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CALLING FOR A TRUCE ON THE MILITARY DIVORCE BATTLEFIELD: A PROPOSAL TO AMEND THE USFSPA

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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49TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
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**CALLING FOR A TRUCE ON THE MILITARY DIVORCE BATTLEFIELD:
A PROPOSAL TO AMEND THE USFSPA**

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CALLING FOR A TRUCE ON THE MILITARY DIVORCE BATTLEFIELD: A PROPOSAL TO AMEND THE USFSPA

Abstract: To service members, military retired pay represents twenty or more years of patriotic, selfless service to their country. To military spouses, the retired pay represents a partnership where they sacrificed their own career and stability to follow their spouse, single-handedly cared for the children, and supported the military community. In addition to the emotional attachment parties have to the retired pay, it is often the largest asset in the marriage. These factors result in significant litigation over dividing the military retired pay. When both service members and spouses adamantly believe that they are entitled to the military retired pay, courts cannot equitably divide the retired pay to their satisfaction.

When dividing military retired pay, state courts must comply with the Uniformed Services Former Spouses' Protection Act (USFSPA). Since Congress enacted the USFSPA in 1982, state courts have struggled with interpreting it in light of their own domestic relations laws. Procedural loopholes, differing court interpretations, amendments to the USFSPA, and the changing role of women in society, create scenarios where military divorce results in inequities, costly hearings, numerous rehearings, and even imprisonment.

This thesis proposes substantive and procedural revisions to advance the USFSPA towards equity in military divorces. The changes will allow states to apply their own domestic relations laws with minimum congressional intervention. Further, the USFSPA must provide thorough procedural tools to make the state courts' orders effective and enforceable. State court control of military retired pay combined with complete procedural and administrative policies can bring equity to military divorces and reduce costly litigation. This thesis proposes new legislation for Congress to consider as an equitable solution to a contentious law.

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Lieutenant Commander (Retired) Catherine Wdowiak sends 18.5% of her retired pay to a man she divorced in 1996 after he revealed he was having an affair. Her ex-spouse remarried and that couple now earns more than \$100,000 per year . . . while she struggles to keep a fledgling business afloat on what remains of her retired pay, about \$24,000 a year.¹

I. Introduction

A military divorce is not simply “the legal dissolution of a marriage by a court”² with one party in the armed service.³ Parties to a military divorce must contend with emotional issues beyond who will have custody of the children and who will keep the house.⁴ A military divorce involves the dissolution of military retired pay, which is much more than a pension or 401K plan. Both spouses and service members have a unique emotional attachment to military retired pay, which cannot equate to other marital property.

To service members, military retired pay represents twenty or more years of patriotic, selfless service to their country.⁵ Military retired pay is what is owed to them in return for living a life where at a moment’s notice they could be sent anywhere in the world, possibly in the line of hostile fire. Military spouses have a different emotional attachment to military retired pay. To military spouses, the retired pay represents a partnership where they

¹ *Military Retirees, Ex-spouses, Battle*, BEAUFORT GAZETTE (S.C.), July 14, 2000.

² BLACK’S LAW DICTIONARY 493 (7th ed. 1999) [hereinafter BLACK’S].

³ Fifty-five percent of all marriages end in divorce. The military divorce rate is generally the same as the civilian divorce rate. MARSHA L. THOLE & FRANK W. AULT, *DIVORCE AND THE MILITARY* II vii (1998).

⁴ Just as military divorce is different from civilian divorce, so is military marriage. A military marriage must contend with more and greater hardship than the average civilian couple. *See id.* at 71.

⁵ Some service members are eligible for early retirement at fifteen years. However, this thesis will refer to the typical twenty-year career as the point retired pay vests.

sacrificed their own careers and stability to follow their spouses, single-handedly cared for the children, and supported the military community. In addition to the emotional attachment, parties litigate division of military retired pay because it is often the largest asset of the marriage.⁶

When both parties to a divorce adamantly believe that they are entitled to the military retired pay, courts cannot equitably divide the retired pay to the parties' satisfaction. All the courts can do is apply the state divorce law and, where appropriate, the federal law specific to military divorce. In the case of military divorce, one federal law that preempts state domestic relations law is the Uniformed Services Former Spouses' Protection Act (USFPSA).⁷ Since

⁶ Military retired pay is frequently the most significant asset acquired during a military member's marriage. Military pensions often have greater value than nonmilitary pensions because payments begin immediately upon retirement and do not have to wait until the retiree reaches a certain age. Some military members retire before the age of forty and begin receiving retired pay immediately; compare this to a nonmilitary pension that may not be being paying until age fifty-five or sixty. See MARSHAL S. WILLOCK, MILITARY RETIREMENT BENEFITS IN DIVORCE xx (1998) (noting that in military divorces, the retired pay often exceeds the value of all other assets combined, including the house); Letter from Marshal S. Willock, Esq., Family Law Section of the ABA, to Francis M. Rush, Jr., Acting Assistant Secretary of Defense, subject: Comprehensive Review of the Federal Former Spouse Protection Law at 2 (Mar. 14, 1999) [hereinafter ABA Position Letter] (on file with author) ("[I]f [retired pay] is inequitably divided, it is usually impossible to make a military divorce fair to both parties."); Letter from Marilyn H. Sobke, President, National Military Family Association, to Office of the Assistant Secretary of Defense for Force Management Policy, subject: Comments of the National Military Family Association on the Uniformed Services Former Spouses' Protection Act (Feb. 12, 1999) [hereinafter NMFA Position Letter] (responding to a Federal Register Notice of Dec. 23, 1998) (on file with author).

Besides their military retirement, the only retirement savings service members may have are individual retirement accounts (IRAs) or private savings. Many military families' financial situations do not allow them to save for retirement. Department of Defense (DOD) surveys reveal fifty percent of members do not have any appreciable levels of savings. ARMED FORCES FINANCIAL NETWORK, SURVEY OF ARMED FORCES FINANCIAL NEEDS AND BEHAVIORS 16 (1996), *cited in* OFFICE OF ASSISTANT SECRETARY OF DEFENSE, FORCE MANAGEMENT POLICY REPORT (May 21, 1998). Service members save one half of the amount saved by the average citizen. *Id.* But see THOLE & AULT, *supra* note 3, at 28 (noting that military retired pay used to be the only major asset of the military couple, but that is no longer the case, couples now own real estate, individual retirement accounts (IRAs), and other investments).

⁷ 10 U.S.C. § 1408 (2000). The USFSPA applies to the Office of the Secretary of Defense, the Military Departments, the Coast Guard (under agreement with the Department of Transportation), the Public Health Service (PHS) (under agreement with the Department of Health and Human Services), and the National Oceanic and Atmospheric Administration (NOAA) (under agreement with the Department of Commerce). See 32 C.F.R. § 63.2 (2000) (explaining the applicability and scope of former spouse payments from retired pay). The "uniformed services" aspect of the USFSPA applies to the Army, Navy, Air Force, Marine Corps, Coast Guard,

Congress enacted the USFSPA in 1982, state courts have struggled with interpreting it in light of their own domestic relations laws. Enforcement loopholes, differing court interpretations, amendments to the USFSPA, and the changing role of women in society,⁸ create situations where military divorce results in inequities, costly hearings, numerous rehearings, and even imprisonment.⁹

How did the USFSPA evolve into an inequitable and ineffective law? This question is troubling because Congress enacted the USFSPA¹⁰ to resolve the inequities in military divorce and to recognize a spouse's important role in a military marriage.¹¹ In its simplest terms, the USFSPA allowed that state courts *may* treat disposable retired pay as marital property.¹² Despite Congress's intended corrective result, enacting the USFSPA began

commissioned corps of the PHS, and commissioned corps of the NOAA. *Id.* Because NOAA and PHS have relatively few USFSPA cases, this thesis will focus on the USFSPA and military services. *See* Interview with Lieutenant Colonel Thomas K. Emswiler, at the Pentagon, Washington D.C. (Feb. 1, 2001) [hereinafter Emswiler Interview].

⁸ The proportion of military spouses in the labor force increased from fifty-four percent in 1985 to sixty-five percent in 1998. THOLE & AULT, *supra* note 3, at vii. The changing role of women in the military began with the women's movement in the 1970s. The increase of women entering the military increased the number of male spouses. Courts began to deal with a new set of challenges as these women started to retire in the 1990s. *Id.*

⁹ *See infra* note 163 and accompanying text (discussing former service members who were imprisoned for contempt for failing to make USFSPA payments).

¹⁰ The Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447, 1448, 1450, 1451 (2000)). Among other things, the USFSPA allowed state courts to reconsider judgments in light of their marital property and procedural laws, disregarding the decision in *McCarty v. McCarty*, 453 U.S. 210 (1981). The USFSPA took effect on 1 February 1983 and applied retroactively to the date of the *McCarty* decision, 26 June 1981. 10 U.S.C. § 1408(c)(1).

¹¹ *See McCarty*, 453 U.S. at 210 (holding that certain state community property laws are preempted by the federal law).

¹² 10 U.S.C. § 1408(c)(1) (emphasis added). *But see* THOLE & AULT, *supra* note 3, at 7 ("The USFSPA has operated in theory as an option but in practice as a mandate.").

nearly twenty years of litigation focusing on interpreting and applying this federal statute.¹³ Litigation and the resulting precedent-setting opinions are one factor in the evolution of the USFSPA.

The USFSPA also evolved through congressional amendments and revisions to address problems and oversights in the original law.¹⁴ Nearly every congressional session has attempted to resolve problems with the USFSPA.¹⁵ In the last Congress, Representative Bob Stump¹⁶ introduced House Bill 72, Uniformed Services Former Spouses Equity Act of 1999 (Equity Act), which addressed some of the highly controversial aspects of the USFSPA.¹⁷ While the Equity Act did not pass during the 106th Congress, with Representative Stump as the new chair of the House Armed Services Committee a similar bill is expected during the 107th Congress.¹⁸ Despite congressional attempts to resolve issues with the USFSPA, neither former spouses nor former service members are satisfied

¹³ See LEGAL ASSISTANCE BRANCH, ADMINISTRATIVE AND CIVIL LAW DEPARTMENT, UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT, JA 274, app. B (Feb. 1999) [hereinafter JA 274] (providing a state-by-state analysis of the divisibility of military retired pay); see also THOLE & AULT, *supra* note 3, at 161-85 (same); Major Janet Fenton, *Former Spouses' Protection Act Update*, ARMY LAW., July 1996, at 22-28 (same).

