disability compensation reduces the "pool" of available retired pay that the courts may divide between the spouses. This especially is apt to occur when – perhaps **years** after the initial court order dividing the retired pay – the service member begins to receive disability pay **or** his percentage of disability is increased, due to a newly-diagnosed physical disability. This has the effect of increasing the amount of disability pay the service member receives and, concurrently, reducing the amount of remaining retired pay that may be divided between the parties. Many courts thus find that the service member's subsequent receipt of more disability pay warrants – on equity grounds – replacing that "forfeited" retired pay with other assets. This enables the former spouse to be returned to the financial position he or she was in before the member opted to receive disability compensation. Many courts consider the service member's action to be a unilateral and extrajudicial modification of the original divorce decree.

1. Indemnity Provisions. Often, courts look to indemnity provisions in the court order or the separation agreement – to the effect that the service member will not take action to reduce the amount of retired pay the former spouse would receive (but that if he does so, he will "make up" that portion that the former spouse loses due to his acceptance of disability pay). *See, e.g.*, In re Marriage of Gahagen, 2004 Iowa App. LEXIS 926 (Iowa Ct. App. 2004); Nelson v. Nelson, 83 P.3d 889 (Okla. Civ. App. 2003); Janovic v. Janovic, 814 So.2d 1096 (Fla. Dist. Ct. App. 2002). *See also* In re Marriage of Pierce, 982 P.2d 995 (Kan. Ct. App. 1999) (refusing to direct a retired service member – who, subsequent to a divorce action, waived a portion of his retired pay to receive disability compensation – to indemnify his former spouse with other assets because nothing in the couple's separation agreement required him to do so).

2. Contract Theory. Where the parties have entered a pre-divorce agreement (*e.g.*, a separation agreement or a property settlement agreement) that courts rely upon to divide the military retired pay, and the service member subsequently waives a portion of his retired pay to receive even more disability compensation, many states hold that **contract theory** precludes the service member from unilaterally reducing the amount of property the former spouse can receive. *See, e.g.*, Hayward v. Hayward, 868 A.2d 554 (Pa. Super. Ct. 2005); Suratt v. Suratt, 85 Ark. App. 267 (Ark. Ct. App. 2004); Gatfield v. Gatfield, 682 N.W.2d 632 (Minn. Ct. App. 2004); Krapf v. Krapf, 786 N.E.2d 318 (Mass. 2003); Shelton v. Shelton, 78 P.3d 507 (Nev. 2003); Scheidel v. Scheidel, 129 N.M. 223 (N.M. Ct. App. 2000); Owen v. Owen, 14 Va. App. 623 (Va. Ct. App. 1992).

3. Constructive Trust Theory. Other states find that, once the divorce is finalized, the service member essentially holds in constructive trust that portion of retired pay that the court awards to the former spouse, and that the service member cannot unilaterally convert or change that interest (*e.g.*, by waiving a portion of retired pay in order to receive disability compensation) without indemnifying the former spouse. As part of this growing trend, courts are finding that the lack of an indemnification provision does not prevent returning the former spouse to her financial position prior to the service member's election to receive disability compensation.

a. Courts often find that the lack of an indemnification provision cannot defeat either the parties' – or the court's – intent that the spouse's original interest not be diminished by a unilateral act of the service member. *See, e.g.*, Black v. Black, 842 A.2d 1280 (Me. 2004); Whitfield v. Whitfield, 862 A.2d 1187 (N.J. Super. Ct. App. Div. 2004); Danielson v. Evans, 36 P.3d 749 (Ariz. Ct. App. 2001); Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001); In re Marriage of Krempin, 70 Cal. App. 4th 1008 (Cal. Ct. App. 1999); In re Marriage of Gaddis, 957 P.2d 1010 (Ariz. Ct. App. 1997); In re Marriage of Nielsen, 293 N.E.2d 844 (Ill. App. Ct. 2003); In re Strassner, 895 S.W.2d 614 (Mo. Ct. App. 1995); McHugh v. McHugh, 861 P.2d 113 (Idaho Ct. App. 1993). *See also* Perez v. Perez, 2005 Haw. App. LEXIS 119 (Haw. Ct. App. 2005) (creating an express constructive trust in the terms of the divorce decree).

b. *But see* Williams v. Williams, 2004 N.C. App. LEXIS 2157 (N.C. Ct. App. 2004) (holding that, where the entered Qualified Domestic Relations Order (QDRO) simply awarded the former spouse "50% of [the retiree's] final disposable retired pay after deduction of his disability benefit," and thereafter the retiree opted to receive additional disability compensation, the QDRO did not provide for the former spouse to receive additional property to "make up" for the waived amount of retired pay the retiree received); In re Marriage of Pierce, 982 P.2d 995 (Kan. Ct. App. 1999) (refusing to direct a retired service member – who, subsequent to a divorce action, waived a portion of his retired pay to receive disability compensation – to indemnify his former spouse with other assets because nothing in the couple's separation agreement required him to do so).

4. Courts that take any of these approaches in preventing the service member from unilaterally altering the division of retired pay typically require the service member to make up the difference with other assets (*e.g.*, property or cash payments). However, it is impermissible under the USFSPA to require the member to "make up" for these payments by providing the former spouse a portion of the actual **disability pay** that the member has opted to receive. *See, e.g.*, In re Marriage of Perkins, 26 P.3d 989 (Wash. Ct. App. 2001) (finding that language in a decree stating the wife is "'entitled to 45% of the . . . husband's . . . military retirement' even 'if the husband's military retirement [pension] . . . is . . . changed in form to a disability payment'" was in violation of federal law despite fact the court called it "maintenance"); In re Marriage of Lodeski, 107 P.3d 1097 (Colo. Ct. App. 2004); Kutzke v. Kutzke, 1996 Ohio App. LEXIS 1480 (Ohio Ct. App. 1996) (invalidating a portion of a court order requiring the retired service member to pay his former spouse 32.9% of "the disability portion of [Mr. Kutzke's] retirement").

5. Moreover, when courts "make up" to the former spouse the amount the retiree waived to receive disability compensation, many states require the courts to merely treat the disability benefits as "one" distribution factor to consider, rather than as an automatic **requirement** to provide the former spouse more property. *See, e.g.*, Halstead v. Halstead, 596 S.E.2d 353 (N.C. Ct. App. 2004) ("[W]hen the payment of disability benefits is the only factor a court considers in providing an unequal distribution of a military retirement and a judge treats the disability benefits by providing a dollar for dollar compensation to the non-military spouse, the disability payments become less a factor and more an [improper] acknowledgment that the non-military spouse has an ownership interest in both the military retirement and the disability payments."); Clauson v. Clauson, 831 P.2d 1257 (Alaska 1992) ("[O]ur holding today might lead trial courts to simply shift an amount of property equivalent to the waived retirement pay from the military spouse's side of the ledger to the other spouse's side. This is unacceptable. In arriving at an equitable distribution of marital assets, courts should only consider a party's military disability benefits as they affect the financial circumstances of both parties."); Perkins v. Perkins, 26 P.3d 989 (Wash. Ct. App. 2001) (holding that "a Washington dissolution court may not divide or

distribute a veteran's disability pension, but it may consider a spouse's entitlement to an *undivided* veteran's disability pension as one factor relevant to a just and equitable distribution of property [and] an award of maintenance"). *See also* In re Marriage of Bahr, 32 P.3d 1212 (Kan. Ct. App. 2001) (noting that courts may consider a service member's receipt of VA disability benefits when allocating other property of the marriage to be paid in maintenance to the former spouse).

D. "Concurrent Receipt" Legislation – Modification of the "VA Offset".

1. The FY 2004 Defense Authorization Act, Pub. L. 108-136; 117 Stat. 1392 (Nov. 24, 2003) created "Concurrent Disability Pay" to restore the retired pay that retirees currently must waive in order to receive non-taxable VA compensation. Beginning on 1 January 2004, qualified individuals could begin receiving **both** disability pay from the VA, **and** a higher amount of their retired pay. "Qualified Individuals" include all retirees with 20 or more years of service and with a VA disability rating of **50% or higher**.

2. The effect of this legislation is to permit individuals' retired pay offsets (*i.e.*, "VA Waivers") to be phased out over ten years. Thus, this legislation permits qualified individuals to receive **both** their regular retired pay **and** their disability compensation. The following is a breakdown of the "phase in" as it began in January 2004:

Disability Rating (%)	Additional Retired Pay
100%	$750 / month* (*see* sub-para. 3, below)
90%	$500 / month
80%	$350 / month
70%	$250 / month
60%	$125 / month
50%	$100 / month

These amounts are scheduled to increase each year, until January 2014, at which point qualified individuals will receive their **full** retired pay entitlements **as well as** their VA disability compensation, with no offset or reduction.

3. Most recently, the National Defense Authorization Act of 2005, Pub. L. 108-375, signed into law in October 2004, re-named "concurrent receipt" to "Concurrent Retirement and Disability Pay" (CDRP). The newest legislation eliminated the nine-year phase in for those individuals rated as 100% disabled, as of 1 January 2005. It provides this class of disabled retirees full military retired pay, plus over $2,000 per month in additional benefits.

4. This "CDRP" creates numerous issues that state courts will have to resolve, regarding the propriety of reopening cases. For instance, is the fact that the retiree now is receiving **both** his disability compensation **and** an increased amount of retired pay a grounds to increase alimony, or to modify property distributions?

5. DFAS has indicated that former spouses who have been entitled to payments under USFSPA directly from DFAS (because of the "10-year overlap rule" (*see infra* Chapter VII)), but who have not received payments due to the service member's being disabled, should send written requests to DFAS, with their current payment addresses, in order to restart payments. (Former spouses should contact DFAS first, to ensure that DFAS has an application on file).

DFAS-DGG/CL
P.O. Box 998002
Cleveland, OH 44199-8002
FAX: 216-522-6960

VII. DIRECT PAYMENT TO FORMER SPOUSE.

A. In some limited circumstances, USFSPA and 32 C.F.R. Pt. 63.6 permit former spouses to receive their payments directly from DFAS, rather than from their former spouse/military retiree.

B. For all direct payments from DFAS – whether for child support, alimony or as a property division – there must be:

1. A final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement. If the court order is for child support, DFAS requires copies of the children's birth certificates.

2. A statement in the order that the soldier's Servicemember Civil Relief Act rights were.

3. An application to DFAS by the *former spouse – not the retiree* – for direct payment. The application to DFAS consists of completing DD Form 2293, and sending a certified copy of the court order to DFAS within 90 days of its certification. Applicants should send applications to:

   Defense Finance and Accounting Service
   Cleveland DFAS-DGG/CL
   PO Box 998002
   Cleveland Ohio 44199-8002
   (866) 859-1845 (toll free Customer Service)

C. The maximum amount of money directly payable by DFAS to the former spouse is 50% of the retiree's disposable retired pay. *See* 10 U.S.C. § 1408(e). However, this percentage increases to 65% if the payment includes child support and/or alimony awarded from the retired pay. *See* 32 C.F.R. 63.6e1.

1. State courts differ regarding interpretations of the "50% cap" on division of disposable retired pay. Most state courts find that the "50%" language in 10 U.S.C. § 1408(e) pertains only to direct payment from DFAS to the former spouse: in essence, courts following this interpretation do not interpret the provision to restrict their award of retired pay to 50% or less of the disposable retired pay. *See, e.g.*, Coon v. Coon, 2005 S.C. LEXIS 149 (S.C. 2005); Ex parte Smallwood, 811 So.2d 537 (Ala. 2001); Geesaman v. Geesaman, 1993 Del. Fam. Ct. LEXIS 126 (Del. Fam. Ct. 1993); Beesley v. Beesley, 758 P.2d 695 (Idaho 1988) (interpreting the statutory provision as only affecting the amount of retired pay that may be garnished, and finding that the provision has no effect on a service member's legal obligation); Deliduka v. Deliduka, 347 N.W.2d 52 (Minn. Ct. App. 1984) (finding that the statutory provision merely limits direct payments from the government to 50% of disposable retired pay).

2. However, at least one state court has determined that the provision of 10 U.S.C. § 1408(e) is a jurisdictional limitation on courts' ability to award more than 50% of a service member's disposable retired pay. *See* Cline v. Cline, 90 P.3d 147 (Alaska 2004) (interpreting the statutory provision to limit state courts "to the distribution of fifty percent or less of a recipient's military retirement").

D. Paragraph VII.B, *supra*, discussed the requirements for direct payment to former spouses, from DFAS. DFAS imposes additional requirements, in the event that direct payment of disposable retired pay is sought specifically as a result of a **property award**. *See* 10 U.S.C. § 1408; 32 C.F.R. Pt. 63.6. In that case, the following additional requirements to the application apply (and DFAS has 90 days to process these applications).

1. The ten year test. The marriage must overlap with ten years of service creditable toward retirement. DFAS states that a recitation in the court order such as, "The parties were married for 10 years or more while the member performed 10 years or more of military service creditable fore retirement purposes" satisfies the requirement. If the court order does not clearly state the date of the parties' marriage, DFAS requires a photocopy of the marriage certificate; the best practice is to submit the photocopy with all applications.

2. Sum certain. The court order must provide for payment from military retired pay, and the amount must be a specific dollar figure or a specific percentage of disposable retired pay.

3. Jurisdiction. The order must show that the court has jurisdiction over the soldier in accordance with USFSPA provisions (**domicile**, **residence**, or **consent**). The court order also should state its jurisdiction over the member under the applicable state law. *See generally supra* Chapter IV (discussing jurisdiction issues).

E. Tax Treatment of Divisions. As a result of 1992 amendments to the USFSPA, amounts paid directly to a former spouse by a military finance center will not be treated as retired pay earned by the retiree by the military services. Direct payments of retired pay received from finance by the former spouse are now subject to withholding. DFAS will withhold taxes on amounts paid directly to ex-spouses. Separate W-2 forms are issued to the retiree and the former spouse.

VIII. ADDITIONAL BENEFITS FOR FORMER SPOUSES.

A. Commissary and PX/BX.

1. 10 U.S.C. § 1062: "[A]n un-remarried former spouse . . . is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services."

2. Requirements to qualify.

a. Un-remarried means "unmarried" for these benefits; termination of a subsequent marriage does revive them.

b. 20/20/20 test.

(1) 20 years of creditable service by the member, and

(2) 20 years of marriage, and

(3) 20 years of overlap between marriage and the creditable service.

B. Medical Benefits.

1. 10 U.S.C. §§ 1072, 1078 & 1086.

2. Three categories of health care.

a. Full military health care program, including CHAMPUS coverage (up to age 62) and in-patient and out-patient care at military treatment facilities.

b. Transitional health care: full coverage for one year after the divorce, with the possibility of limited coverage for an additional year.

c. The DOD Continued Health Care Benefit Program (CHCBP) insurance plan negotiated by DOD.

3. Requirements to qualify for full military health care program.

a. Un-remarried; termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does.

b. 20/20/20 test (or, 20/20/15 test and divorce dated before 1 April 1985).

c. Not enrolled in an employer-sponsored health insurance plan.

d. As in the case of commissary and PX benefits, the date of the divorce is irrelevant.

4. Requirements for transitional health care.

a. Un-remarried; termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does.

b. 20/20/15 test.

(1) 20 years of creditable service by the member, and

(2) 20 years of marriage, and

(3) 15 years of overlap between marriage and the creditable service.

c. Not enrolled in an employer-sponsored health insurance plan.

d. To qualify for the second year of limited coverage, the spouse must have enrolled in the DOD Continued Health Care Benefit Program (CHCBP).

5. Requirements for DOD Continued Health Care Benefit Program (CHCBP).

a. Eligibility: anyone who loses entitlement to military health care (*e.g.*, former spouses, non-career soldiers and their family members, etc.)

b. Concept: premium based temporary health care coverage program designed to mirror the benefits offered under the basic CHAMPUS program (it is not, however, part of CHAMPUS).

(1) Facilitates retention of medical insurance coverage until alternative coverage can be obtained (former spouses and others who no longer qualify as dependents qualify for 36 months coverage).

(2) Primary advantage: guaranteed eligibility for most people if they enroll within 60 days of losing CHAMPUS benefits.

(3) Not free to the individual - premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs).

C. Practical Issue – Getting Former Spouses Identification Cards. Chapter 3 of AR 600-8-14, *Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel*, 20 Dec. 2002, governs procedures and points of contact for assisting eligible former spouses to obtain military identification cards that will entitle them to military benefits.

IX. USFSPA AND DOMESTIC ABUSE CASES.

A. 10 U.S.C. § 1408(h) allows for former spouses to collect their portion of retirement pay (and other benefits) even though the service member does not retire due to domestic abuse he or she has committed. In order to qualify, the former spouse must satisfy the following criteria:

1. Court order awarding as a property settlement (not child support or alimony) a portion of disposable retired pay.

2. Military member is eligible by years for retirement but loses right to retire due to misconduct involving dependent abuse.

   a. Date for determining the years of service is the date of final action by the convening authority (if a court-martial) or approval authority (if a separation action).

   b. Does not apply to early retirement programs.

3. The person with the court order was either the victim of the abuse or the parent of the child who was the victim of the abuse.

B. The benefits to which the dependent is entitled under USFSPA include:

1. Retirement pay as certified by the Secretary of the Service determined by amount member would have received if retired upon date eligible.

2. PX.

3. Commissary.

4. Medical and Dental.

5. These benefits terminate upon remarriage but can be revived by divorce, annulment or death of the subsequent spouse.

C. Procedures.

1. DFAS treats these just like any other direct payment request.

2. Must meet the requirements for direct payment of property settlement. Remember the 10-year test.

3. Use the same USFSPA application for payment as any other former spouse.

X. USFSPA AND SEPARATION INCENTIVES AND BONUSES.

A. Separation Incentives. In addition to involuntary separation benefits and voluntary 15 year retirement, some soldiers are being offered certain separation benefits if they separate from active duty prior to their twenty-year mark.

1. Voluntary Separation Incentive (VSI). The VSI program (*see* 10 U.S.C. § 1175) provides annual annuities to certain eligible active duty members, in over-strength career fields, who leave active duty and affiliate with the Reserves. The unpaid annual annuities are a property interest that the member can bequeath, if he dies before receiving subsequent annual payments.

2. Special Separation Benefit (SSB). The SSB program (*see* 10 U.S.C. § 1174) provides a lump sum payment to those eligible service members who terminate all connection with the military. The tax *disadvantage* of this program is that the lump sum payment is taxed in the year received, which may push the recipient into a higher tax bracket.

3. Are these payments divisible as marital property? Clearly they are not "disposable retired pay" and therefore do not fall under the USFSPA. Nevertheless, the trend is to divide these benefits using rationale of USFSPA cases.

a. Marsh v. Wallace, 924 S. W.2d 423 (Tex. Ct. App. 1996) (dividing lump sum SSB payment giving former spouse the same percentage of the SSB she would have received of retirement pay, and finding that SSB is "in the nature of retirement pay, compensating him now for the retirement benefits he would have received in the future."); Kelson v. Kelson, 675 So. 2d 1370 (Fla. 1996) (dividing VSI benefits with former spouse, finding that while the USFSPA does not cover VSI payments, *per se*, as a practical matter VSI payments "are the functional equivalent of the retired pay in which [the former spouse] has an interest."); In re Marriage of Heupel, 936 P.2d 561 (Colo. 1997) (holding that SSB payment was "disposable retirement pay" rather than severance pay, and thus divisible as marital property); Lykins v. Lykins, 34 S.W.3d 816 (Ky. Ct. App. 2000) (finding that Voluntary Separation Incentive payments are "akin to early retirement benefits" and thus divisible as marital property). *See also* In re Marriage of Menard, 42 P.3d 359 (Or. Ct. App. 2002); Mackey v. Mackey, 768 N.E.2d 644 (Ohio 2002); In re Marriage of Blair, 894 P.2d 958 (Mont. 1995); Fisher v. Fisher, 462 S.E.2d 303 (S.C. Ct. App. 1995).

b. *But see* McClure v. McClure, 647 N.E. 2d 832 (Ct. App. Ohio 1994) (finding VSI payments to be like severance pay and determining that, since the VSI payments came after the divorce proceedings began, they were separate property of the service member-husband).

B. Career Status Bonuses (CSB/Redux). Boedeker v. Larson, 605 S.E.2d 764 (Va. Ct. App. 2004). In this case of first impression, the state court divided a service member's CSB between him and his wife upon their divorce, finding that the bonus, taken while the couple was married, was "[i]n the nature of retirement pay, compensating the service member now for retirement benefits he would have received in the future." While it is unclear what other states plan to do with the issue of service members' acceptance of the CSB during the marriage, Boedeker is significant precedent for the ability of state courts to divide the bonus.

XI. SURVIVOR BENEFIT PLAN.

A. Overview. Retired pay is a personal asset of the retired military member. As such, it terminates when the military member dies. The Survivor Benefit Plan (SBP) assists in making up for the loss of part of this income by paying eligible survivors (defined as a spouse or former spouse; children; or spouse or former spouse and children) a monthly income.

1. The amount paid to the survivor is based on a specified dollar amount of the member's retired pay. Generally, basic SBP for a spouse pays a benefit of 55% of retired pay for spouses younger than 62; for spouses aged 62 or older, it pays 35%. (The amount reduces at age 62 because after that age, spouses qualify for Social Security benefits).

2. Moreover, the SBP annuity stops the first of the month in which an annuitant under the age of 55 remarries. If that marriage ends in death, divorce or annulment, however, DFAS will reinstate the SBP annuity.

3. Service members who have a spouse or dependent children are automatically enrolled in SBP with maximum coverage, upon their retirement. Retirees who are not married upon retirement may elect SBP spouse coverage for the first spouse they acquire after retirement, as long as they elect the coverage before the first anniversary of their marriage.

B. Administration of the SBP. DFAS's Denver office administers the SBP program, providing direct payments to annuitants. DFAS produces a Survivor Benefits Guide at its website: www.dod.mil/dfas/money/retired/sbg.htm; and a list of common issues associated with the SBP at the address www.dod/dfas/money/retired/faqs.htm

C. Designation of Former Spouses as Beneficiaries. A spouse's coverage under the SBP terminates upon the date of divorce – by operation of law – regardless whether DFAS is notified of the divorce. Nevertheless, many divorce decrees direct that the service member must make the former spouse his SBP beneficiary. This is possible because in 1986, Congress authorized state courts to order members to designate former spouses as SBP beneficiaries. State law controls whether such an order will be issued. Congress also authorized the member and former spouse to enter into a voluntary written agreement making the former spouse a beneficiary.

1. Court orders that direct the service member to cover his former spouse must be complied with within one year of the divorce decree. Nevertheless, some service members fail to comply with the court's directive, and do not name their former spouse as the SBP beneficiary. In such cases, *it is the former spouse's responsibility* to notify DFAS of the court order, and to apply for the SBP designation within one year of the court order. This is known as a "deemed election" on the former spouse's part.

2. Such "deemed elections" must include a copy of the divorce decree, and a written statement requesting former spouse coverage, and must be submitted to DFAS at the following address:

   Defense Finance and Accounting Service
   U.S. Military Retirement Pay
   P.O. Box 7130
   London, KY 40742-6559
   FAX: 1-800-469-6559

3. If the service member remarries, he can *only* change his SBP designation to cover his new spouse in a few instances. Those instances are:

   a. The former spouse election was required by court order, and the service member-retiree provides a certified court order that permits the change; or

   b. The former spouse election was made to comply with an agreement that is *not* part of the court order, and the former spouse agrees in writing to the change; or

c. The service member-retiree made the former spouse election voluntarily (*i.e.*, not as part of a court order or written agreement).

.

XII. CONCLUSION.

APPENDIX A

State-by-State Analysis of Divisibility of Military Retired Pay

Alabama

Divisible, but Requires a Ten-Year Overlap. ALA. CODE § 30-2-51 (2005). Alabama Civil Code permits division of present value of future or current "vested" pensions and requires a 10-year marital overlap with the earning of such pension. *See* Vaughn v. Vaughn, 634 So.2d 533 (Ala. 1993) (holding that disposable military retirement benefits accumulated during the course of the marriage are divisible as marital property); *see also* Fowler v. Fowler, 636 So. 2d 433 (Ala. Civ. App. 1994); Jackson v. Jackson, 656 So. 2d 875 (Ala. Civ. App. 1995). Moreover, Alabama case law holds that military retirement benefits are a proper sources of income from which to pay alimony. *See* Edwards v. Edwards, 410 So. 2d 91 (Ala. Civ. App. 1982); Dorey v. Dorey, 412 So. 2d 808 (Ala. Civ. App. 1982); Johnson v. Johnson, 415 So. 2d 1102 (Ala. Civ. App. 1982); King v. King, 601 So. 2d 1025 (Ala. Civ. App. 1992).

Alaska

Divisible. ALASKA STAT. § 25.24.160(a)(4) (2005); Chase v. Chase, 662 P.2d 944 (Alaska 1983); Doyle v. Doyle, 815 P.2d 366 (Alaska 1991). *See also* Cline v. Cline, 90 P.3d 147 (Alaska 2004) (interpreting the "50% cap" on disposable retired pay under 10 U.S.C. § 1408(e) to limit state courts "to the distribution of fifty percent or less of a recipient's military retirement," and not just to *direct payment by DFAS* of 50% of retired pay); Clauson v. Clauson, 831 P.2d 1257 (Alaska 1992) (holding that, after a divorce decree has been entered and the service member waives a portion of his retired pay to receive disability pay, courts may consider the economic consequences of the service member's actions on both parties when determining whether to amend a property division order).

Arizona
(community property state)

Divisible. ARIZ. REV. STAT §§ 25-211, 25-318(A) (2005). DeGryse v. DeGryse, 661 P.2d 185 (Ariz. 1983). *See also* Danielson v. Evans, 36 P.3d 749 (Ariz. Ct. App. 2001) (upholding an order to a service member to compensate his wife for the value of military retired pay he waived to receive disability compensation, where the trial court determined that, upon retirement, the former spouse was expected to receive a set dollar amount per month, and the court further reserved jurisdiction to compensate the spouse in the event the service member did anything to diminish the gross dollar value of his military benefits); In re Gaddis, 957 P.2d 1010 (Ariz. Ct. App. 1997) (requiring the service member – even in the absence of an indemnification provision in the divorce decree – to

reimburse his former spouse when he waived a portion of his retired pay and obtained civil service employment); Koelsch v. Koelsch, 713 P.2d 1234 (Ariz. 1986) (holding that where civilian employees were not eligible to retire at the time of dissolution, their spouses were eligible to receive their share of awarded retired pay at the point the employees are eligible to retire, whether or not the employees choose to retire at that point).

Arkansas

Divisible, If Vested at the Time of Divorce. ARK. CODE ANN. § 9-12-315 (2005). *Young v. Young*, 701 S.W.2d 369 (Ark. 1986). Arkansas has a vesting requirement, as case law has found that Nonvested military retirement benefits lack the following characteristics of property: cash surrender value, loan value, redemption value, lump sum value, and a value realizable after death. *See* Durham v. Durham, 708 S.W.2d 618 (Ark. 1986); Burns v. Burns, 847 S.W.2d 23 (1993). For a case showing a detailed account of how to calculate wife's share of husband's military retirement pay, see Cherry v. Cherry, 934 S.W.2d 936 (1996).

California
(community property state)

Divisible. CAL. FAM. CODE § 2610 (2005). *See* In re Marriage of Brown, 544 P.2d 561 (Cal. 1976) (holding that a husband's non-vested pension interest is a property interest of the community); *see also* In re Gillmore, 629 P.2d 1 (Cal. 1981) (holding that where an employee is eligible to retire but continues to work, he cannot deprive a former spouse of her portion of the community interest in retirement pay, and must reimburse the former spouse for any portion of retirement pay she lost due to the employee's decision to continue working). **Jurisdiction**. Tucker v. Tucker, 226 Cal. App. 3d 1249 (1991) (holding that a non-resident respondent servicemember did not consent California jurisdiction to divide military pension, although he consented to the court deciding dissolution, child support and other property issues).

Colorado

Divisible. COLO. REV. STAT. § 14-10-113 (2005). In re the Marriage of Beckman and Holm, 800 P.2d 1376 (Colo. 1990) (holding that vested or nonvested military retirement pension is divisible as marital property); *see also* In re Marriage of Hunt, 909 P.2d 525 (Colo. 1996) (holding that post-divorce increases in pay resulting from promotions are marital property subject to division and approves use of a formula to define the marital share); In re Marriage of Lodeski, 107 P.3d 1097 (Colo. Ct. App. 2004) (requiring a service member who, subsequent to a divorce decree waived a portion of retired pay to receive disability benefits, to reimburse his former spouse for the value of her share of retired pay that was negated by his actions). Military voluntary separation incentive payments constitute marital property subject to distribution.

Compensation that is deferred until after the dissolution of marriage, but fully earned during the marriage, is marital property. *See* In re Marriage of Shevlin, 903 P.2d 1227 (Colo. App. 1995); *see also* In re Marriage of Heupel, 936 P.2d 561 (Colo. 1997) (holding that a Special Separation Benefit payment was "disposable retirement pay" rather than severance pay, and thus divisible as marital property).

Connecticut

Divisible. CONN. GEN. STAT. § 46b-81 (2005) provides courts with broad discretion to divide property. In Bender v. Bender, 785 A.2d 197 (Conn. 2001), the Connecticut Supreme Court determined that either vested or non-vested pensions were property, holding that "retirement benefits, whether vested or unvested, are significant marital assets, and may be, as in the present case, the only significant marital asset. To consider the pension benefits a nondivisible marital asset would be to blink our eyes at reality."

Delaware

Divisible. DEL. CODE ANN. tit. 13, § 1513 (2005). Robert C.S. v. Barbara J.S., 434 A.2d 383 (Del. 1981); *see also* Memmolo v. Memmolo, 576 A.2d 181 (Del. 1990) (holding that pensions which accrue during a marriage, whether or not they are vested at the time of divorce, are normally considered to be marital property).

District of Columbia

Divisible. D.C. CODE § 16-910 (2005). *Barbour v. Barbour*, 464 A.2d 915 (D.C. App. 1983) (holding that a vested but unmatured civil service pension is divisible as marital property and suggesting in dicta that nonvested pensions are also divisible).

Florida

Divisible. FLA. STAT. § 61.075(3)(a)4 (2005) (allowing courts to divide vested or nonvested pension rights). Janovic v. Janovic, 814 So.2d 1096 (Fla. Dist. Ct. App. 2002) (enforcing a provision of a court decree requiring the service member to indemnify his former spouse for any reductions in his military retired pay, a portion of which the court had awarded to the former spouse); Abernethy v. Fishkin, 699 So.2d 235 (Fla. 1997) (enforcing a court order forbidding the service member from taking any action to diminish his military retired pay and requiring the former spouse to be indemnified in the event of such occurrence). *See also* Kelson v. Kelson, 675 So. 2d 1370 (Fla. 1996) (dividing VSI benefits with former spouse, finding that while the USFSPA does not cover VSI payments, *per se*, as a practical matter VSI payments "are the functional equivalent of the retired pay in which [the former spouse] has an interest").

Georgia

Probably divisible. Holler v. Holler, 54 S.E.2d 140 (Ga. 1987) (assuming that vested and non-vested military retirement benefits are marital property subject to division upon divorce).

Hawaii

Divisible. HAW. REV. STAT. ANN. §§ 580-47, 510-9 (2005). Linson v. Linson, 618 P.2d 748 (Haw. 1981) (dividing vested and non-vested military retired pay as marital property); Perez v. Perez, 2005 Haw. App. LEXIS 119 (Haw. Ct. App. 2005) (requiring a service member – who waived a portion of retired pay in order to receive disability pay – to reimburse his former spouse from other assets for the portion of retired pay to which she would have been entitled, on the basis of a constructive trust).

Idaho
(community property state)

Divisible. IDAHO CODE § 32-906 (2005). Griggs v. Griggs, 686 P.2d 68 (Ida. 1984); Lang v. Lang, 711 P2d 1322 (Ct. App. Ida. 1985).

Illinois

Divisible. 750 ILL. COMP. STAT. ANN. 5/503 (2005). In re Brown, 587 N.E.2d 648 (Ill. Ct. App. 4th Dist. 1992) (holding that a military pension may be treated as marital property under Illinois law); In re Korper, 475 N.E.2d 1333 (Ill. Ct. App. 5th Dist. 1985) (holding that a pension is marital property even if it is not vested and that a spouse is entitled to receive a share upon member eligibility). *See also* In re Marriage of Nielsen, 293 N.E.2d 844 (Ill. App. Ct. 2003) (requiring a service member who waived a portion of retired pay in order to receive disability pay to reimburse from other assets his former spouse for the value of the share she was deprived of as a result of his actions).

Indiana

Divisible, if Vested at the Time of Divorce. IND. CODE § 31-9-2-98 (2005). Kirkman v. Kirkman, 555 N.E.2d 1293 (Ind. 1990) (holding that the right to receive retired pay must be vested as of the date of divorce petition in order for the spouse to be entitled to a share, but that courts should consider the non-vested military retired benefits in adjudging a just and reasonable division of property).

Iowa

Divisible. IOWA CODE ANN. § 598.21 (2005). In re Howell, 434 N.W.2d 629 (Iowa 1989) (holding that a military pension in Iowa is marital property and divided as such in a dissolution proceeding); In re Marriage of Gahagen, 2004 Iowa App. LEXIS 926 (Iowa Ct. App. 2004) (finding a service member's post-divorce decision to waive a portion of retired pay and to receive disability compensation to be a "unilateral and extrajudicial modification" of the divorce decree, requiring him to "make up" to his former spouse from other assets the portion of retired pay that she was deprived of).

Kansas

Divisible. KAN. STAT. ANN. § 23-201(b) (2005) (defining vested and nonvested military pensions as marital property). In re Harrison, 769 P.2d 678 (1989) (providing that vested or unvested military pensions become marital property at the time of the commencement of dissolution proceedings). *See also* In re Marriage of Bahr, 32 P.3d 1212 (Kan. Ct. App. 2001) (noting that courts may consider a service member's receipt of VA disability benefits when allocating other property of the marriage to be paid in maintenance to the former spouse).

Kentucky

Divisible. KY. REV. STAT. ANN. § 403.190 (2005). Jones v. Jones, 680 S.W.2d 921 (Ky. 1984) (holding that a vested military pension is a divisible marital property interest under KY. REV. STAT. ANN. § 403.190); Poe v. Poe, 711 S.W.2d 849 (Ky. Ct. App. 1986) (holding that non-vested military retirement benefits are marital property). *See also* Lykins v. Lykins, 34 S.W.3d 816 (Ky. Ct. App. 2000) (finding that Voluntary Separation Incentive payments are "akin to early retirement benefits" and thus divisible as marital property); In re Marriage of Pierce, 982 P.2d 995 (Kan. Ct. App. 1999) (refusing to direct a retired service member – who, subsequent to a divorce action, waived a portion of his retired pay to receive disability compensation – to indemnify his former spouse with other assets because nothing in the couple's separation agreement required him to do so).

Louisiana
(community property state)

Divisible. LA. CIV. CODE ANN. Art. 2336 (2005). Little v. Little, 513 So. 2d 464 (La. Ct. App. 1987) (treating nonvested and unmatured military retired pay as marital property that is divisible upon divorce).

Maine

Divisible. 19-A ME. REV. STAT. ANN. § 953 (2005). See also Stotler v. Wood, 687 A.2d 636 (Me. 1996) (finding that the unvested right to military retirement benefits was a contractual right, subject to a contingency, and was an asset subject to equal distribution).

Maryland

Divisible. MD. CODE ANN., FAM. LAW. § 8-203(b) (2005) (defining military retirement as marital property); *Nisos v. Nisos*, 483 A.2d 97 (Md. App. 1984) (dividing military pension); *Ohm v. Ohm*, 431 A.2d 1371 (Md. 1981) (holding that nonvested pensions are divisible).

Massachusetts

Divisible. MASS. GEN. LAWS ANN. ch. 208 § 34 (2005) (defining vested and non vested pensions as marital property subject to division upon marital dissolution); McMahon v. McMahon, 579 N.E.2d 1379 (Mass. App. Ct. 1991). *See also* Andrews v. Andrews, 543 N.E.2d 31 (Mass. App. Ct. 1989) (affriming a lower court alimony award from military retired pay and noting that the lower court could have awarded it as property but did not). *See also* Krapf v. Krapf, 786 N.E.2d 318 (Mass. 2003) (holding that a separation agreement created a fiduciary obligation on the service member which prevented him from waiving retired pay to receive disability compensation, without reimbursing his former spouse the value of her portion of the retired pay that he waived).

Michigan

Divisible. MICH. COMP. LAWS ANN. § 552.18 (2005) (vested or unvested retirement benefits are part of the marital estate subject to award); *see also* Chisnell v. Chisnell, 385 N.W.2d 758 (Mich. Ct. App. 1986); Gingrich v. Vanderwerp, 1997 Mich App. LEXIS 3270 (Mich. Ct. App. 1997) (unpublished opinion).

Minnesota

Divisible. MINN. STAT. § 518.54 subd. 5 (2005) (defining vested or nonvested pensions as marital property); Mortenson v. Mortenson, 409 N.W.2d 20 (Minn. App. 1987) (holding that military pensions may qualify as marital property subject to division in a dissolution); *see also* Deason v. Deason, 611 N.W.2d 369 (2000) (rejecting a lower court's interpretation of the USFSPA that would require a ten-year overlap between marriage and military service prior to dividing a military pension as marital property); Gatfield v. Gatfield, 682 N.W.2d 632 (Minn. Ct. App. 2004) (upholding the terms of an agreement requiring the service member to reimburse his former spouse "fifty percent thereof" any portion of military retired pay he chose to waive in order to receive disability pay).

Mississippi

Divisible. MISS. CODE ANN. § 93-5-2 (2005). *See* Pierce v. Pierce, 648 So.2d 523 (Miss. 1994) (dividing military retirement pay as marital property); *see also* Hemsley v. Hemsley, 639 So. 2d 909 (Miss. 1994) (defining marital property for the purpose of a divorce as "any and all property acquired or accumulated during the marriage").

Missouri

Divisible. MO. REV. STAT. § 452.330 (2005). In re Marriage of Cox, 724 S.W.2d 279 (Mo. Ct. App. 1987) (holding that a large percentage of a military nondisability retirement pension was marital property); In re Strassner, 895 S.W.2d 614 (Mo Ct. App. 1995) (holding that an award of military pension was a property division and not a maintenance award, and the award was a distribution of marital property that constituted a final order not subject to modification); Fairchild v. Fairchild, 747 S.W.2d 641 (Mo. Ct. App. 1988) (holding that nonvested and nonmatured military retired pay are marital property).

Montana

Divisible. MONT. CODE ANN. § 40-2-202 (2005). In re Kecskes, 683 P.2d 478 (Mont. 1984) (holding that military retirement benefit pay was analogous to any pension fund and constituted a marital asset subject to division upon dissolution of the marriage).

Nebraska

Divisible. NEB. REV. STAT. ANN. § 42-366(8) (2005). Longo v. Longo, 663 N.W.2d 604 (Neb. 2003) (holding that because subsection (8) of the Nebraska statute governing property division requires inclusion in the marital estate of vested and unvested retirement benefits, the lower court did not err in awarding wife a share of her former husband's future nondisability military pension entitlement, payable only if and when such benefits became payable to the husband). *See also* In re Marriage of Blair, 894 P.2d 958 (Mont. 1995) (holding that Special Separation Benefit payments are marital property subject to division upon divorce).

Nevada
(community property state)

Divisible. NEV. REV. STATE. ANN. § 125.150 (2005). Forrest v. Forrest, 668 P.2d 275 (Nev. 1983) (holding that all retirement benefits are divisible community property, whether vested or not, and whether matured or not); Gemma

v. Gemma, 778 P.2d 429 (Nev. 1989) (holding that a spouse can elect to receive his or her share of retirement benefits when the employee spouse becomes retirement eligible, whether or not retirement occurs at that point). *See also* Shelton v. Shelton, 78 P.3d 507 (Nev. 2003) (finding that where a property settlement agreement provided the spouse "half of husband's military retirement pay," and the husband subsequently waived retired pay to accept disability pay, contract principles prevented the husband from frustrating the parties' intent that the wife receive an amount equal to one-half of the retired pay).

New Hampshire

Divisible. N.H.REV. STAT. ANN. § 458:16-a (2005) (including vested and nonvested pensions as marital property subject to equitable division); Blanchard v. Blanchard, 578 A.2d 339 (N.H. 1990) (holding that military retired pay is divisible in New Hampshire divorce actions). *See also* Halliday v. Halliday, 593 A.2d 233 (N.H. 1991) (holding that a court may take into account the present value of a nonvested military pension as a factor in making a determination that disproportional distribution of property would be equitable, overcoming the statutory presumption that equal division of marital property is equitable).

New Jersey

Divisible. N.J. STAT. ANN. § 2A:34-23 (2005). Whitfield v. Whitfield, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (holding that nonvested military retired pay is marital property).

New Mexico
(community property state)

Divisible. N.M. STAT. ANN. § 40-3-12 (2005). Walentowski v. Walentowski, 672 P.2d 657 (N.M. 1983) (affirming that military pensions are divisible as community property); Scheidel v. Scheidel, 4 P.3d 670 (N.M. Ct. App. 2000) (holding that where a retired military member voluntarily waives retired pay in order to receive disability compensation, he cannot unilaterally frustrate the intent of a marital settlement agreement – which contained an indemnity provision – that guaranteed his former spouse one-half of the community property interest in his military retired pay). *See also* Ruggles v. Ruggles, 860 P.2d 182 (N.M. 1993) (holding that nonemployed spouses were entitled to an immediate distribution of the retirement benefits that had vested and matured from the employed spouses' employment – even though the spouse continued to work – unless an agreement had been entered into between the parties that the nonemployed spouse was to receive periodic payments).