¹⁴ See *infra* note 63 (providing an overview of the amendments to the USFSPA).

¹⁵ See *id.*

¹⁶ Republican, Arizona.

¹⁷ H.R. 72, 106th Cong. (1999). The primary proposals of the Equity Act are: (1) the termination of payment of retirement to a former spouse upon remarriage, (2) award of retired pay to be based on retiree's length of service and pay grade at time of divorce, (3) a statute of limitations for seeking division of retired pay, (4) a limitation on apportionment of disability pay when retired pay has been waived.

¹⁸ Tom Philpott, *Military Tax Panel: Expand Ex-Spouse Benefits But End "Windfall,"* TACOMA NEWS TRIB., Jan. 15, 2001. "'I don't know that he's going to reintroduce the legislation,' said a Stump spokeswoman. 'I know he's going to continue to pursue the issue. Whether it will be his own bill, or included in a larger package, that's what he's working on now.'" *Id.*

with the current law.¹⁹ Many former spouses organizations, former service member organizations, veterans advocacy organizations, and private organizations have recommended changes to the USFSPA.²⁰ These changes are as diverse as they are controversial.

What is the main problem with the USFSPA? Is it the law itself? Is it how the courts interpret and apply the law? This thesis argues that the USFSPA can be an effective tool for dividing retired pay in a military divorce, but the federal procedures for enforcing the provisions of the USFSPA are incomplete and ineffective.²¹ Unnecessary requirements and loopholes in the law cause parties to endure more emotional turmoil and higher litigation costs than necessary.

With substantive revisions and procedural adjustments, the USFSPA can be an equitable means for dissolving military divorces and enforcing division of military retired pay. Appropriate changes to the USFSPA can end the continued animosity over division of retired pay.²² To reach this goal, the USFSPA must provide thorough procedural tools to

¹⁹ See discussion *infra* Section IV (providing the views and opinions of former spouses and former service members).

²⁰ Specific proposals are included in Section V *infra* and in the Appendix.

²¹ Court opinions express disgust with the USFSPA. See, e.g., *Ratkowski v. Ratkowski*, 769 P.2d 569, 572 (Idaho 1989) (Shepard, C.J., dissenting) ("In the instant case, although the result is unfair, and palpably unjust, nevertheless I feel it mandated by the insulation afforded by the federal [USFSPA] statutes.").

²² Animosity between the parties is evident whenever the USFSPA is publicly discussed. One example is the repartee in a series of editorials in the *San Antonio Express-News* in July 2000. John Verburt, Retired Senior Master Sergeant U.S. Air Force, *Law Promotes Divorce* (Editorial), SAN ANTONIO EXPRESS-NEWS, July 8, 2000, at 6B; Mary L. Gallagher, *Pay is Community Property* (Editorial), SAN ANTONIO EXPRESS-NEWS, July 18, 2000, at 4B (responding to Verburt's editorial of 8 July); Karen Silvers, *Get the Facts Straight* (Editorial), SAN ANTONIO EXPRESS-NEWS, July 18, 2000, at 4B (responding to Verburt's editorial of 8 July; but, she gets the facts wrong, she incorrectly states that the marriage must last for ten years before the former spouse can

make state courts' orders effective and enforceable and continue to allow states to apply their own domestic relations laws. State court control of military retired pay combined with complete procedural and administrative policies can bring equity to military divorces. This thesis recommends changes to the USFSPA and proposes new legislation for Congress to consider as an equitable solution to this contentious law.

To arrive at the legislative proposal, which is presented in the Appendix, the following section of this thesis, Section II, reviews the history of the USFSPA. This historical review discusses the case that triggered the USFSPA, *McCarty v. McCarty*, and Congress's intent when passing the USFSPA. In Section III, this thesis describes the current state of the law—the USFSPA and its application. In Section IV, this thesis overviews the various parties positions and suggestions for changing the USFSPA, including former service members, former spouses, and the Department of Defense (DOD). While this thesis supports many of the parties' recommended changes, those not advocated by this thesis are discussed within Section IV.

Section V of this thesis proposes changes to the USFSPA, including an explanation of each problem, proposed changes, and factors that Congress must consider before enacting each revision. This thesis proposes many statutory changes to the USFSPA—some revisions are substantive, while others are procedural and will advance administration of the USFSPA.

receive any portion of the retired pay; such a minimum term of years is not required); Roy Alba, U.S. Air Force Retired, *Ex-Military Wives Wrong* (Editorial), SAN ANTONIO EXPRESS-NEWS, July 27, 2000, at 4B (responding to editorials written by former military wives).

All the proposed changes will make the USFSPA a more equitable law. Finally, following a conclusion, this thesis presents proposed legislation in the Appendix.

II. History of the USFSPA

A. Origins of the USFSPA: *McCarty v. McCarty*

Congress passed the USFSPA²³ in direct response to the Supreme Court decision *McCarty v. McCarty*.²⁴ On 4 November 1981, within five months after the *McCarty* decision, Senator Roger Jepsen introduced the USFSPA as Senate Bill 1814.²⁵ Less than a year later, Congress enacted the USFSPA.²⁶ To understand the congressional intent behind such hasty action,²⁷ the *McCarty* decision, and its impact, must be explained.

In *McCarty*, the Supreme Court contemplated whether federal statutes preempt state courts from dividing non-disability retirement benefits upon divorce? Concerning preemption in general, the Supreme Court has said, “[I]f Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.”²⁸ With respect to

²³ See *supra* note 10.

²⁴ 453 U.S. 210 (1981). The Supreme Court decided *McCarty* on 26 June 1981. Before 1980, state domestic relation law pertaining to military retired pay varied widely. See WILICK, *supra* note 6, at 9.

²⁵ S. REP. No. 97-502, at 4 (1982) *reprinted in* 1982 U.S.C.C.A.N. 1596, 1598.

²⁶ Congress enacted the USFSPA on 8 September 1982. Passing the USFSPA attracted little attention at the time because it was a rider to the annual DOD Authorization Act. See THOLE & AULT, *supra* note 3, at 24.

²⁷ Early critics of the USFSPA believed that Congress enacted the USFSPA too quickly. See, e.g., Comment, *The Uniformed Services Former Spouses Protection Act: A Partial Return of Power*, 11 W. ST. U. L. REV. 71 (1983).

²⁸ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

preempting domestic relations law, the Supreme Court has held that “state interests . . . in the field of family and family-property arrangements . . . should be overridden . . . only where clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied.”²⁹

Applying this definition of preemption, the Supreme Court reviewed the facts and legal arguments in *McCarty*. Colonel and Mrs. McCarty had been married for almost twenty years when they divorced in 1976.³⁰ In the divorce proceedings, the superior court ruled that Colonel McCarty’s military retired pay was distributable as “quasi-community property.”³¹

On appeal to the Supreme Court, Colonel McCarty raised two arguments. While preemption was the second argument, the first argument is worthy of discussion because former service members still use this argument lobby for re-characterizing military retired pay. In his first argument, Colonel McCarty argued that military retired pay was not subject to division as marital property because it was different than civilian retired pay.³² To support this argument, Colonel McCarty cited federal cases to establish that military retired pay is

²⁹ *United States v. Yazell*, 382 U.S. 341, 352 (1966).

³⁰ *McCarty v. McCarty*, 453 U.S. 210, 216 (1981).

³¹ *Id.* at 218 (discussing community property, quasi-community property, and marital property). In community property states, each party has a 50-50 right to all property acquired during the marriage. Quasi-community property is property acquired outside the state that would have been community property if acquired within the state; community property states divide this property like community property. *See* WILLICK, *supra* note 6, at 9. In equitable distribution states, the court divides the property “equitably,” which may not be a 50-50 split. *See* THOLE & AULT, *supra* note 3, at 19; *see generally* Captain Kristine D. Kuenzli, *Uniformed Services Former Spouses’ Protection Act: Is there too much Protection for the Former Spouse?*, 47 A.F. L. REV. 1, 2-3 (1999) (discussing basic marital property law including community property states v. common-law property states and classifying property acquired during marriage which affects distribution of assets at divorce).

³² *McCarty*, 453 U.S. at 221.

actually reduced current pay for continued service in the armed forces at a reduced level.³³

Under this theory, military retired pay, unlike civilian retired pay, is not considered an asset earned during employment with payment deferred until retirement. Rather by remaining on the retired list, military retirees continue to serve in a reduced capacity subject to recall.

Consequently, their military retired pay is a monthly pay in return for their reduced service.³⁴

However, the Court did not adopt this theory. Instead, the Court focused on Colonel McCarty's second argument, preemption.

Colonel McCarty's second argument was that a conflict existed between the terms of the federal retirement statutes and the state community property right asserted by his former spouse.³⁵ Specifically, the state property rights allowing division of military retired pay significantly affected the purpose of the federal military personnel program, such that the court should not recognize the community property right.³⁶

Colonel McCarty argued that military retirement benefits constituted an important part of Congress's goal of meeting the personnel management needs of the active military forces.³⁷ Specifically, retired pay was designed to induce enlistment and reenlistment, to

³³ *Id.* (discussing *United States v. Tyler*, 105 U.S. 244 (1882), *Hooper v. United States*, 326 F.2d 982 (1964)).

³⁴ Several former service members and their organizations still argue "reduced pay for reduced service" as the reason why retired pay is not property, and thus payment from retired pay should end upon a former spouse's remarriage. *See infra* Section IV.A.1.

³⁵ *McCarty*, 453 U.S. at 223.

³⁶ *Id.* at 232.

³⁷ *Id.* at 232-33.

create an orderly career path, and to ensure a “youthful and vigorous” military force.³⁸

Colonel McCarty’s position, therefore, was that allowing state courts to divide retired pay would frustrate Congress’s goals in these areas because the potential for dividing retired pay is a disincentive to the pursuit of military careers.³⁹ The Court agreed.

The Court found that treating military retired pay as community property directly conflicted with the intent of the federal military retirement plan.⁴⁰ Congress intended to provide for retired service members; dividing retirement benefits upon divorce would frustrate this congressional intent and disrupt military personnel management.⁴¹ The Court concluded that this case satisfied the preemption test and that service members’ retirement benefits were *not* subject to division upon divorce as community property assets.⁴²

The Court, however, suggested that congressional action could remedy the result of this preemption by legislating protection for former spouses. Writing for the majority, Justice Blackmun suggested that Congress could legislate more protection for former military

³⁸ *Id.* at 234.

³⁹ *Id.* at 235.

⁴⁰ *Id.* at 232. The Court used a two-step analysis to decide the preemption issue. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (establishing the two-part preemption test). First, the Court determined that Congress intended to grant retired service members a “personal entitlement” to the benefits and dividing this entitlement in conformity with state community property provisions conflicted with federal military retirement statutes. *McCarty*, 453 U.S. at 232 (citing S. REP NO. 1480, at 6 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3294, 3298). Second, the Court considered whether the “application of community property principles to military retired pay threatened grave harm to clear and substantial federal interests.” *McCarty*, 453 U.S. at 232.

⁴¹ *McCarty*, 453 U.S. at 233-35.

⁴² *Id.* at 236.

spouses.⁴³ Justice Blackmun emphasized that the Court gave Congress great deference in “the conduct and control of military affairs.”⁴⁴ Congressional reaction to *McCarty* began with Justice Blackmun’s suggestion. In the wake of *McCarty*, many critics voiced their opinion on necessary congressional legislative action.

B. Criticism of *McCarty*

Following the Supreme Court’s decision in *McCarty*, critics flooded legal journals with concerns about the decision and the Supreme Court’s use of preemption.⁴⁵ A central criticism was that state courts had traditionally controlled domestic relations issues, and the Supreme Court’s use of preemption in *McCarty* threatened to usurp the state role. Many critics were concerned that the Supreme Court’s ruling would trigger substantial litigation surrounding the characterization of other pension and retirement plans. Legal scholars pondered whether private and state pensions and retirement benefits were in jeopardy of federal preemption. The American Bar Association (ABA) believed that with the *McCarty* decision “[t]he Court . . . materially and adversely affected the practice of family law in the

⁴³ *Id.* at 235-36.

⁴⁴ *Id.* at 236.

⁴⁵ See, e.g., Leonard Bierman & John Hershberger, *Federal Preemption of State Family Property Law: The Marriage of McCarty and Ridgway*, 14 PAC. L.J. 27 (1982); Anne Moss, *Women’s Pension Reform: Congress Inches Toward Equity*, 19 U. MICH. J.L. REFORM 165 (1985); Note, *McCarty v. McCarty: A Former Spouse’s Claim to a Service Member’s Military Retired Pay is Shot Down*, 13 LOY. U. CHI. L.J. 555 (1982); Note, *McCarty v. McCarty, the Battle Over Military Nondisability Retirement Benefits*, 34 BAYLOR L. REV. 335 (1982); Note, *Military Retirement Pay Not Subject to Division as Community Property Upon Divorce: McCarty v. McCarty*, 19 HOUS. L. REV. 591 (1982); Note, *Federal Law Preempts State Treatment of Military Retirement Benefits as Community Property: McCarty v. McCarty*, 13 TEX. TECH. L. REV. 212 (1982); Louise Raggio & Kenneth Raggio, *McCarty v. McCarty: The Moving Target of Federal Pre-emption Threatening All Non-Employee Spouses*, 13 ST. MARY’S L.J. 505 (1982).

United States.”⁴⁶ Recognizing the legal community’s concerns, Congress set out to nullify the *McCarty* decision.

C. Congressional Reaction to *McCarty*

After *McCarty*, Congress recognized that it must enact legislation allowing a state to continue to divide military retired pay in divorce.⁴⁷ Congress needed to protect former spouses by correcting the problem started in *McCarty*.⁴⁸ While searching for a resolution, Congress first reviewed the role of military spouses in the military community.⁴⁹

⁴⁶ 128 CONG. REC. 18,314-15 (1982) (letter from Robert D. Evans, Director, ABA) (Evans further stated: “More specifically, this decision has cast a shadow over untold thousands of final divorce decrees in this country.”).

⁴⁷ By 1981, a growing body of state domestic law included division of pensions and retired pay. Case decisions in virtually all community property states and a number of common law property states employing equitable distribution principles, specifically considered military retired pay as an asset of the marriage and subject to division. At least six other states had specifically ruled that military retired pay could not be considered marital property. S. REP. No. 97-502, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1597.

⁴⁸ “The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty v. McCarty*.” *Id.* at 1, *reprinted in* 1982 U.S.C.C.A.N. at 1596.

⁴⁹ *Id.* at 6, *reprinted in* 1982 U.S.C.C.A.N. at 1601 (discussing the contribution of military spouses to military life). “The concept of the military family and its importance to military life is widespread and publicized. Military spouses are still expected to fulfill an important role in the social life and welfare of the military community.” *Id.*

Childcare and management of the family household are many times solely the spouse’s responsibility. The military spouse lends a cohesiveness to the family facing the rigors of military life, including protracted and stressful separations. The committee finds 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. Therefore, the committee believes that the unique status of the military spouse and the spouse’s great contribution to our defense require that the status of the military spouse be acknowledged, supported, and protected.

Id.

Congress, through the Committee on Armed Services, examined the role of the military spouse extensively.⁵⁰ The Committee concluded, “[T]he unique status of the military spouse and the spouse’s great contribution to the defense require that the status of the military spouse be acknowledged, supported, and protected.”⁵¹ Further, military spouses contribute to the effectiveness of the military community while at the same time forgoing the opportunity to have careers and their own retirement. The means to acknowledge, support, and protect military spouses, even upon divorce from the service member, came in the form of the USFSPA proposal.

In the course of reviewing the USFSPA proposal, the Committee looked to the DOD for input. While the DOD recognized the importance of the military spouse, concerns were that the USFSPA may “adversely affect future military recruiting and retention, and pose military personnel assignment problems.”⁵² The service secretaries all agreed that some form of remedial legislation, which was fair and equitable to service members and military spouses, was necessary in response to *McCarty*.⁵³ The service secretaries also recognized the significant sacrifices and contributions made by military spouses. The DOD agreed that congressional action should overrule *McCarty*, but state court authority to divide military

⁵⁰ *Id.* at 6, reprinted in 1982 U.S.C.C.A.N. at 1601. “[T]he committee received extensive testimony from the uniformed services and public witnesses on the contributions and sacrifices made by the military spouse throughout the service member’s career.” *Id.*

⁵¹ *Id.* at 6-7, reprinted in 1982 U.S.C.C.A.N. at 1601.

⁵² *Id.* at 7, reprinted in 1982 U.S.C.C.A.N. at 1601-02. While DOD voiced these concerns, the agency did not submit any empirical data to support their concern on retention and manpower. The Committee on Armed Services conducted their own research and found that community property states seemed to handle retirement pay fairly. This research assisted their decision to allow the states to divide military retired pay. *Id.*

⁵³ *Id.* at 7, reprinted in 1982 U.S.C.C.A.N. at 1601.

retired pay should be “subject to certain limitations necessary to protect the personnel management requirements of the military services.”⁵⁴ One specific limit that DOD asked the Committee to consider was jurisdictional prerequisites to guard against potential abuses inherent in forum shopping.⁵⁵

With this information gathered, the Committee looked to balance the importance of the military spouse with the DOD’s personnel issues. The Committee supported the conclusion that the effect of allowing state court’s the discretion to divide military retired pay may not be “so detrimental to military manpower management as to warrant retaining the fundamental result of the *McCarty* decision.”⁵⁶

Based on the Committee report, Congress passed the USFSPA and restored state marital property law.⁵⁷ Further, Congress substantially revised the federal system for

⁵⁴ *Id.* at 7-8, reprinted in 1982 U.S.C.C.A.N. at 1602-03. According to the DOD, domestic relations matters should primarily be governed by state law, through state courts. *Id.* at 8, reprinted in 1982 U.S.C.C.A.N. at 1601.

⁵⁵ The term “forum shopping” in this context implies a search for the jurisdiction with the most advantageous law and procedures in which to commence a divorce proceeding. The most favorable jurisdiction might be a state with which the spouse or service member has had little previous contact. See BLACK’S, *supra* note 2, at 666. S. REP. No. 97-502, at 8 (1982), reprinted in 1982 U.S.C.C.A.N. 1555, 1603.

⁵⁶ S. REP. No. 97-502, at 8, reprinted in 1982 U.S.C.C.A.N. at 1603.

⁵⁷ The USFSPA does not *require* a state to divide military retired pay; it merely provides a means to enforce valid state court orders that divide retired pay as marital property. Many early post-*McCarty* cases discussed the purpose of the USFSPA. See, e.g., *Allen v. Allen*, 488 So. 2d 199 (3d Cir. 1986) (stating that the USFSPA was intended to end the adverse effect of *McCarty*, which held that federal law precludes state courts from dividing military non-disability retirement pay pursuant to state law); *Neese v. Neese*, 669 S.W.2d 388 (Tex. Ct. App. 1984) (stating simply that the USFSPA is intended to place courts in the same position they were in before the *McCarty* decision); *Steczo v. Steczo*, 659 P.2d 1344 (Ariz. Ct. App. 1983) (stating that the effect of the USFSPA is to allow state courts to apply their community property law regarding divisibility of military retirement to all cases pending in trial court and on appeal).

directing military disposable retired pay.⁵⁸ With the USFSPA, states can classify military retirement pay as marital property. To accomplish a balance between protecting the former spouses and the personnel needs of DOD, Congress placed limits on the ability of state courts to divide retired pay. Specifically, states can divide only disposable retired pay not gross pay.⁵⁹ As marital property, spouses cannot transfer their share of the retired pay and benefits.⁶⁰ Further, a state could not force a service member to retire to initiate retirement benefits to a former spouse.⁶¹ Finally, because of concerns for forum shopping, the USFSPA uses jurisdictional requirements.⁶²

While Congress provided many protections for former spouses, the original USFSPA was substantively and procedurally incomplete and inadequate. Congress has remedied many of the oversights through amendments to the USFSPA.