New York

Divisible. N.Y. DOM. REL. § 236 (2005). Lydick v. Lydick, 516 N.Y.S.2d 326 (N.Y. App. Div. 1987) (recognizing a military pension as marital property); *Gannon v. Gannon*, 498 N.Y.S.2d 647 (N.Y. App. Div. 1986) (affirming the lower court's division of a military pension as marital property); Hoskins v. Skojec, 696 N.Y.S.2d 303 (N.Y. App. Div. 1999) (enforcing on contract principles a separation agreement guaranteeing the former spouse not less than one-half the service member's military retired pay, even after the retiree waived a portion of retired pay in order to receive disability compensation).

North Carolina

Divisible. N.C. GEN. STAT. § 50-20 (2005) (providing that "marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act"). Halstead v. Halstead, 596 S.E.2d 353 (N.C. Ct. App. 2004) (finding that when the payment of disability benefits to a retiree is the sole factor a court considers in providing an unequal distribution of a military retirement, and a judge treats the disability benefits by providing a dollar for dollar compensation to the non-military spouse, the judge improperly acknowledges that the non-military spouse has an ownership interest in both the military retirement and the disability payments); Williams v. Williams, 2004 N.C. App. LEXIS 2157 (N.C. Ct. App. 2004) (refusing to require a service member to reimburse his former spouse for the value of retired pay he waived in order to receive disability benefits, because the court order awarded the spouse 50% of the member's disposable retired pay after deduction of his disability benefit); Bishop v. Bishop, 440 S.E.2d 591 (N.C. Ct. App. 1994) (noting that North Carolina courts have employed two methods for dividing retirement benefits in equitable distribution: present value method (immediate offset method) and the fixed percentage method (deferred distribution method), and noting that courts have discretion to employ either method, so long as a a valuation of the retirement benefits must be made as of the date of separation); Id. (noting that military disability payments "must be classified as the retiree's separate property and, as such, treated as [merely] a distributional factor"); *see also* Atkinson v. Chandler, 504 S.E.2d 94 (N.C. Ct. App. 1998) (approving the trial court's utilization of the fixed percentage method for equitable distribution of plaintiff-wife's military retirement benefits that vested during the marriage, although the majority of the benefits were earned prior to the parties' marriage).

North Dakota

Divisible. N.D. CENT. CODE § 14-05-24 (2005); Bullock v. Bullock, 354 N.W. 2d 904 (N.D. 1984) (holding a nonvested miltary pension is divisible as a marital asset); Id. (adopting the "Bullock Formula" for division of military retired pay). *But see* Northrop v. Northrop, 622 N.W.2d 219 (N.D. 2001); Braun v. Braun, 532 N.W.2d 367 (N.D. 1995); Anderson v. Anderson, 504 N.W.2d 569

(N.D. 1993); Morales v. Morales, 402 N.W.2d 322 (N.D. 1987) (noting that the "Bullock Formula" is but one method of equitably dividing a military pension).

Ohio

Divisible. OHIO REV. CODE. ANN. § 3105.171 (2005). *See* Collins v. Collins, 746 N.E.2d 201 (Ohio Ct. App. 2000) (holding a service member in contempt for voluntarily leaving the Air Force prior to vesting his retired pay, in order to defeat his spouse's interest in a share of the retired pay); *see also* Siler v. Siler, 1994 Ohio App. LEXIS 3266 (Ohio Ct. App. 1994) (finding that Ohio courts may retain jurisdiction over an unvested military pension in order to divide it as marital property). *See also* Mackey v. Mackey, 768 N.E.2d 644 (Ohio 2002) (holding that Voluntary Separation Incentive payments are marital property and divisible upon divorce).

Oklahoma

Divisible. 43 OKL. STAT. § 121 (2004). Carpenter v. Carpenter, 657 P.2d 646 (Okla. 1983) (holding that there is no distincition, for purposes of division, between vested and non-vested pensions). *See also* Stokes v. Stokes, 738 P.2d 1346 (Okla. 1987) (holding that a military pension may be divided as jointly acquired property); Nelson v. Nelson, 83 P.3d 889 (Okla. Civ. App. 2003) (upholding a trial court's requirement for the service member-husband to indemnify the wife for any future waiver of his retirement benefits in favor of disability benefits); Kulskar v. Kulskar, 896 P.2d 1206 (Okla. Ct. App. 1995) (holding Special Separation Benefits to be divisible marital property).

Oregon

Divisible. OR. REV. STAT. § 107.105 (2005). In re Manners, 683 P.2d 134 (Or. App. 1984) (holding that military pensions are divisible); In re Richardson, 769 P.2d 179 (Or. 1989) (holding that nonvested pension plans are marital property). *See also* In re Landis, 2005 Or. App. LEXIS 661 (Or. Ct. App. 2005) (holding that a lump sum VA Disability payment – made to a service member who separated from the military prior to becoming retirement eligible – was divisible marital property).

Pennsylvania

Divisible. 23 PA. CONS. STAT. ANN. § 3501 (2005). Major v. Major, 518 A.2d 1267 (1986) (holding that nonvested military retired pay is marital property); *see also* Vaughn v. Vaughn, 536 A.2d 431 (Pa. Super. Ct. 1988) (awarding a former spouse 60% of the service member's retired pay in an equitable distribution of marital property); Hayward v. Hayward, 868 A.2d 554 (Pa. Super. Ct. 2005) (upholding a court's order that a service member, who

waived a portion of retired pay to receive disability compensation, pay his wife "50% of his military retirement benefit" because the order permitted the service member to reimburse her from sources other than his disability compensation); Horner v. Snyder, 747 A.2d 337 (Pa. 1997) (holding that a SSB lump sum payment that a service member received for voluntarily reverting to the Ready Reserves – four years after his divorce – was not marital property, and refusing to divide it as such). **Jurisdiction**. Wagner v. Wagner, 768 A.2d 1112 (Pa. 2001) (upholding the right of a nonresident, nondomiciliary service member to contest the state court's jurisdiction to divide military pay, although the member does not contest jurisdiction to resolve other property rights; secures counsel who enters a written appearance and represents him during discovery; and answers interrogatories).

Puerto Rico

Not divisible as marital property. Delucca v. Colon, 119 P.R. Dec. 720 (1987) (citation to original Spanish version) (holding that retirement pensions are separate property of the spouses).

Rhode Island

Divisible. R.I. GEN. LAWS § 15-5-16.1 (2005). Flora v. Flora, 603 A.2d 723 (R.I. 1992) (refusing jurisdiction over a former service member's pension where the member was not a state resident, even though he had been the petitioner in the original divorce action years earlier, which failed to address the division of retired pay).

South Carolina

Divisible. S.C. CODE ANN. § 20-7-472 (2005). Tiffault v. Tiffault, 401 S.E.2d 157 (S.C.1991) (holding that vested military retired pay is subject to equitable distribution); Eckhardt v. Eckhardt, 420 S.E.2d 825 (S.C. Ct. App. 1992) (holding that vested military retired pay is subject to division); Ball v. Ball, 430 S.E.2d 533 (S.C. Ct. App. 1993) (holding that nonvested military retiremd pay is subject to equitable division); *but see* Walker v. Walker, 368 S.E.2d 89 (S.C. Ct. App. 1988) (denying wife any portion to military retired pay because she lived with her parents during entire period of husband's naval service, made no contribution to the home, and the couple had no children). *See also* Fisher v. Fisher, 462 S.E.2d 303 (S.C. Ct. App. 1995) (holding that Voluntary Separation Incentive payments are analogous to early retirement and are marital property subject to division upon divorce).

South Dakota

Divisible. S.D. CODIFIED LAWS § 25-4-44 (2005). Gibson v. Gibson, 437 N.W.2d 170 (S.D. 1989) (holding that military retired pay is divisible); *see also*

Caughron v. Caughron, 418 N.W.2d 791 (S.D. 1988) (holding that the present cash value of a nonvested retirement benefit is marital property); Hisgen v. Hisgen, 554 N.W.2d 494 (S.D. 1996) (holding that, where the parties previously had entered an agreement regarding the division of military retired pay, the trial court properly required the service member to pay as part of a property division an amount equal to one-half his military retired pay entitlement, after he waived retirement benefits to receive a corresponding sum in veteran's disability payments).

Tennessee

Divisible. TENN. CODE ANN. § 36-4-121 (2005) (defining vested and non-vested pensions as marital property); Kendrick v. Kendrick, 902 S.W.2d 918 (Tenn. Ct. App. 1994) (holding that vested and nonvested military pension rights should be valued and distributed using the same principles and procedures used to value and distribute other public and private pension rights). *See also* Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993) (holding that a dissolution agreement providing that spousal support and alimony were in consideration of the wife waiving any right to the husband's military retired pay retained its contractual nature, and was not subject to modification by the court); Johnson v. Johnson, 37 S.W.3d 893 (Tenn. 2001) (holding that when a divorce decree divides military retired pay, the former spouse has a vested interest in her portion of the benefits as of the date of the decree, and the service member cannot unilaterally diminish that interest by waiving a portion of his military retired pay, without reimbursing the former spouse).

Texas
(community property state)

Divisible. TEX. FAM. CODE § 7.003 (2005). Morris v. Morris, 894 S.W.2d 859 (Tex. App. 1995) (holding that military retirement pay is a community property right, subject to division by the divorce court, and it is not alimony); Freeman v. Freeman, 133 S.W.3d 277 (Tex. App. 2003) (striking down a lower court's prohibition on a military member from from reducing his ex-spouse's share of his retirement by an election or conversion of his military pay to any other form of payment); *see also* Southern v. Glenn, 677 S.W.2d 576 (Tex. App. 1984) (refusing to assert jurisdiction over the retired military member's pension, where he was neither a resident nor domiciliary of Texas); *cf.* Reynolds v. Reynolds, 2 S.W.3d 429 (Tex. App. 1999) (denying a service member's - a Vermont resident's – objection to the division of his military retired pay in Texas, on the basis that the member filed a special appearance at the trial level and failed to object on jurisdictional grounds at the trial level to the division of his military retired pay). *See also* Marsh v. Wallace, 924 S.W.2d 423 (Tex. App. 1996) (holding that a service member's lump sum Special Separation Benefit received upon voluntary separation from active military duty was in the nature of

retirement benefits and subject to the couple's divorce decree, which awarded a portion of the service member's retirement benefits to wife).

Utah

Divisible. UTAH CODE ANN § 30-3-5 (2005). Greene v. Greene, 751 P.2d 827 (Utah Ct. App. 1988) (holding that marital property encompasses military retirement benefits accrued in whole or in part during the marriage).

Vermont

Probably divisible. VT. STAT. ANN. TIT. 15, § 751 (2005); Milligan v. Milligan, 613 A. 2d 1281 (Vt. 1992) (finding no barrier to dividing pensions as marital assets); McDermott v. McDermott, 552 A.2d 786 (Vt. 1988) (holding pension rights acquired by a party to a divorce during the course of the marriage consitute marital property and are subject to equitable distribution along with other assets). *See also* Hayden v. Hayden, 838 A.2d 59 (Vt. 2003) (stating that when a court apportions a pension pursuant to divorce, it must divide it using a coverture fraction that reflects the portion of the pension earned during the marriage) Id. (stating that assets must be valued as of the date of the final hearing, regardless of whether acquired before or after the marriage).

Virginia

Divisible. VA. CODE ANN. § 20-107.3 (2005) (presuming vested and non-vested pensions to be marital property if acquired during the marriage and before the last separation of the parties, if at least one party intends for the separation to be permanent); Sawyer v. Sawyer, 335 S.E.2d 277 (Va. Ct. App. 1985) (holding that military retired pay is subject to equitable division); *see also* Jordan v. Jordan, 2004 Va. App. LEXIS 285 (Va. Ct. App. 2004) (discussing the division of military retired pay where the service member's retirement was based on both active and Reserve service); Boedeker v. Larson, 2004 Va. App. LEXIS 596 (Va. Ct. App. 2004) (holding that a spouse may share in the husband's Career Status Bonus (CSB) because it was in the nature of retired pay, reduced the husband's military retired pay, and was a retired benefit as the term was used in the parties' separation agreement that was incorporated into the divorce decree); Monahan v. Monahan, 2001 Va. App. LEXIS 504 (Va. Ct. App. 2001) (refusing to divide a service member's military retired pay because the parties executed a postnuptial agreement in which the spouse agreed to accept survivor benefits); Hubble v. Hubble, 2002 Va. App. LEXIS 459 (Va. Ct. App. 2002) (holding that a property settlement agreement that provided the spouse one-half of the service member's monthly retired pay, the service member must indemnify her for the portion of disability compensation he later elected to receive). **Jurisdiction**. Blackson v. Blackson, 579 S.E.2d 704 (Va. Ct. App. 2003) (holding that, where a nonresident, nondomiciliary service member who was served with divorce papers in Virgina filed a cross-complaint which sought to apportion all property except his military

retired pay, he made a general appearance which permitted the Virginia court to exercise jurisdiction over his military retired pay).

Virgin Islands

Divisible. 16 V.I. CODE ANN. § 109 (2005). Fuentes v. Fuentes, 247 F.Supp. 2d 714 (VI 2003) (defining as marital property a husband's pension plan, which was earned up to the date of divorce, even though the parties had been separated for six years immediately preceding the divorce).

Washington
(community property state)

Divisible. WASH. REV. CODE § 26.09.080 (2005). Konzen v. Konzen, 693 P.2d 97 (Wash. 1985) (affirming the lower court's division of military pension as property). *See also* In re Kraft, 832 P.2d 871 (Wash. 1992) (holding that courts may consider military disability retired pay both as a source of income in awarding spousal or child support and as a general economic circumstance of the parties that justifies a disproportionate award of property to the civilian spouse – so long as the court neither divides or distributes the disability pay, nor values the disability pay and offsets it against other property); In re Jennings, 980 P.2d 1248 (Wash. 1999) (holding proper the modification of a divorce decree when the spouse's share of the service member's retired pay was reduced due to the service member's receipt of disability benefits); Perkins v. Perkins, 26 P.3d 989 (Wash. Ct. App. 2001) (holding that "a Washington dissolution court may not divide or distribute a veteran's disability pension, but it may consider a spouse's entitlement to an *undivided* veteran's disability pension as one factor relevant to a just and equitable distribution of property [and] an award of maintenance").

West Virginia

Divisible. W. VA. CODE ANN. § 48-5-610 (2005). Butcher v. Butcher, 357 S.E.2d 226 (W.Va. 1987) (holding that vested and nonvested military retired pay is marital property subject to equitable distribution); Smith v. Smith, 438 S.E.2d 582 (W.Va. 1993) (upholding a court's division of retired pay based on a coverture portion that did not take into account nearly six years of marital overlap, during which the spouse had moved out of the home with the intention of dissolving the marriage).

Wisconsin
(community property state)

Divisible. WIS. STAT. § 767.255 (2005). Cook v. Cook, 560 N.W.2d 246 (Wis. 1997) (holding that military retired pay must be considered as property for purposes of property division unless otherwise excluded by law, and may be considered as income to the recipient for purposes of calculating child support);

Weberg v. Weberg, 463 N.W.2d 382 (Wis. Ct. App. 1990) (holding that retired pay must be considered as property for purposes of property division unless otherwise excluded by law and may be considered as income to the recipient for purposes of calculating child support).

Wyoming

Divisible. WYO. STAT. ANN. § 20-2-114 (2005). Parker v. Parker, 750 P.2d 1313 (Wyo. 1988) (holding that a nonvested military retired pay is marital property and that the 10-year test is a prerequisite to direct payment of military retired pay as property, but not to division of military retired pay as property); WYO. STAT. ANN. § 20-2-114 (2005); *see also* Kelly v. Kelly, 78 P.3d 220 (Wyo. 2003) (calculating the coverture formula for dividing retired pay as if the service member retired as a Major, even though the member attained higher rank after the divorce decree was entered).

APPENDIX B

LEXSTAT 10 USC 1408

*** CURRENT THROUGH P.L. 109-12, APPROVED 5/5/05 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 71. COMPUTATION OF RETIRED PAY

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

10 USCS § 1408 (2005)

§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) Definitions. In this section:
(1) The term "court" means--
(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;
(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;
(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and
(D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act *[42 USCS § § 651* et seq.]), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.
(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act *(42 U.S.C. 653*(p)), which--
(A) is issued in accordance with the laws of the jurisdiction of that court;
(B) provides for--
(i) payment of child support (as defined in section 459(i)(2) of the Social Security Act *(42 U.S.C. 659*(i)(2)));
(ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act *(42 U.S.C. 659*(i)(3))); or
(iii) division of property (including a division of community property); and
(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.
(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.
(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title *[10 USCS § § 1201* et seq.], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title *[10 USCS § § 1431* et seq.] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 12731 of this title *[10 USCS § 12731]*.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) Effective service of process. For the purposes of this section--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by facsimile or electronic transmission or by mail;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Servicemembers Civil Relief Act *(50 U.S.C. App. 501* et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) Authority for court to treat retired pay as property of the member and spouse.

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) Payments by Secretary concerned to (or for benefit of) spouse or former spouse.

(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse (or for the benefit of such spouse or former spouse to a State disbursement unit established pursuant to section 454B of the Social Security Act *[42 USCS § 654b]* or other public payee designated by a State, in accordance with part D of title IV of the Social Security Act *[42 USCS § § 651* et seq.], as directed by court order, or as otherwise directed in accordance with such part D) in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a spouse or former spouse who, pursuant to section 408(a)(3) of the Social Security Act *(42 U.S.C. 608*(a)[(3)](4)), assigns to a State the rights of the spouse or former spouse to receive support, the Secretary concerned may make the child support payments referred to in the preceding sentence to that State in amounts consistent with that assignment of rights. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(6) In the case of a court order for which effective service is made on the Secretary concerned on or after August 22, 1996, and which provides for payments from the disposable retired pay of a member to satisfy the amount of child support set forth in the order, the authority provided in paragraph (1) to make payments from the disposable retired pay of a member to satisfy the amount of child support set forth in a court order shall apply to payment of any amount of child support arrearages set forth in that order as well as to amounts of child support that currently become due.

(7)

(A) The Secretary concerned may not accept service of a court order that is an out-of-State modification, or comply with the provisions of such a court order, unless the court issuing that order has jurisdiction in the manner specified in subsection (c)(4) over both the member and the spouse or former spouse involved.

(B) A court order shall be considered to be an out-of-State modification for purposes of this paragraph if the order--

(i) modifies a previous court order under this section upon which payments under this subsection are based; and

(ii) is issued by a court of a State other than the State of the court that issued the previous court order.

(e) Limitations.

(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3) (A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such courts orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act *(42 U.S.C. 659)* and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4) (A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act *(42 U.S.C. 659),* both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act *(42 U.S.C. 659)* with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act *(42 U.S.C. 662)* to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act *(42 U.S.C. 659),* provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act *(42 U.S.C. 659)* in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) Immunity of officers and employees of United States.

(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (i).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (i), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) Notice to member of service of court order on Secretary concerned. A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) Benefits for dependents who are victims of abuse by members losing right to retired pay.

(1) If, in the case of a member or former member of the armed forces referred to in paragraph (2)(A), a court order provides (in the manner applicable to a division of property) for the payment of an amount from the disposable retired pay of that member or former member (as certified under paragraph (4)) to an eligible spouse or former spouse of that member or former member, the Secretary concerned, beginning upon effective service of such court order, shall pay that amount in accordance with this subsection to such spouse or former spouse.

(2) A spouse or former spouse of a member or former member of the armed forces is eligible to receive payment under this subsection if--

(A) the member or former member, while a member of the armed forces and after becoming eligible to be retired from the armed forces on the basis of years of service, has eligibility to receive retired pay terminated as a result of misconduct while a member involving abuse of a spouse or dependent child (as defined in regulations prescribed by the Secretary of Defense or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Homeland Security); and

(B) the spouse or former spouse--

(i) was the victim of the abuse and was married to the member or former member at the time of that abuse; or

(ii) is a natural or adopted parent of a dependent child of the member or former member who was the victim of the abuse.

(3) The amount certified by the Secretary concerned under paragraph (4) with respect to a member or former member of the armed forces referred to in paragraph (2)(A) shall be deemed to be the disposable retired pay of that member or former member for the purposes of this subsection.

(4) Upon the request of a court or an eligible spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A) in connection with a civil action for the issuance of a court order in the case of that member or former member, the Secretary concerned shall determine and certify the amount of the monthly retired pay that the member or former member would have been entitled to receive as of the date of the certification--

(A) if the member or former member's eligibility for retired pay had not been terminated as described in paragraph (2)(A); and

(B) if, in the case of a member or former member not in receipt of retired pay immediately before that termination of eligibility for retired pay, the member or former member had retired on the effective date of that termination of eligibility.

(5) A court order under this subsection may provide that whenever retired pay is increased under section 1401a of this title *[10 USCS § 1401a]* (or any other provision of law), the amount payable under the court order to the spouse or former spouse of a member or former member described in paragraph (2)(A) shall be increased at the same time by the percent by which the retired pay of the member or former member would have been increased if the member or former member were receiving retired pay.

(6) Notwithstanding any other provision of law, a member or former member of the armed forces referred to in paragraph (2)(A) shall have no ownership interest in, or claim against, any amount payable under this section to a spouse or former spouse of the member or former member.

(7) (A) If a former spouse receiving payments under this subsection with respect to a member or former member referred to in paragraph (2)(A) marries again after such payments begin, the eligibility of the former spouse to receive further payments under this subsection shall terminate on the date of such marriage.

(B) A person's eligibility to receive payments under this subsection that is terminated under subparagraph (A) by reason of remarriage shall be resumed in the event of the termination of that marriage by the death of that person's spouse or by annulment or divorce. The resumption of payments shall begin as of the first day of the month in which that marriage is so terminated. The monthly amount of the payments shall be the amount that would have been paid if the continuity of the payments had not been interrupted by the marriage.

(8) Payments in accordance with this subsection shall be made out of funds in the Department of Defense Military Retirement Fund established by section 1461 of this title *[10 USCS § 1461]* or, in the case of the Coast Guard, out of funds appropriated to the Department of Homeland Security for payment of retired pay for the Coast Guard.

(9)

(A) A spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A), while receiving payments in accordance with this subsection, shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to receive any other benefit that a spouse or a former spouse of a retired member of the armed forces is entitled to receive on the basis of being a spouse or former spouse, as the case may be, of a retired member of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(B) A dependent child of a member or former member referred to in paragraph (2)(A) who was a member of the household of the member or former member at the time of the misconduct described in paragraph (2)(A) shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to have other benefits provided to dependents of retired members of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(C) If a spouse or former spouse or a dependent child eligible or entitled to receive a particular benefit under this paragraph is eligible or entitled to receive that benefit under another provision of law, the eligibility or entitlement of that spouse or former spouse or dependent child to such benefit shall be determined under such other provision of law instead of this paragraph.

(10) (A) For purposes of this subsection, in the case of a member of the armed forces who has been sentenced by a court-martial to receive a punishment that will terminate the eligibility of that member to receive retired pay if executed, the eligibility of that member to receive retired pay may, as determined by the Secretary concerned, be considered terminated effective upon the approval of that sentence by the person acting under section 860(c) of this title *[10 USCS § 860*(c)] (article 60(c) of the Uniform Code of Military Justice).

(B) If each form of the punishment that would result in the termination of eligibility to receive retired pay is later remitted, set aside, or mitigated to a punishment that does not result in the termination of that eligibility, a payment of benefits to the eligible recipient under this subsection that is based on the punishment so vacated, set aside, or mitigated shall cease. The cessation of payments shall be effective as of the first day of the first month following the month in which the Secretary concerned notifies the recipient of such benefits in writing that payment of the benefits will cease. The recipient may not be required to repay the benefits received before that effective date (except to the extent necessary to recoup any amount that was erroneous when paid).

(11) In this subsection, the term "dependent child", with respect to a member or former member of the armed forces referred to in paragraph (2)(A), means an unmarried legitimate child, including an adopted child or a stepchild of the member or former member, who--

(A) is under 18 years of age;

(B) is incapable of self-support because of a mental or physical incapacity that existed before becoming 18 years of age and is dependent on the member or former member for over one-half of the child's support; or

(C) if enrolled in a full-time course of study in an institution of higher education recognized by the Secretary of Defense for the purposes of this subparagraph, is under 23 years of age and is dependent on the member or former member for over one-half of the child's support.

(i) Certification date. It is not necessary that the date of a certification of the authenticity or completeness of a copy of a court order for child support received by the Secretary concerned for the purposes of this section be recent in relation to the date of receipt by the Secretary.

(j) Regulations. The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(k) Relationship to other laws. In any case involving an order providing for payment of child support (as defined in section 459(i)(2) of the Social Security Act *[42 USCS § 659*(i)(2)]) by a member who has never been married to the other parent of the child, the provisions of this section shall not apply, and the case shall be subject to the provisions of section 459 of such Act *[42 USCS § 659]*.

HISTORY:

(Added Sept. 8, 1982, P.L. 97-252, Title X, § 1002(a), 96 Stat. 730; Oct. 19, 1984, P.L. 98-525, Title VI, Part E, § 643(a)-(d), 98 Stat. 2547; Nov. 14, 1986, P.L. 99-661, Div A, Title VI, Part D, § 644(a), 100 Stat. 3887; April 21, 1987,

P.L. 100-26, § § 3(3) in part, 7(h)(1) in part, 101 Stat. 273, 282; Nov. 29, 1989, P.L. 101-189, Div A, Title VI, Part F, § 653(a)(5), Title XVI, Part C, § 1622(e)(6), 103 Stat. 1462, 1605; Nov. 5, 1990, P.L. 101-510, Div A, Title V, Part E, § 555(a)-(d), (f), (g), 104 Stat. 1569, 1570; Dec. 5, 1991, P.L. 102-190, Div A, Title X, Part E, § 1061(a)(7), 105 Stat. 1472; Oct. 23, 1992, P.L. 102-484, Div A, Title VI, Subtitle E, § 653(a), 106 Stat. 2426; Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle E, § 555(a), (b), Title XI, Subtitle H, § 1182(a)(2), 107 Stat. 1666, 1771; Feb. 10, 1996, P.L. 104-106, Div A, Title XV, § 1501(c)(16), 110 Stat. 499; Aug. 22, 1996, P.L. 104-193, Title III, Subtitle G, § § 362(c), 363(c)(1)-(3), 110 Stat. 2246, 2249; Sept. 23, 1996, P.L. 104-201, Div A, Title VI, Subtitle D, § 636, 110 Stat. 2579; Nov. 18, 1997, P.L. 105-85, Div A, Title X, Subtitle G, § 1073(a)(24), (25), 111 Stat. 1901.)

(As amended Dec. 28, 2001, P.L. 107-107, Div A, Title X, Subtitle E, § 1048(c)(9), 115 Stat. 1226; Nov. 25, 2002, P.L. 107-296, Title XVII, § 1704(b)(1), 116 Stat. 2314; Dec. 19, 2003, P.L. 108-189, § 2(c), 117 Stat. 2866.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed paragraph designator "(3)" has been inserted in subsec. (d)(1) in the reference to *42 U.S.C. 608*(a)(4) as the paragraph probably intended by Congress.

Effective date of section:

This section became effective on February 1, 1983, pursuant to § 1006 of Act Sept. 8, 1982, P.L. 97-252, which appears as a note to this section.

Amendments:

1984. Act Oct. 19, 1984, in subsec. (a)(2)(C), inserted "in the case of a division of property,"; in subsec. (b)(1)(C), inserted ", if possible,"; in subsec. (d), in para. (1), substituted "After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order." for "After effective service on the secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order.", in para. (5), substituted "child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part" for "disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part"; and in subsec. (e), in para. (2), substituted ", the disposable retired or retainer pay of the member" for "from the disposable retired or retainer pay of a member, such pay", in para. (3)(A), in the introductory matter, deleted "from the disposable retired or retainer pay" following "former spouse", in cl. (i), substituted "from the member's disposable retired or retainer pay the least amount" for "the least amount of disposable retired or retainer pay", in cl. (ii)(I), deleted "of retired or retainer pay" following "largest amount", in para. (4)(A), deleted "the retired or retainer pay of" following "month from", and substituted "satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be" for "such court orders and legal process shall be satisfied", and in para. (5), deleted "of disposable retired or retainer pay" in two places following "payment of an amount", and substituted "disposable retired or retainer pay" for "such pay" following "which exceeds the amount of".

1986. Act Nov. 14, 1986, § 644(a) (applicable as provided by § 644(b) of such Act, which appears as a note to this section), as amended by Act April 21, 1987, § 3(3), (applicable as if included in Act Nov. 14, 1986 when enacted on 11/14/86, as provided by § 12(a) of Act April 21, 1987, which appears as *10 USCS § 776* note), in subsec. (a), in para. (4), in the introductory matter, deleted "(other than the retired pay of a member retired for disability under chapter 61 of this title)" following "member is entitled", and substituted subpara. (E) for one which read: "are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or".

1987. Act April 21, 1987, in subsec. (a)(4)(D), substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

Such Act further made a technical correction to the directory language of § 644(a) of Act Nov. 14, 1986, P.L. 99-661, which did not affect the text of this section.

1989. Act Nov. 29, 1989, in subsec. (a), in para. (4)(D), deleted "*(26 U.S.C. 3402*(i))" following "1986", and, in para. (5), inserted "entitled to retired pay under section 1331 of this title".

Such Act further, in subsec. (a), in the introductory matter of paras. (1)-(4), and in paras. (5) and (6), inserted "The term" and revised the first word in quotation marks in each para. so that the initial letter of such word is lower case.

1990. Act Nov. 5, 1990 deleted "or retainer" following "retired", wherever appearing, and added the subsection headings in subsecs. (a)-(h).

Such Act further (applicable as provided by § 555(e)(1) of such Act, which appears as a note to this section), in subsec. (c)(1), added the sentence beginning "A court may not treat retired pay as property . . .".

Such Act further (applicable as provided by § 555(e)(2) of such Act, which appears as a note to this section), in subsec. (a)(4), in subpara. (A), substituted "for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;" for the semicolon, substituted subpara. (B) for one which read: "(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;", redesignated former subparas. (E) and (F) as subparas. (C) and (D), and deleted former subparas. (C) and (D), which read:

"(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

"(D) are withheld under *section 3402(i) of the Internal Revenue Code* of 1954 *(26 U.S.C. 3402*(i)) if such member presents evidence of a tax obligation which supports such withholding;";

and added para. (7); in subsec. (c)(2), added the sentence beginning "Payments by the Secretary concerned under subsection (d) . . ."; and, in subsec. (e), in para. (1), substituted "payable under all court orders pursuant to subsection (c)" for "payable under subsection (d)", and, in para. (4)(B), substituted "the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act *(42 U.S.C. 662)* to be remuneration for employment that is payable by the United States" for "the disposable retired or retainer pay payable to such member".

1991. Act Dec. 5, 1991 substituted the section heading for one which read: "§ 1408. Payment of retired pay in compliance with court orders".

1992. Act Oct. 23, 1992 (applicable as provided by § 653(c) of such Act, which appears as a note to this section) redesignated subsec. (h) as subsec. (i); and added new subsec. (h).

1993. Act Nov. 30, 1993 (applicable as provided by § 1182(h) of such Act, which appears as *10 USCS § 101* note), in subsecs. (b), in para. (1)(A), and in subsec. (f), in paras. (1) and (2), substituted "subsection (i)" for "subsection (h)"; and, in subsec. (h)(4)(B), inserted "of" after "of that termination".

Such Act further (effective as of 10/23/92 and applicable as if the provisions of subsec. (h)(10) added by such Act were included in the amendment made by § 653(a)(2) of Act Oct. 23, 1992, P.L. 102-484, as provided by § 555(c) of the 1993 Act, which appears as a note to this section), in subsec. (h), in para. (2)(A), inserted "or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Transportation", in para. (8), inserted "or, in the case of the Coast Guard, out of funds appropriated to the Department of Transportation for payment of retired pay for the Coast Guard", redesignated para. (10) as para. (11), and added a new para. (10).

1996. Act Feb. 10, 1996 (effective 12/1/94 and as if included as amendments made by Title XVI of Act Oct. 5, 1994 as originally enacted, as provided by § 1501(c) of such Act), in subsec. (a)(5), substituted "section 12731" for "section 1331".

Act Aug. 22, 1996 (effective 6 months after enactment, as provided by § 362(d) of such Act, which appears as *42 USCS § 659* note, but subject to § 395(b) and (c) of such Act, which appears as *42 USCS § 654* note), in subsec. (a), in para. (1), in subpara. (B), deleted "and" after the concluding semicolon, in subpara. (C), substituted "; and" for the concluding period, and added subpara. (D), in para. (2), in the introductory matter, inserted "or a support order, as defined in section 453(p) of the Social Security Act *(42 U.S.C. 653*(p)),", in subpara. (B), in cl. (i), substituted "(as defined in section 459(i)(2) of the Social Security Act *(42 U.S.C. 659*(i)(2)))" for "(as defined in section 462(b) of the Social Security Act *(42 U.S.C. 662*(b)))" and, in cl. (ii), substituted "(as defined in section 459(i)(3) of the Social Security Act *(42 U.S.C. 659*(i)(3)))" for "(as defined in section 462(c) of the Social Security Act *(42 U.S.C. 662*(c)))"; in subsec. (d), in the heading, inserted "(or for benefit of)" and, in para. (1), inserted "(or for the benefit of such spouse or former spouse to a State disbursement unit established pursuant to section 454B of the Social Security Act or other

public payee designated by a State, in accordance with part D of title IV of the Social Security Act, as directed by court order, or as otherwise directed in accordance with such part D)"; and added subsec. (j).

Such Act further (effective as provided by § 395(a)-(c) of such Act, which appears as *42 USCS § 654* note), in subsec. (d), in para. (1), inserted the sentence beginning "In the case of a spouse or former spouse . . .", and added para. (6); redesignated subsecs. (i) and (j) as subsecs. (j) and (k), and added subsec. (i).

Act Sept. 23, 1996, in subsec. (b)(1)(A), substituted "facsimile or electronic transmission or by mail" for "certified or registered mail, return receipt requested"; and, in subsec. (d), added para. [(7)] (6).

1997. Act Nov. 18, 1997 (applicable as provided by § 1073(i) of such Act, which appears as *10 USCS § 101* note), in subsec. (d), made technical corrections which required no change in text, redesignated para. [(7)] (6) as para. (7) and, in para. (7) as redesignated, in subpara. (A), substituted "out-of-State" for "out-of State"; and, in subsec. (g), made technical corrections which required no change in text.

2001. Act Dec. 28, 2001, in subsec. (d)(6), substituted "August 22, 1996," for "the date of the enactment of this paragraph,".

2002. Act Nov. 25, 2002 (effective on 3/1/2003 pursuant to § 1704(g) of such Act, which appears as *10 USCS § 101* note), in subsec. (h), in paras. (2) and (8), substituted "of Homeland Security" for "of Transportation".

2003. Act Dec. 19, 2003, in subsec. (b)(1)(D), substituted "Servicemembers Civil Relief Act" for "Soldiers' and Sailors' Civil Relief Act of 1940".

Other provisions:

Repeal of provision for commissary and exchange privileges. Act Sept. 8, 1982, P.L. 97-252, Title X, § 1005, 96 Stat. 737, which formerly appeared as a note to this section, and which was effective on the first day of the first month which began more than 120 days after enactment on Sept. 8, 1982, as provided by § 1006(a) of such Act, which appears as *10 USCS § 1408* note, was repealed by Act July 19, 1988, P.L. 100-370, § 1(c)(5), 102 Stat. 841. It provided for rules and regulations to be prescribed for commissary and post exchange privileges for surviving spouses of retired uniformed services members. For similar provisions see *10 USCS § 1062*.

Effective dates of Sept. 8, 1982 amendments; transitional provisions; applicability of subsec. (d). Act Sept 8, 1982, P.L. 97-252, Title X, § 1006, 96 Stat. 737; Sept. 24, 1983, P.L. 98-94, Title IX, Part D, § 941(c)(4), 97 Stat. 654; Oct. 19, 1984, P.L. 98-525, Title VI, Part E, § 645(b), 98 Stat. 2549, effective Jan. 1, 1985, as provided by § 645(d) in part of such Act, which appears as *10 USCS § 1072* note, provided:

"(a) The amendments made by this title [enacting this section, among other things; for full classification, consult USCS Tables volumes] shall take effect on the first day of the first month which begins more than one hundred and twenty days after the date of the enactment of this title.

"(b) Subsection (d) of section 1408 of title 10, United States Code, as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

"(c) The amendments made by section 1003 of this title [amending *10 USCS § § 1447,* 1448 and 1450] shall apply to persons who become eligible to participate in the Survivor Benefit Plan provided for in subchapter II of chapter 73 of title 10, United States Code *[10 USCS § § 1447* et seq.], before, on, or after the effective date of such amendments [subsec. (a) of this note].

"(d) The amendments made by section 1004 of this title [amending *10 USCS § § 1072,* 1076 and 1086] and the provisions of section 1005 of this title [note to this section] shall apply in the case of any former spouse of a member or former member of the uniformed services whether the final decree of divorce, dissolution, or annulment of the marriage of the former spouse and such member or former member is dated before, on, or after February 1, 1983.

"(e) For the purposes of this section--

"(1) the term 'court order' has the same meaning as provided in section 1408(a)(2) of title 10, United States Code (as added by section 1002 of this title);

"(2) the term 'former spouse' has the same meaning as provided in section 1408(a)(6) of such title (as added by section 1002 of this title); and

"(3) the term 'uniformed services' has the same meaning as provided in section 1072 of title 10, United States Code.".

Applicability of Oct. 19, 1984 amendments. Act Oct. 19, 1984, P.L. 98-525, Title VI, Part E, § 643(e), 98 Stat. 2548, provides: "The amendments made by this section [amending this section] shall apply with respect to court orders

for which effective service (as described in section 1408(b)(1) of title 10, United States Code [subsec. (b)(1) of this section], as amended by subsection (b) of this section) is made on or after the date of the enactment of this Act.".

Applicability of 1986 amendments. Act Nov. 14, 1986, P.L. 99-661, Div A, Title VI, Part D, § 644(b), 100 Stat. 3887, provides: "The amendments made by subsection (a) shall apply with respect to court orders issued after the date of the enactment of this Act.".

Applicability of 1990 amendments. Act Nov. 5, 1990, P.L. 101-510, Div A, Title V, Part E, § 555(e), 104 Stat. 1570; Dec. 5, 1991, P.L. 102-190, Div A, Title X, Part E, § 1062(a)(1), 105 Stat. 1475, provides:

"(1) The amendment made by subsection (a) [amending subsec. (c)(1) of this section] shall apply with respect to judgments issued before, on, or after the date of the enactment of this Act. In the case of a judgment issued before the date of the enactment of this Act, such amendment shall not relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act.

"(2) The amendments made by subsections (b), (c), and (d) [amending subsecs. (a), (c)(2) and (e) of this section] apply with only respect to divorces, dissolutions of marriage, annulments, and legal separations that become effective after the end of the 90-day period beginning on the date of the enactment of this Act.".

Applicability of subsec. (h). Act Oct. 23, 1992, P.L. 102-484, Div A, Title VI, Subtitle E, § 653(c), 106 Stat. 2429, provides: "No payments under subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a)), shall accrue for periods before the date of the enactment of this Act.".

Study required. Act Oct. 23, 1992, P.L. 102-484, Div A, Title VI, Subtitle E, § 653(e), 106 Stat. 2429, provides:

"(1) The Secretary of Defense shall conduct a study in order to estimate--

"(A) the number of persons who will become eligible to receive payments under subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a)), during each of fiscal years 1993 through 2000; and

"(B) for each of fiscal years 1993 through 2000, the number of members of the Armed Forces who, after having completed at least one, and less than 20, years of service in that fiscal year, will be approved in that fiscal year for separation from the Armed Forces as a result of having abused a spouse or dependent child.

"(2) The study shall include a thorough analysis of--

"(A) the effects, if any, of appeals and requests for clemency in the case of court-martial convictions on the entitlement to payments in accordance with subsection (h) of section 1408 of title 10, United States Code (as added by subsection (a));

"(B) the socio-economic effects on the dependents of members of the Armed Forces described in subsection (h)(2) of such section that result from terminations of the eligibility of such members to receive retired or retainer pay; and

"(C) the effects of separations of such members from the Armed Forces on the mission readiness of the units of assignment of such members when separated and on the Armed Forces in general.

"(3) Not later than one year after the date of the enactment of this Act, the Secretary shall submit to Congress a report on the results of the study.".

Effective date of 1993 amendment. Act Nov. 30, 1993, P.L. 103-160, Div A, Title V, Subtitle E, § 555(c), 107 Stat. 1666, provides: "The amendments made by this section shall take effect as of October 23, 1992, and shall apply as the provisions of the paragraph (10) of section 1408(h) of title 10, United States Code, added by such subsection were included in the amendment made by section 653(a)(2) of Public Law 102-484 (106 Stat. 2426).".

Termination of Trust Territory of the Pacific Islands. For termination of Trust Territory of the Pacific Islands, see note preceding *48 USCS § § 1681*.

Payroll deductions. Act Aug. 22, 1996, P.L. 104-193, Title III, Subtitle G, § 363(c)(4), 110 Stat. 2249, provides: "The Secretary of Defense shall begin payroll deductions within 30 days after receiving notice of withholding, or for the first pay period that begins after such 30-day period.".