⁵⁸ Congress intended to negate the effect of *McCarty*, which is why the USFSPA applied retroactively to the date of the *McCarty* decision.

⁵⁹ 10 U.S.C. § 1408(a)(4), (c)(1) (2000). The definition of disposable retired pay is included *infra* Section III.C.

⁶⁰ 10 U.S.C. § 1408 (c)(2); see Kuenzli, *supra* note 31, at 15-16, 84, nn.106-11; Practice Note, *When is Property Not Really Property?*, ARMY LAW., Sept. 1995, at 28. See also S. REP. No. 97-502, at 16, reprinted in 1982 U.S.C.C.A.N. 1596, 1611 (“[F]ormer spouse should have no greater interest in the retired or retainer pay of a member than the member has. And a member has no right to transfer his retired or retainer pay on death.”).

⁶¹ 10 U.S.C. § 1408(c)(3); Kuenzli, *supra* note 31, at 85 (explaining that even though former spouses may be unfairly disadvantaged by delay in retirement after a service member becomes eligible, a state cannot force retirement; some states give the former spouse the option to begin collecting upon eligibility).

⁶² 10 U.S.C. § 1408(c)(4); Kuenzli, *supra* note 31, at nn.86, 118-21 (noting that the jurisdictional requirements are greater than a “minimum contacts” test).

D. Amendments to USFSPA

Since enacting the USFSPA, Congress has continuously amended it to remedy problems in the original law.⁶³ The most significant amendments include applying the USFSPA to child support and alimony payments,⁶⁴ refining the definition of disposable

⁶³ Nearly every Congress has amended the USFSPA. Although many of these are merely updates or technical corrections, some amendments are substantive in nature. Act of Oct. 19, 1984, Pub. L. 98-252, 98 Stat. 2547 (amending the USFSPA to incorporate payment of child support or alimony in the direct payment provision; clarifying the definition of court order to provide that a "division of property" was required to allow payment of disposable retired pay,); Act of Nov. 14, 1986, Pub. L. 99-661, 100 Stat. 3887 (amending the definition of disposable retired pay to deduct from inclusion the payments as "government life insurance premiums (not including amounts deducted for supplemental coverage)"); Act of April 21, 1987, Pub. L. 100-26, 101 Stat. 273, 282 (updating a cross-reference to an Internal Revenue Service Code); Act of Nov. 29, 1989, Pub. L. 101-189, 103 Stat. 1462, 1605 (updating cross-references to other sections of the U.S.C.); Act of Nov. 5, 1990, Pub. L. 101-510, 104 Stat. 1569, 1570 (deleting all references to "retainer" as part of retired pay; limiting the applicability of the USFSPA to court actions occurring after 25 June 1981; amending the definition of disposable retired pay); Act of Dec. 5, 1991, Pub. L. 102-190, 105 Stat. 1472 (adding a section heading); Oct. 23, 1992, Pub. L. 102-484, 106 Stat. 2426 (adding section to address the "benefits for dependents who are victims of abuse by members losing right to retired pay"); Act of Nov. 30, 1993, Pub. L. 103-160, 107 Stat. 1666, 1771 (clarifying the section that covers victims of abuse); Act of Feb. 10, 1996, Pub. L. 104-106, 110 Stat. 499 (amending cross reference to another United States Code section); Act of Aug. 22, 1996, Pub. L. 104-193, 110 Stat. 2246, 2249 (clarifying the USFSPA relationship to the Social Security Act; adding a section entitled "certification date"); Act of Sept. 23, 1996, Pub. L. 104-201, 110 Stat. 2579 (updating methods of service of process and service of a court order to the secretary); Act of Nov. 18, 1997, Pub. L. 105-85, 111 Stat. 1901 (making technical corrections). See generally WILLICK, *supra* note 6, at 17-22 (providing an overview of USFSPA amendments).

⁶⁴ Act of Oct. 19, 1984, Pub. L. 98-252, 98 Stat. 2547. The implementing regulation defines child support as:

Periodic payments for the support and maintenance of a child or children, subject to and in accordance with State law under 42 U.S.C. 662(b). It includes, but is not limited to payments to provide for health care, education, recreation, and clothing or to meet other specific needs of such a child or children.

32 C.F.R. § 63.3(c) (2000). Alimony is defined as:

Period payments for the support and maintenance of a spouse or former spouse in accordance with State law under 42 U.S.C. 662(c). It includes but is not limited to, spousal support, separate maintenance, and maintenance. Alimony does not include any payment for the division of property.

32 C.F.R. § 63(a).

retired pay,⁶⁵ and providing for benefits to certain former spouses who are victims of domestic abuse.⁶⁶

On two occasions, Congress requested that DOD review and report on specific USFSPA issues.⁶⁷ The first review required the Secretary of Defense to estimate the number of people affected if the section addressing benefits to victims of abuse was retroactive. The most recent review, for which Congress awaits a report from the DOD, involves a more comprehensive review of the USFSPA. Congress specifically asked for a comparison of the protections, benefits, and treatment afforded to retired civilian government-employees vice retired uniformed-services employees.⁶⁸

Despite the numerous amendments, the USFSPA requires additional changes to reach the originally intended congressional balance between the needs of the federal government

⁶⁵ See Act of Nov. 5, 1990, Pub. L. 101-510, 104 Stat. 1569, 1570 (deleting all references to “retainer” as part of retired pay; limiting the applicability of the USFSPA to court actions occurring after 25 June 1981; amending the definition of disposable retired pay to exclude federal income tax withholding). Congress revised the definition of disposable retired pay to exclude federal income tax withholdings to remedy a problem created after they enacted the USFSPA. Former service members were tinkering with their exemption claims. Former service members would claim the fewest exemptions possible so that the government would withhold the maximum amount each month. This act would reduce their disposable income and reduce the amount of money a former spouse would receive each month. Former service members, however, could recover the withheld taxes when they filed their income taxes each year. See also Act of Nov. 14, 1986, Pub. L. 99-661, 100 Stat. 3887 (amending the definition of disposable retired pay to deduct from inclusion the payments as “government life insurance premiums (not including amounts deducted for supplemental coverage)”).

⁶⁶ Act of Oct. 23, 1992, Pub. L. 102-484, 106 Stat. 2426 (adding section to address the “benefits for dependents who are victims of abuse by members losing right to retired pay”).

⁶⁷ Act of Nov. 18, 1997, Pub. L. 105-85, 111 Stat. 1799 (requiring the Secretary of Defense to review and report on the protections, benefits and treatment afforded retired uniformed services members compared to retired civilian government employees); Act of Oct. 23, 1992, Pub. L. 102-484, 106 Stat. 2429 (requiring the Secretary of Defense to conduct a study and provide a report to estimate the number of people effected by the section addressing benefits to victims of abuse).

⁶⁸ Act of Nov. 18, 1997, Pub. L. 105-85, § 643(a), 111 Stat. 1799.

and the rights of former spouses. Currently, DOD agencies, former service members' organizations, former spouses organizations, and individual congressional representatives have made suggestions to reach "equity" in the USFSPA and related law. Before addressing these attempts for reform, a complete understanding of the current provisions of USFSPA is required. Section III details the USFSPA and its application.

III. The Current USFSPA⁶⁹

A. Jurisdictional Requirements⁷⁰

To alleviate concerns over forum shopping, Congress included prerequisites for jurisdiction to divide military retired pay, beyond the personal jurisdiction requirements typically needed to dissolve a marriage.⁷¹ At the time Congress enacted the USFSPA, some states allowed division of retirement pay and pensions, while others did not.⁷² The DOD and Congress were concerned that parties to a divorce would search for the jurisdiction with the most advantageous law and procedures in which to commence a divorce proceeding, even

⁶⁹ In the original USFSPA, Congress provided that the statute was retroactive until one day before the *McCarty* decision. The effect of retroactivity on state laws and individual cases was highly litigated during the early years of the USFSPA. Some state enacted legislation to handle the requests to reopen military divorce cases and even established deadlines for doing so. See THOLE & AULT, *supra* note 3, at 23-24. Because retroactivity does not affect divorces that occurred after the USFSPA effective date in 1983, this thesis does not discuss retroactivity and related issues. See generally WILLICK, *supra* note 6, at 15-17 (discussing the window period or "gap" in USFSPA law).

⁷⁰ 10 U.S.C. § 1408(c)(4) (2000). See generally WILLICK, *supra* note 6, at 56-62 (discussing jurisdictional requirements and issues).

⁷¹ These are often referred to as minimum contest or long-arm statutes.

⁷² See discussion *supra* note 47 (explaining the trends in marital property law at the time the USFSPA was proposed and enacted). All states now allow division of military retired pay as marital property. See *supra* note 13 (providing resources that list retired pay division in all fifty states).

though the most favorable jurisdiction might be a state with which the spouse or service member has had little previous contact.⁷³ The USFSPA jurisdictional requirements prevent such forum shopping.

Under the USFSPA, a state may exercise jurisdiction over military retired pay provided one of the following requirements exists: (1) domicile in the territorial jurisdiction of the court;⁷⁴ (2) residence within the state other than because of military assignment, or (3) consent to jurisdiction.⁷⁵ Courts that otherwise have jurisdiction over the divorce may not have subject matter jurisdiction to divide retired pay unless that court has “USFSPA jurisdiction” over both parties. If both personal and subject matter jurisdiction exist, the court can hear the divorce and decide any matters relating to the USFSPA. However, USFSPA jurisdictional requirements do not limit a court’s jurisdiction to award a portion of retired pay for child support or alimony purposes.⁷⁶

⁷³ S. REP. NO. 97-502, at 8-9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1603-04 (expressing DOD’s concerns about forum shopping); H.R. CONF. REP. NO. 97-749, 2d. Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 1571 (same). *See* Kuenzli, *supra* note 31, at 10 (providing additional information about forum shopping concerns during the review of the original USFSPA).

⁷⁴ Under the USFSPA, domicile means more than where the service member is currently living. Domicile requires that the party have the intent to remain in that state. A person can demonstrate domicile through evidence of paying state income and property taxes, voting registration, bank accounts, automobile registration and title, driver’s license, and ownership of property. *See* Mark Sullivan, *Military Pension Division: Scouting the Terrain*, SILENT PARTNER, at 2-3, *available at* <http://www.abanet.org/family/military/home.html> (last visited Mar. 8, 2001).

⁷⁵ 10 U.S.C. § 1408(c) (setting forth these jurisdictional requirements). *See, e.g.,* *Steel v. United States*, 813 F.2d 1545 (9th Cir. 1987) (holding that a court that had jurisdiction of parties is not allowed to invoke powers of the USFSPA unless personal jurisdiction has been acquired by domicile or consent or residence other than by military assignment; careful reading of §1408(c)(1) reveals that provision is limitation on subject-matter, rather than personal jurisdiction).

⁷⁶ 10 U.S.C. § 1408(c) specifically applies to “the disposable retired pay of a member” as property and does not mention when disposable retired pay is treated as income, that is, for child support or alimony payments. Thus, courts can use the minimum contacts for a divorce hearing to order child support or alimony paid from retired pay.

Despite the added jurisdiction requirements, the USFSPA provides that any court of competent jurisdiction from a state, the District of Columbia, U.S. territory,⁷⁷ or federal court can hear a case under the USFSPA.⁷⁸ Under certain circumstances, foreign courts can hear cases under USFSPA as well.⁷⁹

B. Divisibility of Retired Pay

The USFSPA does not give a former spouse the *right* to a certain percentage of military retirement pay. Rather, it grants state courts the authority to treat military retired pay as property⁸⁰ and divide it as they would other pensions.⁸¹ The state court can then apply the state marital property law to determine whether to divide the military retired pay and how

⁷⁷ These include: Puerto Rico, Guam, American Samoa, the Virgin Islands, North Mariana Island, and the Trust Territory of the Pacific.

⁷⁸ 10 U.S.C. § 1408(a)(1) (defining court); 32 C.F.R. § 63.3(d) (defining court for the purposes of the USFSPA implementing regulation).

⁷⁹ For a foreign court to hear USFSPA cases, the United States must have a treaty with that country that specifically requires the United States to honor court orders of such nation. 10 U.S.C. § 1408(a)(1)(C). No such treaty is in force regarding court orders of any nation, however. In *Brown v. Harms*, 863 F. Supp. 278 (E.D. Va. 1994), an action by a former spouse of a retired military officer for partition of the retirement pay was dismissed because the divorce occurred in a German court.

⁸⁰ Unlike other property, however, retired pay when treated as property cannot be sold or divested. See 10 U.S.C. § 1408; THOLE & AULT, *supra* note 3, at 51.

⁸¹ 10 U.S.C. § 1408(c). "Today, all 50 states have recognized military retirement benefits as property, belonging to both parties to the extent earned during the marriage. This is in keeping with the treatment by the states of all other federal, state, and private retirement and pension plans." ABA Position Letter, *supra* note 6, at 2. But see *Delucca v. Colon*, 119 P.R. Dec. 720 (1987) (reestablishing retirement pensions as separate property of the spouse in Puerto Rico; however, pensions may be considered in setting child support and alimony obligations).

to divide it.⁸² Contrary to the belief of many former service members, a former spouse does not have an automatic right to receive retired pay.⁸³

The USFSPA allows state courts to divide military retired pay for three purposes: to enforce child support obligations, to enforce alimony obligations, and to divide for property settlement purposes.⁸⁴ Some courts also apply the USFSPA to divide retired pay upon legal separation.⁸⁵ While not included in the USFSPA, some state courts use the provisions of the USFSPA by analogy to divide military early retirement separation benefits.⁸⁶

⁸² The USFSPA does not provide or require a state to divide disposable retired pay in any particular manner. The parties must look to state law for a "formula" or explanation of the division. Some typical formulas are as follows:

$$1/2 \quad \times \quad \frac{\text{length of overlap of} \\ \text{marriage \& service} \\ \text{time in service}}{\quad} \quad \times \quad 100 \quad = \quad \%$$

$$1/2 \quad \times \quad \frac{\text{length of overlap of} \\ \text{marriage \& service} \\ \text{length of service at} \\ \text{time of separation or} \\ \text{divorce}}{\quad} \quad \times \quad 100 \quad = \quad \%$$

See JA 274, *supra* note 13, at 6. *See generally* Captain Mark E. Henderson, *Dividing Military Retirement Pay and Disability Pay: A More Equitable Approach*, 134 MIL. L. REV. 87 (1991); Practice Note, *Colorado Reinforces the "Time Rule" Formula for Division of Military Pensions*, ARMY LAW., Aug. 1998, at 27.

⁸³ *See infra* Section IV.A discussing former service members concerns about the USFSPA.

⁸⁴ *See supra* note 13 (providing resources on state law). All states now have clearly ruled that military retired pay is divisible for property settlement purposes. The primary exception is Puerto Rico.

⁸⁵ *See* Coates v. Coates, 650 S.W.2d 307 (Mo. 1983) (awarding a portion of the former service member's pension to the spouse in a legal separation proceeding in view of the USFSPA).

⁸⁶ *See infra* Section III.H for a discussion of early retirement separation benefits and the USFSPA.

For division of retired pay as property, the USFSPA does not explicitly require vesting of military retired pay at the time of divorce.⁸⁷ Most states allow division of vested or unvested retired pay at divorce.⁸⁸ Most recently, North Carolina enacted a law that

⁸⁷ 10 U.S.C. § 1408(c) (2000) (providing authority for a court to treat retired pay as property of the marriage; this section does not include a vesting requirement).

⁸⁸ See FLA. STAT. § 61.075(3)(a)(4) (1988) (stating that as of 1 Oct. 1988, all vested and non-vested pension plans are treated as marital property to the extent that they are accrued during the marriage); KAN. STAT. ANN. § 23-201(b) (1987) (stating that effective 1 July 1987, vested and non-vested military pensions are no marital property); NEB. REV. STAT. § 42-366(8) (1993) (stating that in Nebraska, military pensions are part of the marital estate whether vested or not and may be divided as property or alimony); N.H. REV. STAT. ANN. § 458:16-a (1987) (stating that effective 1 January 1988, all vested and non-vested pensions or other retirement plans are divisible); VA. ANN. CODE § 20-107.3 (1988) (defining, in Virginia, that marital property includes all pensions, whether or not vested). See also *Lang v. Lang*, 741 P.2d 649 (Alaska 1987) (holding that in Alaska, non-vested retirement benefits are divisible); *Van Loan v. Van Loan*, 569 P.2d 214 (Ariz. 1977) (holding that in Arizona, a non-vested military pension is community property); *In re Brown*, 544 P.2d 561 (Cal. 1976) (holding that in California, non-vested pensions are divisible); *In re Marriage of Beckman & Holm*, 800 P.2d 1376 (Colo. 1990) (holding that non-vested military retirement pay benefits constitute marital property subject to division pursuant to state law); *Thompson v. Thompson*, 438 A.2d 839 (Conn. 1981) (holding that in Connecticut, a non-vested civilian pension is divisible); *Smith v. Smith*, 458 A.2d 711 (Del. Fam. Ct. 1983) (holding that in Delaware, a non-vested pension is divisible); *Barbour v. Barbour*, 464 A.2d 915 (D.C. 1983) (holding that in D.C., a vested but not matured civil service pension is divisible; dicta suggests that non-vested pensions are also divisible); *Courtney v. Courtney*, 344 S.E.2d 421 (Ga. 1986) (holding that in Georgia, non-vested civilian pensions are divisible); *In re Korper*, 475 N.E.2d 1333 (Ill. 1985) (noting that by Illinois statute, a pension is marital property even if it is not vested); *Poe v. Poe*, 711 S.W.2d 849 (Ky. Ct. App. 1986) (holding that military retirement benefits are marital property even before they vest); *Little v. Little*, 513 So. 2d 464 (La. Ct. App. 1987) (holding that in Louisiana, non-vested and not matured military retired pay is marital property); *Ohm v. Ohm*, 541 A.2d 1371 (Md. 1981) (holding that in Maryland, non-vested pensions are divisible); *Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983) (holding that non-vested pensions are divisible in Minnesota); *Fairchild v. Fairchild*, 747 S.W.2d 641 (Mo. Ct. App. 1988) (holding that in Missouri, both non-vested and not matured retired pay are considered marital property); *Forrest v. Forrest*, 608 P.2d 275 (Nev. 1983) (holding that in Nevada, all retirement benefits are divisible community property, whether vested or not, and whether matured or not); *Whitfield v. Whitfield*, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987) (stating that in New Jersey, non-vested military retired pay is marital property); *In re Richardson*, 769 P.2d 179 (Or. 1989) (holding that in Oregon, non-vested pension plans are marital property); *Major v. Major*, 518 A.2d 1267 (Pa. Super. Ct. 1986) (holding that in Pennsylvania, non-vested military retired pay is marital property); *Ball v. Ball*, 430 S.E.2d 533 (S.C. Ct. App. 1993) (holding that in South Carolina, a non-vested pension is subject to equitable division because a service member acquires a vested right to *participate* in a military pension plan when entering the uniformed services); *Kendrick v. Kendrick*, 902 S.W.2d 918 (Tenn. Ct. App. 1994) (holding that non-vested military pensions can property be characterized as marital property); *Greene v. Greene*, 751 P.2d 827 (Utah Ct. App. 1988) (holding that under Utah law, a non-vested pension can be divided); *Wilder v. Wilder*, 534 P.2d 1355 (Wash. 1975) (holding that non-vested pensions are divisible); *Butcher v. Butcher*, 357 S.E.2d 226 (W.Va. 1987) (holding that vested and non-vested military retired pay is marital property subject to equitable distribution); *Leighton v. Leighton*, 261 N.W.2d 457 (Wis. 1978) (holding that non-vested pensions are divisible); *Parker v. Parker*, 750 P.2d 1313 (Wyo. 1988) (holding that in Wyoming, non-vested military retired pay is marital property). Some courts look at non-vested retired pay as divisible, but in a different way. See *Caughron v. Caughron*, 418 N.W.2d 791 (S.D. 1988) (holding that the present cash value of a non-vested retirement benefit is marital property).

eliminated vesting requirements.⁸⁹ Despite a growing trend toward divisibility of non-vested retired pay, some states will not divide non-vested retired pay.⁹⁰

While the USFSPA allows for division of military retired pay, the actual amount of pay a court should divide has been in controversy since Congress passed the USFSPA. By law, the total amount of disposable retired pay to the former spouse cannot exceed fifty percent of that pay.⁹¹ However, unlike other marital property, such as a family house, former spouses do not have a right to sell or transfer their interest in the retired pay of the service member.⁹²

The USFSPA provides that state courts can only divide “disposable retired pay.”⁹³ However, the definition of disposable retired pay is a source of contention between service

⁸⁹ See generally Major Janet Fenton, Practice Note, *North Carolina Changes Vesting Requirements for Division of Pension*, ARMY LAW., Feb. 1998, at 31.