Review of Federal former spouse protection laws. Act Nov. 18, 1997, P.L. 105-85, Div A, Title VI, Subtitle D, § 643, 111 Stat. 1799, provides:

"(a) Review required. The Secretary of Defense shall carry out a comprehensive review (including a comparison) of--

"(1) the protections, benefits, and treatment afforded under Federal law to members and former members of the uniformed services and former spouses of such persons; and

"(2) the protections, benefits, and treatment afforded under Federal law to employees and former employees of the Government and former spouses of such persons.

"(b) Military personnel matters to be reviewed. In the case of members and former members of the uniformed services and former spouses of such persons, the review under subsection (a) shall include the following:

"(1) All provisions of law (principally those originally enacted in the Uniformed Services Former Spouses' Protection Act (title X of Public Law 97-252 [for full classification, consult USCS Tables volumes])) that--

"(A) establish, provide for the enforcement of, or otherwise protect interests of members and former members of the uniformed services and former spouses of such persons in retired or retainer pay of members and former members; or

"(B) provide other benefits for members and former members of the uniformed services and former spouses of such persons.

"(2) The experience of the uniformed services in administering those provisions of law, including the adequacy and effectiveness of the legal assistance provided by the Department of Defense in matters related to the Uniformed Services Former Spouses' Protection Act [for full classification, consult USCS Tables volumes].

"(3) The experience of members and former members of the uniformed services and former spouses of such persons in the administration of those provisions of law.

"(4) The experience of members and former members of the uniformed services and former spouses of such persons in the application of those provisions of law by State courts.

"(5) The history of State statutes and State court interpretations of the Uniformed Services Former Spouses' Protection Act [for full classification, consult USCS Tables volumes] and other provisions of Federal law described in paragraph (1)(A) and the extent to which those interpretations follow those laws.

"(c) Civilian personnel matters to be reviewed. In the case of former spouses of employees and former employees of the Government, the review under subsection (a) shall include the following:

"(1) All provisions of law that--

"(A) establish, provide for the enforcement of, or otherwise protect interests of employees and former employees of the Government and former spouses of such persons in annuities of employees and former employees under Federal employees' retirement systems; or

"(B) provide other benefits for employees and former employees of the Government and former spouses of such persons.

"(2) The experience of the Office of Personnel Management and other agencies of the Government in administering those provisions of law.

"(3) The experience of employees and former employees of the Government and former spouses of such persons in the administration of those provisions of law.

"(4) The experience of employees and former employees of the Government and former spouses of such persons in the application of those provisions of law by State courts.

"(d) Sampling authorized. The Secretary may use sampling in carrying out the review under this section.

"(e) Report. Not later than September 30, 1999, the Secretary shall submit to the Committee on Armed Services of the Senate and the Committee on National Security of the House of Representatives a report on the results of the review under subsection (a). The report shall include any recommendations for legislation that the Secretary considers appropriate.".

NOTES:

Related Statutes & Rules:

This section is referred to in *10 USCS § § 1059*, 1078a, 1447, 1461, 1463; *5 USCS § § 8332*, 8411.

Research Guide:

Federal Procedure:

3 Fed Proc L Ed, Armed Forces, Civil Disturbances, and National Defense § 5:58.

Am Jur:

9E Am Jur 2d, Bankruptcy § 3370.
15A Am Jur 2d, Community Property § 52.
24 Am Jur 2d, Divorce and Separation § § 217, 539, 540, 543, 597, 599.
24A Am Jur 2d, Divorce and Separation § 782.
31 Am Jur 2d, Exemptions § 46.

Annotations:

Divorce: excessiveness or adequacy of combined property division and spousal support awards. *55 ALR4th 14.*
Divorce: excessiveness or adequacy of trial court's property award. *56 ALR4th 12.*

Law Review Articles:

Bond; Landever. The Uniformed Services Former Spouses' Protection Act: a practitioner's guide, 10 Am J Fam L 145, Fall 1996.

Polchek. Recent property settlement issues for legal assistance attorneys. *1992 Army Law 4*, December 1992.

Cardos; Perry; Sinnott. The Uniformed Services Former Spouses Protection Act. 33 Federal Bar News and Journal 33, January 1986.

Reppy. The 1990 U.S.F.S.P.A. amendment: no bar to recognition of tenancy in common interests created by pre-McCarty *[McCarty v. McCarty, 101 S. Ct. 2728 (1981)]* divorces that fail to divide military retirement benefits. *29 Idaho L Rev 941, 1992*/1993.

Guilford. Exploring the labyrinth: current issues under the Uniformed Services Former Spouses' Protection Act. *132 Mil L Rev 43*, Spring 1991.

Gilbert. A family law practitioner's road map to the Uniformed Services Former Spouses Protection Act. *32 Santa Clara L Rev 61, 1992.*

Manashil. The Uniformed Services Former Spouses' Protection Act of 1982: Problems Resulting From its Application. *20 U S F L Rev 83*, Fall 1985.

Interpretive Notes and Decisions:

I. IN GENERAL 1. Generally 2. Purpose 3. Constitutional issues 4. Construction 5. Application 6. Relationship to state law 7. Jurisdiction 8. Spousal notification requirement 9. Pay subject to apportionment and direct payment 10. -- Pay excluded 11. 10-year marriage requirement 12. Miscellaneous

II. RETROACTIVITY 13. Generally 14. Relationship to state law 15. Validity of prior decisions/decrees 16. -- Res judicata 17. Estoppel

I. IN GENERAL 1. Generally

District court lacked jurisdiction, under Rooker-Feldman doctrine, over naval retiree's claim that Uniformed Services Former Spouses' Protection Act *(10 USCS § 1408)* amounted to unconstitutional taking of his property by state court's award of plaintiff's retirement pay to his ex-spouse as alimony pursuant to Act; plaintiff's constitutional claim was inextricably intertwined with whether state court could award plaintiff's naval retirement pay to his ex-wife and federal district court holding in plaintiff's favor would effectively nullify state court's judgment. *Powell v Powell (1996, CA11 Ga) 80 F3d 464, 9 FLW Fed C 1015.*

10 USCS § 1408 does not require division of military retired pay; it merely provides mechanism to enforce valid state court order directing such division for retired pay received after 6/25/81. DOHA Case No. 99122104 (3/16/00).

2. Purpose

Federal Uniform Services Former Spouses' Protection Act *(10 USCS § 1408)* was not intended to expand subject-matter jurisdiction of federal courts, but rather merely empowered court that otherwise had jurisdiction to divide marital property. *Steel v United States (1987, CA9 Cal) 813 F2d 1545.*

Uniformed Services Former Spouses' Protection Act was intended to obliterate adverse effect of U. S. Supreme Court decision which held that federal law precludes state court from dividing military non-disability retirement pay pursuant to state law. *Allen v Allen (1986, La App 3d Cir) 484 So 2d 269*, cert den (1986, La) *488 So 2d 199* and cert den *(1986) 479 US 850, 93 L Ed 2d 114, 107 S Ct 178.*

Effect of *10 USCS § 1408* is to allow state court to apply state community property law regarding divisibility of multipensions as it existed on June 26, 1981 to all cases pending in trial court and on appeal. *Steczo v Steczo (1983, App) 135 Ariz 199, 659 P2d 1344.*

Purpose of *10 USCS § 1408*(c)(1) was to overrule in its entirety United States Supreme Court decision in McCarty v McCarty, which held that under community property law military retirement pensions could not be divided between divorcing spouses. *In re Marriage of Buikema (1983, 4th Dist) 139 Cal App 3d 689, 188 Cal Rptr 856.*

Purpose of *10 USCS § 1408*(c)(1) is to reverse effect of *McCarty v McCarty (1981) 453 US 210, 69 L Ed 2d 589, 101 S Ct 2728, 2 EBC 1502*, which holds that nondisability military retirement benefits are not divisable as community property by state courts; apparent purpose of § 1408(c)(1) reference to June 25, 1981, is to place courts in same

position they were in on June 26, 1981, date of McCarty decision. *Neese v Neese (1984, Tex App Eastland) 669 SW2d 388.*

10 USCS § 1408 effectively nullified Supreme Court's holding in McCarty Decision. *In re Marriage of Smith (1983) 100 Wash 2d 319, 669 P2d 448.*

3. Constitutional issues

Passage of Uniform Services Former Spouse's Protection Act *(10 USCS § 1408*(c)(1) (USFSPA) did not result in taking of former military personnel's property (portion of their military retired pay) in violation of Fifth Amendment to Constitution as Act merely removed federal pre-emption which precluded state courts from considering military retirement pay as marital property subject to division as part of divorce decree and there was no intent on government's part to take claimants' property; even assuming arguendo that property was taken from claimants, it was taken not for public use but for private use of claimants' ex-spouses. *Fern v United States (1988) 15 Cl Ct 580,* affd (1990, CA) *908 F2d 955, 12 EBC 1936.*

Uniform Services Former Spouses Protection Act, which authorizes state courts to treat disposable retire pay as property solely of retiree or as property of retiree and spouse, does not effect taking of property requiring service member whose pay has been apportioned in community property states pursuant to divorce decree to be reimbursed by U.S. Government. *Fern v United States (1990, CA) 908 F2d 955, 12 EBC 1936.*

4. Construction

Statute does not grant state courts power to treat as property divisible upon divorce military retirement pay that retiree had waived pursuant to *38 USCS § 3105* in order to receive veterans' disability benefits; it cannot be read merely as garnishment statute designed not to pre-empt authority of state courts but solely to set out circumstances under which federal government will make direct payments of retirement pay to retiree's former spouse pursuant to court order because statute provides that court may treat disposable retired or retainer pay but not total retired pay as property of retiree and spouse, and term "disposable retired or retainer pay" is defined to exclude military retirement pay waived in order to receive veterans' disability benefits, and other subsections of statute impose substantive limits on state courts' power to divide military retirement pay. *Mansell v Mansell (1989) 490 US 581, 104 L Ed 2d 675, 109 S Ct 2023, 10 EBC 2521.*

Direct payment provision does not apply to amendment or modification of divorce decree that does not divide or address military retired pay and that became final before June 26, 1981. *Carmody v Secretary of Navy (1989, CA4 Va) 886 F2d 678.*

Action by former spouse of retired military officer for partition of officer's retirement pay is dismissed, where parties' marriage was dissolved by German court, because Uniformed Services Former Spouses Protection Act only allows courts to apply state divorce laws to military pensions, but does not expressly or impliedly grant court power to adjudicate any cause nor does it provide substantive rules for treatment of military pensions in divorce or domestic relations contexts, so court lacks jurisdiction to adjudicate plaintiff's request to partition military retirement pay. *Brown v Harms (1994, ED Va) 863 F Supp 278.*

Uniform Services Former Spouse's Protection Act, *10 USCS § 1408,* authorizes court with jurisdiction over matters ancillary to divorce to order payment of portion of military pension directly to estranged spouse of military member upon their divorce. *Nichols v Nichols (In re Nichols) (2004, BC MD Pa) 305 BR 418.*

Under California law, Uniform Services Former Spouse's Protection Act grants authority for state court to determine wife's community property interest in former husband's military retirement pension in action subsequent to divorce decree, since there was no final adjudication of that interest at time divorce decree became final in 1970. *Bryant v Sullivan (1985, App) 148 Ariz 426, 715 P2d 282.*

Former serviceman's wife seeking division of military retirement pay of husband in accord with § 1408 has community interest in such pay where military retirement pay was classified as community property under state law at time of divorce and after effective date of § 1408 which permits but does not require states to classify military retirement pay as marital property. *Savoie v Savoie (1986, La App 5th Cir) 482 So 2d 23.*

Rights to military retirement benefits accrue continuously throughout husband's period of service, and wife's entitlement to those benefits should be determined under law of state in which parties were domiciled for respective

periods during which military retirement benefits accrued. *Allen v Allen (1986, La App 3d Cir) 484 So 2d 269*, cert den (1986, La) *488 So 2d 199* and cert den *(1986) 479 US 850, 93 L Ed 2d 114, 107 S Ct 178.*

Modification of decree of dissolution ordering Secretary of Air Force to directly pay retired serviceman's former wife 50 percent of military retirement pay is appropriate equitable response to circumstances and is permitted under § 1408 where serviceman failed to pay wife any support after dissolution. *In re Marriage of Hadley (1986) 77 Or App 295, 713 P2d 39.*

Order modifying decree of dissolution which required retired serviceman and former wife to certify to Secretary of Air Force as to validity of modification decree of dissolution should be eliminated since there are no conflicting court orders in case and § 1408 requiring certification is applicable only when Secretary of Air Force is served with conflicting court orders. *In re Marriage of Hadley (1986) 77 Or App 295, 713 P2d 39.*

Section 1048(c)(1) does not mandate that military retirement pension be shared by recipient and recipient's former spouse; it only authorizes division, and leaves to state courts decision regarding whether any allocation is to be made. *In re Marriage of Habermehl (1985, 5th Dist) 135 Ill App 3d 105, 89 Ill Dec 939, 481 NE2d 782.*

Section 1408 does not require reinstatement of earlier judgments or division of military pay but only permits reopening of final judgments for reconsideration in light of its provisions. *In re Marriage of Giroux (1985) 41 Wash App 315, 704 P2d 160.*

10 USCS § 1408 does not signify congressional intent to pre-empt state law and disallow disposition of military disability retirement paid by state courts in accordance with state law, in situation where (1) retirement occurred before dissolution of marriage and at time when military spouse was eligible for both longevity and disability retirement and could have elected to receive longevity retirement benefits under both federal and state law, and (2) nonmilitary spouse would have been entitled to a community property share of longevity retirement pension for which husband was eligible had he elected to receive longevity retirement benefits; in such situation, military spouse cannot destroy other spouse's federal statutory right and concomitant state law right by simply accepting disability retirement and opting not to elect longevity retirement. *In re Marriage of Mastropaolo (1985, 4th Dist) 166 Cal App 3d 953, 213 Cal Rptr 26*, cert den *(1986) 475 US 1011, 89 L Ed 2d 301, 106 S Ct 1185.*

5. Application

Division of value by state Family Court of right of United States Public Health veterinarian to retire and receive benefits does not violate *10 USCS § 1408. Wallace v Wallace (1984, App) 5 Hawaii App 55, 677 P2d 966.*

Trial court did not err in awarding portion of husband's military pension to wife in legal separation proceeding in view of enactment of *10 USCS § 1408. Coates v Coates (1983, Mo App) 650 SW2d 307.*

Husband's military nondisability retirement benefits could be divided in divorce action where trial court still had control over divorce judgment. *Voronin v Voronin (1983, Tex App Austin) 662 SW2d 102.*

Trial court erred in not considering husband's military retirement benefits at time of division of community estate between divorcing husband and wife, notwithstanding at time of divorce decree, Congress had not enacted *10 USCS § 1408. Gordon v Gordon (1983, Tex App Corpus Christi) 659 SW2d 475* (superseded by statute on other grounds as stated in *Southern v Glenn (1984, Tex App San Antonio) 677 SW2d 576).*

In dividing military pension in marital dissolution, trial court erred by using denominator of 25 years in its formula, which it had drawn from husband's basic pay line of his retirement orders, when court should have instead used husband's actual 20 years of active and creditable service. *Kelly v Kelly (2003, Wyo) 2003 WY 133, 78 P3d 220.*

6. Relationship to state law

Section 1408 does not pre-empt New Mexico community property law which treats military disability retirement benefits as community property. *Austin v Austin (1985) 103 NM 457, 709 P2d 179.*

Trial court erred in declaring military pension to be husband's separate property, notwithstanding that Uniformed Services Former Spouse's Protection Act *(10 USCS § 1408)* gives each state power to deal with military pensions as it sees fit. *In re Marriage of Sarles (1983, 4th Dist) 143 Cal App 3d 24, 191 Cal Rptr 514.*

Former Spouses' Protection Act *(10 USCS § 1408)* allowing courts to consider retirement pay in fashioning divorce settlements permits but does not command state courts to consider military retirement benefit as marital property; Act

provides power to each state to deal with military pensions in manner in which it had previously treated them or chooses to treat them in future. *Koenes v Koenes (1985, Ind App) 478 NE2d 1241* (superseded by statute on other grounds as stated in *In re Marriage of Bickel (1989, Ind App) 533 NE2d 593); In re Marriage of Battles (1991, Ind) 564 NE2d 565.*

Section 1408, which is permissive, cannot create procedural mechanism to reopen final state court judgments; divorce decree entered prior to enactment of § 1408 awarding all military retirement benefits to husband was final judgment which, not being void, could not be collaterally attacked in partition suit filed subsequent to enactment of § 1408. *Allison v Allison (1985, Tex App Fort Worth) 690 SW2d 340.*

Uniformed Services Former Spouses' Protection Act *(10 USCS § 1408)* does not preclude state courts from considering former spouse's military disability benefits received in lieu of waived retirement pay when making equitable division of marital assets. *Clauson v Clauson (1992, Alaska) 831 P2d 1257, 15 EBC 1913.*

In light of enactment of § 1408, marital property interest may be recognized in retirement benefits from military pension in accordance with Illinois case law prior to United States Supreme Court's decision in *McCarty v McCarty (1981) 453 US 210, 101 S Ct 2728, 69 L Ed 2d 589. In re Marriage of Dooley (1985, 2d Dist) 137 Ill App 3d 401, 92 Ill Dec 163, 484 NE2d 894.*

Although failure to include within *10 USCS § 1408*(c)(1) disability payments received in accordance with waiver executed pursuant to *28 USCS § 3105* arguably leads to conclusion that Congress' intent was to preclude states from recognizing community interest in such payments, neither *38 USCS § 3101*(a) prohibition against assignments of Veterans' benefits nor any other federal law directly or positively precludes application of Louisiana's community property law to disability payments received pursuant to *38 USCS § 3105* election. *Campbell v Campbell (1985, La App 2d Cir) 474 So 2d 1339,* cert den (1985, La) *478 So 2d 148.*

Although states are precluded by federal law from treating disability benefits as community property, states are not precluded from applying state contract law, even when disability benefits are involved; former husband thus could not escape obligation under property settlement agreement by voluntarily choosing to forfeit military retirement pay. *Shelton v Shelton (2003, Nev) 78 P3d 507, 119 Nev Adv Rep 55.*

7. Jurisdiction

Court otherwise having jurisdiction of parties is not allowed to invoke powers of Federal Uniform Services Former Spouses' Protection Act *(10 USCS § 1408)* unless personal jurisdiction has been acquired by domicile or consent or residence other than by military assignment; careful reading of *10 USCS § 1408*(c)(1) reveals that provision is limitation on subject-matter, rather than personal jurisdiction. *Steel v United States (1987, CA9 Cal) 813 F2d 1545.*

Nevada District Court has jurisdiction over former military wife's suit for partition of ex-husband's military retirement benefits, even though ex-husband, at time of suit, did not reside in, was not domiciled in, and had not consented to jurisdiction in Nevada, because *10 USCS § 1408*(c) is limitation on subject matter rather than personal jurisdiction, and court has personal jurisdiction under Nevada law based on ex-husband's consent to jurisdiction for purposes of 1974 divorce decree. *Lewis v Lewis (1988, DC Nev) 695 F Supp 1089.*

Exception to court's subject matter jurisdiction overruled in former wife's post divorce petition to partition husband's military retirement pay, where military spouse gave implied consent to state court's jurisdiction by making general appearance waiving all jurisdictional objections under state law when spouse answered divorce petition, this waiver gave state jurisdiction over all matters incidental to dissolution of marriage; § 1408 does not require express consent to court's jurisdiction. *Allen v Allen (1986, La App 3d Cir) 484 So 2d 269,* cert den (1986, La) *488 So 2d 199* and cert den *(1986) 479 US 850, 93 L Ed 2d 114, 107 S Ct 178.*

Exception to personal jurisdiction in post-divorce action for partition of community property including former husband's military retirement pay overruled since husband who domiciled in Mississippi and formerly resided in Louisiana with wife submitted to jurisdiction over his person in Louisiana by answering divorce petition filed in Louisiana such that it was within state power to bind him by every subsequent order in the cause. *Allen v Allen (1986, La App 3d Cir) 484 So 2d 269,* cert den (1986, La) *488 So 2d 199* and cert den *(1986) 479 US 850, 93 L Ed 2d 114, 107 S Ct 178.*

Under Uniform Services Former Spouses' Protection Act, Texas court did not have personal jurisdiction over former husband in action to partition of husband's military retirement pay where husband never resided or was domiciled in Texas, and where husband never consented to personal jurisdiction in Texas for partition of military

retirement pay notwithstanding that husband was petitioner in Texas divorce suit. *Kovacich v Kovacich (1986, Tex App San Antonio) 705 SW2d 281.*

Where at time of Texas divorce action husband was serviceman stationed in Germany, and where husband initially filed special appearance contesting jurisdiction but subsequently entered general appearance by allowing case to be tried, husband consented to jurisdiction and satisfied requirements of § 1408(c)(4). *Seeley v Seeley (1985, Tex App Austin) 690 SW2d 626.*

Section 1408(c)(4) setting forth jurisdictional criteria applicable to courts' treatment of disposable retired or retainer pay in manner provided by § 1408(c)(1) is limitation upon court's exercise of jurisdiction to dispose of military retirement pay; Court of Appeals must apply such jurisdictional provisions rather than more expansive state law provisions applied by trial court. *Seeley v Seeley (1985, Tex App Austin) 690 SW2d 626.*

United States' U.S. Ct. Fed. Cl. R. 12(b)(1) motion to dismiss retired service member's claims, which sought to recover judgment for amount of retired military pay withheld from him and paid to his ex-wife under Uniformed Services Former Spouses' Protection Act (USFSPA), *10 USCS § 1408,* was granted where service member failed to meet his burden of proving that U.S. had waived its sovereign immunity with regard to making direct payments to former spouse under USFSPA; under *10 USCS § 1408*(f)(1), U.S. had not consented to be sued for making payments to former spouse under USFSPA unless court order was irregular on its face or if officials failed to follow procedures established by *USFSPA. Mora v United States (2003) 59 Fed Cl 234.*

8. Spousal notification requirement

Requirement in predecessor to *10 USCS § 1448*(a) that spouse be notified if person eligible to participate in plan elects not to participate applies only to service member who is automatically enrolled in Survivor Benefit Plan because he retires on or after effective date of § 1448; requirement does not apply with respect to service member who was already entitled to retired or retainer pay and who was permitted by Congress but declined to elect to participate in Plan. *Passaro v United States (1985, CA) 774 F2d 456,* cert den *(1986) 476 US 1114, 90 L Ed 2d 653, 106 S Ct 1969.*

9. Pay subject to apportionment and direct payment

Secretary of Army is directed to distribute portion of exhusband's military retirement pay to divorced wife, where discrepancy over validity of divorce decree granting wife one-third of benefits was resolved when state appellate court denied husband's post-trial motion for relief, because wife has complied with requirements and Secretary has duty to make payments under *10 USCS § 1408*(d)(1). *Andrean v Secretary of the United States Army (1993, DC Kan) 840 F Supp 1414.*

Former spouse's partition action is forbidden by *10 USCS § 1408*(c)(1), where pre-1981 final divorce decree neither treated nor reserved jurisdiction to treat any amount of military retired pay as community property, even though decree did not include court-ordered, court-ratified, or court-approved property settlement, because parenthetical clause in § 1408(c)(1) expands or illustrates preceding list to include property settlements incident to such decrees but does not limit preceding words. *Delrie v Harris (1997, WD La) 962 F Supp 931.*

If retired military personnel requests additional income tax withholdings beyond regularly required withholdings in computation of net or "disposable" military retired pay subject to apportionment, applicant is required to present factual evidence demonstrating existence of tax burden justifying additional withholding; no additional tax withholding may be allowed in computation of disposable retired pay in case of retired officer who gives only rough estimate or opinion of projected tax obligations and presents no financial record as evidence in support of estimate; although Comptroller General has jurisdiction to resolve questions relating to computation of net military "disposable retired or retainer pay" under Uniform Services Former Spouses' Protection Act *(10 USCS § 1408),* revenue rulings concerning withholding of federal taxes from income are reserved by statute for determination primarily by the Internal Revenue Service. *(1984) 63 Op Comp Gen 323.*

No error in award to wife of percentage of former husband's military retirement benefits notwithstanding allegation that said retirement benefits accrued in Maryland which was not then community property state, since husband failed to offer convincing proof of substantive law of Maryland on issue of distribution of military pay and where it was not clear that said benefits accrued in Maryland, such that court presumed Maryland and Louisiana law were similar thus permitting distribution to former spouse of military retirement pay. *Allen v Allen (1986, La App 3d Cir) 484 So 2d 269,* cert den (1986, La) *488 So 2d 199* and cert den *(1986) 479 US 850, 93 L Ed 2d 114, 107 S Ct 178.*

Trial court did not abuse discretion in determining that husband's military retirement pay was available for division in divorce proceeding. *Chase v Chase (1983, Alaska) 662 P2d 944.*

Section 1408(a)(4)(C)(1) does not preclude California court from awarding ex-spouse more than community property interest in retiree's "disposable" retirement pay. *Casas v Thompson (1986) 42 Cal 3d 131, 228 Cal Rptr 33, 720 P2d 921,* cert den *(1986) 479 US 1012, 93 L Ed 2d 713, 107 S Ct 659.*

Military retirement is classified in accordance with law of jurisdiction for purposes of division following dissolution of marriage; military retirement pay is classified as community or separate property according to whether act of service upon which benefits were based took place prior to marriage or after marriage. *Lang v Lang (1985, App) 109 Idaho 802, 711 P2d 1322.*

Fact that § 1408(c)(1) was made retroactive to June 25, 1981, does not warrant modification of judgment for maintenance and division of marital and nonmarital property rendered in February, 1982, notwithstanding that judgment did not divide husband's retirement pension, where parties and trial court gave full recognition to payments generated by pension in making division of marital property and where parties agreed to non-modification provision pursuant to Illinois law. *In re Marriage of Habermehl (1985, 5th Dist) 135 Ill App 3d 105, 89 Ill Dec 939, 481 NE2d 782.*

Uniformed Services Former Spouses' Protection Act *(10 USCS § 1408)* grants states authority to treat all disposable retired pay as marital property, but limits direct government payment to former spouses to 50 percent of disposable retired pay; where trial court intends to give half of gross pension to spouse, court must, in addition to ordering direct government payments, order retired servicemen to make monthly supplemental payments. *Deliduka v Deliduka (1984, Minn App) 347 NW2d 52.*

Under *10 USCS § 1408*(d)(2), wife is entitled to portion of husband's nondisability military retirement pay from June 25, 1981. *Cameron v Cameron (1982, Tex) 641 SW2d 210* (superseded by statute on other grounds as stated in *Southern v Glenn (1984, Tex App San Antonio) 677 SW2d 576)* and (superseded by statute on other grounds as stated in *Harrell v Harrell (1984, Tex App Corpus Christi) 684 SW2d 118).*

Decree of dissolution awarding wife less than one-half of husband's military retirement pay is effective for pay periods beginning after effective date of *10 USCS § 1408,* regardless of date of previous dissolution order. *In re Marriage of Wood (1983) 34 Wash App 892, 664 P2d 1297.*

10. --Pay excluded

Retirement pay owed to United States is excluded from definition of disposable retired or retainer pay and thus is not subject to state's marital property law so that withheld portion of husband's retirement pay in satisfaction of unpaid tax assessments was not subject to wife's community property interests. *Arford v United States (1991, CA9 Idaho) 934 F2d 229, 91 CDOS 4026, 91 Daily Journal DAR 6329, 92-1 USTC P 50229, 67 AFTR 2d 91-1135,* magistrate's recommendation (1992, DC Idaho) *71 AFTR 2d 93-718* and (criticized in *Lyle v Commodity Credit Corp. (1996, CA10 Kan) 97-1 USTC P 50119, 78 AFTR 2d 96-7623).*

Military separation pay received under § 1174, a one time payment received upon involuntary discharge from service to financially assist transition to private employment, is not embraced within meaning of disposable retirement or retainer pay under § 1408, which permits states to treat as separate property or property of serviceman and his spouse, where separation pay is a one time payment as opposed to compensation for past services and where § 1408 does not mention separation pay in its definition of retired or retainer pay, accordingly if service member is not married at time of involuntary discharge, separation pay is separate property unless service member re-enlists and becomes eligible for military longevity retirement benefits. *In re Marriage of Kuzmiak (1986, 2nd Dist) 176 Cal App 3d 1152, 222 Cal Rptr 644,* cert den *(1986) 479 US 885, 93 L Ed 2d 252, 107 S Ct 276.*

Even though *10 USCS § 1408* specifically excluded orders dividing active duty injury disability awards to veterans from general rule permitting division of military retirement benefits, trial court did not err in denying retired military spouse's motion to dismiss declaratory judgment action and in awarding former spouse amount of money originally promised under separation agreement, after military spouse waived most rights to pension funds upon being awarded disability benefits; there was no direct payment order, and amount was simply in fulfillment of contract obligation avoidance of which would have violated military spouse's covenant of good faith and fair dealing. *Krapf v Krapf (2003) 439 Mass 97, 786 NE2d 318.*

11. 10-year marriage requirement

Federal Uniformed Services Former Spouse's Protection Act *(10 USCS § 1408)* is not limited in its application to spouses married to military retiree for 10 years or more during which time retiree served at least 10 years of service; § 1408(d)(2) bar to payments if spouse or former spouse was not married to member for a period of 10 years or more during which member performed at least 10 years of service applies only where direct payments are made by Secretary to Former Spouse pursuant to § 1408(c)(1) in response to court order. *Le Vine v Spickelmier (1985) 109 Idaho 341, 707 P2d 452.*

10 USCS § 1408 does not require that 10-year threshold be met by consecutive years of marriage, but may be obtained by tacking on credit from 2 marriages to same spouse. *Anderson v Anderson (1984, Greene Co) 13 Ohio App 3d 194, 13 Ohio BR 242, 468 NE2d 784.*

10 USCS § 1408(d) does not impose 10-year marriage requirement as prerequisite to division of military retirement benefits and receipt thereof by former spouse but merely provides such requirement as prerequisite to direct payments to former spouse by Secretary. *Oxelgren v Oxelgren (1984, Tex App Fort Worth) 670 SW2d 411.*

12. Miscellaneous

Authority to issue authoritative revenue rulings on federal income tax withholding rests with IRS; however, Comptroller General may render decision regarding individual's tax withholdings to extent that amounts withheld affect calculation of individual's disposable retired pay as that term is defined in *10 USCS § 1408.* Colonel Robert M. Krone, USAF (Retired)--Federal Income Tax Withholding from *Military Retired Pay for Former Spouse Protection Act Purposes (8/6/96) Comp. Gen. Dec. No. B-271052, 1996 US Comp Gen LEXIS 457.*

In view of explicit provision in subsection (f)(1) it is patently clear that U.S. has not waived its immunity to permit claim challenging USFSPA. *Goad v United States (1991) 24 Cl Ct 777,* app dismd without op (1992, CA) *976 F2d 747,* cert den *(1992) 506 US 1034, 121 L Ed 2d 687, 113 S Ct 814.*

Since Uniform Services Former Spouse's Protection Act *(10 USCS § 1408)* provides that spouses and former spouses have proprietary, inalienable interest in member's military pension benefits, if so awarded by court with subject matter jurisdiction over parties, when spouse or former spouse files bankruptcy petition, that interest is excluded from bankruptcy estate. *In re Satterwhite (2002, BC WD MO) 271 BR 378.*

Provision prohibiting payments pursuant to court order that became final before June 26, 1981, did not apply to 1985 bankruptcy court order authorizing U.S. Army Finance and Accounting Center to begin making direct payments of portion of plaintiff's retirement pay to plaintiff's ex-wife. *Chandler v United States (1994) 31 Fed Cl 106,* affd without op (1994, CA FC) *39 F3d 1196,* reported in full (1994, CA FC) *1994 US App LEXIS 28130* and mand den, motion den sub nom *In re Chandler (1995, CA FC) 1995 US App LEXIS 11894.*

10 USCS § 1408 does not impose duty on federal agencies to continually "police" former spouse's entitlement to service member's retired pay. DOHA Case No. 99122104 (3/16/00).

10 USCS § 1408(f)(1) means that United States has not waived its immunity from suit, and that United States and its officers and employees are not liable when they comply with statute. DOHA Case No. 99122104 (3/16/00).

II. RETROACTIVITY 13. Generally

Because there is no property or contractual interest in any anticipated level of military retired pay, and right to retired pay is within exclusive control of Congress and is always subject to change, retroactive application of Uniform Services Former Spouse's Protection Act *(10 USCS § 1408*(c)(1)) did not constitute unjustified impairment of implied contractual arrangement between retired members of Armed Forces and government. *Fern v United States (1988) 15 Cl Ct 580,* affd (1990, CA) *908 F2d 955, 12 EBC 1936.*

State judgments rendered before McCarty decision are not void ab initio and Texas divorce decree awarding wife percentage of husband's Army pension benefits upon his retirement may not be collaterally attacked; nor is res judicata effect of unappealed divorce decree overcome by retroactive application of McCarty decision. *Brown v Robertson (1985, WD Tex) 606 F Supp 494.*

Decision in *McCarty v McCarty (1981) 453 US 210, 101 S Ct 2728, 69 L Ed 2d 589,* that wife has no property interest in her husband's military retirement pay is not to be applied retroactively to any community property settlement agreement, be it incorporated into judgment or not; to apply McCarty retroactively would violate clear intent of

Congress, in passing § 1408, to completely obliterate effect of McCarty decision. *Stevens v Stevens (1985, La App 2d Cir) 476 So 2d 883,* cert den (1985, La) *478 So 2d 908.*

Former serviceman's wife was entitled to community share of military retirement pay as of retroactive date specified in § 1408, and not retirement date of 8/1/80 since there was no prior adjudication of retirement pay prior to retroactive date. *Savoie v Savoie (1986, La App 5th Cir) 482 So 2d 23.*

Wife not entitled to equitable distribution of former husband's military pension where wife entered into valid separation agreement which contained no reference to pension but contained general release or waiver provision of all rights of claims to property, notwithstanding that at time of agreement state law precluded consideration of military pensions as marital property and that subsequent to date of agreement § 1408 was enacted with limited retroactive application permitting but not requiring state to consider pensions as marital property and that state law was subsequently amended to include military pensions as marital property since state law as amended was effective prospectively. *Morris v Morris (1986) 79 NC App 386, 339 SE2d 424,* review den *(1986) 316 NC 733, 345 SE2d 390.*

Use of date on which United States Supreme Court decided McCarty Case as reference in *10 USCS § 1408*(c)(1) evidences legislative intent that law relative to community property treatment of military retirement pensions be as though McCarty did not exist, rendering moot any argument as to retroactive application of McCarty rule. *In re Marriage of Frederick (1983, 5th Dist) 141 Cal App 3d 876, 190 Cal Rptr 588.*

10 USCS § 1408 is retroactive to date of United States Supreme Court McCarty decision and applicable to all cases not final as of its effective date. *In re Marriage of Hopkins (1983, 2nd Dist) 142 Cal App 3d 350, 191 Cal Rptr 70.*

Decision in *McCarty v McCarty (1981) 453 US 210, 101 S Ct 2728, 69 L Ed 2d 589,* that wife has no property interest in her husband's military retirement pay is not to be applied retroactively to any community property settlement agreement, be it incorporated into judgment or not; to apply McCarty retroactively would violate clear intent of Congress, in passing § 1408, to completely obliterate effect of McCarty decision. *Stevens v Stevens (1985, La App 2d Cir) 476 So 2d 883,* cert den (1985, La) *478 So 2d 908.*

Uniformed Services Former Spouse Protection Act *(10 USCS § 1408)* does not compel opening of final decree disposing of marital property. *Bishir v Bishir (1985, Ky) 698 SW2d 823.*

McCarty v McCarty (1981) 453 US 210, 101 S Ct 2728, 69 L Ed 2d 589, prohibiting division of military retirement benefits upon divorce, and *10 USCS § 1408,* which in effect overruled McCarty but expressly exempted from division disability retirement benefits under *10 USCS § 1201,* do not apply retroactively to divorce decrees which became final prior to McCarty decision. *Patrick v Patrick (1985, Tex App Fort Worth) 693 SW2d 52.*

10 USCS § 1408 may be applied retroactively since it permits state courts to remedy harsh result to former spouses and, as remedial statute, may be retroactively applied since it cures defects or furthers remedy. *Thorpe v Thorpe (1985, App) 123 Wis 2d 424, 367 NW2d 233.*

14. Relationship to state law

Whatever limitations § 1408 may have concerning dissolution of military pay, § 1408 has no bearing on determining arrears for community property obligations decreed in judgments long final before effective date of Federal Uniform Services Former Spouses' Protection Act. *In re Marriage of Stier (1986, 4th Dist) 178 Cal App 3d 42, 223 Cal Rptr 599.*

Retroactive provisions of Federal Uniformed Services Former Spouses' Protection Act does not pre-empt act of state legislature which provides procedure for reopening community property settlements, judgments or decrees that become final prior to effective date of FUSFSPA and permit modification of community property division to include division of military retirement benefits where act of state legislature does not attempt to override limited retroactivity of FUSFSPA or to expand upon it; Federal Uniform Services Former Spouse' Protection Act, standing alone, does not have retroactive application sufficient to allow reopening of final divorce judgments which became effective before effective date of FUSFSPA. *In re Marriage of Potter (1986, 5th Dist) 179 Cal App 3d 73, 224 Cal Rptr 312,* cert den and app dismd *(1987) 479 US 1072, 94 L Ed 2d 124, 107 S Ct 1262.*

15. Validity of prior decisions/decrees

Former wife's action against Defense Finance and Accounting Service, seeking direct payment of her share of her former husband's military retirement pay as provided in state-court judgments, is dismissed, because final decree of

divorce was issued prior to June 25, 1981, and because subsequent state-court judgments awarding wife portion of military retirement benefits were not in accord with mandate of *10 USCS § 1408*(c)(1) and of state law. *Kemp v United States Dep't of Defense (1994, WD La) 857 F Supp 32.*

Passage of Uniform Services Former Spouses' Protection Act which permits but does not require state to consider retirement benefits as marital property and provides new remedies for collection of support does not constitute sufficient change in circumstances with respect to method and mode of support payment to warrant modification of decree of dissolution where retired serviceman's and former wife had stipulated amount and duration of spousal support before effective date of § 1408 and where serviceman's ability to pay was unaffected by § 1408 since his pension was considered in computation of support payments. *In re Marriage of Hadley (1986) 77 Or App 295, 713 P2d 39.*

Fact that § 1408 is effective February 1, 1983 does not bar action by former wife, divorced from serviceman in 1966, for community interest in serviceman's military retirement pension, where former wife does not seek to modify or reopen 1966 judgment, and where her action is independent one to divide asset which was not before divorce court in 1966 and was not altered by divorce decree. *Casas v Thompson (1986) 42 Cal 3d 131, 228 Cal Rptr 33, 720 P2d 921,* cert den *(1986) 479 US 1012, 93 L Ed 2d 713, 107 S Ct 659.*

Family court decision rendered on basis of Supreme Court's McCarty decision was properly reopened to apply state laws as they existed prior to McCarty. *Smith v Smith (1983, Del Fam Ct) 458 A2d 711, 1983 Del Fam Ct LEXIS 41.*

Congress intended § 1408(c)(1) to be applied retroactively to divorces which occurred between US Supreme Court's decision in *McCarty v McCarty (1981) 69 L Ed 2d 589,* holding that military pension could not be divided between spouses by state court, and effective date of § 1408(c)(1), although Missouri law would not allow final divorce decree to be reopened to address military pension question. *In re Marriage of Quintard (1985, Mo App) 691 SW2d 950.*

Divorced wife of military service member is entitled to benefits of *10 USCS § 1408,* notwithstanding it became effective one month after date of final divorce. *Walentowski v Walentowski (1983) 100 NM 484, 672 P2d 657.*

Retroactive application of § 1408 so as to give former spouse relief from amended decree, entered in response to *McCarty v McCarty (1981) 453 US 210, 101 S Ct 2728, 69 L Ed 2d 589,* taking from former wife previously-awarded one-half community interest in former husband's military retirement pay does not deprive husband of vested right without due process of law. *In re Marriage of Giroux (1985) 41 Wash App 315, 704 P2d 160.*

U.S. was entitled to dismissal of retired service member's claim, which sought to recover retired military pay withheld from him and paid to his ex-wife pursuant to Uniformed Services Former Spouses' Protection Act, *10 USCS § 1408,* where divorce decree had been issued by state court, contained appropriate signatures, and was stamped as true and correct copy of original and where, as result, member had not demonstrated that it was irregular on its face under *28 USCS § 1408*(b)(2). *Mora v United States (2003) 59 Fed Cl 234.*

16. --Res judicata

Res judicata did not bar wife seeking recovery of percentage of former husband's disposable military retirement pay because of previous action denying entitlement to retirement pay based in part on Supreme Court decision holding military benefits as personal not marital property, since subsequent enactment of § 1408 created new fact, a change in law, and new cause of action. *Powell v Powell (1985, Tex App Waco) 703 SW2d 434,* app dismd *(1986) 476 US 1180, 91 L Ed 2d 541, 106 S Ct 2911,* reh den *(1986) 478 US 1031, 92 L Ed 2d 767, 107 S Ct 11* and (criticized in *Trahan v Trahan (1995, Tex App Austin) 894 SW2d 113).*

17. Estoppel

Although doctrines of res judicata and collateral estoppel do not bar spouse from recovering his or her community interest invested in matured military pension benefits omitted from petition and later judgment of dissolution of marriage, retroactive enforcement of such rights is subject to military retiree's rights to raise defenses of equitable estoppel and laches; in such cases, trial court must apply equitable principles to prevent unfairness to spouse who may have placed substantial reliance on judgment. *In re Marriage of Chambers (1985, 4th Dist) 174 Cal App 3d 1079, 220 Cal Rptr 504.*

APPENDIX C

Uniformed Services Former Spouses' Protection Act Bulletin

The Uniformed Services Former Spouses' Protection Act (the Act), 10 U.S.C. 1408, recognizes the right of state courts to distribute military retired pay to a spouse or former spouse (hereafter, the former spouse) and provides a method of enforcing these orders through the Department of Defense. The Act itself does not provide for an automatic entitlement to a portion of the member's retired pay to a former spouse. A former spouse must have been awarded a portion of a member's military retired pay as property in their final decree of divorce, dissolution, annulment, or legal separation (the court order). The Act also provides a method of enforcing current child support and/or arrears and current alimony awarded in the court order.