⁹⁰ See *Messinger v. Messinger*, 827 P.2d 865 (Okla. 1992) (holding that in Oklahoma, only a pension vested at the time of the divorce is divisible); *Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990) (holding that in Indiana, 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 courts should consider the non-vested military retired benefits in adjudging a just and reasonable division of property); *Durham v. Durham*, 708 S.W.2d 618 (Ark. 1986) (holding that in Arkansas, military retired pay is not divisible where the member had not served twenty years at the time of the divorce, and therefore the military pension had not “vested”).

Some courts that require vesting of pensions before division still look to find equity in the property division. See *Lemon v. Lemon*, 537 N.E.2d 246 (Ohio Ct. App. 1988) (holding that nonvested pensions are divisible as marital property *where some evidence of value demonstrated*); *Boyd v. Boyd*, 323 N.W.2d 553 (Mich. Ct. App. 1982) (holding that in Michigan, where only vested pensions are divisible, a vested right is discussed broadly and discretion over what is marital property is left to the trial court).

⁹¹ 10 U.S.C. § 1408(e)1. See *Smallwood v. Smallwood*, 2000 Ala. Civ. App. LEXIS 674 (Nov. 3, 2000) (holding that payments of disposable retired pay are capped at fifty percent, even if the divorce incorporated a voluntary agreement for a greater division of property). However, this limit does not relieve a service member from liability of child support or alimony if such payments exceed the fifty percent cap. 10 U.S.C. § 1408(e)(5-6); 42 U.S.C. § 659 (2000).

⁹² 10 U.S.C. § 1408(c)(2).

⁹³ *Id.* § 1408(c)(1).

members and former spouses. The next section defines disposable retired pay and examines the key issues.

C. Disposable Retired Pay⁹⁴

The stated definition of disposable retired pay⁹⁵ includes pre-tax⁹⁶ total monthly retired pay less statutorily defined amounts, including any amounts that the government

⁹⁴ The definition of disposable pay has changed since Congress first enacted the USFSPA. Originally, disposable retired pay included gross non-disability retired pay minus certain deductions, such as federal, state, and local income tax withholdings; federal employment taxes; life insurance; survivor benefit plan premiums in some cases; statutory offsets required by the retiree's receipt of federal civil service employment benefits; and statutory offsets required by the retiree's receipt of disability benefits from the Veterans Administration (VA). See 10 U.S.C. § 1408(a)(4) (1988) amended by the National Defense Authorization Act for 1991, Pub. L. No. 101-510, § 555, 104 Stat. 1569-70 (1990) (codified as amended at 10 U.S.C. § 1408(c)(1)(1994)). This well-defined version of disposable pay caused problems with state courts tried to reconcile it with the gross retired pay used in state statutes. Because of the confusion, and seemingly unfair division for the former spouse, many states ignored the USFSPA definition of disposable retired pay and divided gross retired pay. See Kuenzli, *supra* note 31, at 13-14 nn.92-95. See, e.g., *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986); *Deliduka v. Deliduka*, 347 N.W.2d 52 (Minn. Ct. App. 1984); *White v. White*, 734 P.2d 1283 (N.M. Ct. App. 1987); *Lewis v. Lewis*, 350 S.E.2d 587 (N.C. Ct. App. 1986); *Bullock v. Bullock*, 354 N.W.2d 904 (N.D. 1984); *Martin v. Martin*, 373 S.E.2d 706 (S.C. 1988); *Grier v. Grier*, 731 S.W.2d 936 (Tex. 1987); *Butcher v. Butcher*, 357 S.E.2d 226 (W.Va. 1987). See generally WILLICK, *supra* note 6, at 70-79 (explaining the evolving definition of disposable retired pay).

⁹⁵ 10 U.S.C. § 1408(a)(4) (2000). Disposable retired pay includes pre-tax gross retired pay, minus amounts that:

- (1) 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;
- (2) 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;
- (3) in the case of a member entitled to retired pay under chapter 61 of this title are equal to the amount of retired pay of the member under that chapter computed under 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
- (4) are deducted because of an election under chapter 73 of this title [10 USC § 1431 *et. seq.*] to provide an annuity to a spouse of former spouse to whom a payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

Id.

⁹⁶ Disposable pay for divorces on or after 5 February 1991 is figured pre-income tax. See 1991 Defense Authorization Act, Pub. L. 102-484. See THOLE & AULT, *supra* note 3, at 195.

recoups for previous overpayment, waiver of retired pay adjudged at court-martial, disability pay, and Survivor Benefit Plan (SBP) premiums.⁹⁷ Notably, the definition of military retired pay does not include disability pay.⁹⁸ Qualifying retired service members can receive disability benefits from the Veterans Administration (VA),⁹⁹ but must first waive an equivalent amount of military retired pay.¹⁰⁰ A retired service member benefits from receiving VA disability pay in lieu of retirement pay because disability pay is neither taxable as income nor subject to garnishment by creditors.¹⁰¹ When a service member qualifies for disability pay and waives a portion of retired pay, the amount of disposable retired pay subject to division under the USFSPA decreases.

⁹⁷ Until it was repealed in 1999, the Dual Compensation Act, 5 U.S.C. § 5532(b) (1994), required retired officers who were employed in the federal government to waive a portion of their retired pay. See Bruce D. Callander, *New Rules on Dual Compensation*, A.F. MAG., Jan. 2000 (noting that the Dual Compensation Act was repealed by the Fiscal Year 2000 Defense Authorization Act, signed by President Clinton on 5 Oct. 1999), available at <http://www.afa.org/magazine/toc/01cont00.html>.

⁹⁸ Disability pay may be awarded to a member when he is so disabled that he cannot perform his duties. See 10 U.S.C. § 1212; see also R. ROBERTS, *THE VETERANS GUIDE TO BENEFITS* 129-64 (1989). Once the VA determines that the service member has a qualifying amount of service, he may be placed on the disability retired list and begin receiving disability retired pay. 10 U.S.C. § 1221. Service members may collect disability retirement pay when they have a permanent disability of at least thirty percent, which renders the service members unfit to perform assigned duties and has either served at least eight years on active duty or was disabled while performing active duty. See 10 U.S.C. § 1201(b).

⁹⁹ 38 U.S.C. § 110 (2000).

¹⁰⁰ 38 U.S.C. § 5301. The relevant part of this section reads:

Payments of benefits due or to become due under any law administered by the Secretary *shall not be assignable except to the extent authorized by law . . .* shall be exempt from taxation, shall be exempt 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.

38 U.S.C. § 5301(a) (emphasis added). A statutory exemption exists for child support and alimony, but not for awards of military retirement as property. See Practice Note, *Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards*, ARMY LAW. Feb. 1998, at 31. The purpose of waiver provision is to permit a retiree to receive retired pay and veterans' benefits, not to exceed the full rate of retired pay, without terminating the status that affords the right to either benefit.

¹⁰¹ Disability pay is nontaxable to the member, and it is protected from certain creditors. See 38 U.S.C. § 5301.

Courts have struggled with interpreting the definition of disposable retired pay. One of the most significant post-*McCarty* court decisions questioned whether disposable retired pay included disability pay. In *Mansell v. Mansell*,¹⁰² the Supreme Court settled the controversy existing among various jurisdictions regarding divisibility of disability benefits received in lieu of retired pay. *Mansell* held that the language of the USFSPA¹⁰³ preempts states from dividing the value of waived military retired pay because it is not “disposable retired pay” as defined by the statute.¹⁰⁴

In practice, *Mansell* has a significant impact on property awards.¹⁰⁵ *Mansell*’s clear interpretation of disposable retired pay ensures that state courts do not grant former spouses a share of service members’ VA disability pay.¹⁰⁶ Thus, when courts award former spouses a percentage of retired pay, they have a smaller pool of money from which to draw that percentage if the service member receives disability pay. Many courts, however, look to circumvent the order in *Mansell* and provide former spouses with an alternate form of

¹⁰² 490 U.S. 581 (1989).

¹⁰³ 10 U.S.C. § 1408(c)(1) (2000).

¹⁰⁴ The court found that, in light of § 1408 (a)(4)(B)’s limiting language as to such waived pay, the plain and precise language established that § 1408(c)(1) granted state courts the authority to treat only disposable retired pay, not total retired pay, as community property. *See also* JA 274, *supra* note 13, at 3.

¹⁰⁵ When discussing the issue of disability pay and retired pay, courts cite to the USFSPA and *Mansell* as precedent for non-divisibility of disability pay. Issues surrounding disposable pay and disability pay are found more often than any other issues relating to the USFSPA, based on an electronic search of LEXIS.

¹⁰⁶ *Robinson v. Robinson*, 647 So. 2d 160, 161 (Fla. Dist. Ct. App. 1994) (holding that military disability benefits are not subject to distribution to a former spouse; a former wife has no “continuing special equity” interest in a former husband’s military disability benefits).

support in lieu of the share of retired pay they would have received but for the disability determination.¹⁰⁷

D. Direct Payment to the Former Spouse¹⁰⁸

In some circumstances, the USFSPA allows Defense Finance and Accounting Service (DFAS) to directly pay the former spouse the awarded child support, alimony, or percentage of retired pay.¹⁰⁹ No additional requirements are necessary for direct payment of child support or alimony.¹¹⁰ However, for a former spouse to receive direct payment of a percentage of retired pay as a property award, there must be at least ten years of marriage overlapping with ten years of service creditable toward retirement.¹¹¹

¹⁰⁷ See *infra* Section VI.C discussing the current interpretation of the USFSPA and circumventing the *Mansell* decision.

¹⁰⁸ See generally Kuenzli, *supra* note 31, at 29-31 (providing a detailed description of “direct payment” and its limitations).

¹⁰⁹ 10 U.S.C. § 1408(d) (2000); 32 C.F.R. § 63.6(a) (2000) (explaining eligibility of a former spouse for direct pay of property, child support, or alimony). For all direct-pay orders there must be: (a) a final decree of divorce, dissolution, legal separation, or court approval of a property settlement agreement; and (b) an application for direct payment. 32 C.F.R. § 63.6(b) (a former spouse shall deliver to the designated agent of the service a signed DD Form 2293, Request for Former Spouse Payments from Retired Pay).

¹¹⁰ 10 U.S.C. § 1408(d)(1); 32 C.F.R. § 63.6(a)(2).

¹¹¹ The criteria is commonly known as the “ten-year overlap” requirement. 10 U.S.C. § 1408(d)(2); 32 C.F.R. § 63.6(a)(2). Further, 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; and the order must show that the court has jurisdiction over the soldier in accordance with the USFSPA provisions. Creditable service is defined as “service counted towards the establishment of any entitlement for retired pay.” 32 C.F.R. § 63.3(f).

Where a court orders a USFSPA payment where the ten-year overlap does not exist, the former spouse must rely on the former service member to forward the monthly payments. If the former service member fails to make these payments, a former spouse can return to court for a garnishment order. See DEP’T OF DEFENSE, FINANCIAL MANAGEMENT REG., *Military Pay Policy and Procedure—Retired Pay*, ch. 29 (Sept. 1999) cited in Kuenzli, *supra* note 31, at 29.

If the former spouse meets the USFSPA criteria for direct payment, the maximum amount of money directly payable to the former spouse is fifty percent of the retiree's disposable retired pay.¹¹² If the direct payment includes an award of child support or alimony, the maximum increases to sixty-five percent.¹¹³ If these caps do not meet the court ordered support, the former service member must still pay the amount, although not directly from DFAS. The direct payments of retired pay are income to the former spouse for tax purposes.¹¹⁴

E. The USFSPA and Domestic Abuse Cases

One of the significant amendments to the USFSPA provides benefits to victims of domestic abuse who lose their entitlements because of the service members' separation from service.¹¹⁵ If a service member is separated from active service by a punitive or administrative discharge for misconduct, that member loses eligibility for retirement pay and

¹¹² 10 U.S.C. § 1408(e)(1). This section of the USFSPA also places a limit on how much retired pay must be paid to satisfy judgments awarding a share of military retired pay as property. Single or multiple judgments awarding military retired pay as property are considered to be fully satisfied by payments that total fifty percent of disposable retired pay. *But see* Blissit v. Blissit, 702 N.E.2d 945 (Ohio Ct. App. 1997) (holding that despite the fifty percent limit on award of disposable retired pay, the statute does not limit the amount which a service member may be ordered to pay for child support or alimony, it merely limits the extent to which the government will make such payments directly to the former spouse). A former service member can be ordered to pay child support or alimony from a source other than retired pay.

¹¹³ 32 C.F.R. § 63.6(e)(1)(ii).

¹¹⁴ See JA 274, *supra* note 13, at 7. Direct payments of retired pay received from DFAS by the former spouse are subject to federal income tax withholding. Separate tax forms are issued to the retiree and the former spouse.

¹¹⁵ Act of Oct. 23, 1992, Pub. L. 102-484, 106 Stat. 2426 (adding section to address the "benefits for dependents who are victims of abuse by members losing right to retired pay").

benefits.¹¹⁶ Under this provision of the USFSPA, former spouses can collect a portion of the retirement as support, as long as the service member would have been by years eligible to retire but for separation because of committing domestic abuse.¹¹⁷ These benefits¹¹⁸ are provided under specific marriage and divorce circumstances to victims¹¹⁹ of abuse.¹²⁰ The USFSPA considers these benefits “support” payments and not “property interest” payments; thus, the payments terminate upon remarriage of the former spouse.¹²¹

Congress passed this amendment to remedy a concern that loss of retired pay creates a disincentive for a family member to report abuse. Congress “felt compelled to address the plight of victims of spouse and child abuse and the hardship imposed on them by discharge

¹¹⁶ See Kuenzli, *supra* note 31, at 42-44 (describing the USFSPA provisions for victims of domestic abuse).

¹¹⁷ 10 U.S.C. § 1408(h) (2000).

¹¹⁸ Benefits include the disposable retired pay that the service member would have received if retired upon date eligible, PX privileges, commissary privileges, medical, dental, and legal assistance. See JA 274, *supra* note 13, at 10. These benefits terminate upon remarriage, but can be revived by divorce, annulment, or death of the subsequent spouse. *Id.* at 11.

¹¹⁹ 10 U.S.C. § 1408(h)(2) provides that a spouse or former spouse must be the “victim of the abuse and married to the member or former member at the time of that abuse; or a natural or adopted parent of dependent child of the member or former member who was the victim of the abuse.”

¹²⁰ 10 U.S.C. § 1408(h). See JA 274, *supra* note 13, at 10. To qualify, a former spouse must have a court order awarding as *property settlement* a portion of disposable retired pay. The service member must be eligible *by years* for retirement but loses right to retire due to misconduct involving dependent abuse. The date for determining the years of service is the date of final action by the convening authority (if court-martial) or approval authority (if separation action). These provisions do not apply to early retirement programs.

¹²¹ 10 U.S.C. § 1408(h)(7)(A).

of the member resulting from the abuse.”¹²² At present there are less than twenty-five former spouses receiving payment under this program.¹²³

F. Enrollment as the Beneficiary of the Service Member’s Survivor Benefit Plan¹²⁴

The SBP program ensures that a reasonable amount of income is paid to surviving family of service members who die on active duty while eligible for retirement¹²⁵ and surviving family of service members who die after retirement.¹²⁶ Service members on active duty who are eligible for retirement are automatically enrolled in the SBP. Upon retirement, the SBP applies automatically to a service member who is married or has at least one dependent child at the time the member becomes entitled to retired pay, unless the service member affirmatively elects not to participate in the SBP.¹²⁷ A service member can elect to provide the SBP annuity to a former spouse.¹²⁸

¹²² Kuenzli, *supra* note 31, at 42. See Act of Oct. 23, 1992, Pub. L. 102-484, 106 Stat. 2426 (adding section to address the “benefits for dependents who are victims of abuse by members losing right to retired pay”).

¹²³ See E-mail from Neal W. Nelson, Deputy Assistant General Counsel, Garnishment Operations, Defense Finance and Accounting, to Major Mary J. Bradley (Feb. 15, 2001) [hereinafter DFAS E-mail] (on file with author) (providing statistics on USFSPA payments as of October 2000).

¹²⁴ See generally WILLICK, *supra* note 6, at 140-61 (providing history of the SBP and USFSPA interaction and over-viewing the benefits and prerequisites of the SBP); LIEUTENANT COLONEL (RETIRED) EDWARD S. GRZYNSKI ET AL., SBP MADE EASY: THE SURVIVOR BENEFIT PLAN (1998) (providing a complete discussion of SBP).

¹²⁵ Service members who are retirement eligible but remain on active duty are automatically enrolled in SBP. Dependents of service members who die on active duty automatically receive SBP annuity. The qualifying dependents are spouse and children. See GRZYNSKI ET AL., *supra* note 124, at 6 (describing SBP while on active duty); WILLICK, *supra* note 6, at 151 (noting that under certain circumstances, former spouses can also be beneficiaries of the SBP when the service member dies on active duty). See also THOLE & AULT, *supra* note 3, at 149-60.

¹²⁶ 10 U.S.C. §§ 1447-1460(b).

¹²⁷ 10 U.S.C. § 1448(a)(2). If the service member elects not to participate in the SBP, the spouse must consent to any election not to participate in the SBP, to an annuity for that spouse at less than the maximum level, or to

The original USFSPA included an amendment to the SBP that authorized service members to designate a former spouse as the beneficiary under the SBP.¹²⁹ Courts can now order a retiring service member to designate the former spouse as an SBP beneficiary—the election need not be voluntary.¹³⁰ If, however, a retired member fails to make the court-ordered election, the former spouse may make a “deemed election” of SBP by providing written notice to DFAS within one year of the date of the court order.¹³¹ A former spouse who fails to make the “deemed election” within one year may lose entitlement to the SBP annuity.¹³²

The current SBP allows for designation of only one beneficiary. Thus, a former service member who has remarried cannot designate both their former spouse and their current spouse as beneficiaries. A former service member can designate a current spouse as

an annuity for a dependent child rather than the spouse. *Id.* § 1448 (a)(3)(A). See generally WILLICK, *supra* note 6, at 148.

¹²⁸ Problems can arise when the service member is divorced after retirement and fails to reclassify the spouse as the “former spouse.” See Section V.J.3 (discussing problems with the one-year deemed election rule).

¹²⁹ See Pub. L. No. 97-252 §§ 1003(b)(1), 1006(c), 96 Stat. 718 (1982) *codified at* 10 U.S.C. § 1447 (designating the former spouses as potential beneficiaries to the SBP).