Court orders enforceable under the Act include final decrees of divorce, dissolution, annulment, and legal separation, and court-ordered property settlements incident to such decrees. The pertinent court order must provide for the payment of child support, alimony, or retired pay as property, to a spouse/former spouse. Retired pay as property awards must provide for the payment of an amount expressed in dollars or as a percentage of disposable retired pay (gross retired pay less allowable deductions). An award of a percentage of a member's retired pay is automatically construed under the Act as a percentage of disposable retired pay. A Qualified Domestic Relations Order is not required to divide retired pay as long as the former spouse's award is set forth in the pertinent court order.

In all cases where the member is on active duty at the time of the divorce, the member's rights under the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA) must have been observed during the state court proceeding. In addition, for orders dividing retired pay as property to be enforced under the Act, a member and former spouse must have been married to each other for at least 10 years during which the member performed at least 10 years of creditable military service (the 10/10 rule). Also, to enforce orders dividing retired pay as property, the state court must have had jurisdiction over the member by reason of, (1) the member's residence in the territorial jurisdiction of the court (other than because of his military assignment), (2) the member's domicile in the territorial jurisdiction of the court, or (3) the member's consent to the jurisdiction of the court,. as indicated by the member's taking some affirmative action in the legal proceeding. The 10/10 rule and the jurisdictional requirement do not apply to enforcement of child support or alimony awards under the Act.

The maximum that can be paid to a former spouse under the Act is fifty percent (50%) of a member's disposable retired pay. In cases where there are payments both under the Act and pursuant to a garnishment for child support or alimony under 42 U.S.C. 659, the total amount payable cannot exceed sixty-five percent (65%) of the member's disposable retired pay. The right to payments under the Act terminates upon the death of the member or former spouse, unless the applicable court order provides that the payments terminate earlier.

In order to apply for payments under the Act, a completed application form (DD Form 2293) signed by a former spouse together with a certified copy of the applicable court order certified by the clerk of court within 90 days immediately preceding its service on this Center should be served either by facsimile or by mail, upon the:

Defense Finance and Accounting Service
Cleveland DFAS-DGG/CL
PO Box 998002
Cleveland Ohio 44199-8002
(866) 859-1845 (toll free Customer Service)
The application form should state which awards the former spouse is seeking to enforce under the Act (i.e., alimony, child support, and/or division of retired pay as property). If the application does not contain this information, then only awards of retired pay, as property will be enforced under the Act. A former spouse should also indicate the priority of the awards to be enforced in case there is not sufficient disposable retired pay to cover multiple awards.

The court order should contain sufficient information for us to determine whether the SSCRA, and the Act's jurisdictional and 10/10 requirements (if applicable), have been met. If we cannot determine the parties' marriage date from the court order, then the former spouse must submit a photocopy of their marriage certificate. If the former spouse is requesting child support, and the court order does not contain the birth dates of the children, the former spouse must provide photocopies of their birth certificates.

If the requirements of the Act have been met, payments to a former spouse must begin no later than 90 days after the date of effective service of a complete application. If the member has not yet retired at the time the former spouse submits his or her application, payments must begin no later than 90 days after the date on which the member first becomes entitled to receive retired pay.

Court orders awarding a portion of military retired pay as property that were issued prior to June 26, 1981, can be honored if the requirements of the Act are met. However, amendments issued after June 25, 1981, to court orders issued prior to June 26, 1981, which were silent as to providing for a division of retired pay as property, cannot be enforced under the Act. Also, for court orders issued prior to November 14, 1986, if any portion of a member's military retired pay is based on disability retired pay, the orders are unenforceable under the Act.

Section 1408(h) of the Act provides benefits to former spouses who are victims of abuse by members who, as a result of the abuse of a spouse or dependent child, lose the right to retired pay after becoming retirement eligible. A former spouse may only enforce an order dividing retired pay as property under this Section, and all of the other requirements of the Act must be satisfied. The right to payments under this Section terminates upon the remarriage of the former spouse, or upon the death of either party.

Garnishment Operations Facsimile (FAX) Information:
Fax Phone Number: Commercial (216) 522-6960 or DSN 580-6960.

In improving the processes in the Garnishment Operations we are now using a fax gateway directly into our Electronic Document Management System. To ensure your document is processed in a timely and efficient manner you must include the following information on the fax document and follow the additional guidance provided:

- Member/Employee Social Security Number (SSN) - Court Orders/Documents will not be processed if the SSN is not on the document
- Return Phone Number
- Return Fax Number

- Ensure original documents are clear and legible
- In each fax transmission, include only correspondence for one member or employee (if you have multiple documents for one member, they can be sent on one fax transmission)

Survivor Benefit Plan (SBP) Coverage:
A member may elect "former spouse" SBP coverage for a former spouse who was originally a "spouse" beneficiary under SBP, provided that the parties were divorced after the member became eligible to receive retired pay. In addition, a former spouse may initiate SBP coverage on her own behalf ("deemed election"), provided that this election is made within 1 year of the issuance of the court order requiring SBP coverage. All correspondence regarding SBP coverage should be sent directly to the Retired Pay office:
Defense Finance and Accounting Service
US Military Retirement Pay
PO Box 7130
London KY 40742-7130
Toll free 1-800-321-1080

APPENDIX D

Uniformed Services
Former Spouses' Protection Act

Frequently Asked Questions and Answers

1. ***The court awarded me 50% of my former spouse's retired pay which had accrued as of the date of our divorce. Why do I need to get a clarifying order to have my award enforced under the Uniformed Services Former Spouses' Protection Act (USFSPA)?***
   Without a clarifying order, there is no way to determine the amount of what your award should be under the Act. Military retired pay is an entitlement based on the service member's rank and number of years of creditable service at the time of retirement. It is paid on a monthly basis and as such is not a fund which can be valued or divided as of some point in time, either before or after the member's retirement. Thus, it is not comparable to a company's private retirement plan, which can be identified as a specific amount and can be divided as of a particular date. The USFSPA requires that an award of a portion of a member's retired pay as property must be expressed in dollars or as a percentage of disposable retired pay. 10 U.S.C. 1408(a)(2)(C). Therefore, a clarifying order would be necessary in those cases where the award is not so expressed.
2. ***My award of a portion of the member's military retired pay as property is expressed as a formula with the numerator as the number of years we were married while the member performed military service creditable for retirement. I was told I had to get a clarifying order because this "number" was not provided in the court order. Why is this the case when our marriage and divorce dates, and the member's service entry date, were given in the court order?***
   An award of military retired pay as property expressed as a formula or hypothetical retired pay amount may be enforced under the USFSPA without a clarifying order only if the requirements of the proposed regulations (60 Fed. Reg. 17,507 (1995)(to be codified at 32 CFR pt. 63)(proposed April 6, 1995) are met. With regard to an award expressed as a formula, the only number supplied by DFAS will be the number of years of creditable service. All other information must be contained in the court ordered formula. With regard to a hypothetical for payment of a retired pay amount, the award must be based on at least 15 years of creditable service, and the only information DFAS will supply is the date of retirement. All other information, such as the member's hypothetical rank or years of creditable service at hypothetical retirement, must be contained in the court order.
3. ***Why does it take so long for me to begin to receive payments under the Act after I apply?***
   The USFSPA requires that your payments must begin not later than 90 days after effective service of your application for payments on the designated agent. 10 U.S.C. 1408(d)(1). This 90 day requirement gives DFAS enough time to process your application, and provide the member with the notice that the Act requires. The member has 30 days from the date the notice was mailed to provide evidence as to why payments should not begin. No payments can be made until after the 30 day notice period. Also, since payments of military retired pay are only made once each month, the commencement of your payments must be coordinated with the monthly retired pay cycle.

4. ***I applied for enforcement of both my child support and retired pay property awards under USFSPA. My application for child support was honored, but my application for property payments was not. I was told that the reason was that the court lacked jurisdiction over the member. What's the problem? My divorce decree stated that the court had jurisdiction over the member.***
   The USFSPA has a separate jurisdiction requirement for enforcement of property awards. The Act states that the court must have had jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court. 10 U.S.C. 1408(c)(4). The court may have had jurisdiction over an absent member by reason of some state statute, but that type of jurisdiction may not be the type that legally satisfies the requirement for purposes of the USFSPA. This special jurisdiction requirement does not apply to enforcement of alimony and child support awards.
5. ***I was married to my former spouse for 8 years while my former spouse was performing military service creditable for retirement. I was awarded a portion of my former spouse's military retired pay as property in our divorce decree. My application for property payments under the USFSPA was turned down, even though my former spouse waived the ten year requirement in our divorce decree. Why?***
   In order for a division of retired pay as property award to be enforced under the USFSPA, the former spouse must have been married to the military member for ten years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retirement. 10 U.S.C. 1408(d)(2). This is a requirement to receive payments under the USFSPA, which cannot be waived by either party. However, retired members may always make the payment themselves. This requirement does not apply to enforcement of awards for alimony or child support.
6. ***My former spouse has been receiving military retired pay for several years, and has not paid me any of my portion of his retired pay as a property award. Can I collect any of the arrearages under USFSPA?***
   No, the USFSPA does not provide for the collection of arrearages of retired pay as property or alimony. Payments under the Act are prospective only 32 CFR 63.6.(h)(10)

   However, child support arrearages set forth in the pertinent court order may now be collected under the Act. 10 U.S.C. 1408(d)(6). Regulations to implement this statute have not been published yet. Alimony and child support arrearages may also be collectible by garnishment under a different statute, 42 U.S.C. 659. A former spouse should consult his or her attorney for additional assistance regarding garnishments. This website also contains information regarding this topic.

7. ***What are the current requirements for service of documents, and certification of documents?***
   Court orders no longer need to be served by registered or certified mail, return receipt requested. They may now be served by facsimile or electronic transmission or by regular mail. Court orders must be copies of documents certified by the clerk of courts as to their authenticity within 90 days of effective service. Photocopies of certified documents are acceptable. Certified copies of court orders to enforce child support under USFSPA need not have been certified within 90 days of service.
8. ***I understand that because my former spouse was married to me for over ten years while I was on active duty that she is entitled to a portion of my military retired pay. Is this true?***

No. The USFSPA does not provide entitlement to military retired pay. However, the USFSPA does provide an avenue for former spouse to receive a direct payment of up to 50% of disposable retired pay when: the former spouse was married to a service member for 10 years or more concurrent with creditable service for retirement and a court treats the military retired pay as marital property.

9. ***Does the USFSPA require division of military retired pay in a divorce?***
   USFSPA does NOT automatically divide retired pay as property. However, it does authorize state courts to treat military retired pay either as property of the retiree or as the property of the retiree and his spouse in accordance with the law of the jurisdiction of such courts, i.e. the USFSPA permits a court to award a portion Military retired pay to a former spouse as his or her property. (This is in addition to any other court award spousal and/or child support and/or division of other marital property.) A court may award more than 50 percent of a retired service member's pay check to the ex-spouse as property but the Government is authorized only to send up to 50 percent of "disposable" retired pay directly to the ex-spouse as property.
10. ***What constitutes "disposable" retired pay for division in a divorce?***
    "Disposable" retired pay is defined in 10 U.S. Code, Section 1408(a) (4) of P.L. 97-252, as amended by P.L.99-661, Nov. 14, 1986 and Section 555 of P.L. 101-510, Nov. 5, 1990. Disposable retired pay is the gross monthly pay entitlement, including renounced pay, less authorized deductions.
    For divorce, dissolution of marriage, annulments, and legal separations that become effective on or after February 3, 1991, the authorized deductions are:
    a. Amounts owed to the United States for previous overpayments of retired pay and the recoupments required by law resulting from entitlement to retired pay.
    b. Forfeitures of retired pay ordered by court-martial.
    c. Amounts waived in order to receive compensation under Title 5 or 38 of USC.
    d. Premiums paid as a result of an election under 10 U.S. Code Chapter 73 to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order.
    e. The amount of the member's retired pay under 10 U.S. Code Chapter 61 computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list).
11. ***I was awarded a portion of the member's retired pay as a fixed dollar amount but I do not receive any cost of living increases (COLA) as ordered by the court. Why can't I receive COLAs?***
    The implementing regulations for the USFSPA state, at 32 Code of Federal Regulations, Part 63.6 (h), that COLAs are payable only for those awards that are based on a division of retired pay awarded as a percentage or fraction of the member's retired pay.
12. ***I established an allotment to pay my former spouse her portion of my retirement one month after our divorce. She has now applied for direct payments and effective this month, DFAS began sending her payments. Since the allotment was not stopped I request that you recover the overpayment from my former spouse and return the funds to me.***
    We are required to provide you thirty (30) days notice prior to the commencement of payments to your former spouse. This affords you the opportunity to submit evidence that the court order is defective, or has been modified, superseded or set aside, and to cancel any voluntary allotments you may have established for the same obligation. It is a member's responsibility to stop any voluntary allotment for the same obligation. Our office has no authority to cancel a voluntary allotment.

Therefore, we are unable to comply with your request to recover any overpayment made to your former spouse as a result of a voluntary allotment. We suggest that you contact the overpaid party directly for reimbursement.

13. ***Can I use an order from a court of a foreign country to collect my payments pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA)?***

    No. We can honor orders issued by courts as defined in the USFSPA. The USFSPA defines "court" as "any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands." If your order was not issued by a court located in one of those named geographical areas, you should consult a private attorney for guidance regarding registering foreign court orders and whether such action will meet the requirements of the USFSPA.

    You should be aware that unless all of the other requirements of the USFSPA were met by the original order, we would not be able to honor the request for payments under the USFSPA even after it is registered in a court located in an approved geographical area. Thus, the mere fact of registering a court order will not act as a means to correct Title 10, United States Code, Section 1408 deficiencies in the original court order.

APPENDIX E

Uniformed Services Former Spouses' Protection Act[1]	Length of Time that Marriage Overlaps with Service Creditable for Retirement Purposes[3]			
	Number of Years			
Benefits for Former Spouses[2]	**0 to <10**	**10 to <15**	**15 to <20**	**20 or more**
Division of Retired Pay[4]	X	X	X	X
Designation as an SBP Beneficiary[5]	X	X	X	X
Direct Payment[6]				
Child Support	X	X	X	X
Alimony	X	X	X	X
Property Division[7]		X	X	X
Health Care[8]				
Transitional[9]			X	
Full[10]				X
Insurance[11]	X	X	X	X
Commissary[12]				X
PX[12]				X
Dependent Abuse				
Retired Pay Property Share Equivalent[13]		X	X	X
Transitional Compensation[14]	X	X	X	X

FOOTNOTES

[1.] Pub. L. 97-252, Title X, 96 Stat. 730 (1982), as amended. This chart reflects all changes to the Act through the amendments in the National Defense Authorization Act, Fiscal Year 1994, Pub. L. 103-160 (1993).

[2.] For guidance on obtaining a military identification card to establish entitlement for health care, commissary, and PX benefits, see appropriate service regulations (e.g., AR 640-3). Former spouses of reserve component members may be entitled to these benefits; see the following notes for applicable benefits.

[3.] Except for Dependent Abuse Victims Transitional Compensation payments, this chart assumes that the member serves long enough to retire from an active duty component or reserve component of the Armed Forces (generally this will mean (s)he has twenty years of service creditable for retirement purposes, but can mean fifteen years in the case of the Voluntary Early Release and Retirement Program [statutory authority for this program expires in 1999]).

[4.] At least one court has awarded a portion of military retired pay to a spouse whom the retiree married after he retired, Konzen v. Konzen, 103 Wash.2d 470, 693 P.2d 97, cert denied, 473 U.S. 906 (1985).

[5.] Federal law does not create any minimum length of overlap for this benefit; the parties' agreement or state law will control a former spouse's entitlement to designation as an SBP beneficiary.

[6.] See 10 U.S.C. §§ 1408(d) & 1408(e) and 32 C.F.R. part 63 for further guidance on mandatory language in the divorce decree or court-approved separation agreement. The former spouse initiates the direct payment process by sending a written request to the appropriate finance center.

[7.] While eligibility for direct payment does not extend to former spouses whose overlap of marriage and service is less than ten years, this is not a prerequisite to award of a share of retired pay as property to the former spouse (see Note 4).

[8.] To qualify for any health care provided or paid for by the military, the former spouse must be unremarried and must not be covered by an employer-sponsored health care plan; see 10 U.S.C. §§ 1072(2)(F), 1072(2)(G) & 1072(2)(H). Department of the Army interpretation of this provision holds that termination of a subsequent marriage by divorce or death does not revive this benefit, but an annulment does. These remarriage and employer-insurance restrictions do not limit eligibility to enroll in the civilian health care insurance plan discussed in Note 11.

9. "Transitional health care" was created by Pub. L. 98-625, § 645(c) (not codified), as a stop-gap measure while a civilian health care plan was negotiated for former spouses and other who lose an entitlement to receive military health care (see Note 11). The program subsequently was modified and narrowed by the National Defense Authorization Act, Fiscal Year 1989, Pub. L. 100-456, Title VI, § 651, 102 Stat. 1990 (1988). Current program benefits are described at 10 U.S.C. § 1078a.titled "Continued Health Benefits Coverage." Qualifying former spouses are those who are unremarried, who have no employer-sponsored health insurance, and who meet the "20/20/15" requirement (i.e., married to the member for at least 20 years, and the member has at least 20 years of service that are creditable for retirement purposes, and the marriage overlaps at least 15 years of the creditable service). Transitional health care now includes full military health care for 1 year after the date of the divorce, and during this period the former spouse is eligible to enroll in the civilian group health care plan negotiated by DOD (see Note 11).

Note that for health care purposes, 10 U.S.C. § 1072(2)(G) treats a 20/20/15 former spouse as if he or she were a full 20/20/20 former spouse (20 years of marriage, 20 years of service, and 20 years of overlap) if the divorce decree is dated before April 1, 1995. A 20/20/15 former spouse of a reserve component retiree with a divorce decree prior to April 1, 1985, can receive full health care too, but only if the member survives to age 60 or if he or she elected to participate in the Reserve Component Survivor Benefit Program upon becoming retirement eligible.

10. "Full health care" includes health care at military treatment facilities and that provided through the TRICARE insurance program. A former spouse of a reserve component retiree is eligible for this benefit upon the retiree's 60th birthday (or on the day the retiree would have been 60 if (s)he dies before reaching age 60) if (s)he meets the normal qualification rules (i.e., an unremarried 20/20/20 former spouse who is not covered by an employer-sponsored health care plan); see 10 U.S.C. § 1076(b)(2).

11. Implementation of the Department of Defense Continued Health Care Benefit Program (CHCBP) was directed by Congress in the National Defense Authorization Act for Fiscal Year 1993 (see 10 U.S.C§ 1078a). It is a premium based program of temporary continued health benefits coverage available to eligible beneficiaries. Medical benefits mirror those available under the standard TRICARE program, but CHCBP is <u>not</u> part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119). The CHCBP replaces the Uniformed Services Voluntary Insurance Program (USVIP).

[12.] Pursuant to statute and service regulations, commissary and PX benefits are to be available to a former spouse "to the same extent and on the same basis as the surviving spouse of a retired member..." Pub. L. 97-252, Title X, § 1005, 96 Stat. 737 (1982); see Army Regulation 640-3. The date of the divorce is no longer relevant for commissary and PX purposes. See Pub. L. 98-525, Title IV, § 645, 98 Stat. 2549 (1984) (amending Uniformed Services Former Spouses' Protection Act § 1006(d)). The former spouse must be "unmarried," and, unlike the rules for health care, any termination of a subsequent marriage revives these benefits. Qualified former spouses of reserve component retirees receive commissary and PX benefits when the retiree reaches age 60 (or when (s)he would have reached age 60 if the retiree dies before that time, but in such cases the entitlement arises only if the retiree elected to participate in the Reserve Component Survivor Benefit Plan when (s)he became retirement eligible; see AR 640-3). Notwithstanding the provision of the Act and the regulation, however, the extent of commissary and exchange privileges in overseas locations may be restricted by host-nation customs law.

[13.] When a retirement-eligible member receives a punitive discharge via court-martial, or is discharged via administrative separation processing, the member's retirement benefits are lost. In certain cases where the court-martial or separation action was based on dependent abuse, eligible spouses may receive their court-ordered share of retired pay (divided as property) as if the member had actually retired. Authority for these payments was created in the National Defense Authorization Act, Fiscal Year 1993, § 653, Pub. L. 103-484. An overlap of marriage and service of at least ten years is a prerequisite to receipt of payments. The National Defense Authorization Act, Fiscal Year 1994, § 555, Pub. L. 103-160, clarifies that eligibility begins on the date the sentence is approved and does not have to wait until the member is actually discharged.

[14.] The National Defense Authorization Act, Fiscal Year 1994, § 554, Pub. L. 103-160, also creates authority for monthly transitional compensation to dependents of a non-retirement eligible member separated from the service by reason of dependent abuse.

APPENDIX F

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT
DIVIDING MILITARY RETIRED PAY

GARNSHMENT OPERATIONS
DEFENSE FINANCE AND ACCOUNTING SERVICE
CLEVELAND, OHIO

DFAS-DGG/CL
P.O. BOX 998002
CLEVELAND, OH 44199-8002

1-866-859-1845
FAX 1-216-522-6960
Website www.dfas.mil/garnish/

TABLE OF CONTENTS

UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT
DIVIDING MILITARY RETIRED PAY

I. HISTORY.

The Uniformed Services Former Spouses' Protection Act (USFSPA) was passed by Congress in 1982. The USFSPA gives a State court the authority to treat military retired pay as marital property and divide it between the spouses. Congress' passage of the USFSPA was prompted by the United States Supreme Court's decision in *McCarty v. McCarty* in 1981.[1]

The *McCarty* decision effectively precluded state courts from dividing military retired pay as an asset of the marriage. Justice Blackmun, writing for the majority, stated that allowing a state to divide retired pay would threaten "grave harm to 'clear and substantial' federal interests."[2] Accordingly, the Supremacy Clause of Article VI preempted the State's attempt to divide military retired pay. Congress, by enacting the USFSPA, clarified it's intent that State courts have the power to divide what can be the largest asset of a marriage.

With the passage of the USFSPA, Congress took the opportunity to set forth various requirements to govern the division of military retired pay. Congress sought to make a fair system for military members, considering that their situation often exposes them to difficulties with civil litigation. Therefore, if a member is divorced while on active duty, the requirements of the Soldiers' and Sailors' Civil Relief Act (SSCRA)[3] must be met before an award dividing military retired pay can be enforced under the USFSPA.[4] The USFSPA contains its own jurisdictional requirement.[5] It limits the amount of the member's retired pay which can be paid to a former spouse to 50% of the member's disposable retired pay (gross retired pay less authorized deductions).[6] It requires that the parties must have been married for at least 10 years while the member performed at least 10 years of active duty service before a division of retired pay is enforceable under the USFSPA.[7] It specifies how an award of military retired pay must be expressed.[8]

II. DOCUMENTS NEEDED TO DIVIDE MILITARY RETIRED PAY.

[1] McCarty v. McCarty, 453 U.S. 210 (1981)
[2] Id. at 232.
[3] *See* Soldier's and Sailor's Civil Relief Act, 10 U.S.C. App. § 501 et seq.
[4] 10 U.S.C. §1408(b)(1)(D).
[5] 10 U.S.C. § 1408(c)(4).
[6] 10 U.S.C. § 1408 (e)(1).
[7] 10 U.S.C. § 1408 (d)(2).
[8] 10 U.S.C. § 1408 (a)(2)(C).

The USFSPA defines a "court order" dividing military retired pay enforceable under the Act as a "final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree."[9] This also includes an order modifying a previously issued "court order."

Since military retired pay is a Federal entitlement, and not a qualified pension plan, there is no requirement that a Qualified Domestic Relations Order (QDRO) be used. As long as the award is set forth in the divorce decree or other court order in an acceptable manner, that is sufficient. It is also not necessary to judicially join the "member's plan" as a part of the divorce proceeding. There is no Federal statutory authority for this. The award may also be set forth in a court ratified or approved separation agreement, or other court order issued incident to the divorce.

In order to submit an application for payments under the USFSPA, a former spouse needs to submit a copy of the applicable court order certified by the clerk of court within 90 days immediately preceding its service on the designated agent,[10] along with a completed application form (DD Form 2293).[11] Instructions, including designated agent names and addresses, are on the back of the DD Form 2293. The Defense Finance and Accounting Service (DFAS) is the designated agent for all uniformed military services. The Form and instructions can be downloaded from our DFAS website at www.dfas.mil. Click on Money Matters, then Garnishments.

III. REQUIREMENTS FOR ENFORCEABILITY UNDER USFSPA.

a. Soldiers' and Sailors' Civil Relief Act.

The provision of the SSCRA that has primary application to the USFSPA and the division of military retired pay is the section concerning default judgments against active duty service members. This section requires that if an active duty defendant fails to make an appearance in a legal proceeding, the plaintiff must file an affidavit with the court informing the court of the member's military status. The court shall appoint an attorney to represent the interests of the absent defendant.[12] Since a member has 90 days after separation from active duty service to apply to a court rendering a judgment to re-open a case on SSCRA grounds[13], the SSCRA is not a USFSPA issue where a member has been retired for more than 90 days.

b. The 10/10 requirement.

[9] 10 U.S.C. § 1408(a)(2).
[10] Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Subparagraph 290601.C. Available over the Internet at www.dod.mil/comptroller/fmr/.
[11] Id. at Paragraph 290502.
[12] 10 U.S.C. App. § 520(1).
[13] 10 U.S.C. App. § 520(4).

This is a "killer" requirement. For a division of retired pay as property award to be enforceable under the USFSPA, the former spouse must have been married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable towards retirement eligibility.[14] This requirement does not apply to the Court's authority to divide military retired pay, but only to the ability of the former spouse to get direct payments from DFAS. This is a statutory requirement, and not a personal right of the member that can be waived. Although this requirement was probably included in the USFSPA to protect members, we have had more complaints about it from members than from former spouses. Assuming that a member intends to meet his or her legal obligations, the member would much rather have us pay the former spouse directly rather than have to write a check each month. It would lessen contact with the former spouse, and the former spouse would receive her or his own IRS Form 1099, instead of the member being taxed on the entire amount of military retired pay.

If we cannot determine from the court order whether the 10/10 requirement has been met, we may ask the former spouse to provide a copy of the parties' marriage certificate. A recitation in the court order such as, "The parties were married for 10 years or more while the member performed 10 years or more of military service creditable for retirement purposes" will satisfy the 10/10 requirement.

c. USFSPA Jurisdiction.

The USFSPA's jurisdictional requirement is found in 10 U.S.C. § 1408(c)(4). This is another "killer" requirement. If it is not met, the former spouse's application for retired pay as property payments under the USFSPA will be rejected. For a court to have the authority to divide military retired pay, the USFSPA requires that the court have "C-4" jurisdiction over the military member in one of three ways. One way is for the member to consent to the jurisdiction of the court. The member indicates his or her consent to the court's jurisdiction by taking some affirmative action with regard to the legal proceeding, such as filing any responsive pleading in the case. Simply receiving notice of filing of the divorce complaint or petition is not sufficient. Consent is the most common way for a court to have "C-4" jurisdiction over a member.

The other ways for the court to have C-4 jurisdiction is for the member to be a resident of the State other than because of his or her military assignment, or for the court to find that the member was domiciled in the particular State. Now, the key with regard to domicile is that it should be the court making this determination, and it should be noted in the divorce decree.

IV. LANGUAGE DIVIDING MILITARY RETIRED PAY.

a. Fixed dollar amount or percentage awards.

[14] 10 U.S.C. § 1408(d)(2).

The amount of a former spouse's award is entirely a matter of state law. However, in order for the award to be enforceable under the USFSPA, it must be expressed in a manner consistent with the USFSPA, and the court order must provide us with all the information necessary to compute the award.

The major reason we reject applications for payments under the USFSPA is that the language dividing retired pay is faulty. The USFSPA states that for an award to be enforceable, it must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay.[15] If a fixed dollar amount award is used, the former spouse would not be entitled to any of the member's retired pay cost of living adjustments (COLAs).[16] Because of the significant effect of COLAs over time, it is infrequent that an award is stated as a fixed dollar amount. The more common method of expressing the former spouse's award is as a percentage of the member's disposable retired pay. This has the benefit to the former spouse of increasing the amount of the former spouse's award over time due to periodic retired pay COLAs.

All percentage awards are figured based on a member's disposable retired pay, which is a member's gross retired pay less authorized deductions.[17] The authorized deductions vary based on the date of the parties' divorce. The principal deductions now include retired pay waived to receive VA disability compensation, disability retired pay, and Survivor Benefit Plan premiums where the former spouse is elected as the beneficiary. Since the United States Supreme Court has ruled that Congress authorized the division of only disposable retired pay, not gross retired pay,[18] the regulation provides that all percentage awards are to be construed as a percentage of disposable retired pay.[19]

Set-offs against the former spouse's award are not permitted. If the amount of the former spouse's award is expressed as a percentage of disposable retired pay less some set-off amount (e.g., the Survivor Benefit Plan premium or the former spouse's child support obligation or some other debt), the entire award is unenforceable. This type of award language does not meet the statutory requirement of a fixed dollar amount or percentage. If the award language is acceptable, but another provision of the court order requires that a set-off amount be deducted from the former spouse's share, only the set-off is unenforceable. This is because there is no provision of the USFSPA that authorizes enforcement of a set-off against the former spouse's retired pay as property award. State courts have authority to divide military retired pay only as set forth by the USFSPA.[20] Thus, state court provisions not in accordance with the USFSPA are unenforceable.

---

[15] 10 U.S.C. §1408(a)(2)(C).
[16] DoDFMR, vol. 7B, Paragraph 291103 provides for automatic COLA's only for awards expressed as a percentage of disposable retired pay.
[17] 10 U.S.C. § 1408(a)(4)(amended 1986, 1990).
[18] Mansell v. Mansell, 490 U.S. 581.
[19] DoDFMR, vol. 7B, Paragraph 290606.
[20] Mansell, 490 U.S. at 581, illustrates the general principal that state courts may deal with military retired pay only in accordance with the provisions of the USFSPA.

There is no magic language required to express a percentage or fixed dollar award. All the divorce decree needs to say is that: **"The former spouse is awarded ___ percent [or dollar amount] of the member's military retired pay."**

b. Formula awards for divorces while the member is on active duty.

Most of the problems with award language have arisen in cases where the parties were divorced while the member was still on active duty. In these cases, the former spouse's award is indeterminate since the member has not yet retired. Since the parties do not know how much longer the member will remain in military service after the divorce, a straight percentage award may not be suitable. Also, many States take the approach that the former spouse should not benefit from any of the member's post-divorce promotions or pay increases based on length of service after the divorce. These awards are often drafted in such a way that we cannot determine the amount of the award. This causes the parties to have to go back to court and obtain a clarifying order.

A proposed regulation was issued in 1995 that allowed the use of formula and hypothetical awards to divide military retired pay when the parties were divorced prior to the member's becoming eligible to receive retired pay.[21] Although this proposed regulation has never been finalized, it still provides the basis for our review of these types of awards.

A formula award is an award expressed in terms of a marital fraction, where the numerator covers the period of the parties' marriage while the member was performing creditable military service, and the denominator covers the member's total period of creditable military service. The former spouse's award is usually calculated by multiplying the marital fraction by ½.

(1) For members retiring from active duty, the numerator is the total period of time from marriage to divorce or separation while the member was performing creditable military service. The numerator, expressed in terms of whole months, must be provided in the court order. Days or partial months will be dropped. DFAS will supply the denominator in terms of whole months of service creditable for retirement, and then work out the formula to calculate the former spouse's award as a percentage of disposable retired pay. All fractions will be carried out to six decimal places.

For example, assume you have a marriage that lasted exactly 12 years or 144 months. The member serves for 25 years and then retires. Using the above formula, the former spouse would be entitled to ½ x (144/300) = 24.0000% of the members disposable retired pay.

The following language is an example of an acceptable way to express an active duty formula award:

[21] Former Spouse Payments From Retired Pay, 60 Fed. Reg. 17507 (1995) (to be codified at 32 C.F.R. pt. 63)(proposed Apr 5, 1995).

"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _____ months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service."

(2) In the case of members retiring from reserve duty, a marital fraction award must be expressed in terms of reserve retirement points rather than in terms of whole months. The numerator, which for reservists is the total number of reserve retirement points earned during the marriage, must be provided in the court order.[22] DFAS will supply the member's total reserve retirement points for the denominator. All fractions will be carried out to six decimal places.

The following language is an example of an acceptable way to express a reserve duty formula award.

"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is _____ reserve retirement points earned during the period of the marriage, divided by the member's total number of reserve retirement points earned."

c. Hypothetical awards based on the member's pay at the time the court divides retired pay.

A hypothetical award is an award based on a retired pay amount different from the member's actual retired pay. It is usually figured as if the member had retired on the date of separation or divorce. Many jurisdictions use hypothetical awards to divide military retired pay. Unlike a formula award, a hypothetical award does not give the former spouse the benefit of any of the member's pay increases due to promotions or increased service time after the divorce.

(1) The basic method for computing military retired pay is to multiply the member's retired pay base times the retired pay multiplier.[23] For members entering military service before September 8, 1980, the retired pay base is the member's final basic pay.[24] For members entering military service after September 7, 1980, the retired pay base is the average of the member's highest 36 months of basic pay.[25] This will usually be the last 36 months prior to retirement.

[22] Id.
[23] DoDFMR, Vol. 7B, Paragraph 030102.
[24] Id. at Subparagraphs 030102.A through C.
[25] Id. at Subparagraph 030108.C.

The retired pay multiplier is the product of two and one-half percent times the member's years of creditable service.[26] For members who entered military service on or after August 1, 1986, who are under the age of 62, and who elect to participate in the CSB/REDUX retirement system, their retired pay multiplier is reduced one percentage point for each full year of service less than 30, and 1/12th of one percent for each full month.[27] Their retired pay is recomputed without the reduction when the member attains age 62. The years of creditable service for a reservist are computed by dividing the reserve retirement points on which the award is to be based by 360.[28]

(2) The hypothetical retired pay amount is computed the same way as the member's actual military retired pay, but based on variables that apply to the member's hypothetical retirement date**. These variables must be provided to us in the applicable court order. Failure to do so will cause the court order to be rejected.** The court order must provide: 1) the hypothetical retired pay base, and 2) the hypothetical years of creditable service (or reserve points, in the case of a reservist). The principal problem we find with hypothetical awards is that one or more of the necessary variables for the hypothetical retired pay computation is often left out of the court order. If we are not able to compute a hypothetical retired pay figure from the information provided in the court order, the parties will have to have the court clarify the award.

For members entering military service before February 8, 1980, the hypothetical retired pay base is the member's basic pay at the hypothetical retirement date. Basic pay tables are available at the DFAS website at www.dfas.mil, under Money Matters. Attorneys should be able to obtain the basic pay figure either from the member or from the applicable pay table.

For members entering military service after September 7, 1980, the hypothetical retired pay base is the average of the member's highest 36 months of basic pay prior to the hypothetical retirement date. The "high 36 months" will probably be the last 36 months prior to that date. This information is specific to each member. The pay information can be obtained from either the member during discovery or from his pay center by subpoena. **We at the Garnishment Directorate do not have access to this pay information.** It must be included in the court order dividing military retired pay.

For members who elect to retire under the CSB/REDUX retirement system, we will compute the member's hypothetical retired pay amount using the standard retired pay multiplier, and not the reduced CSB/REDUX multiplier. Thus, the former spouse's award will not be reduced as a result of the member's electing to receive a Career Status Bonus (CSB) and a reduced retired pay amount.

[26] Id. at Subparagraph 030102.D.
[27] Id.
[28] Id. at Subparagraph 010301.F.

(3) We will convert all hypothetical awards into a percentage of the member's actual disposable retired pay according to the following method set forth in the proposed regulation.[29]

Assume that the court order awards the former spouse 25% of the retired pay of an E-6 with a retired pay base of $2,040 and with 18 years of service retiring on June 1, 1997. The member's hypothetical retired pay is $2,040 x (.025 x 18) = $918. The member later retires on June 1, 2002, as an E-7 with a retired pay base of $3,200.40 and 23 years of service. The member's actual gross retired pay is $3,200.40 x (.025 x 23) = $1,840.

The former spouse's award is converted to a percentage of the member's actual disposable retired pay by multiplying 25% times $918/$1,840, which equals 12.4728%. This converted percentage is the former spouse's award, and will be set up in the retired pay system. While the percentage number has been reduced, the amount the former spouse receives is the correct amount intended by the court, because the lower percentage is multiplied against the higher dollar amount of the member's actual disposable retired pay. This percentage will be applied each month to the member's disposable retired pay to determine the amount the former spouse receives. The former spouse will automatically receive a proportionate share of the member's cost of living adjustments (COLAs).[30]

The hypothetical retired pay amount is a fictional computation, since the member is not actually retiring as of the date his or her retired pay is divided. Our goal in computing a hypothetical retired pay award is to make the computation in a way that is reasonable and equitable to both the member and former spouse. In order to do this, we will compute the hypothetical award as if the member has enough creditable service to qualify for military retired pay as of the hypothetical retirement date, even if he or she did not.

Also, a member who retires with less than 20 years of creditable service has a reduction factor applied to his or her retired pay computation.[31] But the only time we will apply a reduction factor to the hypothetical retired pay calculation is if a reduction factor was actually used to compute the member's military retired pay. In that case, we would apply the same reduction factor to both computations to achieve equity.

For members who elect to retire under the CSB/REDUX retirement system, we will recompute the former spouse's percentage award when the member attains age 62, and his retired pay is adjusted to the amount he would have received had the member not elected CSB/REDUX. It is the member's responsibility to provide us with his birth date to ensure that we are able to make this adjustment.

(4***)*** The following language is an example of an acceptable way to express an active duty hypothetical award.

---

[29] Former Spouse Payments From Retired Pay, 60 Fed. Reg. 17507, 17508 (1995) (to be codified at 32 C.F.R. pt. 63)(proposed Apr 5, 1995).
[30] See DoDFMR, Vol. 7B, Paragraph 290606.
[31] Id. at Subparagraph 030110.A.

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired with a retired pay base of _____ and with _____ years of creditable service."

The following proposed language is an example of an acceptable way to express a reserve duty hypothetical award.

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base of _____ and with _____ reserve retirement points."

d. Hypothetical awards based on the pay table in effect at the time a member becomes eligible to receive military retired pay.

The court order may direct us to calculate a hypothetical retired pay amount using the pay table in effect at the time the member becomes eligible to receive military retired pay, instead of the pay table in effect at the time the court divides military retired pay. If this is the case, then the court order dividing an active duty member's military retired pay must provide us with: 1) the percentage awarded the former spouse, 2) the member's rank to be used in the calculation, and 3) the years of creditable service to be used in the calculation. For reserve retirements, the court order must provide us with: 1) the percentage awarded the former spouse, 2) the member's rank to be used, 3) the reserve retirement points to be used, and 4) years of service for basic pay purposes.

We will make the hypothetical retired pay calculation using the basic pay figure from the pay table in effect at the member's retirement for the rank and years of service given in the court order. This will apply whether or not the member is a "high 36" retiree.

The following language is an example of an acceptable active duty hypothetical award based on the pay table in effect at the member's retirement.

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the rank of _____ and with _____ years of creditable service."

The following language is an example of an acceptable reserve hypothetical award based on the pay table in effect at the member's becoming eligible to receive military retired pay.

"The former spouse is awarded _____% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on the date he [or she] attained age 60, with the rank of _____ , with _____ reserve retirement points, and with _____ years of service for basic pay purposes."

e. Examples of unacceptable former spouse award language.

1. "The former spouse is awarded one-half of the community interest in the member's military retired pay."

Here, there is no way for us to determine the community interest unless a formula for calculating it is provided elsewhere in the court order.

2. "The former spouse is awarded one-half of the member's military retirement that vested during the time of the marriage."

The problem here is that there is no way for us to determine an amount or percentage. Military retired pay is a Federal entitlement, which the member either qualifies for or does not. It does not vest in any way prior to the member's retirement.

3. "The former spouse is awarded one-half of the accrued value of the member's military retirement benefits as of the date of the divorce."

The problem here is similar to that above. Since military retired pay is a statutory entitlement, there is no value that accrues prior to the member's retiring.

4. "The former spouse shall be entitled to 42% of the member's military retirement based on the amount he would have received had he retired as of the date of the divorce."

Since we do not have access to the member's active duty service information, there is no way for us to determine the member's rank or years of active duty service as of the date of divorce. Thus, there is no way for us to compute a hypothetical retired pay amount.

5. "The former spouse is a awarded a portion of the member's military retired pay calculated according to the Bangs formula."

Here, the court order presupposes that we are familiar with that State's laws and know what the Bangs formula is, or that we are able to do legal research to resolve an ambiguity in a court order.

6. "The former spouse is awarded an amount equal to 50% of the member's disposable retired pay less the amount of the Survivor Benefit Plan Premium."

The amount of the former spouse's award must be expressed either as a fixed dollar amount or as a percentage of disposable retired pay. This award does not meet that requirement.

APPENDIX G

DIRECT DEPOSIT AUTHORIZATION

FOR PROCESSING FEDERAL NET PAYMENTS

(Refer to instructions for preparing authorization before completing the form.)

SECTION 1 - RECIPIENT INFORMATION

YOUR SOCIAL SECURITY NUMBER

RETIREE'S SOCIAL SECURITY NUMBER

YOUR NAME *(Last, First MI)*

YOUR HOME TELEPHONE NUMBER

YOUR WORK TELEPHONE NUMBER

YOUR HOME / CORRESPONDENCE ADDRESS

SECTION II - ACCOUNT INFORMATION

TYPE OF ACCOUNT

- ☐ CHECKING
- ☐ SAVINGS

TYPE OF PAYMENT

- ☐ COMMUNITY PROPERTY
- ☐ CHILD SUPPORT
- ☐ ALIMONY

NOTE: IF YOU SELECTED A CHECKING ACCOUNT, A VOIDED PERSONAL CHECK OR SHAREDRAFT MUST BE ATTACHED, IN ADDITION TO COMPLETING ITEMS 8 THROUGH 12 OF THIS SECTION. SEE INSTRUCTIONS ON THE BACK OF THIS FORM.

ROUTING TRANSIT NUMBER

ACCOUNT NUMBER

ACCOUNT TITLE *(Account Holder's Name)*

FINANCIAL INSTITUTION NAME AND ADDRESS

SECTION III AUTHORIZATION

RECIPIENT'S SIGNATURE

DATE *(YYYYMMDD)*

PRIVACY ACT STATEMENT

Collection of the information you are requested to provide on this form is authorized under 31 CFR 209 and/or 210. The information is confidential and is needed to prove entitlement to payments. The information will be used to process payment data from the federal agency to the financial institution and/or its agent.

INSTRUCTIONS FOR PREPARING AUTHORIZATION

PURPOSE - You may use this form to provide instructions for processing your net pay. Failure to provide the requested information may affect the processing of this form and may delay or prevent the receipt of payments through the Direct Deposit / Electronic Funds Transfer Program.

SECTION I - **EMPLOYEE / MEMBER / ANNUITANT INFORMATION (ITEMS 1-5)**

You must complete all blocks after carefully reading the instructions and Privacy Act Statement. You must keep the agency informed of any address change to remain qualified for payments.

SECTION II - **DIRECT DEPOSIT ACCOUNT INFORMATION**

ITEM 6 - TYPE OF ACCOUNT - Place "X" in the appropriate box, to indicate if you want your payment to be sent to a checking or savings account.

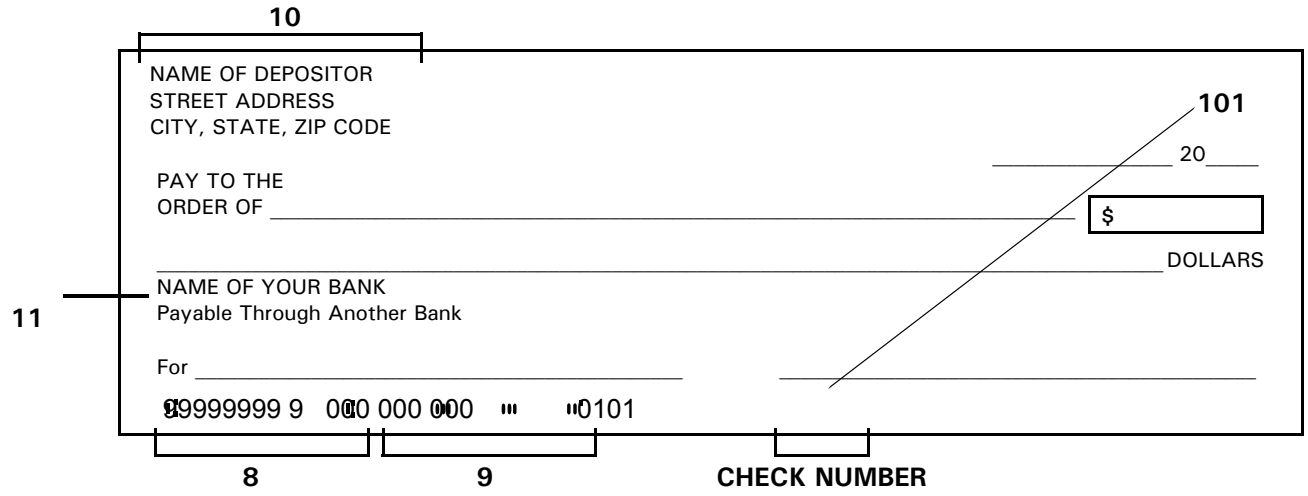
ITEM 7 - TYPE OF PAYMENT - Place an "X" in the appropriate box to indicate what type of payment you want sent by Direct Deposit.

ITEM 8 - ROUTING TRANSIT NUMBER - Your financial institution's 9-digit routing transit number. See the illustration below.

ITEM 9 - ACCOUNT NUMBER - Your account number at your financial institution. See the illustration below.

ITEM 10 - ACCOUNT TITLE - The depositor's name on the account at the financial institution. See the illustration below.

ITEM 11 - FINANCIAL INSTITUTION NAME / ADDRESS - The institution to which payments are to be directed See the illustration below.



8 - ROUTING TRANSIT NUMBER - Examine your deposit slip or check for items labeled 9 in the above sample. Is the Routing Transit Number (RTN) eight numbers in a row followed by a space and then one number? Is the first number of the RTN "0," "1," "2," or "3"? If the answer to both questions is "yes" enter the numbers from your deposit slip or check on the reverse of this form in Item 9. Otherwise, call your financial institution and ask them to provide you with their RTN.

9 - ACCOUNT NUMBER - Include dashes where the symbol ⑈ appears on your check or deposit slip. Be sure not to include the check number (#101 in the example) or deposit slip number as part of your Account Number in Item 9. If you cannot determine your Account Number, contact your financial institution.

10 - ACCOUNT TITLE - Must include recipient's name.

11 - FINANCIAL INSTITUTION NAME / ADDRESS - If your check or sharedraft includes "Payable Through" under the bank name, contact the financial institution to help obtain the correct Routing Transit Number for Direct Deposit.

SECTION III - **AUTHORIZATION**

ITEMS 12 AND 13 - You must sign and date this form before the authorization can be processed.

FOR CHANGES - You must complete and submit a new "Direct Deposit Authorization" form to the applicable DoD agency. We recommend that you maintain accounts at both financial institutions until the new institution receives your Direct Deposit payments.

FOR CANCELLATIONS - This authorization will remain in effect until you cancel by providing a written notice to the DoD Agency or by your death or legal incapacity. Upon cancellation, you should notify the receiving financial institution. The authorization may be cancelled by the financial institution by providing you a written notice 30 days in advance of the cancellation date. You must immediately advise the DoD Agency if the authorization is cancelled by the financial institution. The financial institution cannot cancel the authorization by advice to the Government Agency.

APPENDIX H

APPLICATION FOR FORMER SPOUSE PAYMENTS FROM RETIRED PAY

(Please read instructions on back and the Privacy Act Statement before completing this form.)

Form Approved
OMB No. 0730-0008
Expires Dec 31, 2007

FOR OFFICIAL USE

PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE SERVICE ADDRESS LISTED ON BACK.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 USC 1408; EO 9397.

PRINCIPAL PURPOSE(S): To request direct payment through a Uniformed Service designated agent of court ordered child support, alimony, or division of property to a former spouse from the retired pay of a Uniformed Service member.

ROUTINE USE(S): In addition to those disclosures generally permitted under 5 U.S.C. Section 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. Section 552a(b)(3) as follows:
Records are provided to the Internal Revenue Service for normal wage and tax withholding purposes. The "Blanket Routine Uses" published at the beginning of the DFAS compilation of systems of records notices also apply.

DISCLOSURE: Voluntary; however, failure to provide requested information may delay or make impossible processing this direct payment request.

1. APPLICANT IDENTIFICATION	**2. SERVICE MEMBER IDENTIFICATION**
a. NAME *(As appears on court order) (Last, First, Middle Initial)*	**a. NAME** *(Last, First, Middle Initial)*
b. CURRENT NAME *(Last, First, Middle Initial)*	**b. SOCIAL SECURITY NUMBER**
c. SOCIAL SECURITY NUMBER	**c. BRANCH OF SERVICE**
d. ADDRESS *(Street, City, State, ZIP Code)*	**d. ADDRESS** *(Street, City, State, ZIP Code) (If known)*

3. REQUEST STATEMENT

I request direct payment from the retired pay of the above named Uniformed Service member based on the enclosed court order.

I request payment of:

(1) Child support in the amount of $ _____ per month.

(2) Alimony, spousal support or maintenance in the amount of $ _____ , or _____ percent of disposable retired pay per month.

(3) A division of property in the amount of $ _____ , or _____ percent of disposable retired pay per month.

I certify that any request for current child and/or spousal support is not being collected under any other wage withholding or garnishment procedure authorized by statute. Furthermore, I certify that the court order has not been amended, superseded or set aside and is not subject to appeal. As a condition precedent to payment, I agree to refund all overpayments and that they are otherwise recoverable and subject to involuntary collection from me or my estate, and I will notify the appropriate agent (as listed on back) if the operative court order, upon which payment is based, is vacated, modified, or set aside. I also agree to notify the appropriate agent (as listed on back) of a change in eligibility for payments. This includes notice of my remarriage, if under the terms of the court order or the laws of the jurisdiction where it was issued, remarriage causes the payments to be reduced or terminated; or notice of a change in eligibility for child support payments by reason of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payments from retired pay. I hereby acknowledge that any payment to me must be paid from disposable retired pay as defined by the statute and implementing regulations.

Reset

4. I HAVE ENCLOSED ALL PERTINENT DOCUMENTATION TO INCLUDE: *(X as applicable)*		
	a. A copy of the operative court order and other accompanying documents that provide for payment of child support, alimony or a division of retired pay as property, containing a certification dated by the clerk of the court within 90 days preceding the date the application is received by the designated agent.	
	b. Evidence of the date(s) of my marriage to the member if the application is for the direct payment of a division of the member's disposable retired pay as property. Give **MARRIAGE DATE** *(YYYYMMDD)* in this block unless stated in court order.	
	c. If payment request includes child support, give name(s) and birth date(s) of child(ren):	
	(1) NAME OF CHILD *(Last, First, Middle Initial)*	**(2) DATE OF BIRTH** *(YYYYMMDD)*
	d. Other information *(please identify)* or remarks.	

5a. APPLICANT'S SIGNATURE	b. DATE SIGNED

INSTRUCTIONS FOR COMPLETION OF DD FORM 2293

GENERAL. These instructions govern an application for direct payment from retired pay of a Uniformed Service member in response to court ordered child support, alimony, or a division of property, under the authority of 10 USC 1408.

SERVICE OF APPLICATION. You may serve the application by mail on the appropriate Uniformed Service designated agent. The Uniformed Services' designated agents are:

(1) ARMY, NAVY, AIR FORCE, AND MARINE CORPS: Attn: DFAS-CL/GAG, Assistant General Counsel for Garnishment Operations, DEFENSE FINANCE AND ACCOUNTING SERVICE - CLEVELAND, P.O. Box 998002, Cleveland, OH 44199-8002;

(2) COAST GUARD: Commanding Officer (LGL), United States Coast Guard, Human Resources Service and Information Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591;

(3) PUBLIC HEALTH SERVICE: Attn: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001;

(4) NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: Same as U.S. Coast Guard.

IMPORTANT NOTE: Making a false statement or claim against the United States Government is punishable. The penalty for willfully making a false claim or false statement is a maximum fine of $10,000 or maximum imprisonment of 5 years or both (18 USC 287 and 1001).

ITEM 1.
a. Enter full name as it appears on the court order.
b. Enter current name if different than it appears on court order.
c. Enter Social Security Number.
d. Enter current address.

ITEM 2.
a. Enter former spouse's full name as it appears on the court order.
b. Enter former spouse's Social Security Number.
c. Enter former spouse's branch of service.
d. Enter former spouse's current address, if known.

ITEM 3. Read the Request Statement carefully.

ITEM 4. A certified copy of a court order can be obtained from the court that issued the court order. Other documents include, but are not limited to, final divorce decree, property settlement order, and any appellate court orders. If the court order does not state that the former spouse was married to the member for ten years or more while the member performed ten years creditable service and the request is for payment of a division of property, the applicant must provide evidence to substantiate the ten years' marriage condition. Additional evidence must show that the ten years' requirement has been met, including: Uniformed Service orders, marriage certificate, and other documents that establish the period of marriage. Other information or documents included with the request should be clearly identified by the document's title and date. Remarks may be provided to clarify specific points.

ITEM 5. Self-explanatory.

Reset

APPENDIX H

APPLICATION FOR FORMER SPOUSE PAYMENTS FROM RETIRED PAY

(Please read instructions on back and the Privacy Act Statement before completing this form.)

Form Approved
OMB No. 0730-0008
Expires Dec 31, 2007

FOR OFFICIAL USE

PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ORGANIZATION. RETURN COMPLETED FORM TO THE APPROPRIATE SERVICE ADDRESS LISTED ON BACK.

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 USC 1408; EO 9397.

PRINCIPAL PURPOSE(S): To request direct payment through a Uniformed Service designated agent of court ordered child support, alimony, or division of property to a former spouse from the retired pay of a Uniformed Service member.

ROUTINE USE(S): In addition to those disclosures generally permitted under 5 U.S.C. Section 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. Section 552a(b)(3) as follows:
Records are provided to the Internal Revenue Service for normal wage and tax withholding purposes. The "Blanket Routine Uses" published at the beginning of the DFAS compilation of systems of records notices also apply.

DISCLOSURE: Voluntary; however, failure to provide requested information may delay or make impossible processing this direct payment request.

1. APPLICANT IDENTIFICATION	**2. SERVICE MEMBER IDENTIFICATION**
a. NAME *(As appears on court order) (Last, First, Middle Initial)*	**a. NAME** *(Last, First, Middle Initial)*
b. CURRENT NAME *(Last, First, Middle Initial)*	**b. SOCIAL SECURITY NUMBER**
c. SOCIAL SECURITY NUMBER	**c. BRANCH OF SERVICE**
d. ADDRESS *(Street, City, State, ZIP Code)*	**d. ADDRESS** *(Street, City, State, ZIP Code) (If known)*

3. REQUEST STATEMENT

I request direct payment from the retired pay of the above named Uniformed Service member based on the enclosed court order.

I request payment of:

(1) Child support in the amount of $ _____ per month.

(2) Alimony, spousal support or maintenance in the amount of $ _____ , or _____ percent of disposable retired pay per month.

(3) A division of property in the amount of $ _____ , or _____ percent of disposable retired pay per month.

I certify that any request for current child and/or spousal support is not being collected under any other wage withholding or garnishment procedure authorized by statute. Furthermore, I certify that the court order has not been amended, superseded or set aside and is not subject to appeal. As a condition precedent to payment, I agree to refund all overpayments and that they are otherwise recoverable and subject to involuntary collection from me or my estate, and I will notify the appropriate agent (as listed on back) if the operative court order, upon which payment is based, is vacated, modified, or set aside. I also agree to notify the appropriate agent (as listed on back) of a change in eligibility for payments. This includes notice of my remarriage, if under the terms of the court order or the laws of the jurisdiction where it was issued, remarriage causes the payments to be reduced or terminated; or notice of a change in eligibility for child support payments by reason of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payments from retired pay. I hereby acknowledge that any payment to me must be paid from disposable retired pay as defined by the statute and implementing regulations.

Reset

4. I HAVE ENCLOSED ALL PERTINENT DOCUMENTATION TO INCLUDE: *(X as applicable)*		
	a. A copy of the operative court order and other accompanying documents that provide for payment of child support, alimony or a division of retired pay as property, containing a certification dated by the clerk of the court within 90 days preceding the date the application is received by the designated agent.	
	b. Evidence of the date(s) of my marriage to the member if the application is for the direct payment of a division of the member's disposable retired pay as property. Give **MARRIAGE DATE** *(YYYYMMDD)* in this block unless stated in court order.	
	c. If payment request includes child support, give name(s) and birth date(s) of child(ren):	
	(1) NAME OF CHILD *(Last, First, Middle Initial)*	**(2) DATE OF BIRTH** *(YYYYMMDD)*
	d. Other information *(please identify)* or remarks.	

5a. APPLICANT'S SIGNATURE	b. DATE SIGNED

INSTRUCTIONS FOR COMPLETION OF DD FORM 2293

GENERAL. These instructions govern an application for direct payment from retired pay of a Uniformed Service member in response to court ordered child support, alimony, or a division of property, under the authority of 10 USC 1408.

SERVICE OF APPLICATION. You may serve the application by mail on the appropriate Uniformed Service designated agent. The Uniformed Services' designated agents are:

(1) ARMY, NAVY, AIR FORCE, AND MARINE CORPS: Attn: DFAS-CL/GAG, Assistant General Counsel for Garnishment Operations, DEFENSE FINANCE AND ACCOUNTING SERVICE - CLEVELAND, P.O. Box 998002, Cleveland, OH 44199-8002;

(2) COAST GUARD: Commanding Officer (LGL), United States Coast Guard, Human Resources Service and Information Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591;

(3) PUBLIC HEALTH SERVICE: Attn: Retired Pay Section, CB, Division of Commissioned Personnel, PUBLIC HEALTH SERVICE, Room 4-50, 5600 Fishers Lane, Rockville, MD 20857-0001;

(4) NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: Same as U.S. Coast Guard.

IMPORTANT NOTE: Making a false statement or claim against the United States Government is punishable. The penalty for willfully making a false claim or false statement is a maximum fine of $10,000 or maximum imprisonment of 5 years or both (18 USC 287 and 1001).

ITEM 1.
a. Enter full name as it appears on the court order.
b. Enter current name if different than it appears on court order.
c. Enter Social Security Number.
d. Enter current address.

ITEM 2.
a. Enter former spouse's full name as it appears on the court order.
b. Enter former spouse's Social Security Number.
c. Enter former spouse's branch of service.
d. Enter former spouse's current address, if known.

ITEM 3. Read the Request Statement carefully.

ITEM 4. A certified copy of a court order can be obtained from the court that issued the court order. Other documents include, but are not limited to, final divorce decree, property settlement order, and any appellate court orders. If the court order does not state that the former spouse was married to the member for ten years or more while the member performed ten years creditable service and the request is for payment of a division of property, the applicant must provide evidence to substantiate the ten years' marriage condition. Additional evidence must show that the ten years' requirement has been met, including: Uniformed Service orders, marriage certificate, and other documents that establish the period of marriage. Other information or documents included with the request should be clearly identified by the document's title and date. Remarks may be provided to clarify specific points.

ITEM 5. Self-explanatory.

Reset

453 U.S. 210, *; 101 S. Ct. 2728, **;
69 L. Ed. 2d 589, ***; 1981 U.S. LEXIS 128

APPENDIX I

McCARTY v. McCARTY

No. 80-5

SUPREME COURT OF THE UNITED STATES

453 U.S. 210; 101 S. Ct. 2728; 69 L. Ed. 2d 589; 1981 U.S. LEXIS 128; 49 U.S.L.W. 4850; 2 E.B.C. 1502

March 2, 1981, Argued

June 26, 1981, Decided

PRIOR HISTORY:

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

DISPOSITION:

Reversed and remanded.

SYLLABUS:

A regular commissioned officer of the United States Army who retires after 20 years of service is entitled to retired pay. Retired pay terminates with the officer's death, although he may designate a beneficiary to receive any arrearages that remain unpaid at death. In addition there are statutory plans that allow the officer to set aside a portion of his retired pay for his survivors. Appellant, a Regular Army Colonel, filed a petition in California Superior Court for dissolution of his marriage to appellee. At the time, he had served approximately 18 of the 20 years required for retirement with pay. Under California law, each spouse, upon dissolution of a marriage, has an equal and absolute right to a half interest in all community and quasi-community property, but retains his or her separate property. In his petition, appellant requested, *inter alia*, that his military retirement benefits be confirmed to him as his separate property. The Superior Court held, however, that such benefits were subject to division as quasi-community property, and accordingly ordered appellant to pay to appellee a specified portion of the benefits upon retirement. Subsequently, appellant retired and began receiving retired pay; under the dissolution decree, appellee was entitled to approximately 45% of the retired pay. On review of this award, the California Court of Appeal affirmed, rejecting appellant's contention that because the federal scheme of military retirement benefits pre-empts state community property law, the Supremacy Clause precluded the trial court from awarding appellee a portion of his retired pay.

Held: Federal law precludes a state court from dividing military retired pay pursuant to state community property laws. Pp. 220-236.

(a) There is a conflict between the terms of the federal military retirement statutes and the community property right asserted by appellee. The military retirement system confers no entitlement to retired pay upon the retired member's spouse, and does not embody even a limited "community property concept." Rather, the language, structure, and history of the statutes make it clear that retired pay continues to be the personal entitlement of the retiree. Pp. 221-232.

(b) Moreover, the application of community property principles to military retired pay threatens grave harm to "clear and substantial" federal interests. Thus, the community property division of retired pay, by reducing the amounts that Congress has determined are necessary for the retired member, has the potential to frustrate the congressional objective of providing for the retired service member. In addition, such a division has the potential to interfere with the congressional goals of having the military retirement system serve as an inducement for enlistment and re-enlistment and as an encouragement to orderly promotion and a youthful military. Pp. 232-235.

COUNSEL:

Mattaniah Eytan argued the cause and filed briefs for appellant.

Walter T. Winter argued the cause for appellee. With him on the brief was Barbara R. Dornan. *

> * Herbert N. Harmon filed a brief for the Non-Commissioned Officers Association of the United States of America et al. as amici curiae urging reversal.
>
> Briefs of amici curiae urging affirmance were filed by William H. Allen for John L. Burton et al.; and by Gertrude D. Chern, Judith I. Avner, Gill Deford, and Neal Dudovitz for the National Organization for Women Legal Defense and Education Fund et al.

JUDGES:

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BRENNAN and STEWART, JJ., joined, post, p. 236.

OPINIONBY:

BLACKMUN

OPINION:

[*211] [*593] [**2730]** JUSTICE BLACKMUN delivered the opinion of the Court.

[*HR1A]** A regular or reserve commissioned officer of the United States Army who retires after 20 years of service is entitled to retired pay. *10 U. S. C. § § 3911* and 3929. The question presented by this case is whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws.

I

Although *disability* pensions have been provided to military veterans from the Revolutionary War period to the **[*212]** present, n1 it was not until the War Between the States that Congress enacted the first comprehensive *nondisability* military retirement legislation. See Preliminary Review of Military Retirement Systems: Hearings before the Military Compensation Subcommittee of the House Committee on Armed Services, 95th Cong., 1st and 2d Sess., 5 (1977-1978) (Military Retirement Hearings) (statement of Col. Leon S. Hirsh, Jr., USAF, Director **[**2731]** of Compensation, Office of the Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics); Subcommittee on Retirement Income and Employment, House Select Committee on Aging, Women and Retirement Income Programs: Current Issues of Equity and Adequacy, 96th Cong., 1st Sess., 15 (Comm. Print 1979) (Women and Retirement). Sections 15 and 21 of the Act of Aug. 3, 1861, 12 Stat. 289, 290, provided that any Army, Navy, or Marine Corps officer with 40 years of service could apply to the President to be retired with pay; in addition, § § 16 and 22 of that Act authorized the involuntary retirement with pay of any officer "incapable of performing the duties of his office." 12 Stat. 289, 290.

> n1 See Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, *52 Wash. L. Rev. 227, 228-229 (1977).* The current military disability provisions are *10 U. S. C. § 1201 et seq.* (1976 ed. and Supp. IV).

[*HR2]** The impetus for this legislation was the need to encourage or force the retirement of officers who were not fit for wartime duty. n2 Women and Retirement, at 15. Thus, from **[*213]** its inception, n3 the military nondisability retirement system has been "as much a personnel management tool as an income maintenance method," *id*., at 16; the system was and is designed not only to provide for retired officers, but also to ensure a "young and vigorous" military force, to create an orderly pattern of promotion, and to serve as a recruiting and re-enlistment inducement. Military Retirement Hearings, at 4-6, 13 (statement of Col. Hirsh).

> n2 See Cong. Globe, 37th Cong., 1st Sess., 16 (1861) (remarks of Sen. Grimes) ("some of the commanders of regiments in the regular service are utterly incapacitated for the performance of their duty, and they ought to be retired upon some terms, and efficient men placed in their stead"); *id*., at 159 (remarks of Sen. Wilson) ("We have colonels, lieutenant colonels, and majors in the Army, old men, worn out by exposure in the service, who cannot perform their duties; men who ought to be honorably retired, and receive the compensation provided for in this measure").
>
> n3 For a survey of subsequent military nondisability legislation, see U.S. Dept. of Defense, Military Compensation Background Papers, Third Quadrennial Review of Military Compensation 183-202 (1976); Military Retirement Hearings, at 12-13.

Under **[***594]** current law, there are three basic forms of military retirement: nondisability retirement; disability retirement; and reserve retirement. See *id*., at 4. For our present purposes, only the first of these three forms is relevant. n4 Since each of the military services has substantially the same nondisability retirement system, see *id*., at 5, the Army's system may be taken as typical. n5 An Army officer who has 20 years of service, at least 10 of which have been active service as a commissioned officer, may request that the Secretary of the **[*214]** Army retire him. *10 U. S. C. § 3911*. n6 An officer who requests such retirement is entitled to "retired pay." This is calculated on the basis of the number of years served and rank achieved. § § 3929 and 3991. n7 An **[**2732]** officer who serves for less than 20 years is not entitled to retired pay.

n4 For an overview of the disability and reserve retirement systems, see Subcommittee on Investigations, House Committee on Post Office and Civil Service, Dual Compensation Paid to Retired Uniformed Services' Personnel in Federal Civilian Positions, 95th Cong., 2d Sess., 18-20 (Comm. Print 1978).

n5 The voluntary nondisability retirement systems of the various services are codified as follows: *10 U. S. C., ch. 367,* § 3911 *et seq*. (1976 ed. and Supp. IV) (Army); ch. 571, § 6321 *et seq*. (1976 ed. and Supp. IV) (Navy and Marine Corps); ch. 867, § 8911 *et seq*. (Air Force). The nondisability retirement system was recently amended by the Defense Officer Personnel Management Act, Pub. L. 96-513, 94 Stat. 2835. Under § 111 of that Act, *id*., at 2875, *10 U. S. C. § 1251* (1976 ed., Supp. IV), regular commissioned officers in all the military services are required, with some exceptions, to retire at age 62; the Act also amended various provisions dealing with involuntary nondisability retirement for length of service. The Act, however, did not affect the particular voluntary nondisability retirement provisions at issue here.

n6 An enlisted member of the Army may be retired upon his request after 30 years of service. *10 U. S. C. § 3917*. See also § 3914, as amended by the Military Personnel and Compensation Amendments of 1980, Pub. L. 96-343, § 9 (a)(1), 94 Stat. 1128, *10 U. S. C. § 3914* (1976 ed., Supp. IV) (voluntary retirement after 20 years followed by service in Army Reserve). A retired enlisted member is also entitled to retired pay. *10 U. S. C. § § 3929* and 3991.

n7 The amount of retired pay is calculated according to formula: (basic pay of the retired grade of the member) x (2 1/2%) x (the number of years of creditable service). Thus, a retiree is eligible for at least 50% (2 1/2% x 20 years of service) of his or her basic pay, which does not include special pay and allowances. There is, however, an upper limit of 75% of basic pay -- the percentage attained upon retirement after completion of 30 years of service (30 years x 2 1/2%) -- regardless of the number of years actually served. See *10 U. S. C. § 3991*. See generally Women and Retirement, at 16. The amount of retired pay is adjusted for any increase in the Consumer Price Index. § 1401a.

Since the initiation of this suit, § 3991 has been amended twice. See the Department of Defense Authorization Act, 1981, Pub. L. 96-342, § 813(c), 94 Stat. 1104, and the Defense Officer Personnel Management Act, Pub. L. 96-513, § 502(21), 94 Stat. 2910. Neither amendment has any bearing here.

Under the Internal Revenue Code of 1954, retired pay is taxable as ordinary income when received. *26 U. S. C. § 61*(a)(11); 26 CFR § 1.61-11 (1980).

The nondisability retirement system is noncontributory in that neither the service member nor the Federal Government makes periodic contributions to any fund during the period of active service; instead, retired pay is funded by annual appropriations. Military Retirement Hearings, at 5. In contrast, since 1957, military personnel have been required to contribute to the Social Security System. Pub. L. 84-881, 70 Stat. 870. See *42 U. S. C. § § 410* (*l*) and (m). Upon satisfying the necessary age **[***595]** requirements, the Army retiree, the **[*215]** spouse, an ex-spouse who was married to the retiree for at least 10 years, and any dependent children are entitled to Social Security benefits. See *42 U. S. C. § § 402*(a) to (f) (1976 ed. and Supp. IV).

Military retired pay terminates with the retired service member's death, and does not pass to the member's heirs. The member, however, may designate a beneficiary to receive any arrearages that remain unpaid at death. *10 U. S. C. § 2771*. In addition, there are statutory schemes that allow a service member to set aside a portion of the member's retired pay for his or her survivors. The first such scheme, now known as the Retired Serviceman's Family Protection Plan (RSFPP), was established in 1953. Act of Aug. 8, 1953, 67 Stat. 501, current version at *10 U. S. C. § § 1431*-1446 (1976

ed. and Supp. IV). Under the RSFPP, the military member could elect to reduce his or her retired pay in order to provide, at death, an annuity for a surviving spouse or child. Participation in the RSFPP was voluntary, and the participating member, prior to receiving retired pay, could revoke the election in order "to reflect a change in the marital or dependency status of the member or his family that is caused by death, divorce, annulment, remarriage, or acquisition of a child ...." § 1431 (c). Further, deductions from retired pay automatically cease upon the death or divorce of the service member's spouse. § 1434 (c).

Because the RSFPP was self-financing, it required the deduction of a substantial portion of the service member's retired pay; consequently, only about 15% of eligible military retirees participated in the plan. See H. R. Rep. No. 92-481, pp. 4-5 (1971); S. Rep. No. 92-1089, p. 11 (1972). In order to remedy this situation, Congress enacted the Survivor Benefit Plan (SBP) in 1972. Pub. L. 92-425, 86 Stat. 706, codified, as amended, at *10 U. S. C. § § 1447*-1455 (1976 ed. and Supp. IV). Participation in this plan is automatic unless the service member chooses to opt out. § 1448 (a). **[*216]** The SBP is not entirely self-financing; instead, the Government contributes to the plan, thereby rendering participation in the SBP less expensive for the service member than participation in the RSFPP. Participants in the RSFPP were given the option of continuing under that plan or of enrolling in the SBP. Pub. L. 92-425, § 3, 86 Stat. 711, as amended by Pub. L. 93-155, § 804, 87 Stat. 615.

II

Appellant Richard John McCarty and appellee Patricia Ann McCarty were married in Portland, Ore., on March 23, 1957, while **[**2733]** appellant was in his second year in medical school at the University of Oregon. During his fourth year in medical school, appellant commenced active duty in the United States Army. Upon graduation, he was assigned to successive tours of duty in Pennsylvania, Hawaii, Washington, D. C., California, and Texas. After completing his duty in Texas, appellant was assigned to Letterman Hospital on the Presidio Military Reservation in San Francisco, where he became Chief of Cardiology. At the time this suit was instituted in 1976, appellant held the rank of Colonel and had served **[***596]** approximately 18 of the 20 years required under *10 U. S. C. § 3911* for retirement with pay.

[*HR3]** Appellant and appellee separated on October 31, 1976. On December 1 of that year, appellant filed a petition in the Superior Court of California in and for the City and County of San Francisco requesting dissolution of the marriage. Under California law, a court granting dissolution of a marriage must divide "the community property and the quasi-community property of the parties." Cal. Civ. Code Ann. § 4800 (a) (West Supp. 1981). Like seven other States, California treats all property earned by either spouse during the marriage as community property; each spouse is deemed to make an equal contribution to the marital enterprise, and therefore each is entitled to share equally in its assets. See **[*217]** *Hisquierdo v. Hisquierdo, 439 U.S. 572, 577-578 (1979).* "Quasi-community property" is defined as

"all real or personal property, wherever situated heretofore or hereafter acquired ... [by] either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in [California] at the time of its acquisition." Cal. Civ. Code Ann. § 4803 (West Supp. 1981).

Upon dissolution of a marriage, each spouse has an equal and absolute right to a half interest in all community and quasi-community property; in contrast, each spouse retains his or her separate property, which includes assets the spouse owned before marriage or acquired separately during marriage through gift. See *Hisquierdo, 439 U.S., at 578.*

[*HR4A]** In his dissolution petition, appellant requested that all listed assets, including "[all] military retirement benefits," be confirmed to him as his separate property. App. 2. In her response, appellee also requested dissolution of the marriage, but contended that appellant had no separate property and that therefore his military retirement benefits were "subject to disposition by the court in this proceeding." n8 *Id.*, at 8-9. On November 23, 1977, the Superior Court entered findings of fact and conclusions of law holding that appellant was entitled to an interlocutory judgment dissolving **[*218]** the marriage. *Id.*, at 39, 44. Appellant was awarded custody of the couple's three minor children; appellee was awarded spousal support. The court found that the community property of the parties consisted of two automobiles, cash, the cash value of life insurance policies, and an uncollected **[***597]** debt. *Id.*, at 42. It allocated this property between the parties. *Id.*, at 45. In addition, the court held that appellant's "military pension and retirement rights" were subject to division as quasi-community property. *Ibid.* Accordingly, the court ordered appellant to pay to appellee, so long as she lives,

[2734]** "that portion of his total monthly pension or retirement payment which equals one-half (1/2) of the ratio of the total time between marriage and separation during which [appellant] was in the United States Army

to the total number of years he has served with the ... Army at the time of retirement." *Id*., at 43-44.

The court retained jurisdiction "to make such determination at that time and to supervise distribution ...." *Ibid*. On September 30, 1978, appellant retired from the Army after 20 years of active duty and began receiving retired pay; under the decree of dissolution, appellee was entitled to approximately 45% of that retired pay.

[*HR4B]**

n8 At the time the interlocutory judgment of dissolution was entered, appellant had not begun to receive retired pay, since he had not yet completed 20 years of active service. Under California law, however, "pension rights" may be divided as community property even if they have not "vested." See *In re Brown, 15 Cal. 3d 838, 544 P. 2d 561 (1976).* A California trial court may divide the present value of such rights, which value must take into account the possibility that death or termination of employment may destroy them before they vest. *Id., at 848, 544 P. 2d, at 567.* Alternatively, the court may maintain continuing jurisdiction, and award each spouse an appropriate portion of each pension payment as it is made. *Ibid*. The trial court here apparently elected the latter alternative.

Appellant sought review of the portion of the Superior Court's decree that awarded appellee an interest in the retired pay. The California Court of Appeal, First Appellate District, however, affirmed the award. App. to Juris. Statement 32. In so ruling, the court declined to accept appellant's contention that because the federal scheme of military retirement benefits pre-empts state community property laws, the Supremacy Clause, U.S. Const., Art. VI, cl. 2, precluded the trial court from awarding appellee a portion of his retired pay. n9 The court noted that this precise contention had **[*219]** been rejected in *In re Fithian, 10 Cal. 3d 592, 517 P. 2d 449,* cert. denied, *419 U.S. 825 (1974).* n10 Furthermore, the court concluded that the result in *Fithian* had not been called into question by this Court's subsequent decision in *Hisquierdo v. Hisquierdo, supra,* where it was held that benefits payable under the federal Railroad Retirement Act of 1974 could not be divided under state community property law. See also *Gorman v. Gorman, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 (1979).* n11

n9 The Court of Appeal also held that since appellant had invoked the jurisdiction of the California courts over both his marital and property rights, he was estopped from arguing that California community property law did not apply to him because he was an Oregon domiciliary. App. to Juris. Statement 50-54. Appellant has not renewed this argument before us.

n10 In *Fithian*, the Supreme Court of California concluded that there was "no evidence that the application of California community property law interferes in any way with the administration or goals of the federal military retirement pay system ...." *10 Cal. 3d, at 604, 517 P. 2d, at 457.*

n11 In *Gorman*, the California Court of Appeal held that *Hisquierdo* was based on the unique history and language of the Railroad Retirement Act of 1974; the court therefore considered itself bound to follow *Fithian* "pending further consideration of the issue by the California Supreme Court." *90 Cal. App. 3d, at 462, 153 Cal. Rptr., at 483.* The California Supreme Court has since reaffirmed *Fithian* in *In re Milhan, 27 Cal. 3d 765, 613 P. 2d 812 (1980),* cert. pending *sub nom. Milhan* v. *Milhan*, No. 80-578.

The California Supreme Court denied appellant's petition for hearing. App. to Juris. Statement 83.

We postponed jurisdiction. *449 U.S. 917 (1980).* We have now concluded that this case properly falls within **[***598]** our appellate jurisdiction, n12 and we therefore proceed to the merits.

n12 Appellee contends that this is not a proper appeal because appellant did not call the constitutionality of any statute into question in the California courts. Our review of the record, however, leads us to conclude otherwise. The Court of Appeal stated that appellant "also contends that the federal scheme of military retirement benefits pre-empts all state community property laws with respect thereto, and that California courts are accordingly precluded by the Supremacy Clause from dividing such benefits ...." App. to Juris. Statement 57. The court flatly rejected this argument, *id*., at 57-59, and appellant then renewed it in his petition for hearing, p. 1, before the California Supreme

Court. The present case thus closely resembles *Dahnke-Walker Milling Co*. v. *Bondurant, 257 U.S. 282 (1921),* where a state statute was challenged as being in conflict with the Commerce Clause. The Court held that the appeal was proper, since the appellant "did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the transaction in question the ... statute was void, and therefore unenforceable, because in conflict with the commerce clause ...." *Id., at 288-289.* Accordingly, we conclude on the authority of *Dahnke-Walker* that this is a proper appeal. See also *Japan Line, Ltd*. v. *County of Los Angeles, 441 U.S. 434, 440-441 (1979).*

[*220] [2735]** III

[*HR5]** This Court repeatedly has recognized that "'[the] whole subject of the domestic relations of husband and wife ... belongs to the laws of the States and not to the laws of the United States.'" *Hisquierdo, 439 U.S., at 581,* quoting *In re Burrus, 136 U.S. 586, 593-594 (1890).* Thus, "[state] family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo, 439 U.S., at 581,* with references to *United States v. Yazell, 382 U.S. 341, 352 (1966).* See also *Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981).* In *Hisquierdo,* we concluded that California's application of community property principles to Railroad Retirement Act benefits worked such an injury to federal interests. The "critical terms" of the federal statute relied upon in reaching that conclusion included provisions establishing "a specified beneficiary protected by a flat prohibition against attachment and anticipation," see *45 U. S. C. § 231m,* and a limited community property concept that terminated upon divorce, see *45 U. S. C. § 231d. 439 U.S., at 582-585.* Appellee argues that no such provisions are to be found in the statute presently under consideration, and that therefore *Hisquierdo* is inapposite. But *Hisquierdo* did not hold that only the particular statutory terms there considered would justify a finding **[*221]** of pre-emption; rather, it held that "[the] pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Id., at 583.* It is to that twofold inquiry that we now turn.

A

Appellant argues that California's application of community property concepts to military retired pay conflicts **[***599]** with federal law in two distinct ways. He contends, first, that the California court's conclusion that retired pay is "awarded in return for services previously rendered," see *Fithian, 10 Cal. 3d, at 604, 517 P. 2d, at 457,* ignores clear federal law to the contrary. The community property division of military retired pay rests on the premise that that pay, like a typical pension, represents deferred compensation for services performed during the marriage. *Id., at 596, 517 P. 2d, at 451.* But, appellant asserts, military retired pay in fact is current compensation for reduced, but currently rendered, services; accordingly, even under California law, that pay may not be treated as community property to the extent that it is earned after the dissolution of the marital community, since the earnings of a spouse while living "separate and apart" are separate property. Cal. Civ. Code Ann. § § 5118, 5119 (West 1970 and Supp. 1981).

[*HR6]** Appellant correctly notes that military retired pay differs in some significant respects from a typical pension or retirement plan. The retired officer remains a member of the Army, see *United States v. Tyler, 105 U.S. 244 (1882),* n13 **[**2736]** and **[*222]** continues to be subject to the Uniform Code of Military Justice, see *10 U. S. C. § 802* (4). See also *Hooper v. United States, 164 Ct. Cl. 151, 326 F.2d 982,* cert. denied, *377 U.S. 977 (1964).* In addition, he may forfeit all or part of his retired pay if he engaged in certain activities. n14 Finally, the retired officer remains subject to recall to active duty by the Secretary of the Army "at any time." Pub. L. 96-513, § 106, 94 Stat. 2868. These factors have led several courts, including this one, to conclude that military retired pay is reduced compensation for reduced current services. In *United States v. Tyler, 105 U.S., at 245,* the Court stated that retired pay is "compensation ... continued at a reduced rate, and the connection is continued, **[***600]** with a retirement from active service only." n15

n13 In *Tyler,* the Court held that a retired officer was entitled to the benefit of a statute that increased the pay of "commissioned officers." The Court reasoned:

"It is impossible to hold that men who are by statute declared to be part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial,

for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service." *105 U.S., at 246.* (Emphasis in original.)

See also *Kahn v. Anderson, 255 U.S. 1, 6-7 (1921); Puglisi v. United States, 215 Ct. Cl. 86, 97, 564 F.2d 403, 410 (1977),* cert. denied, *435 U.S. 968 (1978).*

n14 A retired officer may lose part of his retired pay if he takes Federal Civil Service employment. See *5 U. S. C. § 5531 et seq*. (1976 ed. and Supp. IV). He may lose all his pay if he gives up United States citizenship, see *58 Comp. Gen. 566, 568-569 (1979);* accepts employment by a foreign government, U.S. Const., Art. I, § 9, cl. 8, but see Pub. L. 95-105, § 509, 91 Stat. 859 (granting congressional permission to engage in such employment with approval of the Secretary concerned and the Secretary of State); or sells supplies to an agency of the Department of Defense, or other designated agencies. *37 U. S. C. § 801*. See also Pub. L. 87-849, § 2, 76 Stat. 1126 (retired officer may not represent any person in sale of anything to Government through department in whose service he holds retired status). The officer also may forfeit his retired pay if court-martialed. See *Hooper* v. *United States*, cited in the text.

n15 Relying upon *Tyler*, the Ninth Circuit recently rejected the argument that Congress' alteration of the method by which retired pay is calculated deprived retired military personnel of property without due process of law. *Costello v. United States, 587 F.2d 424, 426 (1978),* cert. denied, *442 U.S. 929 (1979).* The court held that since "retirement pay does not differ from active duty pay in its character as pay for continuing military service," *587 F.2d, at 427*, its method of calculation could be prospectively altered under the precedent of *United States v. Larionoff, 431 U.S. 864, 879 (1977).* See also *Abbott v. United States, 200 Ct. Cl. 384,* cert. denied, *414 U.S. 1024 (1973); Lemly v. United States, 109 Ct. Cl. 760, 763, 75 F.Supp. 248, 249 (1948); Watson v. Watson, 424 F.Supp. 866 (EDNC 1976).*

Some state courts also have concluded that military retired pay is not "property" within the meaning of their state divorce statutes because it does not have any "cash surrender value; loan value; redemption value; ... [or] value realizable after death." *Ellis v. Ellis, 191 Colo. 317, 319, 552 P. 2d 506, 507 (1976).* See *Fenney v. Fenney, 259 Ark. 858, 537 S. W. 2d 367 (1976).*

[*223]

[*HR1B]** Having said all this, we need not decide today whether federal law prohibits a State from characterizing retired pay as deferred compensation, since we agree with appellant's alternative argument that the application of community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation. n16 The statutory language is **[**2737]** straightforward: **[*224]** "A member of the Army retired under this chapter is entitled to retired pay ...." *10 U. S. C. § 3929.* In *Hisquierdo, 439 U.S., at 584*, we emphasized that under the Railroad Retirement Act a spouse of a retired railroad worker was entitled to a separate annuity that terminated upon divorce, see *45 U. S. C. § 231d* (c)(3); in contrast, the military retirement system confers no entitlement to retired pay upon the retired service member's spouse. Thus, unlike the Railroad Retirement Act, the military retirement **[***601]** system does not embody even a limited "community property concept." Indeed, Congress has explicitly stated: "Historically, military retired pay has been a *personal entitlement* payable to the retired member himself as long as he lives." S. Rep. No. 1480, 90th Cong., 2d Sess., 6 (1968) (emphasis added).

n16 A number of state courts have held that military retired pay is deferred compensation, not current compensation for reduced services. See, *e. g., In re Fithian, 10 Cal. 3d, at 604, 517 P. 2d, at 456; In re Miller, Mont. , 609 P. 2d 1185 (1980),* cert. pending *sub nom. Miller* v. *Miller*, No. 80-291; *Kruger v. Kruger, 73 N. J. 464, 375 A. 2d 659 (1977).* It is true that retired pay bears some of the features of deferred compensation. See W. Glasson, Federal Military Pensions in the United States 99 (1918). The amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement. See n. 7, *supra*. Furthermore, should the service member actually be recalled to duty, he receives additional compensation according to the active duty pay scale, and his rate of retired pay is also increased thereafter. *10 U. S. C. § 1402*, as amended by Pub. L. 96-342, § 813

(b)(2), 94 Stat. 1102, and by Pub. L. 96-513, § 511 (50), 94 Stat. 2924.

Nonetheless, the fact remains that the retired officer faces not only significant restrictions upon his activities, but also a real risk of recall. At the least, then, the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that States must tread with caution in this area, lest they disrupt the federal scheme. See *Hooper v. United States, 164 Ct. Cl., at 159, 326 F.2d, at 987* ("the salary he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies"). Cf. Cong. Globe, 37th Cong., 1st Sess., 158 (1861) (remark of Sen. Grimes) (object of first nondisability retirement statute was "to retire gentlemen who have served the country faithfully and well for forty years, voluntarily if they see fit, (but subject, however, to be called into the service of the country at any moment that the President of the United States may ask for their services,) ...").

Appellee argues that Congress' use of the term "personal entitlement" in this context signifies only that retired pay ceases upon the death of the service member. But several features of the statutory schemes governing military pay demonstrate that Congress did not use the term in so limited a fashion. First, the service member may designate a beneficiary to receive any unpaid arrearages in retired pay upon his death. *10 U. S. C. § 2771*. n17 The service member is free **[*225]** to designate someone other than his spouse or ex-spouse as the beneficiary; further, the statute expressly provides that "[a] payment under this section bars recovery by any other person of the amount paid." § 2771 (d). In *Wissner v. Wissner, 338 U.S. 655 (1950)*, this Court considered an analogous statutory scheme. Under the National Service Life Insurance Act, an insured service member had the right to designate the beneficiary of his policy. *Id., at 658. Wissner* held that California could not award a service member's widow half the proceeds of a life insurance policy, even though the source of the premiums -- the member's Army pay -- was characterized as community property under California law. The Court reserved the question whether California is "entitled to call army pay community property," *id., at 657, n. 2*, since it found that Congress had "spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id., at 658.* In the present context, Congress has stated with "force and clarity" that a beneficiary under § 2771 claims an interest in the retired **[*226]** pay itself, not simply in proceeds from a policy purchased with that pay. One commentator has noted: "If retired pay were community property, the retiree could not thus summarily **[**2738]** deprive his wife of her interest in the arrearage." Goldberg, Is Armed Services Retired Pay Really Community **[***602]** Property?, 48 Cal. Bar J. 12, 17 (1973).

-

n17 Section 2771 provides in relevant part:

"(a) In the settlement of the accounts of a deceased member of the armed forces ... an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

"(1) Beneficiary designated by him in writing to receive such an amount ....

"(2) Surviving spouse.

"(3) Children and their descendants, by representation.

"(4) Father and mother in equal parts or, if either is dead, the survivor.

"(5) Legal representative.

"(6) Person entitled under the law of the domicile of the deceased member."

Section 2771 was designed to "permit the soldier himself to designate a beneficiary for his final pay." H. R. Rep. No. 833, 84th Cong., 1st Sess., 2 (1955). While this statute gives a service member the power of testamentary disposition over any amount owed by the Government, we do not decide today whether California may treat active duty pay as community property. Cf. *Wissner v. Wissner, 338 U.S. 655, 657, n. 2 (1950).* We hold only that § 2771, in combination with other features of the military retirement system, indicates that Congress intended retired pay to be a "personal entitlement."

Second, the language, structure, and legislative history of the RSFPP and the SBP also demonstrate that retired pay is a "personal entitlement." While retired pay ceases upon the death of the service member, the RSFPP

and the SBP allow the service member to reduce his or her retired pay in order to provide an annuity for the surviving spouse or children. Under both plans, however, the service member is free to elect to provide no annuity at all, or to provide an annuity payable only to the surviving children, and not to the spouse. See *10 U. S. C. § 1434* (1976 ed. and Supp. IV) (RSFPP); § 1450 (1976 ed. and Supp. IV) (SBP). Here again, it is clear that if retired pay were community property, the service member could not so deprive the spouse of his or her interest in the property. n18 But we need not rely on this implicit conflict alone, for both the language of the statutes n19 and their legislative history make it clear that the **[*227]** decision whether to leave an annuity is the service member's decision alone *because* retired pay is his or her personal entitlement. It has been stated in Congress that "[the] rights in retirement pay accrue to the retiree and, ultimately, the decision is his as to whether or not to leave part of that retirement pay as an annuity to his survivors." H. R. Rep. No. 92-481, p. 9 (1971). n20 California's community property division of retired pay is simply inconsistent with this explicit expression of congressional intent that retired pay accrue to the retiree.

n18 An annuity under either plan is not "assignable or subject to execution, levy, attachment, garnishment, or other legal process." *10 U. S. C. § 1440* and § 1450 (i). Clearly, then, a spouse cannot claim an interest in an annuity not payable to him or her on the ground that it was purchased with community assets. See *Wissner, 338 U.S., at 659.* Cf. *Hisquierdo, 439 U.S., at 584.*

n19 The RSFPP provides in relevant part:

"To provide an annuity under section 1434 of this title, a [service member] may elect to receive a reduced amount of the retired pay or retainer pay *to which he may become entitled* as a result of service in his armed force." *10 U. S. C. § 1431* (b) (emphasis added).

The SBP states in relevant part:

"The Plan applies --

"(A) to a person who is eligible to participate in the Plan ... and who is married or has a dependent child *when he becomes entitled to retired or retainer pay*, unless he elects not to participate in the Plan before the first day for which he is eligible for that pay ...." *10 U. S. C. § 1448* (a)(2) (1976 ed., Supp. IV) (emphasis added).

n20 The SBP provides: "If a person who is married elects not to participate in the Plan at the maximum level or elects to provide an annuity for a dependent child but not for his spouse, that person's spouse shall be notified of the decision." *10 U. S. C. § 1448* (a). But, as both the language of this section and the legislative history make clear, the spouse only receives notice; the decision is the service member's alone. See H. R. Rep. No. 92-481, at 8-9. An election not to participate in the SBP is in most cases irrevocable if not revoked before the date on which the service member first becomes entitled to retired pay. § 1448 (a).

Moreover, such a division would have the anomalous effect of placing an ex-spouse in a better position than that of a widower or a widow under the RSFPP and the SBP. n21 **[***603]** **[**2739]** Appellee **[*228]** argues that "Congress' concern for the welfare of soldiers' widows sheds little light on Congress' attitude toward the community treatment of retirement benefits," quoting *Fithian, 10 Cal. 3d, at 600, 517 P. 2d, at 454.* But this argument fails to recognize that Congress deliberately has chosen to favor the widower or widow over the ex-spouse. An ex-spouse is not an eligible beneficiary of an annuity under either plan. *10 U. S. C. § 1434* (a) (RSFPP); § § 1447 (3) and 1450 (a) (SBP). In addition, under the RSFPP, deductions from retired pay for a spouse's annuity automatically cease upon divorce, § 1434 (c), so as "[to] safeguard the participants' future retired pay when ... divorce occurs ...." S. Rep. No. 1480, 90th Cong., 2d Sess., 13 (1968). While the SBP does not expressly provide that annuity deductions cease upon divorce, the legislative history indicates that Congress' policy remained unchanged. The SBP, which was referred to as the "widow's equity bill," 118 Cong. Rec. 29811 (1972) (statement of Sen. Beall), was enacted because of Congress' concern over the number of widows left without support through low participation in the RSFPP, not out of concern for ex-spouses. See H. R. Rep. No. 92-481, pp. 4-5 (1971); S. Rep. No. 92-1089, p. 11 (1972).

n21 In *Fithian, 10 Cal. 3d, at 600, 517 P. 2d, at 454*, the California Supreme Court observed and acknowledged: "Because federal military retirement pay carries with it no right of survivorship, the characterization of benefits as community property places the serviceman's ex-wife in a somewhat better position than that of his widow."

This is so for several reasons. If the service member does not elect to participate in the RSFPP or SBP, his widow will receive nothing. In contrast, if an ex-spouse has received an offsetting award of presently available community property to compensate her for her interest in the expected value of the retired pay, see n. 8, *supra*, she continues to be provided for even if the service member dies prematurely. See *Hisquierdo, 439 U.S., at 588-589.* Furthermore, whereas an SBP annuity payable to a surviving spouse terminates if he or she remarries prior to age 60, see *10 U. S. C. § 1450* (b), the ex-spouse's community awards against the retired service member continue despite remarriage. Lastly, annuity payments are subject to Social Security offsets, see *10 U. S. C. § 1451,* whereas community property awards are not. It is inconceivable that Congress intended these anomalous results. See Goldberg, Is Armed Services Retired Pay Really Community Property?, 48 Cal. Bar J. 89 (1973).

Third, and finally, it is clear that Congress intended that military retired pay "actually reach the beneficiary." See *Hisquierdo, 439 U.S., at 584.* Retired pay cannot be attached to satisfy a property settlement incident to the dissolution of a marriage. n22 In enacting the SBP, Congress rejected **[*229]** a provision in the House bill, H. R. 10670, that would have allowed attachment of up to 50% of military retired pay to comply with a court order in favor of a spouse, former spouse, or child. See H. R. Rep. No. 92-481, at 1; S. Rep. No. 92-1089, at 25. The House Report accompanying H. R. 10670 noted that under *Buchanan v. Alexander, 4 How. 20 (1845),* and *Applegate v. Applegate, 39 F.Supp. 887 (ED Va. 1941),* military pay **[***604]** could not be attached so long as it was in the Government's hands; n23 thus, this clause of H. R. 10670 represented a "drastic departure" from current law, but one that the House Committee on Armed Services believed to be necessitated by the difficulty of enforcing support orders. H. R. Rep. No. 92-481, at 17-18. Although this provision passed the House, it was not included in the Senate version of the bill. See S. Rep. No. 92-1089, at 25. Thereafter, the House acceded to the Senate's view that the attachment provision would unfairly "single out military retirees for a form of enforcement of court orders imposed on no other employees or retired employees of the Federal Government." 118 Cong. Rec. 30151 (1972) (remarks of Rep. Pike); S. Rep. No. 92-1089, **[*230]** at 25. Instead, **[**2740]** Congress determined that the problem of the attachment of military retired pay should be considered in the context of "legislation that might require all Federal pays to be subject to attachment." *Ibid.*; 118 Cong. Rec. 30151 (1972) (remarks of Rep. Pike).

n22 In addition, an Army enlisted man may not assign his pay. *37 U. S. C. § 701* (c). While an Army officer may transfer or assign his pay account "[under] regulations prescribed by the Secretary of the Army," he may do so only when the account is "due and payable." § 701 (a). This limitation would appear to serve the same purpose as the prohibition against "anticipation" discussed in *Hisquierdo, 439 U.S., at 588-589.* Cf. *Smith v. Commanding Officer, Air Force Accounting and Finance Center, 555 F.2d 234, 235 (CA9 1977).* But even if there were no explicit prohibition against "anticipation" here, it is clear that the injunction against attachment is not to be circumvented by the simple expedient of an offsetting award. See *Hisquierdo, 439 U.S., at 588.* Cf. *Free v. Bland, 369 U.S. 663, 669 (1962).*

n23 Appellee contends, mistakenly in our view, that the doctrine of nonattachability set forth in *Buchanan* simply "[restates] the Government's sovereign immunity from burdensome garnishment suits ...." See *Hisquierdo, 439 U.S., at 586.* Rather than resting on the grounds that garnishment would be administratively burdensome, *Buchanan* pointed out: "The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended." *4 How., at 20.* See also H. R. Rep. No. 92-481, at 17.

Subsequently, comprehensive legislation was enacted. In 1975, Congress amended the Social Security Act to provide that all federal benefits, including those payable to members of the Armed Services, may be subject to legal process to enforce child support or alimony obligations. Pub. L. 93-647, § 101 (a), 88 Stat. 2357, *42 U. S. C. § 659.* In 1977, however, Congress added a new definitional section (§ 462 (c)) providing that the term "alimony" in § 659 (a) "does not include any payment or transfer of property ... in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." Pub. L. 95-30, § 501 (d), 91 Stat. 159, *42 U. S. C. § 662* (c) (1976 ed.,

Supp. IV). As we noted in *Hisquierdo*, it is "logical to conclude that Congress, in adopting § 462 (c), thought that a family's need for support could justify garnishment, even though it deflected other federal benefits from their intended goals, but that community property claims, which are not based on need, could not do so." *439 U.S., at 587.*

Hisquierdo also pointed out that Congress might conclude that this distinction between support and community property claims is "undesirable." *Id., at 590.* Indeed, Congress recently enacted legislation that requires that Civil Service retirement benefits be paid to an ex-spouse to the extent provided for in "the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation." Pub. L. 95-366, § 1 (a), 92 Stat. 600, *5 U. S. C. § 8345* (j)(1) (1976 ed., Supp. IV). In an even more extreme recent step, Congress **[***605]** amended the Foreign Service retirement legislation to provide that, as a matter of federal law, an ex-spouse is entitled **[*231]** to a pro rata share of Foreign Service retirement benefits. n24 Thus, the Civil Service amendments require the United States to recognize the community property division of Civil Service retirement benefits by a state court, while the Foreign Service amendments establish a limited federal community property concept. Significantly, however, while similar legislation affecting military retired pay was introduced in the 96th Congress, none of those bills was reported out of committee. n25 Thus, in striking **[**2741]** contrast to its amendment **[*232]** of the Foreign Service and Civil Service retirement systems, Congress has neither authorized nor required the community property division of military retired pay. On the contrary, that pay continues to be the personal entitlement of the retiree.

n24 Under § 814 of the Foreign Service Act of 1980, Pub. L. 96-465, 94 Stat. 2113, a former spouse who was married to a Foreign Service member for at least 10 years of creditable service is entitled to a pro rata share of up to 50% of the member's retirement benefits, unless otherwise provided by spousal agreement or court order; the former spouse also may claim a pro rata share of the survivor's annuity provided for the member's widow. Moreover, the member cannot elect not to provide a survivor's annuity without the consent of his spouse or former spouse.

The Committee Reports commented upon the radical nature of this legislation. See H. R. Rep. No. 96-992, pt. 1, pp. 70-71 (1980); S. Rep. No. 96-913, pp. 66-68 (1980); H. R. Conf. Rep. No. 96-1432, p. 116 (1980). During the floor debates Representative Schroeder pointed out: "Whereas social security provides automatic benefits for spouses and former spouses, married at least 10 years, Federal retirement law has previously not recognized the contribution of the nonworking spouse or former spouse." 126 Cong. Rec. 28659 (1980). Representative Schroeder also noted that Congress had "thus far" failed to enact legislation that would extend to the military the "equitable treatment of spouses" afforded under the Civil Service and Foreign Service retirement systems. *Id*., at 28660.

n25 Like the Foreign Service amendments, H. R. 2817, 96th Cong., 1st Sess. (1979), would have entitled a former spouse to a pro rata share of the retired pay and of the annuity provided to the surviving spouse; similarly, the bill would have required the service member to obtain the consent of his spouse and ex-spouse before electing not to provide a survivor's annuity. This bill was referred to the House Committee on Armed Services along with two other bills, H. R. 3677, 96th Cong., 1st Sess. (1979), and H. R. 6270, 96th Cong., 2d Sess. (1980). Whereas H. R. 2817 would have amended Title 10 to bring it into conformity with the Foreign Service model, these other two bills paralleled the Civil Service legislation, and would have authorized the United States to comply with the terms of a court decree or property settlement in connection with the divorce of a service member receiving retired pay. After extensive hearings, all three bills died in committee. See Hearing on H. R. 2817, H. R. 3677, and H. R. 6270 before the Military Compensation Subcommittee of the House Committee on Armed Services, 96th Cong., 2d Sess. (1980).

Legislation has been introduced in the 97th Congress that would require the pro rata division of military retired pay. See H. R. 3039, 97th Cong., 1st Sess. (1981), and S. 888, 97th Cong., 1st Sess. (1981). See also H. R. 3040, 97th Cong., 1st Sess. (1981) (pro rata division of retirement benefits of any federal employee).

B

[*HR1C]** We conclude, therefore, that there is a conflict between the terms of the federal retirement statutes and the community property right asserted by appellee here. But "[a] mere conflict in words is not

sufficient"; the question remains whether the "consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo, 439 U.S., at 581-583.* This **[***606]** inquiry, however, need be only 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.* Under the Constitution, Congress has the power "[to] raise and support Armies," "[to] provide and maintain a Navy," and "[to] makes Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8, cls. 12, 13, and 14. See generally *Rostker* v. *Goldberg, ante,* at 59. Pursuant to this grant of authority, Congress has enacted a military retirement system designed to accomplish two major goals: to provide for the retired service member, and to meet the personnel management **[*233]** needs of the active military forces. The community property division of retired pay has the potential to frustrate each of these objectives.

In the first place, the community property interest appellee seeks "promises to diminish that portion of the benefit Congress has said should go to the retired [service member] alone." See *Hisquierdo, 439 U.S., at 590.* State courts are not free to reduce the amounts that Congress has determined are necessary for the retired member. Furthermore, the community property division of retired pay may disrupt the carefully balanced scheme Congress has devised to encourage a service member to set aside a portion of his or her retired pay as an annuity for a surviving spouse or dependent children. By diminishing the amount available to the retiree, a community property division makes it less likely that the retired service member will choose to reduce his or her retired pay still further by purchasing an annuity for the surviving spouse, if any, or children. In *McCune v. Essig, 199 U.S. 382 (1905),* the Court held that federal law, which permitted a widow to patent federal land entered by her husband, prevailed over the interest in the patent asserted by the daughter under state inheritance law; the Court noted that the daughter's contention "reverses the order of the statute and gives the children an interest paramount to that of the widow through the laws of the State." *Id., at 389.* So here, the right appellee asserts "reverses the order of the statute" by giving the ex-spouse an interest paramount to that of the surviving spouse and children of the service member; indeed, at least one court (in a noncommunity property State) has gone so far as to hold that the heirs of the ex-spouse may even inherit her interest in military retired pay. See *In re Miller, Mont. , 609 P. 2d 1185 (1980),* cert. pending *sub nom. Miller* v. *Miller,* No. 80-291. **[**2742]** Clearly, "[the] law of the State is not competent to do this." *McCune v. Essig, 199 U.S., at 389.*

[*234]

[*HR7A]** The potential for disruption of military personnel management is equally clear. As has been noted above, the military retirement system is designed to serve as an inducement for enlistment and re-enlistment, to create an orderly career path, and to ensure "youthful and **[***607]** vigorous" military forces. n26 While conceding that there is a substantial interest in attracting and retaining personnel for the military forces, appellee argues that this interest will not be impaired by allowing a State to apply its community property laws to retired military personnel in the same manner that it applies those laws to civilians. Yet this argument ignores two essential characteristics of military service: the military forces are national in operation; and their members, unlike civilian employees, cf. *Hisquierdo,* are not free to choose their place of residence. Appellant, for instance, served tours of duty in four States and the District of Columbia. The value of retired pay as an inducement for enlistment or re-enlistment is obviously diminished to the extent that the service member recognizes that he or she may be involuntarily transferred to a State that will divide that pay upon divorce. In *Free v. Bland,* **[*235]** *369 U.S. 663 (1962),* the Court held that state community property law could not override the survivorship provision of a federal savings bond, since it was "[one] of the inducements selected," *id., at 669,* to make purchase of such bonds attractive; similarly, retired pay is one of the inducements selected to make military service attractive, and the application of state community property law thus "[interferes] directly with a legitimate exercise of the power of the Federal Government." *Ibid.*

[*HR7B]**

n26 A recent Presidential Commission has questioned the extent to which the military retirement system actually accomplishes these goals. See Report of the President's Commission on Military Compensation 49-56 (1978). Moreover, the Department of Defense has taken the position that service members are legally bound to comply with financial settlements ordered by state divorce courts; but while the Department did not oppose the legislation introduced in the 96th Congress that would have required the United States to honor community property divisions of military retired pay by state courts, it did express its concern over the dissimilar treatment afforded service members depending on whether or not they are stationed in community property States. See Hearing on H. R. 2817, H. R. 3677, and H. R. 6270 before the

Military Compensation Subcommittee of the House Committee on Armed Services, 96th Cong., 2d Sess., 55, 58, 63 (1980) (statement of Deputy Assistant Secretary Tice). Of course, the questions whether the retirement system should be amended so as better to accomplish its personnel management goals, and whether those goals should be subordinated to the protection of the service member's ex-spouse, are policy issues for Congress to decide.

The interference with the goals of encouraging orderly promotion and a youthful military is no less direct. Here, as in the Railroad Retirement Act context, "Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire." See *Hisquierdo, 439 U.S., at 585.* But the reduction of retired pay by a community property award not only discourages retirement by reducing the retired pay available to the service member, but gives him a positive incentive to keep working, since current income after divorce is not divisible as community property. See Cal. Civ. Code Ann. § § 5118, 5119 (West 1970 and Supp. 1981). Congress has determined that a youthful military is essential to the national defense; it is not for States to interfere with that goal by lessening the incentive to retire created by the military retirement system.

[*608]** IV

We recognize that the plight of an ex-spouse of a retired service member is often a serious one. See Hearing on H. R. 2817, H. R. 3677, and H. R. 6270 before the Military Compensation Subcommittee of the House Committee on Armed Services, 96th Cong., 2d Sess. (1980). That plight may be mitigated **[**2743]** to some extent by the ex-spouse's right to claim Social Security benefits, cf. *Hisquierdo, 439 U.S., at 590,* and to garnish military retired pay for the purposes of support. Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection **[*236]** should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs. See *Rostker* v. *Goldberg, ante,* at 64-65. Thus, the conclusion that we reached in *Hisquierdo* follows *a fortiori* here: Congress has weighed the matter, and "[it] is not the province of state courts to strike a balance different from the one Congress has struck." *439 U.S., at 590.*

The judgment of the California Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

DISSENTBY:
REHNQUIST

DISSENT:

JUSTICE REHNQUIST, with whom JUSTICE BRENNAN and JUSTICE STEWART join, dissenting.

The Court's opinion is curious in at least two salient respects. For all its purported reliance on *Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979),* the Court fails either to quote or cite the test for pre-emption which *Hisquierdo* established. In that case the Court began its analysis, after noting that States "lay on the guiding hand" in marriage law questions, by stating:

"On the rare occasion where state family law has come into conflict with the federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. *Wetmore v. Markoe, 196 U.S. 68, 77 (1904).*" *Id.*, at 581.

The reason for the omission of this seemingly critical sentence from the Court's opinion today is of course quite clear: the Court cannot, even to its satisfaction, plausibly maintain that Congress has "positively required by direct enactment" that California's community property law be pre-empted by the **[*237]** provisions governing military retired pay. The most that the Court can advance are vague implications from tangentially related enactments or Congress' *failure* to act. The test announced in *Hisquierdo* established that this was not enough and so the critical language from that case must be swept under the rug.

The other curious aspect of the Court's opinion, related to the first, **[***609]** is the diverting analysis it provides of laws and legislative history having little if anything to do with the case at bar. The opinion, for example, analyzes at great length Congress' actions concerning the attachability of federal pay to enforce alimony and child support awards, *ante,* at 228-230. However interesting this subject might be, this case concerns community property rights, which are quite distinct from rights to alimony or child support, and there has in fact been no effort by appellee to attach appellant's retired pay. To take another example, we learn all about the provisions governing Foreign Service and Civil Service retirement pay, *ante,* at 230-232. Whatever may

be said of these provisions, it cannot be said that they are "direct enactments" on the question whether *military* retired pay may be treated as community property. The conclusion is inescapable that the Court has no solid support for the conclusion it reaches -- certainly no support of the sort required by *Hisquierdo* -- and accordingly I dissent.

I

Both family law and property law have been recognized as matters of peculiarly local concern and therefore governed by state and not federal law. *In re Burrus, 136 U.S. 586, 593-594* **[**2744]** *(1890); United States v. Yazell, 382 U.S. 341, 349, 353 (1966).* Questions concerning the appropriate disposition of property upon the dissolution of marriage, therefore, such as the question in this case, are particularly within the control of the States, and the authority of the States should not be displaced except pursuant to the clearest direction from Congress. **[*238]** Only in five previous cases has this Court found pre-emption of community property law. An examination of those cases clearly establishes that there is no precedent supporting admission of this case to the exclusive club.

The first such case was *McCune v. Essig, 199 U.S. 382 (1905).* McCune's father, a homesteader, died before completing the necessary conditions to obtain title to the land. McCune claimed that under the community property laws of the State of Washington she was entitled to a half interest in her father's land. Congress in the Homestead Act, however, had "positively required by direct enactment," *Hisquierdo, supra, at 581,* that in the case of a homesteader's death the *widow* would succeed to the homesteader's interest in the land. Indeed, the Act set forth an explicit schedule of succession which specifically provided for a homesteader's daughter such as McCune. She succeeded to rights and fee under the statute only in the case of the death of both her father and mother. In the words of Justice McKenna:

"It requires an exercise of ingenuity to establish uncertainty in these provisions .... The words of the statute are clear, and express who in turn shall be its beneficiaries. The contention of appellant reverses the order of the statute and gives the children an interest paramount to that of the widow through the laws of the state." *199 U.S., at 389.*

There is, of course, nothing remotely **[***610]** approaching this situation in the case at bar. Congress has not enacted a schedule governing rights of ex-spouses to military retired pay and appellee's claim does not go against any such schedule. n1

n1 The Court maintains that the present case is like *McCune*: "[so] here, the right appellee asserts 'reverses the order of the statute' by giving the ex-spouse an interest paramount to that of the surviving spouse and children of the service member ...." *Ante,* at 233. With all respect, I do not understand the statute to establish *any* ordered list of those with interests in *retired pay.* The Court's argument is apparently that recognizing the ex-spouse's interest in retired pay would burden the serviceman's decision to fund an annuity for his current spouse out of retired pay. This is of course a far cry from the situation in *McCune,* where the statute accorded the surviving widow and daughter specific places and the daughter sought to switch the order by invoking community property law. Even if the Court is correct that there is a conflict between California's community property law and the decision of the serviceman to fund an annuity out of retired pay, the answer is not to pre-empt community property treatment across the board, but only to the extent of the conflict, *i. e.*, permit community property treatment of retired pay less any amounts which are used to fund an annuity. See *infra,* at 245.

[*239] The next case from this Court finding pre-emption of community property law did not arise until 45 years later. In *Wissner v. Wissner, 338 U.S. 655 (1950),* the deceased serviceman's estranged wife claimed she was entitled to one-half of the proceeds of a National Service Life Insurance policy, the premiums of which were paid out of the serviceman's pay accrued while he was married, even though decedent had designated his parents as the beneficiaries. The Act in question specifically provided that the serviceman shall have "'the right to designate the beneficiary or beneficiaries of the insurance [within a designated class], ... and shall ... at all times have the right to change the beneficiary or beneficiaries.'" *Id., at 658* (quoting *38 U. S. C. § 802* (g) (1946 ed.)). As the Court interpreted this, "Congress has spoken with force and clarity in directing that the proceeds belonged to the named beneficiary and no other." *338 U.S., at 658.* That is not at all the case here. Congress has provided that the serviceman receive **[**2745]** retired pay in *10 U. S. C. § 3929,* to be sure, but that is simply the general provision permitting payment -- it hardly evinces the "deliberate purpose of Congress" concerning the question before us, as was the case with the designation of a life insurance policy beneficiary in *Wissner. 338 U.S., at 659.*

The Court in *Wissner* also noted that the statute provided that "[payments] to the named beneficiary 'shall be exempt **[*240]** from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.'" *Ibid*. (quoting *38 U. S. C. § 816* (1946 ed.)). The wife's claim was thus in "flat conflict" with the terms of the statute. *338 U.S., at 659.* This forceful and unambiguous language protecting the rights of the designated beneficiary has no parallel so far as military retired pay is concerned.

It is important to recognize that the Court's analysis, while purporting to rely on *Wissner*, actually is contrary to the analysis in that case. **[***611]** As will be explored in greater detail below, the Court focuses on two provisions in concluding that military retired pay cannot be treated as community property: the provision permitting a serviceman to designate who shall receive any arrearages in pay after his death, and the provision permitting a retired serviceman to fund an annuity for someone other than the ex-spouse out of retired pay. The Court's theory is that since the serviceman can dispose of part of the retired pay without participation of the ex-spouse -- either the arrearages or the premiums to fund the annuity -- the retired pay cannot be treated as community property. This, however, is *precisely* the analysis the *Wissner court declined* to adopt in concluding that the proceeds of an insurance policy, purchased with military pay, could not be treated as community property. The *Wissner* court simply concluded that the wife could not pursue her community property claim *to the proceeds*, even though purchased with community property funds. This is comparable to ruling in this case that appellee cannot obtain half of any annuity funded out of retired pay pursuant to the statute, or half of the arrearages, when the serviceman has designated someone else to receive them. The Wissner court specifically left open the question whether the whole from which the premiums were taken -- the military pay -- could be treated as community property. *Id., at 657, n. 2.* That is, however, the analytic jump the Court takes today, in ruling that retired pay cannot **[*241]** be treated as community property simply because parts of it, or proceeds of parts of it -- arrearages and the annuity -- cannot be. n2

n2 The error in the Court's logic is perhaps most apparent when it is recognized that the arrearages provision applies to *regular* military pay as well as retired pay. The Court's logic would compel the conclusion that regular pay is thus not subject to community property treatment, an untenable position which the Court itself shies away from without explanation, *ante*, at 224-225, n. 17.

The next two cases, *Free v. Bland, 369 U.S. 663 (1962),* and *Yiatchos v. Yiatchos, 376 U.S. 306 (1964),* involved the same provisions. Plaintiffs sought community property rights in United States Savings Bonds, even though duly issued Treasury Regulations provided that designated co-owners would, upon the death of the other co-owner, be "the sole and absolute owner" of the bonds. No such language is involved in this case.

The most recent case is, of course, *Hisquierdo*, in which the Court held that Congress in the Railroad Retirement Act pre-empted community property laws so that a railroad worker's pension could not be treated as community property. It bears noting that this case is not *Hisquierdo* revisited. In *Hisquierdo* there was a specific statutory provision which satisfied the requirement that Congress "'positively [require] by direct enactment' that state law be pre-empted." *439 U.S., at 581* (quoting *Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).* Section 14 of the Railroad Retirement **[**2746]** Act of 1974, carrying forward the provisions of § 12 of the Act of 1937, provided:

"Notwithstanding any other law **[***612]** of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." *45 U. S. C. § 231m.*

[*242] The *Hisquierdo* Court viewed this provision as playing "a most important role in the statutory scheme," *439 U.S., at 583-584.* The Court stressed the language "[notwithstanding] any other law ... of any State," *id., at 584*, and noted that § 14 "pre-empts all state law that stands in its way." *Ibid*.

With all the emphasis placed on § 14 in *Hisquierdo*, one would have expected the counterpart in the military retired pay scheme to figure prominently in the Court's opinion today. There is, however, nothing approaching § 14 in the military retired pay scheme. The closest analogue, *37 U. S. C. § 701* (a), is buried in footnote 22 of the Court's opinion. It simply provides:

"Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable."

The contrast with the provision in *Hisquierdo* is stark. Section 14 *forbids* assignment; § 701 (a) *permits* it. Section 14 contains a "flat prohibition against attachment and anticipation," *439 U.S., at 582;* all that can be gleaned from § 701 (a) is a negative implication prohibiting *voluntary* assignments prior to the time pay is due and payable. Such a limit is of course a far cry from the *Hisquierdo* provision requiring that the retired pay may not be subject to "legal process under any circumstances whatsoever" and that it shall not "be anticipated." It is no wonder § 701 (a) is buried in a footnote in the Court's opinion. n3

n3 The Court states that "[retired] pay cannot be attached to satisfy a property settlement incident to the dissolution of a marriage," *ante*, at 228. The sources for this are not statutory but rather a common-law doctrine, *Buchanan v. Alexander, 4 How. 20 (1845),* and a House Report explaining a decision not to enact a bill, see *ante*, at 228-230. The Court cannot of course justify either source as Congress "positively [requiring] by direct enactment" that state law be pre-empted. See *Hisquierdo, 439 U.S., at 581.* Thus even accepting the rule, it does not, as § 14 of the Railroad Retirement Act did in *Hisquierdo*, evince the strong *congressional intent* that military retired pay "actually reach the beneficiary." And congressional intent is all the prohibition on attachment is relevant to, since appellee seeks neither anticipation of pay nor attachment from the Government.

[*243] In addition to § 14 the *Hisquierdo* Court also relied on the fact that the Railroad Retirement Act provided a separate spousal entitlement, "[embodying] a community concept to an extent." *439 U.S., at 584.* Under the Railroad Retirement Act, *45 U. S. C. § 231d* (c), a spouse is entitled to a separate benefit, which terminates upon divorce. § 231d (c)(3). Congress explicitly considered extending the spousal benefit to a divorced spouse but declined to do so. *439 U.S., at 585.* **[***613]** The *Hisquierdo* Court found support in this not to permit California to expand the community property concept beyond its limited use by Congress in the Act. No similar separate spousal entitlement, terminable on divorce, exists in the statutes governing military retired pay. The "this far and no further" implication in *Hisquierdo*, therefore, cannot be made here.

II

The foregoing demonstrates that today's decision is not simply a logical extension of prior precedent. That does not, to be sure, mean that it is necessarily wrong -- there has to be a first time for everything. But examination of the analysis in the Court's opinion convinces me that it is both unprecedented and wrong.

[2747]** In its analysis the Court contrasts the statute involved in *Hisquierdo*, noting that there spouses received an annuity which terminated upon divorce. Here there is no such provision. As the Court states its conclusion: "Thus, unlike the Railroad Retirement Act, the military retirement system does not embody even a limited 'community property concept.'" *Ante*, at 224. This analysis, however, is the exact opposite **[*244]** of the analysis employed in *Hisquierdo*. As we have seen, there the Court's point was that Congress had provided *some* community property rights and made a conscious decision to provide *no more*:

"Congress carefully targeted the benefits created by the Railroad Retirement Act. It even embodied a community concept to an extent. ... Congress purposefully abandoned that theory, however, in allocating benefits upon absolute divorce. ... The choice was deliberate." *439 U.S., at 584-585.*

Now we are told that pre-emption of community property law is suggested in this case because there is *no* community property concept *at all* in the statutory scheme. Under *Hisquierdo* , this absence would have been thought to suggest that there was no pre-emption, since the argument could not be made, as it was in *Hisquierdo*, that Congress had addressed the question and drawn the line. See *In re Milhan, 27 Cal. 3d 765, 775-776, 613 P. 2d 812, 817 (1980),* cert. pending *sub nom. Milhan* v. *Milhan*, No. 80-578. I am not certain whether the analysis was wrong in *Hisquierdo* or in this case, but it is clear that both cannot be correct. One is led to inquire where this moving target will next appear.

The Court also relies on "several features of the statutory scheme" as evidence that Congress intended military retired pay to be the "personal entitlement" of the serviceman. The Court first focuses on *10 U. S. C. § 2771,* which permits a serviceman to select the beneficiary of unpaid arrearages. As we have seen, *supra*, at 240-241, the Court's reliance on *Wissner* in this context establishes, at most, only that *unpaid arrearages* cannot be treated as community property, not that retired pay in general cannot be. A provision permitting a serviceman to tell the Government where to mail his last paycheck after his death hardly supports the inference of a congressional intent to pre-empt state law governing disposition of military retired pay in general.

[*245] [*614]** The Court next relies on the statutory provisions permitting a retired serviceman to fund an annuity for his potential widow and/or dependent children out of retired pay. Even granting the Court its premise that the annuity is not subject to community property treatment, the conclusion that military retired pay is not subject to community property treatment simply does not follow. If California's community property law conflicts with permitting a retired serviceman to fund an annuity out of retired pay, then by all means override California's law -- *to the extent of the conflict*. Even if Congress did intentionally intrude on community property law to the extent of permitting a serviceman to fund an annuity, that hardly supports an intent to intrude on all community property law. Nothing in the Court's analysis shows any reason why appellee should not be entitled to one-half of appellant's retired pay *less amounts he uses to fund an annuity*, should he decide to do so.

The Court resists the recognition of any rights to retired pay in the ex-spouse because of a policy judgment that it would be "anomalous" to place the ex-spouse in a better position than a widow receiving benefits under an annuity. *Ante*, at 227. The Court, however, is comparing apples and oranges in two respects. The ex-spouse's rights are to retired pay, and *cease* when the serviceman dies. The widow's rights are to an annuity which *begins* when the serviceman dies. The fact that Congress "deliberately has chosen to favor the widower or widow over the ex-spouse" so far as the annuity is concerned, *ante*, at 228, simply has no relevance to the rights of the ex-spouse to the retired pay itself. Second, the ex-spouse has contributed to the earning of the retired pay to the same degree as the serviceman, according to state law. **[**2748]** The widow may have done nothing at all to "earn" her annuity, as would be the case, for example, if appellant remarried and funded an annuity for his widow out of retired pay. In view of this, I see nothing "anomalous" in providing the ex-spouse with rights in retired pay. In any event, such policy **[*246]** questions are for Congress to decide, not the Court, and the Court fails in its efforts to show *Congress* has found California's system anomalous.

The third argument advanced by the Court is the weakest of all: the Court argues that an ex-spouse in a community property State cannot obtain half of the military retired pay, by attachment or otherwise, because she *can* obtain alimony and child support by attachment. This is pre-emption by negative implication -- not the "positive requirement" and "direct enactment" which *Hisquierdo* indicated were required. And since appellee does not seek to attach anything, even the negative implication is not directly relevant.

The Court also stresses the recognition of community property rights in varying degrees in the Foreign Service and Civil Service laws. Again, this hardly meets the *Hisquierdo* test. Both the Foreign Service and Civil Service laws are quite different from the military retired pay laws. The former contain strong anti-attachment provisions like § 14 of the Railroad Retirement Act considered in *Hisquierdo*, see *5 U. S. C. § 8346;* **[***615]** *22 U. S. C. § 1104*, so Congress could well have thought explicit legislation was necessary in these areas.

III

The very most that the Court establishes, therefore, is that the provisions governing arrearages and annuities pre-empt California's community property law. There is no support for the leap from this narrow pre-emption to the conclusion that the community property laws are pre-empted so far as military retired pay in general is concerned. Such a jump is wholly inconsistent with this Court's previous pronouncements concerning a State's power to determine laws concerning marriage and property in the absence of Congress' "direct enactment" to the contrary, and I therefore dissent.

********** Print Completed **********

Time of Request: July 11, 2002 11:46 AM EDT

Print Number: 928:0:58953942
Number of Lines: 1184
Number of Pages:

Send To: STONE, EVAN
ARMY JUDGE ADVOCATE GENERAL SCHOOL
600 MASSIE RD
CHARLOTTESVILLE, VIRGINIA 22903-1750

490 U.S. 581, *; 109 S. Ct. 2023, **;
104 L. Ed. 2d 675, ***; 1989 U.S. LEXIS 2605

APPENDIX J

LEXSEE 490 U.S. 581

MANSELL v. MANSELL

No. 87-201

SUPREME COURT OF THE UNITED STATES

490 U.S. 581; 109 S. Ct. 2023; 104 L. Ed. 2d 675; 1989 U.S. LEXIS 2605; 57 U.S.L.W. 4567; 10 E.B.C. 2521

January 10, 1989, Argued
May 30, 1989, Decided

PRIOR HISTORY:

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT.

DISPOSITION:
Reversed and remanded.

SYLLABUS:

In direct response to *McCarty v. McCarty, 453 U.S. 210,* which held that federal law as it then existed completely pre-empted the application of state community property law to military retirement pay, Congress enacted the Uniformed Services Former Spouses' Protection Act (Act), *10 U. S. C. § 1408* (1982 ed. and Supp. V), which authorizes state courts to treat as community property "disposable retired or retainer pay," § 1408(c)(1), specifically defining such pay to exclude, *inter alia,* any military retirement pay waived in order for the retiree to receive veterans' disability benefits, § 1408(a)(4)(B). The Act also creates a mechanism whereby the Federal Government will make direct community property payments of up to 50% of disposable retired or retainer pay to certain former spouses who present state-court orders granting such pay. A pre-*McCarty* property settlement agreement between appellant and appellee, who were divorced in a county Superior Court in California, a community property State, provided that appellant would pay appellee 50 percent of his total military retirement pay, including that portion of such pay which he had waived in order to receive military disability benefits. After the Act's passage, the Superior Court denied appellant's request to modify the divorce decree by removing the provision requiring him to share his total retirement pay with appellee. The State Court of Appeal affirmed, rejecting appellant's contention that the Act precluded the lower court from treating as community property the military retirement pay appellant had waived to receive disability benefits. In so holding, the court relied on a State Supreme Court decision which reasoned that the Act did not limit a state court's ability to treat total military retirement pay as community property and to enforce a former spouse's rights to such pay through remedies other than direct Federal Government payments.

Held: The Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits. In light of § 1408(a)(4)(B)'s limiting language as to such waived pay, the Act's plain and precise language establishes that § 1408(c)(1) grants state courts the authority to treat only disposable retired pay, not total retired pay, as community property. Appellee's argument that the Act has no pre-emptive effect of its own and must be read as a garnishment statute designed solely to limit when the Federal Government will make direct payments to a former spouse, and that, accordingly, § 1408(a)(4)(B) defines "disposable retired or retainer pay" only because payments under the statutory direct payment mechanism are limited to amounts defined by that term, is flawed for two reasons. First, the argument completely ignores the fact that § 1408(c)(1) also

uses the quoted phrase to limit specifically and plainly the extent to which state courts may treat military retirement pay as community property. Second, each of § 1408(c)'s other subsections imposes new substantive limits on state courts' power to divide military retirement pay, and it is unlikely that all of the section, except for § 1408(c)(1), was intended to pre-empt state law. Thus, the garnishment argument misplaces its reliance on the fact that the Act's saving clause expressly contemplates that a retiree will be liable for "other payments" in excess of those made under the direct payment mechanism, since that clause is more plausibly interpreted as serving the limited purpose of defeating any inference that the mechanism displaced state courts' authority to divide and garnish property not covered by the mechanism. Appellee's contention that giving effect to the plain and precise statutory language would thwart the Act's obvious purposes of rejecting *McCarty* and restoring to state courts their pre-*McCarty* authority is not supported by the legislative history, which, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place on state courts limits designed to protect military retirees. Pp. 587-594.

COUNSEL:

Douglas B. Cone argued the cause for appellant. With him on the briefs was Jim T. Elia.

Dennis A. Cornell argued the cause and filed a brief for appellee. *

* Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Bolton*, and *Deputy Solicitor General Merrill;* and for the Retired Officers Association et al. by *Jan Horbaly*.

June Kazuko Inuzuka, Judith I. Avner, and *Sally F. Goldfarb* filed a brief for the Women's Equity Action League et al. as *amici curiae* urging affirmance.

JUDGES:

Marshall, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Brennan, White, Stevens, Scalia, and Kennedy, JJ., joined. O'Connor, J., filed a dissenting opinion, in which Blackmun, J., joined, post, p. 595.

OPINIONBY:

MARSHALL

OPINION:

[*583] [*681] [**2025]** JUSTICE MARSHALL delivered the opinion of the Court.

[*HR1A]** In this appeal, we decide whether state courts, consistent with the federal Uniformed Services Former Spouses' Protection Act, *10 U. S. C. § 1408* (1982 ed. and Supp. V) (Former Spouses' Protection Act or Act), may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits. We hold that they may not.

I

A

Members of the Armed Forces who serve for a specified period, generally at least 20 years, may retire with retired pay. *10 U. S. C. § 3911 et seq.* (1982 ed. and Supp. V) (Army); § 6321 *et seq.* (1982 ed. and Supp. V) (Navy and Marine Corps); § 8911 *et seq.* (1982 ed. and Supp. V) (Air Force). The amount of retirement pay a veteran is eligible to receive is calculated according to the number of years served and the rank **[**2026]** achieved. § § 3926 and 3991 (Army); § § 6325-6327 (Navy and Marine Corps); § 8929 (Air Force). Veterans who became disabled as a result of military service are eligible for disability benefits. *38 U. S. C. § 310* (wartime **[***682]** disability); § 331 (peacetime disability). The amount of disability benefits a veteran is eligible to receive is calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired. § § 314 and 355.

In order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay. § 3105. n1 Because disability benefits are exempt from federal, state, and local taxation, § 3101(a), military retirees who waive their retirement pay in favor of disability benefits increase **[*584]** their after-tax income. Not surprisingly, waivers of retirement pay are common.

n1 For example, if a military retiree is eligible for $ 1500 a month in retirement pay and $ 500 a month in disability benefits, he must waive $ 500 of retirement pay before he can receive any disability benefits.

[*HR2]** California, like several other States, treats property acquired during marriage as community property. When a couple divorces, a state court divides community property equally between the spouses while each spouse retains full ownership of any separate property. See Cal. Civ. Code Ann. § 4800(a) (West 1983 and Supp. 1989). California treats military retirement payments as community property to the extent they derive from military service performed during the marriage. See, *e. g., Casas v. Thompson, 42 Cal. 3d 131, 139, 720 P. 2d 921, 925,* cert. denied, *479 U.S. 1012 (1986).*

In *McCarty v. McCarty, 453 U.S. 210 (1981),* we held that the federal statutes then governing military retirement pay prevented state courts from treating military retirement pay as community property. We concluded that treating such pay as community property would do clear damage to important military personnel objectives. *Id., at 232-235.* We reasoned that Congress intended that military retirement pay reach the veteran and no one else. *Id., at 228.* In reaching this conclusion, we relied particularly on Congress' refusal to pass legislation that would have allowed former spouses to garnish military retirement pay to satisfy property settlements. *Id., at 228-232.* Finally, noting the distressed plight of many former spouses of military members, we observed that Congress was free to change the statutory framework. *Id., at 235-236.*

[*HR1B]** In direct response to *McCarty*, Congress enacted the Former Spouses' Protection Act, which authorizes state courts to treat "disposable retired or retainer pay" as community property. *10 U. S. C. § 1408*(c)(1). n2 "'Disposable retired or **[*585]** retainer pay'" is defined as "the total monthly retired or retainer pay to which a military member is entitled," minus certain deductions. § 1408(a)(4) (1982 ed. and Supp. V). Among the amounts required to be deducted from total pay **[***683]** are any amounts waived in order to receive disability benefits. § 1408(a)(4)(B). n3

[*HR1C]**

n2 The language of the Act covers both community property and equitable distribution States, as does our decision today. Because this case concerns a community property State, for the sake of simplicity we refer to § 1408(c)(1) as authorizing state courts to treat "disposable retired or retainer pay" as community property.

n3 Also deducted from total military retirement pay are amounts: (a) owed by the military member to the United States; (b) required by law to be deducted from total pay, including employment taxes, and fines and forfeitures ordered by courts-martial; (c) properly deducted for federal, state, and local income taxes; (d) withheld pursuant to other provisions under the Internal Revenue Code; (e) equal to the amount of retired pay of a member retired for physical disability; and (f) deducted to create an annuity for the former spouse. *10 U. S. C. § § 1408*(a)(4)(A)-(F) (1982 ed. and Supp. V).

[2027]** The Act also creates a payments mechanism under which the Federal Government will make direct payments to a former spouse who presents, to the Secretary of the relevant military service, a state-court order granting her a portion of the military retiree's disposable retired or retainer pay. This direct payments mechanism is limited in two ways. § 1408(d). First, only a former spouse who was married to a military member "for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay," § 1408(d)(2), is eligible to receive direct community property payments. Second, the Federal Government will not make community property payments that exceed 50 percent of disposable retired or retainer pay. § 1408(e)(1).

B

Appellant Gerald E. Mansell and appellee Gaye M. Mansell were married for 23 years and are the parents of six children. Their marriage ended in 1979 with a divorce decree from the Merced County, California, Superior Court. At that time, Major Mansell received both Air Force retirement pay and, pursuant to a waiver of a portion of that pay,

disability benefits. Mrs. Mansell and Major Mansell entered **[*586]** into a property settlement which provided, in part, that Major Mansell would pay Mrs. Mansell 50 percent of his total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits. Civ. No. 55594 (May 29, 1979). In 1983, Major Mansell asked the Superior Court to modify the divorce decree by removing the provision that required him to share his total retirement pay with Mrs. Mansell. The Superior Court denied Major Mansell's request without opinion.

[*HR3A]** **[***HR4A]** Major Mansell appealed to the California Court of Appeal, Fifth Appellate District, arguing that both the Former Spouses' Protection Act and the anti-attachment clause that protects a veteran's receipt of disability benefits, *38 U. S. C. § 3101*(a) (1982 ed. and Supp. IV), n4 precluded the Superior Court from treating military retirement pay that had been waived to receive disability benefits as community property. Relying on the decision of the Supreme Court of California in *Casas v. Thompson, supra,* the Court of Appeal rejected that portion of Major Mansell's argument based on the Former Spouses' Protection Act. 5 Civ. No. F002872 (Jan. 30, **[***684]** 1987). n5 *Casas* held that after the passage of the Former Spouses' Protection Act, federal law no longer pre-empted **[*587]** state community property law as it applies to military retirement pay. The *Casas* court reasoned that the Act did not limit a state court's ability to treat total military retirement pay as community property and to enforce a former spouse's rights to such pay through remedies other than direct payments from the Federal Government. *42 Cal. 3d, at 143-151, 720 P. 2d, at 928-933.* The Court of Appeal did not discuss the anti-attachment clause, *38 U. S. C. § 3101*(a). n6 The Supreme **[**2028]** Court of California denied Major Mansell's petition for review.

n4 That clause provides that veterans' benefits "shall not be assignable except to the extent specifically authorized by law, and ... shall be exempt from the claim[s] of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the [veteran]." *38 U. S. C. § 3101*(a) (1982 ed. and Supp. V).

n5 In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty v. McCarty, 453 U.S. 210 (1981).* The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. 5 Civ. No. F002872 (Jan. 30, 1987). Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us. n6 Because we decide that the Former Spouses' Protection Act precludes States from treating as community property retirement pay waived to receive veterans' disability benefits, we need not decide whether the anti-attachment clause, § 3101(a), independently protects such pay. See, *e. g., Rose v. Rose, 481 U.S. 619 (1987); Wissner v. Wissner, 338 U.S. 655 (1950).*

[*HR3B]** **[***HR4B]**

We noted probable jurisdiction, *487 U.S. 1217 (1988),* and now reverse.

II

[*HR5]** Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. See, *e. g., Rose v. Rose, 481 U.S. 619, 628 (1987); Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979).* Thus we have held that we will not find pre-emption absent evidence that it is "'positively required by direct enactment.'" *Hisquierdo, supra, at 581* (quoting *Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).* The instant case, however, presents one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations.

[*HR6A]** It is clear from both the language of the Former Spouses' Protection Act, see, *e. g.*, § 1408(c)(1), and its legislative history, see, *e. g.*, H. R. Conf. Rep. No. 97-749, p. 165 (1982); S. Rep. No. 97-502, pp. 1-3, 16 (1982), that Congress sought to change the legal landscape created by the *McCarty* decision. n7 **[*588]** Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property. Cf. *Midlantic Nat. Bank v.* **[***685]** *New Jersey Dept. of Environmental Protection, 474 U.S. 494, 501 (1986).*

n7 Congress also demonstrated its focus on *McCarty* when it chose June 25, 1981, the day before *McCarty* was decided, as the applicable date for some of the Act's provisions. *10 U. S. C. § 1408*(c)(1); see also note following § 1408, Pub. L. 97-252, § 1006(b) (transition provisions).

The appellant and appellee differ sharply on the scope of Congress' modification of *McCarty*. Mrs. Mansell views the Former Spouses' Protection Act as a complete congressional rejection of *McCarty*'s holding that state law is pre-empted; she reads the Act as restoring to state courts all pre-*McCarty* authority. Major Mansell, supported by the United States, argues that the Former Spouses' Protection Act is only a partial rejection of the *McCarty* rule that federal law pre-empts state law regarding military retirement pay. n8

n8 Although the United States has filed an *amicus* brief supporting Major Mansell, its initial *amicus* brief, filed before the Court noted jurisdiction, supported Mrs. Mansell.

[*HR1D]** **[***HR7A]** Where, as here, the question is one of statutory construction, we begin with the language of the statute. See, *e. g., Blum v. Stenson, 465 U.S. 886, 896 (1984); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).* Mrs. Mansell's argument faces a formidable obstacle in the language of the Former Spouses' Protection Act. Section 1408(c)(1) of the Act affirmatively grants state courts the power to divide military retirement pay, yet its language is both precise and limited. It provides that "a court may treat disposable retired or retainer pay ... either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of **[*589]** such court." § 1408(c)(1). The Act's definitional section specifically defines the term "disposable retired or retainer pay" to exclude, *inter alia*, military retirement pay waived in order to receive veterans' disability **[**2029]** payments. § 1408(a)(4)(B). n9 Thus, under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay as community property.

n9 The statute provides in pertinent part:

"'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled ... less amounts which --

..."(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martials, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38 [disability payments]." § 1408(a)(4)(B).

[*HR1E]** Mrs. Mansell attempts to overcome the limiting language contained in the definition, § 1408(a)(4)(B), by reading the Act as a garnishment statute designed solely to set out the circumstances under which, pursuant to a court order, the Federal Government will make direct payments to a former spouse. According to this view, § 1408(a)(4)(B) defines "[d]isposable retired or retainer pay" only because payments under the federal direct payments mechanism are limited to amounts defined by that term.

[*HR8]** The garnishment argument relies heavily on the Act's saving clause. That clause provides:

"Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, *or other payments* required by a court order on the grounds that payments **[***686]** made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under [the direct payments mechanism]. Any such unsatisfied obligation **[*590]** of a member may be enforced by any means available under law

other than the means provided under this section in any case in which the maximum amount permitted under ... [the direct payments mechanism] has been paid." § 1408(e)(6) (emphasis added).

Mrs. Mansell argues that, because the saving clause expressly contemplates "other payments" in excess of those made under the direct payments mechanism, the Act does not "attempt to tell the state courts what they may or may not do with the underlying property." Brief for Appellee 17. For the reasons discussed below, we find a different interpretation more plausible. In our view, the saving clause serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism. Cf. *Hisquierdo, 439 U.S., at 584* (to prohibit garnishment is to prohibit division of property); *Wissner v. Wissner, 338 U.S. 655 (1950)* (same).

[*HR1F]** First, the most serious flaw in the garnishment argument is that it completely ignores § 1408(c)(1). Mrs. Mansell provides no explanation for the fact that the defined term -- "disposable retired or retainer pay" -- is used in § 1408(c)(1) to limit specifically and plainly the extent to which state courts may treat military retirement pay as community property.

Second, the view that the Act is solely a garnishment statute and therefore not intended to pre-empt the authority of state courts is contradicted not only by § 1408(c)(1), but also by the other subsections of § 1408(c). Sections 1408(c)(2), (c)(3), and (c)(4) impose new substantive limits on state courts' power to divide military retirement pay. Section 1408(c)(2) prevents a former spouse from transferring, selling, or otherwise disposing of her community interest in the military retirement pay. n10 Section 1408(c)(3) provides that a **[*591]** state court cannot order a military member to retire so that the former spouse can immediately begin receiving her portion of **[**2030]** military retirement pay. n11 And § 1408(c)(4) prevents spouses from forum shopping for a State with favorable divorce laws. n12 Because each **[***687]** of these provisions pre-empts state law, the argument that the Act has no pre-emptive effect of its own must fail. n13 Significantly, Congress placed **[*592]** each of these substantive restrictions on state courts in the same section of the Act as § 1408(c)(1). We think it unlikely that every subsection of § 1408(c), except § 1408(c)(1), was intended to pre-empt state law.

n10 The Senate Report expressly contemplates that § 1408(c)(2) will pre-empt state law. S. Rep. No. 97-502, p. 16 (1982).

n11 There was some concern expressed at the Senate hearings on the Act that state courts could direct a military member to retire. See, *e. g.*, Hearings before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, 97th Cong., 2d Sess., 132-133 (1982) (Sen. Exon); *id.*, at 70-71 (veterans' group); *id.*, at 184 (Air Force). Thus the Senate version of the bill contained § 1408(c)(3) in order to ensure that state courts did not have such power, S. Rep. No. 97-502, *supra*, at 17, and at conference the House agreed to add the provision. H. R. Conf. Rep. No. 97-749, p. 167 (1982).

n12 A state court may not treat disposable retirement pay as community property unless it has jurisdiction over the military member by reason of (1) residence, other than by military assignment in the territorial jurisdiction of the court, (2) domicile, or (3) consent. § 1408(c)(4). Although the Senate Committee had decided not to include any forum shopping restrictions, seeing "no need to limit the jurisdiction of the State courts by restricting the benefits afforded by this bill ...," S. Rep. No. 97-502, *supra*, at 9, the House version of the bill contained the restrictions, and at conference, the Senate agreed to add them. H. R. Conf. Rep. No. 97-749, *supra*, at 167.

n13 That Congress intended the substantive limits in § 1408(c)(1) to be, to some extent, distinct from the limits on the direct payments mechanism contained in § 1408(d) is demonstrated by the legislative compromise that resulted in the direct payments mechanism being available only to former spouses who had been married to the military retiree for 10 years or more. § 1408(d)(2). Under the House version of the bill, military retirement pay could be treated as community property only if the couple had been married for 10 years or more. H. R. Conf. Rep. No. 97-749, *supra*, at 165. The Senate Committee had considered, but rejected, such a provision. S. Rep. No. 97-502, *supra*, at 9-11. The conferees agreed to remove the House restriction. Instead, they limited the federal direct payments mechanism to marriages that had lasted 10 years or more. H. R. Conf. Rep. No. 97-749, *supra*, at 166-167. Under this compromise, state courts have been granted the authority to award a portion

of disposable military retired pay to former spouses who were married to the military member for less than 10 years, but such former spouses may not take advantage of the direct payments mechanism.

[*HR7B]** **[***HR9]** In the face of such plain and precise statutory language, Mrs. Mansell faces a daunting standard. She cannot prevail without clear evidence that reading the language literally would thwart the obvious purposes of the Act. See, *e. g., Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978).* The legislative history does not indicate the reason for Congress' decision to shelter from community property law that portion of military retirement pay waived to receive veterans' disability payments. n14 But the absence of legislative history on this decision is immaterial in light of the plain and precise language of the statute; Congress is not required to build a record in the legislative history to defend its policy choices.

n14 The only reference to the definitional section is contained in the Senate Report which states that the deductions from total retired pay, including retirement pay waived in favor of veterans' disability payments, "generally parallel those existing deductions which may be made from the pay of Federal employees and military personnel before such pay is subject to garnishment for alimony or child support payments under section 459 of the Social Security Act. *(42 U. S. C. 659).*" S. Rep. No. 97-502, *supra*, at 14. This statement, however, describes the defined term in § 1408(a)(4). It is not helpful in determining why Congress chose to use the defined term -- "disposable retired or retainer pay" -- to limit state-court authority in § 1408(c)(1).

[*HR1G]** **[***HR6B]** Because of the absence of evidence of specific intent in the legislative history, Mrs. Mansell resorts to arguments about the broad purposes of the Act. But this reliance is misplaced because, at this general level, there are statements that both **[**2031]** contradict and support her arguments. Her argument that the Act contemplates no federal pre-emption is supported by statements in the Senate Report and the House Conference **[*593]** Report that the purpose of the Act is to overcome the *McCarty* decision and to restore power **[***688]** to the States. n15 But the Senate Report and the House Conference Report also contain statements indicating that Congress rejected the uncomplicated option of removing all federal pre-emption and returning unlimited authority to the States. n16 Indeed, a bill that would have eliminated all federal pre-emption died in the Senate Committee. n17 Her argument that Congress primarily intended to protect former spouses is supported by evidence that Members of Congress were moved by, and responding to, the distressed economic plight of military wives after a divorce. n18 But the Senate Report and the House debates contain **[*594]** statements which reveal that Congress was concerned as well with protecting the interests of military members. n19

n15 See, *e. g.*, S. Rep. No. 97-502, *supra*, at 1 ("The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty v. McCarty, 453 U.S. 210 (1981).* The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation"). See also *id.*, at 5 and 16; H. R. Conf. Rep. No. 97-749, *supra*, at 165.

n16 H. R. Conf. Rep. No. 97-749, *supra*, at 165 ("The House amendment would permit disposable military retired pay to be considered as property in divorce settlements *under certain specified conditions*") (emphasis added); *ibid.* ("The House Amendment contained several provisions that would place restrictions on the division of retired pay"); S. Rep. No. 97-502, *supra*, at 4 ("[Senate] 1814 imposes *three distinct limits* on the division or enforcement of court orders against military retired pay in divorce cases") (emphasis added).

n17 Entitled "Nonpreemption of State law" the bill provided that "[f]or purposes of division of marital property of any member or former member of the armed forces upon dissolution of such member's marriage, the law of the State in which the dissolution of marriage proceeding was instituted shall be dispositive on all matters pertaining to the division of any retired, retirement, or retainer pay to which such member or former member is entitled or will become entitled." S. 1453, 97th Cong., 1st Sess. (1981).

n18 The Senate Committee pointed out that "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection." S. Rep. No. 97-502, *supra*, at 6. The language of the Act, and much of its legislative history, is written in gender neutral terms, and there is no doubt that the Act applies equally to both former husbands and former wives. But "it is quite evident from the legislative history that Congress acted largely in response to the plight of the military *wife*." Horkovich, Uniformed Services Former Spouses' Protection Act: Congress' Answer to *McCarty* v. *McCarty* Goes Beyond the Fundamental Question, *23 Air Force L. Rev. 287, 308* (1982-1983) (emphasis in original).

n19 See, *e. g.*, S. Rep. No. 97-502, *supra*, at 7 ("All agreed that some form of remedial legislation which is fair and equitable to both spouses was necessary to provide a solution to the *McCarty* decision"); see also *id.*, at 11; nn. 10, 11, 12, and 16, *supra*.

[*HR1H] [***HR6C] [***HR10]** Thus, the legislative history, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits on state courts designed to protect military retirees. Our task is to interpret the statute as best we can, not to second-guess the wisdom of the congressional policy choice. See, *e. g., Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam)* ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice"). Given Congress' mixed purposes, the legislative history does not clearly support Mrs. Mansell's view that giving effect to **[***689]** the plain and precise language of the statute would thwart the obvious purposes of the Act.

[2032]**

[*HR11]** We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

III

[*HR1I]** For the reasons stated above, we hold that the Former Spouses' Protection Act does not grant state courts the **[*595]** power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits. The judgment of the California Court of Appeal is hereby reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

DISSENTBY:
O'CONNOR

DISSENT:

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, dissenting.

Today the Court holds that the federal Uniformed Services Former Spouses' Protection Act (Former Spouses' Protection Act or Act) denies state courts the power to order in a divorce decree the division of military retirement pay unilaterally waived by a retiree in order to receive veterans' disability benefits. The harsh reality of this holding is that former spouses like Gaye Mansell can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits. On the Court's reading of the Former Spouses' *Protection* Act, Gaye Mansell will lose nearly 30 percent of the monthly retirement income she would otherwise have received as community property. I view the Court's holding as inconsistent with both the language and the purposes of the Act, and I respectfully dissent.

The Court recognized in *McCarty v. McCarty, 453 U.S. 210, 235 (1981)*, that "the plight of an ex-spouse of a retired service member is often a serious one." In holding that federal law precluded state courts from dividing *nondisability* military retired pay pursuant to state community property laws, *McCarty* concluded with an invitation to

Congress to reexamine the issue. Congress promptly did so and enacted the Former Spouses' Protection Act. Today, despite overwhelming evidence that Congress intended to overrule *McCarty* completely, to alter pre-existing federal military retirement law so as to eliminate the pre-emptive effect **[*596]** discovered in *McCarty*, and to restore to the States authority to issue divorce decrees affecting military retirement pay consistent with state law, the Court assumes that Congress only partially rejected *McCarty* and that the States can apply their community property laws to military retirement pay only to the extent that the Former Spouses' Protection Act affirmatively grants them authority to do so. *Ante*, at 588. The *McCarty* **[***690]** decision, however, did not address retirement pay waived to receive disability benefits; nor did it identify any explicit statutory provision precluding the States from characterizing such waived retirement pay as community property. Thus, I reject the Court's central premise that the States are precluded by *McCarty* from characterizing as community property any retirement pay waived to receive disability benefits absent an affirmative grant of authority in the Former Spouses' Protection Act.

In my view, Congress intended, by enacting the Former Spouses' Protection Act, to eliminate the effect of *McCarty* 's pre-emption holding altogether and to return to the States their authority "to treat military pensions in the same manner as they treat other retirement benefits." S. Rep. No. 97-502, p. 10 (1982). See also *id.*, at 1 ("The primary purpose of the bill is to remove the effect of the United States Supreme **[**2033]** Court decision in *McCarty v. McCarty, 453 U.S. 210 (1981).* The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation"); *id.*, at 5 ("[T]he committee intends the legislation to restore the law to what it was when the courts were permitted to apply State divorce laws to military retired pay"); *id.*, at 16 ("The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining **[*597]** whether military retired or retainer pay should be divis[i]ble"); 128 Cong. Rec. 18314 (1982) ("The amendment simply returns to State courts the authority to treat military retired pay as it does other public and private pensions") (remarks of Rep. Schroeder, bill sponsor).

Family law is an area traditionally of state concern, *Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979),* and we have not found federal pre-emption of state authority in this area absent a determination that "Congress has 'positively required by direct enactment' that state law be pre-empted." *Ibid.* (quoting *Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).* The Former Spouses' Protection Act does not "positively require" States to abandon their own law concerning the divisibility upon divorce of military retirement pay waived in order to obtain veterans' disability benefits. On the contrary, the whole thrust of the Act was to restore to the States their traditional authority in the area of domestic relations. Even beyond that restoration, Congress sought to provide greater federal assistance and protection to military spouses than existed before *McCarty* by creating a federal garnishment remedy in aid of state court community property awards. That, in fact, is the central purpose and preoccupation of the Act's complex statutory framework. The Former Spouses' Protection Act is primarily a remedial statute creating a mechanism whereby former spouses armed with state court orders may enlist the Federal Government to assist them in obtaining some of their property entitlements upon divorce. The federal garnishment **[***691]** remedy created by the Act is limited, but it serves as assistance and not, as the Court would have it, a hindrance to former spouses. Thus, the provision at *10 U. S. C. § 1408*(a)(4)(B) (1982 ed. and Supp. V) of the Act defining "[d]isposable retired or retainer pay" to exclude "amounts waived in order to receive compensation under title 5 or title 38," and its incorporation into § 1408(c)(1)'s community property provision, only limits the federal garnishment remedy created by the Act. It does not limit the authority **[*598]** of States to characterize such waived retirement pay as community property under state law.

This reading is reinforced by the legislative history, which indicates that "[t]he specific deductions that are to be made from the total monthly retired and retainer pay generally parallel those existing deductions which may be made from the pay of Federal employees and military personnel before such pay is subject to *garnishment* for alimony or child support payments under section 459 of the Social Security Act *(42 U. S. C. 659).*" S. Rep. No. 97-502, *supra*, at 14 (emphasis added). The Court finds that this statement "is not helpful in determining why Congress chose to use the defined term -- 'disposable retired or retainer pay' -- to limit state-court authority in § 1408(c)(1)." *Ante*, at 592, n. 14. True, it is singularly unhelpful in supporting the Court's view that § 1408(c)(1) denies state courts authority to *characterize* retirement pay waived in lieu of disability benefits as community property. By contrast, it *is* **[**2034]** helpful in determining why Congress chose to use "disposable retired or retainer pay" as the term limiting state court authority to *garnish* military retirement pay. In light of the fact that disability benefits are exempt from garnishment in most cases, *38 U. S. C. § 3101* (a) (1982 ed., Supp. V), had Congress not excluded "amounts waived" in order to receive veterans' disability benefits from the federal garnishment remedy created by the Former Spouses' Protection Act it would have eviscerated the force of the anti-attachment provisions of § 3101(a).

To take advantage of the federal garnishment remedy, which provides for direct payment by the Government to former spouses in specified circumstances, former spouses must serve on the appropriate service Secretary court orders meeting certain requirements. In the case of a division of property, the court order must "specifically provid[e] for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member." *10 U. S. C. § 1408*(a)(2)(C) **[*599]** (1982 ed., Supp. V). It must contain certain information and be regular on its face. § § 1408(b)(1)(B), 1408(b)(1)(C), 1408(b)(1)(D), 1408(b)(2) (1982 ed. and Supp. V). The Act sets forth the procedures to be followed by the Secretary in making payments directly to former spouses. § 1408(d) (1982 ed. and Supp. V). Finally, the Act places limits on the total amount of disposable retirement pay that may be paid by the Secretary to former spouses, § § 1408(e)(1), 1408(e)(4)(B) (1982 ed. and Supp. V), and it clarifies the procedures to be followed in the event of multiple or conflicting court orders. § § 1408(e)(2), 1408(e)(3)(A) (1982 ed., Supp. V).

[*692]** Subsection 1408(c)(1) authorizes the application of this federal garnishment remedy to community property awards by providing that "a court *may* treat disposable retired or retainer pay payable to a member ... either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (Emphasis added.) This provision should not be read to *pre-clude* States from characterizing retirement pay waived to receive disability benefits as community property but only to preclude the use of the federal direct payments mechanism to attach that waived pay. Nor do § § 1408 (c)(2), (c)(3), and (c)(4) compel the conclusion that Congress intended to pre-empt States from characterizing gross military retirement pay as community property divisible upon divorce. Those three provisions indicate what States may "not" do. That Congress explicitly restricted the authority of courts in certain specific respects, however, does not support the inference that § 1408(c)(1) -- an affirmative *grant* of power -- should be interpreted as precluding everything it does not grant. On the contrary, it supports the inference that Congress explicitly and directly precluded those matters it wished to pre-empt entirely, leaving the balance of responsibility in the area of domestic relations to the States. In this respect, the Court mischaracterizes Gaye Mansell's argument as insisting that "the Act contemplates no federal pre-emption. ..." **[*600]** *Ante*, at 592. Subsection 1408(c) has substantive effects on the power of state courts -- its first paragraph expands those powers ("a court may treat"); its remaining paragraphs restrict those powers ("this section does not create"; "[t]his section does not authorize"; "[a] court may not treat").

That States remain free to characterize waived portions of retirement pay as community property is unambiguously underscored by the broad language of the saving clause contained in the Act, § 1408(e)(6). That clause provides:

"*Nothing* in this section shall be construed to relieve a member of liability for the payment of alimony, child support, *or other payments* required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph **[**2035]** (1) or subparagraph (B) of paragraph (4). *Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section* in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act *(42 U. S. C. 659)* in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid." (Emphasis added.)

The Court explains that the saving clause "serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property *not* covered by the mechanism." *Ante*, at 590 (emphasis added). I agree. What I do not understand is how the Court can read the Act's saving clause in this manner and yet conclude, without contradiction, **[***693]** that California may not characterize retirement pay waived for disability benefits as community property. All California seeks to do is "divide and garnish property not covered by the [federal direct payments] mechanism." *Ibid.* Specifically, California wishes to exercise its traditional family **[*601]** law powers to divide as community property that portion of Major Mansell's retirement pay which he unilaterally converted into disability benefits, and use state-law garnishment remedies to attach the *value* of Gaye Mansell's portion of this community property. That is precisely what § 1408(e)(6) saves to the States by "defeating" any contrary inference, *ante*, at 590, that the Act has displaced the State's authority to enforce its divorce decrees "by any means available under law other than the means provided under this section. ..." § 1408(e)(6). As the California Supreme Court so aptly put it, in the saving clause Congress emphasized that "the limitations on the service secretary's ability to reach the retiree's gross pay [are] not to be deemed a limitation on the state court's ability to define the community property interests at the time of dissolution." *Casas v. Thompson, 42 Cal. 3d 131, 150, 720 P. 2d 921, 933,* cert. denied, *479 U.S. 1012 (1986).* In other words, while a former spouse may not receive community property payments that exceed 50 percent of a retiree's disposable retirement pay through the direct federal garnishment

mechanism, § 1408(e)(1), a state court is free to characterize gross retirement pay as community property depending on the law of its jurisdiction, and former spouses may pursue any other remedy "available under law" to satisfy that interest. "Nothing" in the Former Spouses' Protection Act relieves military retirees of liability under such law if they possess other assets equal to the value of the former spouse's share of the gross retirement pay.

Under the Court's reading of the Act as precluding the States from characterizing gross retirement pay as community property, a military retiree has the power unilaterally to convert community property into separate property and increase his after-tax income, at the expense of his ex-spouse's financial security and property entitlements. To read the statute as permitting a military retiree to pocket 30 percent, 50 percent, even 80 percent of gross retirement pay by converting it into disability benefits and thereby to avoid his obligations **[*602]** under state community property law, however, is to distort beyond recognition and to thwart the main purpose of the statute, which is to recognize the sacrifices made by military spouses and to protect their economic security in the face of a divorce. Women generally suffer a decline in their standard of living following a divorce. See Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, *28 UCLA L. Rev. 1181, 1251 (1981).* Military wives face special difficulties because "frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, **[**2036]** job skills and pension protection." S. Rep. No. 97-502, at 6. The average military couple married for 20 years moves about 12 times, and military wives experience an unemployment **[***694]** rate more than double that of their civilian counterparts. Brief for Women's Equity Action League et al. as *Amici Curiae* 10-11. Retirement pay, moreover, is often the single most valuable asset acquired by military couples. *Id.*, at 18. Indeed, the one clear theme that emerges from the legislative history of the Act is that Congress recognized the dire plight of many military wives after divorce and sought to protect their access to their exhusbands' military retirement pay. See S. Rep. No. 97-502, at 6; 128 Cong. Rec. 18318 (1982) ("[F]requent military moves often preclude spouses from pursuing their own careers and establishing economic independence. As a result, military spouses are frequently unable to vest in their own retirement plans or obtain health insurance coverage from a private employer. Military spouses who become divorced often lose all access to retirement and health benefits -- despite a 'career' devoted to the military") (remarks of Rep. Schumer). See also *id.*, at 18315, 18316, 18317, 18320, 18323, 18328. Reading the Act as not precluding States from characterizing retirement pay waived to receive disability benefits as property divisible upon divorce is faithful to **[*603]** the clear remedial purposes of the statute in a way that the Court's interpretation is not.

The conclusion that States may treat gross military retirement pay as property divisible upon divorce is not inconsistent with *38 U. S. C. § 3101*(a) (1982 ed., Supp. V). This anti-attachment provision provides that veterans' disability benefits "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Gaye Mansell acknowledges, as she must, that § 3101(a) precludes her from garnishing under state law Major Mansell's veterans' disability benefits in satisfaction of her claim to a share of his gross military retirement pay, just as § 1408(c)(1) precludes her from invoking the federal direct payments mechanism in satisfaction of that claim. To recognize that § 3101(a) protects the funds from a specific source, however, does not mean that § 3101(a) prevents Gaye Mansell from recovering her 50 percent interest in Major Mansell's gross retirement pay out of any income or assets he may have *other* than his veterans' disability benefits. So long as those benefits themselves are protected, calculation of Gaye Mansell's entitlement on the basis of Major Mansell's gross retirement pay does not constitute an "attachment" of his veterans' disability benefits. Section 3101(a) is designed to ensure that the needs of disabled veterans and their families are met, see *Rose v. Rose, 481 U.S. 619, 634 (1987),* without interference from creditors. That purpose is fulfilled so long as the benefits themselves are protected by the anti-attachment provision.

In sum, under the Court's interpretation of the Former Spouses' Protection Act, the former spouses Congress sought to protect risk having their economic security severely undermined by a unilateral decision of their ex-spouses to waive retirement pay in lieu of disability benefits. It is inconceivable that Congress intended the broad remedial purposes of the statute to be thwarted in such a way. To be sure, as the Court notes, Congress sought to be "fair **[***695]** and equitable" to retired **[*604]** service members as well as to protect divorced spouses. *Ante*, at 593-594, and n. 19. Congress explicitly protected military members by limiting the percentage of disposable retirement pay subject to the federal garnishment remedy and by expressly providing that military members could not be forced to retire. See *10 U. S. C. § § 1408*(e)(1), 1408(e)(4)(B), 1408(c)(3). Moreover, a retiree is still advantaged by waiving retirement pay in lieu of disability benefits: the pay that is waived is not subject to the federal direct **[**2037]** payments mechanism, and the former spouse must resort instead to the more cumbersome and costly process of seeking a state garnishment order against the value of that waived pay. See H. R. Rep. No. 98-700, pp. 4-5 (1984) (discussing difficulties faced by ex-spouses in obtaining state garnishment orders). Even these state processes cannot directly attach the military retiree's

disability benefits for purposes of satisfying a community property division given the strictures of the anti-attachment provision of *38 U. S. C. § 3101* (a). There is no basis for concluding, however, that Congress sought to protect the interests of service members by allowing them unilaterally to deny their former spouses *any* opportunity to obtain a fair share of the couple's military retirement pay.

It is now once again up to Congress to address the inequity created by the Court in situations such as this one. But because I believe that Congress has already expressed its intention that the States have the authority to characterize waived retirement pay as property divisible upon divorce, I dissent.

APPENDIX K

LEXSEE 817 F SUPP 680

JUDITH KNISLEY, Plaintiff(s), v. UNITED STATES OF AMERICA, Defendant(s).

Case No. C-3-91-144

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

817 F. Supp. 680; 1993 U.S. Dist. LEXIS 4314

April 6, 1993, Decided

LexisNexis(R) Headnotes

COUNSEL: [**1] For Plaintiff: Arthur Robert Hollencamp, Room 1206, 120 W. Second Street, Dayton, OH 45402, (513) 228-9179.

For Defendant: Bredan F. Flanagan, U. S. Department of Justice, Torts Branch, Civil Division - P. O. Box 888, Washington, DC 20044, (202) 501-6334.

JUDGES: Merz

OPINIONBY: MICHAEL R. MERZ

OPINION:

[*681] **DECISION AND ORDER FOR JUDGMENT**

This is an action under the Federal Tort Claims Act by Plaintiff Judith Knisley to recover for legal malpractice with respect to the Separation Agreement between herself and her former spouse, Master Sergeant Carl Knisley

The parties unanimously consented to full magistrate judge trial authority under *28 U.S.C. 636*(c) and the case was referred on that basis (Doc. #34) and tried to the Court without a jury on March 22-24, 1993.

The Court's findings of fact and conclusions of law as required by *Fed. R. Civ. P. 52* are embodied in the following opinion.

Plaintiff Judith Knisley was married in September, 1966, to Carl Knisley, an enlisted member of the United States Air Force. n1 While Ms. Knisley was not employed outside the home for most of her marriage, by 1985 she had become travel coordinator for the 1815th Test Evaluation Squadron, stationed at Wright-Patterson Air Force [**2] Base, Ohio ("WPAFB"). At that time her husband was notified of reassignment to Mons, Belgium, at NATO SHAPE (Supreme Headquarters, Allied Powers, Europe). Because of a one year break in service, Msgt. Knisley would not reach his twentieth anniversary of enlistment for sometime. His wife understood that he had an option of accepting a two-year assignment in Belgium, unaccompanied by his family, or a three-year assignment accompanied by them. Although their marriage [*682] had been undergoing some difficulties because she suspected him of infidelity, Ms. Knisley decided to accompany her husband to Europe, at the urging of friends at work.

n1 No record references are made to trial testimony because the testimony has not been transcribed. Exhibits admitted in evidence are referred to thus: Joint Exhibits - "JX"; Plaintiffs Exhibits - "PX"; Defendant's Exhibits - "DX."

The Knisley family had acquired a home in Greenfield, Highland County, Ohio, and had recently put a second mortgage on it to finance remodeling. Nonetheless, [**3] they were only able to lease it as of January 1, 1986, for approximately $ 300 per month less than the mortgage payments. The family had also acquired a new car which was heavily financed. Ms. Knisley took an unpaid leave of absence from her job at WPAFB, but expected to be able to find employment shortly after arriving in Belgium.

Living conditions in Belgium were not what Ms. Knisley had hoped. She and MSgt. Knisley had talked for years about a European tour of duty as an occasion to see Europe, but initially she found herself stuck in a country home with her three children, no transportation, no telephone, and a frequently-absent husband because of his TDY assignments. Nor was she able to find employment promptly and she was concerned about the family's financial situation. By March she had decided to return to the United States and go back to her job at WPAFB.

Ms. Knisley testified that she told her husband of her intention but he was not cooperative in arranging transportation. Finally, in March, 1986, she went to the Army Legal Assistance office in Brussels, where she had been directed from the Legal Assistance Office in Mons. She was then introduced to Captain David Riddle, [**4] an active duty Army officer then serving as an Army Legal Assistance Officer in Brussels. She told him that she wanted to return to the United States without her husband or children.

Ms. Knisley testified Captain Riddle did not talk to her about a separation agreement during this first visit, but told her to discuss the separation with her husband and if they wanted to proceed, to draw up a list of property and debts and return to see him. MSgt. Knisley's recollection is that his first notice of any intended separation was when Ms. Knisley handed him a draft separation agreement with blanks to be filled in and he then proceeded to prepare lists of property and debts. Captain Riddle did not testify on this precise point. Whatever the exact sequence, the first draft of a separation agreement which is in evidence, Joint Exhibit VI (which is also the first draft any witness remembered), is clearly more than an arrangement to cover a military spouse's returning from an overseas assignment without her husband; indeed, it does not deal at all with what Ms. Knisley testified was the most important detail: who was going to pay for the travel. Instead, it reads as if it were arranging [**5] a permanent separation of a married couple in anticipation of a possible divorce. Although Ms. Knisley testified she never contemplated a divorce or even a permanent separation, her testimony on this point is not credible under the circumstances. She is a highly literate person, having handled complex secretarial work and all of the family business matters. Captain Riddle had advised her that if she went back to the United States without her husband or children, she could be charged with desertion, but a simple acknowledgment in writing by her husband of his agreement with what she intended to do would have been sufficient if a permanent separation were not contemplated. Whatever her initial intentions when she approached Captain Riddle, she understood by the time she signed Joint Exhibit 8 that the agreement at least was permanent, whether or not she and her husband might ever decide to live together again.

The second draft of the Separation Agreement, JX VII, included a choice of law clause, N18, mistakenly designating the State of Washington for the governing law. It also contained N17 which was an express waiver of any rights Ms. Knisley might have to participate in MSgt. Knisley's [**6] military retirement pay. By the time this second draft was prepared, MSgt. Knisley was being represented by Captain Thomas Emswiler of the Army Legal Assistance Office in Mons. By Army policy, to prevent conflicts of interest, lawyers from different Legal Assistance Offices were to represent the spouses in any contested family law matter. By arrangement between Captains Riddle and Emswiler, the latter always handled the military [*683] member and the former always handled the dependent. Captain Emswiler believed he may have inserted NN 17 and 18. A choice of law clause naming Ohio would have made sense since both parties resided in Ohio. N 17 represented MSgt. Knisley's desires; he testified he was not willing to divide his military pension because he was assuming all the marital debts and Ms. Knisley had her own retirement under federal Civil Service.

While MSgt. Knisley wanted an explicit waiver of the military pension, Ms. Knisley would not sign the separation agreement with N 17 in it; it is stricken out on JX VII in her own hand. MSgt. Knisley was willing to sign with the Separation Agreement silent on the subject. Captain Riddle had at trial only a general recall of what he told [**7] Ms. Knisley about the separation agreement, but that general recall was that he told her she had rights to the retirement pay which she would waive if she signed the separation agreement in the form of JX VI or VIII, even though they both do not expressly mention the subject. Presumably this is because of the effect of N2 which is a general waiver of rights not dealt with. Ms. Knisley's more specific recall is that Captain Riddle passed on to her what he remembers he was told by Major Johnson, the Deputy JAG in Mons, to wit, that a sympathetic court might allow later litigation of the pension rights in a divorce action. It is clear that both Carl and Jude Knisley rejected language which would have said they agreed to agree later on any division. In any event, both parties signed the separation agreement in its final form in Captain Riddle's office and Ms. Knisley returned to the United States with the two younger children.

Once she had returned to the United States, Ms. Knisley resumed her job at WPAFB. 1Within a short time, she had taken up residence in an apartment in Fairborn, Greene County, Ohio, and had begun a sexually intimate relationship with one of her co-

workers, Chief [**8] MSgt. David Morgan. She and Morgan had worked together before she went to Belgium, and he was responsible for processing her requests for extensions of her leave without pay while she was there.

In May, 1986, Chief Morgan had visited Ms. Knisley in Mons in the company of a Lieutenant Ritter. Both he and Ms. Knisley admit that on the second evening they were together, they kissed. Chief Morgan testified further that on this same occasion Ms. Knisley became sexually aggressive to the point of partially disrobing. Ms. Knisley denied that this happened, but the Court credits Chief Morgan's testimony which is more consistent with the course of the relationship they pursued immediately after Ms. Knisley returned from Belgium.

The physical relationship between Chief Morgan and Ms. Knisley ended September 26, 1986, although they continued to work together and to be friends. However, Ms. Knisley was apparently emotionally upset over the relationship as she sought counseling on several occasions in October from the WPAFB Mental Health Unit and was counseled by Dr. Ray Crosby, a psychologist at the Unit.

Also sometime in the fall of 1986, Ms. Knisley became concerned about damage being [**9] done to the family home by the tenants. She approached attorney Ralph Phillips, an attorney for whom she had once been employed who had done previous work for the family and who had drafted the lease for the home, for advice as to what could be done. During that visit, which occurred sometime before the end of December, 1986, she furnished Phillips with a copy of the Separation Agreement. He exclaimed "Ridiculous!" when he saw that she was not getting any child support or alimony, but professed ignorance about separation agreements. He told her nothing could be done about the damage, that she should wait until the lease expired to get the tenants out of the house. n2

> n2 So far as this Court is informed, Ms. Knisley has not sought legal malpractice damages against Attorney Phillips for drafting a lease which could not be terminated for destruction of the property by tenants.

In April, 1987, Ms. Knisley was referred to attorney Richard Brown. His first appointment with her was April 16, 1987 (PX 15). Ms. Knisley's [**10] claim of legal malpractice under the Federal Tort Claims Act was filed nearly two years later on April 12, 1989 (DX [*684] L). It was eventually finally denied by the United States Army by letter to Mr. Hollencamp, her present counsel, on October 5, 1990 (JX I), and this suit followed on April 4, 1991.

On August 13, 1987, Ms. Knisley filed an alimony-only action n3 against MSgt. Knisley, *Knisley v. Knisley*, Case No. 87-DR-488 (DX N). MSgt. Knisley counterclaimed for divorce. In that litigation the Greene County Common Pleas Court, apparently not being the "sympathetic court" contemplated by Major Johnson, refused to open the pension division question and concluded that Ms. Knisley had finally waived any rights thereto by signing the Separation Agreement in its final form. Ms. Knisley appealed from the final decision on several points, including this one. The Greene County Court of Appeals in *Knisley v. Knisley*, its Case No. 88 CA 92, upheld the Greene County Common Pleas Court's exercise of judicial discretion in confirming the Separation Agreement and refusing to divide the military pension (DX N).

> n3 Ms. Knisley testified she understood she could not sue for divorce because her husband was in the uniformed service on an overseas assignment. Whether that is a correct understanding of the law is not material to decision of this case.

[**11]

At all times pertinent to these proceedings, Captain David A. Riddle was an active Army commissioned officer, a member of the Judge Advocate General's Corps, and a legal assistance officer in the Army Legal Assistance Program.

Captain Riddle received the Juris Doctor degree from California Western University in 1977. Captain Riddle's law school curriculum included no courses in domestic relations or family law. In accordance with its standard practice, the Army Accession Board made no inquiry with regard to the content of Captain Riddle's law school curriculum. Having received his undergraduate degree with high honors from the University of Hawaii in 1974, Captain Riddle also received an LL.M. *cum laude* in International Comparative Law from the University of Brussels in 1985.

Captain Riddle was licensed to practice law in the State of Hawaii, effective April 21, 1978, and maintained an active status to do so through June 28, 1984. Effective June 29, 1984, Captain Riddle's legal license was transferred from active to inactive status at his request. He has been ineligible to practice law in the State of Hawaii since that time and has not been granted or denied a license to [**12] practice law by any other

State. No evidence was presented to this Court relating to this transfer to inactive status from which any adverse inference as to the quality of Captain Riddle's performance as an attorney could be drawn.

Captain Riddle attended the Officer's Basic Course at the Judge Advocate General's School in Charlottesville, Virginia, in 1977. That three-month duration course involved all aspects of military law, criminal law, evidence, law of war, domestic relations law, government contract law, international law, law of military installations and claims. It is a required introduction for all beginning JAG officers.

Upon completion of the Judge Advocate General's School's basic course, Captain Riddle was stationed at WESTCOM, Hawaii, from October, 1977, through October, 1978, where he served as claims attorney and trial counsel (prosecutor). In 1978, Captain Riddle took the prosecutor's course at the Northwestern University School of Law. Captain Riddle was the Chief of the Legal Assistance at WESTCOM, Hawaii, from October, 1978, to October, 1979.

Following that duty assignment, Captain Riddle took the one-week duration continuing legal education course at the [**13] Judge Advocate General's School, covering such topics as divorce, wills and estates, adoptions and name changes, non-support indebtedness, taxes, landlord/tenant relationships, consumer affairs, civil suits, Soldiers and Sailors Relief Act, powers of attorney, and personal finances. He was then assigned as Chief of Legal Assistance from October, 1979, to July, 1980, for the Eighth U.S. Army in Korea. From July, 1980, through June, 1982, Captain Riddle was Chief, SOFA Claims, U.S. Army Claims Services, Korea. From July, 1982, to May, 1984, he was Chief, Commissions [*685] Branch, U.S. Army Claims Services, Europe, where he supervised the tax program. He performed no domestic relations legal assistance between August, 1980, and May, 1984.

After four to six years of service in the field, the Judge Advocate General Corps' members often return to the Judge Advocate General's School in Charlottesville, Virginia, for the one-year duration "graduate course" leading to an LL.M. degree. Although Captain Riddle had been on active duty for eight years at the time of his representation of Plaintiff, he had not taken the graduate course at the Judge Advocate General's School. There was no evidence [**14] as to how officers are chosen for the graduate course, including whether they have any choice in the matter.

Captain Riddle was the officer in charge, NATO Support Activities Group, Brussels, Belgium, a subordinate headquarters to NATO SHAPE, from May, 1984, through December, 1986. In the Fall of 1986, he attended the 1986 USAEUR Legal Assistance CLE Course on the Uniformed Services Former Spouses Protection Act, after he had concluded his representation of Plaintiff.

Captain Riddle has never tried a divorce case or taken a deposition. He has however, at all pertinent times provided legal advice and assistance to eligible personnel about their personal legal affairs at an authorized and established legal assistance office of the United States Army.

The Court was not given any general history of the Army Legal Assistance Program, but the parties are in agreement that the governing regulation for the pertinent time period is Army Regulation ("AR") 27-3, introduced in evidence as JX II, and effective April 1, 1984. In pertinent parts, AR 27-3 describes the following features of the Army Legal Assistance Program: It is governed by The Judge Advocate General who has responsibility [**15] for furnishing legal assistance officers with information on current developments in the law, model programs, and suggested procedures (N1-4a). Commanders of installations or with general court-martial authority are authorized, but not required, to establish legal assistance offices (N 1-4b). Legal assistance officers provide legal advice and assistance to eligible persons about their personal legal affairs (N1-4c). However, "Actions taken and opinions given on behalf of individual clients reflect the personal, considered judgment of the LAO [Legal Assistance Officer] as an individual member of the legal profession." (N1-4(c)(2)). Priority in providing legal assistance is given to military members; as a matter of policy, other eligible individuals are to receive service if resources are available (N 1-5).

Paragraph 1-9 incorporates by reference the American Bar Association Model Code of Professional Responsibility for LAO's, except when inconsistent with AR 27-3. Paragraph 1-10 provides that local conditions may require changes from the policy and procedures outlined in AR 27-3 and requires that variations be placed in writing and filed with Army Headquarters. No variations [**16] from AR 27-3 for the Mons or Brussels offices were offered in evidence.

Paragraph 2-3 provides that an LAO giving legal assistance enters into an attorney-client relationship. LAO's are encouraged to participate in civilian professional organizations (N2-3(c)) and to communicate among themselves and with the Legal Assistance Branch of the JAG School in Charlottesville on clients' legal questions *(Id.).*

AR 27-1 (JX III) is the general regulation covering the entire Judge Advocate Legal Service, which essentially comprises military and civilians working

under general command of The Judge Advocate General. That officer was required to manage the professional legal training within the Department of the Army. In order to aid in that management, the Judge Advocate General's School was established at the University of Virginia, Charlottesville, as a field operating agency. (AR 27-1, N 2-2r)

The Judge Advocate General is also charged with the duty to recruit members and manage the careers of the members of the Judge Advocate General's Corps, specifically including the duty of technical supervision of active officers of the Judge Advocate General Corps (AR 27-1, N2-2t(1)).

[*686] Finally, [**17] The Judge Advocate General is charged with guiding and assisting Judge Advocates in the discharge of their professional duties, including furnishing opinions, instructions, digests, special texts, and other technical information pertaining to the performance of their duties, orally or in writing. (AR 27-1, N 2-2t(3)). N 7-2(a)(3)(4) specifies further "In addition to common law library resources, complete and current copies of the State or geographic area's statutory, decisional, and administrative compilations must be available to legal assistance officers."

The Staff Judge Advocate General of a Command, Supervising Judge Advocate, or civilian attorney, or other members of the office designated by the Staff Judge Advocate, are required to supervise legal assistance activities under the Army Legal Assistance Program. Those individuals are to perform a role like that of a senior partner in a law firm and are authorized to review all office administration activities and procedures. (AR 27-3, N 1-9c.).

There is no essential difference between a military position and a civilian position in the Army Legal Assistance Program. Both attorneys perform the same function - one is simply on [**18] active duty, and the other has an excepted federal service appointment.

As a pre-requisite to serving on active duty in the Judge Advocate General's Corps, all members are required to have graduated from an American Bar Association accredited law school, and to be licensed to practice law by a State. The Army Accession Board reviews the applications and files of applicants for active duty in the Judge Advocate General's Corps, prior to allowing them to enter into active duty. There is, however, no inquiry as to what courses were included in the law school curriculum of an applicant. The Army expects that successful applicants for active duty in the Judge Advocate General's Corps are fully prepared to practice law. To further prepare them for military law, however, members entering active duty are brought to the Judge Advocate General Corps School in Charlottesville, Virginia, where they are taught the specifics of the military system in the ten-week "Basic Course."

The Army expects its Judge Advocate General Corps officers to meet the continuing legal education requirements of their licensing States, in order to maintain the Judge Advocate General's Corps officer's good standing. [**19] If a Judge Advocate General Corps member's licensing State has no continuing legal education requirements, then the Department of the Army imposes no continuing legal education requirement upon that member. At all times pertinent to these proceedings, the State of Hawaii (Captain Riddle's licensing State) maintained no continuing legal education requirement for its licensed attorneys. However, Captain Riddle attended the JAG School CLE program in Europe every year from 1984 through 1989.

Lieutenant Colonel (then Major) Charles Hemingway was assigned to the Legal Assistance Branch, Administrative Law Division, Judge Advocate General's School, Charlottesville, Virginia, from 1983 through June, 1986. During the final two years of that period, he was the Chief of the Legal Assistance Branch. His duties in that regard included providing instruction to students at the Judge Advocate General's School in the basic course, the graduate course, and continuing legal education programs, as well as other special programs presented by the Judge Advocate General's School.

During Col. Hemingway's tenure, continuing legal education courses were offered twice a year for a one-week duration each. [**20] In configuring those courses, the Legal Assistance Branch relied heavily on input from JAG Corps field officers as to what education they wanted and did not dictate to them what education they needed.

During the pertinent time period, it was extremely uncommon for a JAG Officer stationed in Europe to attend the continuing legal education courses provided at the JAG School, due to the cost and transportation involved. To accommodate this problem, the Legal Assistance Branch provided a one-week continuing legal education course in Europe with the same curriculum as in Charlottesville. In 1986 it included a section on [*687] the Uniformed Services Former Spouses Protection Act. Course outlines for the CLE courses for 1984, 1985, and 1986 are admitted in evidence as DX I.

The second part of Lt. Col. Hemingway's duty assignment was to act as a resource for civilian and military legal assistance attorneys, world wide, and to gather materials which would be of use to them in their practices, try to identify and distribute resources, and respond to any inquiries. However, he was neither aware of, nor made inquiry to determine, what, if any, of the

materials referenced in AR 27-1, Paragraph [**21] 7-2 a(4) were available to Captain Riddle in the Brussels, Belgium, Legal Assistance Office.

The Judge Advocate General directed the Legal Assistance Branch of the Army to determine which were the most common areas of practice for Legal Assistance Officers, and then to develop resource materials in those areas. World wide statistical analysis validated that a substantial percentage of Legal Assistance Officer's case loads dealt with family law issues. In January, 1984, the Judge Advocate General's School of the United States Army published and disseminated to Judge Advocate General Legal Assistance Officers, under the Army Legal Assistance Program, the *All States Marriage and Divorce Guide(JX IV).* Included therein were chapters on marriage, divorce, and dissolution, drafting separation agreements, sample separation agreement provisions, a separation agreement work sheet, and a compilation of State laws in the legal topic area. The *All States Marriage and Divorce Guide* was generated as a result of a mandate from the Judge Advocate General, who recognized that although the Army could not provide to every legal assistance attorney every state and federal law publication, more [**22] was needed than was being done, in order to enable legal assistance practitioners to represent their clients effectively.

Equitable division of military pension as a marital asset was not mentioned in the 1984 edition of the *All States Marriage and Divorce Guide.* The preface indicated that it would be updated annually by the Legal Assistance Branch of the Judge Advocate General's School, but no update was completed in 1985. However, updated legal information was provided to legal assistance officers on the covered topics through *The Army Lawyer*, CLE's, and other publications.

The next update was published and disseminated in September 1986 (PX 9). That edition contained numerous references to the equitable division of military pension as a marital asset. Several alternative separation agreement provisions were included.

In providing assistance to its attorneys, the JAG Corps obviously has limited resources. Therefore, libraries around the world cannot be supplied with bound copies of all research materials which might be pertinent. Military members and dependents seeking legal assistance at any particular office may well be from anywhere in the United States. Provision [**23] of a fully equipped law library at each office would obviously be impractical. Instead, the JAG School provides resources to its attorneys through JAG-produced publications as well as libraries. The publications include *Readings in Legal Assistance* (DX C), *The Army Lawyer* (Pertinent excerpts at DX E), various All States Guides, *The Military Law Review*, regulations, and CLE outlines. Also available is a computer research source called "FLITE." Special Legal Assistance Attorneys located around the United States are available for consultation; a directory of the type introduced in evidence as DX F was provided to legal assistance attorneys during the pertinent time period. Also advice and assistance were provided directly from the JAG School and a network of JAG offices located around the United States .

The Preface to the *1984 All States Guide* states:

> this book is intended to provide legal assistance officers with a basic understanding of the laws controlling the formation and dissolution of marriage . . . Legal assistance officers are advised that these state and territorial laws are subject to amendment by legislature and interpretation by courts. Therefore, [**24] additional research and verification may be required. Legal assistance officers are also advised that the sample separation agreement provisions in Chapter 4 are presented to aid [*688] you in the preparation of these agreements. These forms should not be used in whole or in part without a thorough understanding of the purpose and effect of each provision. This text does not purport to promulgate Department of the Army policy or to be directory in any sense.

The *Guide* further states that "certain kinds of property are subject to special marital interests . . . this may include the spouse's retirement benefits." *Id.* at 2-8. Finally, the *Guide* cautions "the legal assistance officer must be extremely cognizant of the relevant state law as well as the tax consequences of creating a separation agreement." *Id.* at 2-12.

SUBJECT MATTER JURISDICTION

Plaintiff brought this action under the Federal Tort Claims Act (the "FTCA"), *28 U.S.C. 2671* et seq. This Court has exclusive subject matter jurisdiction over such claims under *28 U.S.C. 1346*(b). The United States contends that the Court lacks jurisdiction of Plaintiff's claims because they fall within the so-called foreign [**25] country exception *(28 U.S.C. 2680*(k)) and discretionary function exception *(28 U.S.C. 2680* (a)) to the FTCA.

THE FOREIGN COUNTY EXCEPTION TO THE FTCA

In his Decision of March 19, 1992, District Judge Rice, to whom this case was assigned before referral, agreed with the Government's position in part. He found, and the trial record now confirms, that all of the legal services Captain Riddle performed for Ms. Knisley were performed in Belgium. Judge Rice granted the Government's Motion to Dismiss Plaintiff's claims insofar as they were grounded solely in the negligence of Captain Riddle. Although no judgment was entered on this Decision, it is now the law of the case.

Although the facts supporting and opposing Plaintiff's claim that Captain Riddle committed legal malpractice were thoroughly tried, there is no reason to disturb Judge Rice's conclusion. Neither facts inconsistent with Judge Rice's factual premises nor law in conflict with that upon which he relied has been presented to the Court subsequent to his Decision. There is accordingly no reason to reconsider that result and judgment will be entered dismissing all of Plaintiff's claims which purport to arise solely [**26] from any legal malpractice committed by Captain Riddle, as barred by the foreign country exception.

CAPTAIN DAVID RIDDLE'S ASSERTED LEGAL MALPRACTICE

Even though the United States cannot be liable on a *respondeat superior* basis for any legal malpractice committed in Belgium, the question of whether Captain Riddle actually committed legal malpractice remains a potentially dispositive question. If Captain Riddle committed no legal malpractice in his representation of Ms. Knisley, then nothing the Army did in failing to adequately train, supervise, or properly equip him (the "Headquarters Claim" discussed below) could have proximately caused any damage to Ms. Knisley. For that reason, a great deal of evidence was presented on what advice Captain Riddle actually gave Ms. Knisley. Unfortunately, that evidence is completely inconclusive in the Court's mind.

As noted above, Plaintiff presented evidence of what she was told by Captain Riddle about the effect of the Separation Agreement as finally signed. She claims that he told her at one point that unless the parties had been married twenty years and MSgt. Knisley had twenty years service at the time of any divorce, she would [**27] not be entitled to any portion of his retirement. Plaintiff's expert Steven Dankof testified that was not an accurate statement of Ohio law in 1986. Captain Riddle's somewhat vague recollection is that he did not tell her this and that to have discussed waiver at all (which clearly was discussed, since it was in and out of the drafts), he would have had to tell her she had rights to a portion of the pension. The Court finds that this is more probably what happened. Thus this advice as given was an accurate statement of Ohio law in 1986, at least as testified to by Plaintiff's expert witness. n4

n4 Even the most perspicuous lawyer, viewing his task from Justice Holmes' perspective of predicting what the courts will do in fact, could have guessed what court an eventual divorce case would have been litigated in. The parties' home was in Greenfield, Highland County, Ohio.

[*689] Captain Riddle also testified that he told Ms. Knisley that her chances of prevailing in obtaining a portion of the pension in later litigation were [**28] slight without any mention of it in the Separation Agreement, but admits he may have passed on to her what he heard from Major Johnson: that a sympathetic divorce court might allow the question to be reopened. Mr. Dankof also testified that this was not necessarily an inaccurate statement of Ohio law, that some courts might have allowed it. He opined, for example, that the Montgomery County Domestic Relations Court (which sits in Dayton, Ohio, with this Court) would have been more likely to revisit the issue than the Common Pleas Court of contiguous Greene County which eventually heard the divorce case.

Ms. Knisley testified that Captain Riddle's advice was a good deal more certain than he remembers it, that he assured her the matter would be dealt with in a subsequent divorce action because the final agreement was silent and even insisted that she sign an acknowledgment that he gave her that advice. n5 Plaintiff's experts were asked to assume the truth of Ms. Knisley's version of the events and did so (See, e.g., p. 31 of the Greenberg Deposition).

n5 The alleged document has never been found and Captain Riddle did not recall that any such document had been created.

[**29]

The difficulty with Plaintiff's case at this point in its logical development is that the Court has not been told which acts or omissions of Captain Riddle are alleged to have been negligent or to have constituted legal malpractice. Plaintiff's apparent theory is that all of the facts and circumstances surrounding Captain Riddle's representation, taken together, constitute legal malpractice.

In part the Court's confusion is caused by the way in which hypothetical questions were presented to the

expert witnesses. Messrs. Dankof and Greenberg were qualified as experienced Ohio domestic relations practitioners; indeed, the Court has no doubt of their qualifications, since each of them has a good reputation in the Dayton legal community for domestic relations work. Then each was asked to assume the truth of virtually all the facts, with immaterial variations, in Plaintiff's proposed findings of fact. n6 Having made that assumption, they were then asked for their conclusions as follows:

> Q. . . . do you have an opinion within the realm of a reasonable legal certainty as to whether or not Capt. David A. Riddle possessed the knowledge, skill and ability ordinarily possessed and exercised [**30] by members of the civilian legal profession so situated as to represent Jude Knisley with regards to the matters undertaken by Capt. David A. Riddle in furtherance of his representation of her during their attorney-client relationship?
>
> . . .
>
> A. . . . he did not.
>
> . . .
>
> Q. . . . do you have an opinion within the realm of a reasonable legal probability as to whether or not Capt. David A. Riddle while acting within the scope of his official employment and duties with the Department of the Army in connection with the attorney-client relationship entered into between he [sic] and Jude Knisley regarding the negotiation and execution of her separation and property settlement agreement with Carl Knisley was ordinarily and reasonably diligent, careful and prudent in discharging the duties he assumed?
>
> . . .
>
> A. He was not.
>
> Q. Again, assuming the stated facts, do you have an opinion within the realm of a reasonable legal probability as to whether or not Capt. David A. Riddle represented Jude Knisley zealously within the bounds [*690] of the law while acting within the scope of his official employment and duties of the Department of the Army in connection with the attorney-client relationship [**31] entered into between he [sic] and Jude Knisley regarding the negotiation and execution of her separation and property settlement agreement with Carl Knisley?
>
> . . .
>
> A. He did not.
>
> Q. Again assuming the facts stated, do you have an opinion within the realm of a reasonable legal probability as to whether or not Capt. David A. Riddle competently represented Jude Knisley while acting within the scope of his official employment and duties with the Department of the Army in connection with the attorney-client relationship entered into between he [sic] and Jude Knisley regarding the negotiation and execution of her separation and property settlement agreement with Carl Knisley?
>
> . . .
>
> A. . . . he did not competently represent her.

(Greenberg Deposition, pp. 33-40). The questions asked of Mr. Dankof and the answers given by him were virtually identical.

> n6 There is only immaterial variance between the facts Plaintiff intended to prove and actually succeeded in proving, with the exception of some points on which Ms. Knisley was directly contradicted by other witnesses and the Court has decided to adopt a version which differs from the Plaintiff's. None of those variances has any bearing on the difficulty the Court has with the answers to the hypothetical questions.

[**32]

Fed. R. Evid. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an

> expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

There was no impropriety in eliciting the opinions by use of a hypothetical question; *Fed. R. Evid. 705* abolished only the requirement, not the option, of using this form.

Nor was there any impropriety in offering expert testimony on questions of law in this case. n7 The possible concern over invasion of the judge-jury relationship is not present in Federal Tort Claims cases which are tried to the bench. Even judges, who are "presumed" to know the law, could frequently find help in expert legal opinion orally delivered, as opposed to being found in books. Finally, if one takes Justice Holmes's perspective that law, at least in important part, is what courts do in fact, n8 expert testimony may be very useful in assessing legal malpractice in fields saturated with judicial discretion. The most important thing to know about, for example, a criminal sentencing [**33] or a domestic relations property division may be the reputation and practices of the judge before whom the proceeding will occur. Experienced counsel would certainly be expected to know this information, which cannot be found in any lawbook, and to use it in representing clients. Failure to know or use this type of information would at least be relevant on the question of how competent an attorney was.

> n7 See Baker, The Impropriety of Expert Witness Testimony on the Law, *40 U. Kan. L. Rev. 325 (1992).*
>
> n8 Holmes, The Path of the Law, *10 Harvard L. Rev. 457 (1897).*

However helpful expert legal opinion could have been in this case, the testimony actually offered is virtually useless because neither Mr. Greenberg nor Mr. Dankof was permitted to testify how Captain Riddle was unqualified, incompetent, or less than zealous. To put the matter another way, while this Court was very willing to hear where Messrs. Greenberg and Dankof thought Captain Riddle went wrong, [**34] they were never asked.

Because they were never asked how Captain Riddle failed to meet the requisite standard of care, any portion of the extensive hypothetical question might have been the key to their opinions. For example, Plaintiff's counsel put great emphasis on the fact that Captain Riddle's license in Hawaii was inactive, that fact was part of the hypothetical, and either expert might have found it critical. The Court, however, concludes it is meaningless: Captain Riddle was not purporting to practice law in Hawaii; the fact that his license was inactive is totally irrelevant on any other question, including whether he knew Hawaii law, Ohio law, or Belgian [*691] law. n9

> n9 The inactive status is logically irrelevant because it could not possibly have proximately caused Ms. Knisley any damage.

Or take another possibility. It appears from his deposition that Mr. Greenberg believed that Army lawyers should not at all be involved in offering legal assistance in domestic relations cases, but he was not asked if this [**35] was the basis of his opinions.

Or it may be that Messrs. Greenberg and Dankof believe that Captain Riddle misstated Ohio law or mispredicted Ohio judicial behavior on whether the pension question could be revisited in a later divorce proceeding. If so, they were not asked.

Or it may be, as is lightly suggested in Mr. Greenberg's deposition, that he believes no lawyer should allow a military dependent client to sign a separation agreement silent on this subject or which purports, by its general terms, to waive all rights not dealt with. Again, he was not asked by Plaintiff's counsel. Probably having sleeping dogs in mind, Defendant's counsel also did not ask. And it was certainly not within the Court's province to conduct the examination of Plaintiff's expert witnesses.

Rather, the burden was on Plaintiff to prove the legal malpractice by a preponderance of the evidence and the Court concludes that Plaintiff has failed to prove that Captain Riddle's acts or omissions constituted legal malpractice.

THE HEADQUARTERS CLAIM: THE STANDARD OF CARE

Presumably in an effort to avoid the foreign country exception, Plaintiff presented what Judge Rice characterized as a "headquarters" [**36] claim: that the Department of the Army failed to appropriately train, supervise, and equip Captain Riddle and that each of these failures took place within the continental United States and proximately caused Captain Riddle's failure to meet an appropriate standard of legal practice. The Court has already determined that Plaintiff failed to prove Captain Riddle's legal malpractice, and therefore any failure to train, supervise, or equip could not have proximately caused Plaintiff any damage, but the standard of care portion of the Headquarters Claim has also been fully litigated and deserves decision.

No law has been cited to the Court on the standard of care governing an organization which employs attorneys and then makes them available to the general public for legal assistance. Only one case of liability directly for failure to supervise, as opposed to respondeat superior liability, is cited in the leading treatise, Mallen and Smith, *Legal Malpractice* 3d, I5.5 (1989). n10

n10 *Gautam v. DeLuca, 215 N.J. Super. 388, 521 A.2d 1343 (1987)*

[**37]

Plaintiff's only theory of recovery is under the FTCA. Under that the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." The liability is for tort claims and therefore determined by state tort law. *Carlson v. Green, 446 U.S. 14, 64 L. Ed. 2d 15, 100 S. Ct. 1468 (1980).* Which State? The State where the tort was committed. See *28 U.S.C. 1346*(b). Thus if there was a tortious failure to train, supervise, or equip Captain Riddle which was committed in the continental United States, n11 it happened, based on Plaintiff's evidence, in the Commonwealth of Virginia, because both the Headquarters of the Department of the Army and the Judge Advocate General's School are located there, one in Arlington and one in Charlottesville.

n11 AR 27-3 provides for supervision for legal assistance officers of the type provided by senior partners in law firms by local supervising attorneys. But any tortious failure to supervise Captain Riddle locally in Belgium is not actionable because of the foreign country exception.

[**38]

What is the standard of care as to training, supervision, and equipment of employed attorneys in Virginia? As noted above, no case law was offered on this point and apparently none exists. To fill this gap, the parties offered expert legal testimony. Messrs. Dankof and Greenberg were again asked to assume virtually all of the facts in Plaintiff's proposed findings and then to give conclusory opinions "to a reasonable legal probability" [*692] whether the Army had duties to train, supervise, and equip Captain Riddle and whether it breached those duties. In each case they responded as expected that the Army had the posited duties and that it had breached them.

As with their opinions on Captain Riddle's malpractice, these experts' opinions on the standard of care for supervision were less than useful because again they were not asked to offer any opinion on what it would have taken to adequately train, supervise, or equip Captain Riddle. For example, Mr. Greenberg may believe no attorney should be allowed to give advice on any State's domestic relations law unless he or she has available all of that State's statutory and decisional law. Or Mr. Dankof may believe that an attorney's supervisor [**39] should review every document he or she prepares. As with their opinions on Captain Riddle's conduct, their opinions on the headquarters claim are not really helpful to the Court.

In addition, there is serious question about the competence of their testimony. Messrs. Dankof and Greenberg are Ohio lawyers who candidly admitted they are not licensed in Virginia and do not know Virginia law. In contrast, Defendant presented an expert witness licensed on Virginia from the faculty of the Washington and Lee Law School who testified the Commonwealth of Virginia does not impose a duty to supervise, train, or equip an employed attorney on an employing organization. At the very least, Plaintiff's experts admitted lack of knowledge of Virginia law seriously undermines the weight of their testimony on the standard of care. See Mallen and Smith, Legal Malpractice 3d (1989), I27.17.

Plaintiff's other approach to the standard of care on the Headquarters Claim was to assert that the standard is supplied by federal law. Plaintiff relies on *10 U.S.C. 3065*(e) which provides:

> (e) No officer of the Army may be assigned to perform technical, scientific, or other professional duties unless he is [**40] qualified to perform those duties and meets professional qualifications at least as strict as those in effect on June 28, 1950. If the duties to which an officer is assigned involve professional work that is the same as or is similar to that performed in civil life by a member of a learned profession, such as engineering, law, medicine, or theology, the officer must have the qualifications, by education, training, or experience, equal to or similar to those usually required of members of that profession, unless the exigencies of the situation prevent.

Plaintiff's reliance on this statute is unavailing for several reasons. First of all, the statute is cited completely out of context. It is part of Chapter 307 of Title 10 which is devoted to prescribing the organization of the Army. No decisional law known or made known to the Court suggests that this statute was intended to

create a standard of care for the protection of third parties who might deal with Army lawyers.

Secondly, there is no evidence of what "education, training, or experience" is usually required of members of the legal profession such that Captain Riddle's education, training, or experience would be less. The basic [**41] requirement for the practice of law is that one pass a bar examination and Captain Riddle had done that. Moreover, he had the basic law degree from an American Bar Association accredited law school. Indeed, he had also been awarded, before he became Plaintiff's lawyer, a Master's of law degree; the Court takes judicial notice that no State of the United States requires the LL.M. as a condition of practice. If what Plaintiff was attempting to do was create an inference, from the conclusory testimony of Messrs. Dankof and Greenberg that Captain Riddle did not satisfy *10 U.S.C. 3065,* that there is some standard higher than a J.D. and admission to the bar of a State Supreme Court, she failed to do so, again because these witnesses offered no explanations of their conclusions.

If we put to one side the technical questions about which State's law controls and focus instead on what kind of supervision, training, and equipment are generally furnished to employed attorneys, it is difficult to fault the Army. What other law firm or organization employing attorneys routinely provides ten weeks of pure instruction to [*693] starting attorneys? n12 How many offer an in-house ABA-accredited masters [**42] program?

> n12 Mr. Dankof admitted on cross-examination that he had been assigned to try a divorce case the very day after he was admitted to the bar, although he had taken no family law courses in law school. The assignment came from Lloyd O'Hara, at the time probably the most respected domestic relations attorney in the Dayton, Ohio, area and a senior partner in Smith & Schnacke, then Dayton's largest law firm.

As defense counsel emphasized at trial, the Army in substantial part relies on the ethical standards imposed on its legal assistance officers. They, like all American lawyers subject to the ABA Model Code of Professional Responsibility, are bound not to handle matters which they cannot handle competently or to associate other counsel with themselves in those situations. n13 This Court is not prepared to say that in every instance such reliance is or will be adequate, but it appears to be the common standard in the legal profession today, and Plaintiff has not proven that the Army is subject to any higher standard. [**43] n14

> n13 It is interesting to note that the ethics of being a supervising attorney or organization is largely ignored in the older ABA Model Code. In the new Model Rules which the ABA now suggests be adopted, supervising attorneys are required to "make reasonable efforts to ensure that [those attorneys they supervise] conform to the Rules of Professional Conduct." Model Rule 5.1(b).
>
> n14 Of course, in most cases supervising attorneys or law firms will be liable for the malpractice of their employed attorneys on a respondeat superior basis and there is no need to consider "direct" liability for failure to train, supervise, or equip. That approach is not available to Plaintiff because of the foreign country exception.

In sum, the Headquarters Claim fails because Plaintiff has failed to establish the standard of care from which the Army allegedly deviated in its training, supervision, and equipping of Captain Riddle.

THE HEADQUARTERS CLAIM AND THE DISCRETIONARY FUNCTION EXCEPTION TO THE FTCA

The Headquarters [**44] Claim also fails because of the Discretionary Function exception to the FTCA. *28 U.S.C. 2680* provides in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to --
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion be abused;

This statute has recently been interpreted by the Supreme Court in *United States v. Gaubert, 499 U.S. , 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991),* where it held that, by reason of this exception, the FTCA did not reach negligent supervision of a savings and loan and rejected a suggested distinction between "policy decisions" and "operational decisions" offered by the Fifth Circuit.

The Court noted that "the purpose of this exception is to prevent judicial "second-guessing" of legislative and administrative [**45] decisions grounded in social, economic, and political policy through the medium of an action in tort," *111 S. Ct. at 1273*, quoting *United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 at 814, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984).* It further held that the relevant question is not at what level in an administrative agency the decision is made, but whether the decision is "susceptible to policy analysis." *111 S. Ct. at 1275.*

The *Gaubert* decision (which was unanimous) is directly applicable to Plaintiff's Headquarters Claim. This Court will assume for the sake of argument that The Judge Advocate General has a mandatory duty to supervise, train, and equip the lawyers she or he assigns to legal assistance work. Even if that be the case, the **manner** in which those duties are carried out obviously calls for the exercise of discretion. For example, AR 27-3 and 27-1 call for the provision to legal assistance officers of technical legal information such as that found in a law library, but they do [**46] not purport to list the [*694] books which the library must contain. Army Legal Assistance Officers in Belgium were provided with the *All States Marriage and Divorce Guide* and the *Family Law Reporter*, the latter being a very comprehensive compilation of decisions in the family law area, as well as other materials and access to other lawyers to consult. Certainly the decision whether particular law books ought to be provided is a discretionary one, calling for a judgment much like the judgment found protected in *Gaubert.* Similarly, the decision about how to supervise legal assistance officers calls for judgments balancing costs and needs. The sort of training to be provided also calls for the same kind of discretionary judgment.

Thus each area of conduct in which Plaintiff alleges the Army failed comes within the discretionary function exception. As the Supreme Court emphasizes in *Gaubert*, it is not the **level** at which the decision is made, either in the military hierarchy or in the level of generality of the decision, that is determinative, but whether the decision calls for policy analysis and judgment, which all of these decisions do. The Headquarters Claim is precluded [**47] by the discretionary function exception to the FTCA.

THE STATUTE OF LIMITATIONS DEFENSE

Although the statute of limitations defense was thoroughly litigated, it involves a number of difficult factual questions which are not necessary to decide in light of the Court's decision on other dispositive questions.

ORDER FOR JUDGMENT

In accordance with the foregoing opinion, the Clerk shall enter judgment dismissing the Complaint herein with prejudice.

April 6, 1993.

Michael R. Merz

UNITED STATES MAGISTRATE JUDGE