¹³⁰ This was a change from the original USFSPA. See JA 274, *supra* note 13, at 13. Even if a court order requires that the service member elect the former spouse as beneficiary of the SBP, the election is not automatic. Once a timely request is made, the finance center will flag the service member’s records. When the member retires, the former spouse will be designated as an SBP beneficiary.

¹³¹ 10 U.S.C. § 1450(f)(3). One confusing issue is when does the one year begin. The service member must make the election “‘within one year after the date of the decree of divorce, dissolution or annulment’ whereas the former spouse must make the request ‘within one year of the date of the court order or filing involved.’” WILLICK, *supra* note 6, at 154 (quoting 10 U.S.C. § 1448(b)(3)(A)).

¹³² See *Dugan v. Childers*, 2001 Va. LEXIS 9 (Va. Jan. 12, 2001) (holding that a former spouse was not entitled to SBP payments because she failed to file the deemed election paperwork within one year, despite the former service member’s civil court contempt conviction for failing to arrange the court-ordered SBP annuity). See generally WILLICK, *supra* note 6, at 152-55 (providing information about the one-year deemed election rule).

beneficiary, provided however, the former spouse was not the court-ordered beneficiary or if the former spouse dies.¹³³

G. Additional Benefits

Additional benefits, including commissary and exchange privileges and medical care, are available to certain former spouses in certain situations.¹³⁴ Eligibility for additional benefits depends on the former spouse's "category." The former spouse's category is a three number sequence. The first number is the years of creditable service by the service member, the second number is the length of the marriage, and the third number is the overlap between the first two. Thus, upon retirement, if the military member served twenty years of creditable service, the marriage lasted fifteen years, and the overlap between service and marriage was ten years, the former spouse would be a "20/15/10" spouse. The two categories of former spouses who are eligible for additional benefits are 20/20/20 spouses and 20/20/15 spouses.

Unlike the payment of retired pay, these benefits do not cost the former service member directly or indirectly. Additionally, the former spouse loses these benefits upon remarriage.

¹³³ See GRYCZYNSKI ET AL., *supra* note 124, at 4 (explaining designation of current wife as new beneficiary). See also WILLICK, *supra* note 6, at 150 (noting that the service member must wait at least one year to designate a current wife as the beneficiary).

¹³⁴ Other benefits include use of morale, welfare, and recreation (MWR) facilities, clubs, libraries, chapels, military golf courses, legal assistance, casualty assistance, and other benefits typically entitled to a military identification card holder. See 10 U.S.C. §§ 1062, 1065, 1072; WILLICK, *supra* 6, at 163.

1. Commissary and Exchange Privileges¹³⁵

Former spouses in the 20/20/20 category are entitled to continuing commissary and exchange privileges.¹³⁶ They must obtain a military identification card to exercise these privileges.¹³⁷ The purpose of these benefits is to provide merchandise, food, and certain services available to military personnel at moderate prices and in convenient locations.¹³⁸

2. Medical Benefits¹³⁹

A former spouse can receive different types of medical benefits depending on the length of the marriage and the years that the marriage overlapped with active military service.¹⁴⁰ The categories for medical benefits include full,¹⁴¹ transitional,¹⁴² and the

¹³⁵ See generally WILICK, *supra* note 6, at 162-63.

¹³⁶ 10 U.S.C. § 1062. Authorizes commissary and exchange privileges and care in military medical facilities or under the Civilian Health and Medical Program (CHAMPUS) for unremarried former spouses who were married for at least twenty years during active duty service, if divorced after 1 February 1983. "[A]n unremarried former spouse . . . is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of the retired member of the uniformed services." 10 U.S.C. § 1062. Under this section, unremarried means "unmarried" for these benefits and a termination of a subsequent marriage *does* revive them. For these benefits, the date of divorce is irrelevant.

¹³⁷ See WILICK, *supra* note 6, at 163 (explaining how a former spouse can obtain a military identification card).

¹³⁸ See 10 U.S.C. §§ 2484-2486.

¹³⁹ See generally WILICK, *supra* note 6, ch. 6 (providing the history and an overview of the medical benefits; explaining the requirements to receive medical benefits).

¹⁴⁰ 10 U.S.C. §§ 1072, 1078, 1086. See JA 274, *supra* note 13, at 11. See also U.S. DEP'T ARMY, REG. 40-3, MEDICAL DENTAL, AND VETERINARY CARE (30 July 1999) (allowing a service secretary to authorize medical care for individuals who are not eligible by law).

¹⁴¹ The full military health care program includes CHAMPUS coverage (to age sixty two) and in-patient and out-patient care at military treatment facilities. To receive full medical benefits the former spouse must be an unremarried 20/20/20 spouse. A termination of a subsequent marriage by divorce or death of the second spouse

Continued Health Care Benefit Program.¹⁴³ Otherwise qualified former spouses lose these medical benefits if they remarry, if they are covered by an employer-sponsored health plan, or if they are eligible due to age for Part A of Medicare.¹⁴⁴

H. Pre-Retirement Bonuses and Separation Incentives

Career Status Bonuses (CSB/REDUX),¹⁴⁵ involuntary separation benefits, voluntary fifteen-year retirements, voluntary separation incentives (VSI), and voluntary lump-sum special separation benefits (SSB) are not considered disposable retired pay under the

does not revive health care benefits, but an annulment does. Further, the former spouse cannot be enrolled in an employer-sponsored health insurance plan. See JA 274, *supra* note 13, at 12.

¹⁴² The transitional health care program includes full coverage for one year after the divorce, with the possibility of limited coverage for an additional year. To receive transitional health care, the former spouse must be a 20/20/15 spouse and unremarried. A termination of a subsequent marriage by divorce or death of the second spouse does not revive health care benefits, but an annulment does. Additionally, the former spouse must not be enrolled in an employer-sponsored health insurance plan. To qualify for the second year of limited coverage, the spouse must have enrolled in the DOD Continued Health Care Benefit Program (CHCBP). See JA 274, *supra* note 13, at 12.

¹⁴³ The DOD Continued Health Care Benefit Program (CHCBP) insurance plan is available to anyone who loses entitlement to military health care (former spouses, non-career soldiers and their family members, etc.). See JA 274, *supra* note 13, at 12. This premium-based temporary health care coverage program is designed to mirror the benefits offered under the basic CHAMPUS program. See *id.* (detailing the concept of CHCBP). This plan provides benefits for specific period, usually eighteen to thirty-six months, to certain unremarried former spouses and emancipated children who enroll and pay quarterly premiums. Eligible individuals must enroll in CHCBP within sixty days from when they lose eligibility for military health care. *Id.*

¹⁴⁴ The Medicare exception depends on specific personal factors. Any former spouse who loses medical benefits because of Medicare should seek legal assistance to ensure that the benefits were properly ended.

¹⁴⁵ See Office of the Secretary of Defense, *Retirement Choice for Those Who Entered after July 1, 1986*, at <http://pay2000.dtic.mil> (last visited Mar. 2, 2001) [hereinafter *REDUX Information*] (explaining the Career Status Bonus or “REDUX” retirement plan). Under this plan, when service members who entered after 1 July 1986 reach their fifteen-year mark, they have the option of converting to the pre-1986 retirement plan or keeping the new plan and accepting a \$30,000 bonus, which carries a commitment to remain on active duty until the twenty-year point. Because of the “bonus” payment while on active duty, these payment can be analogized to enlistment bonuses and judge advocate continuation pay.

USFSPA.¹⁴⁶ Nevertheless, some courts have treated VSI and SSB payments similarly to disposable retired pay, while courts have yet to litigate treatment of CSB/REDUX. The CSB/REDUX provides a pre-retirement bonus tied to a certain career service commitment.¹⁴⁷ The VSI program provides variable-length annuities to service members leaving active duty and affiliating with the Reserve Components.¹⁴⁸ The SSB program provides enhanced separation pay benefits for members agreeing to terminate all connections with the military.¹⁴⁹

Most courts have used the rationale of USFSPA cases and state division of pensions to divide VSI and other separation benefits.¹⁵⁰ A few courts view VSI payments as the separate property of the service member.¹⁵¹ These courts distinguish the VSI payments from

¹⁴⁶ See 10 U.S.C. § 1408 (defining the parameters of the USFSPA to include division of retired or retainer pay only). See also Kuenzli, *supra* note 31, at 34-38 (describing how courts treat separation incentives).

¹⁴⁷ See discussion *supra* note 145.

¹⁴⁸ 10 U.S.C. § 1175.

¹⁴⁹ 10 U.S.C. § 1174a.

¹⁵⁰ See *Lykins v. Lykins*, 2000 Ky. App. LEXIS 137 (Ky. Ct. App. Nov. 17, 2000) (holding that payments under the VSI were marital property and therefore the former spouse could be awarded a share of the payments); *Marsh v. Marsh*, 973 P.2d 988 (Ct. App. Utah 1999) (holding that the separation benefit received by the service member was divisible and property of the marriage because it was equivalent to an advance on his retirement pay); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996) (holding that a lump sum SSB payment was divisible and granting the former spouse the same percentage of the SSB she would have received of retirement pay). The *Marsh* court found that the SSB was "in the nature of retirement pay, compensating him now for the retirement benefits he would have received in the future." *Id.* See also *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Kelson v. Kelson*, 675 So. 2d 1370 (Fla. 1996) (holding that VSI payments were not covered by the USFSPA, but finding that 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 Crawford*, 884 P.2d 210 (Ariz. 1994); *In re Marriage of Babauta*, 66 Cal. App. 4th 784 (1998) (holding that VSI pay is divisible).

¹⁵¹ *Mackey v. Mackey*, No. 20010, 2001 Ohio App. LEXIS 98 (Ohio Ct. App. Jan. 17, 2001). In *Mackey*, a man who received a VSI payment upon leaving the Air Force after fourteen years of service was not required to divide the payment upon his divorce. The court distinguished the VSI payment from a pension plan because the payment was made after divorce.

retired pay or pension pay because they are similar to “severance payment . . . and compensate a separated service member for future lost wages.”¹⁵²

I. Conclusion

After almost twenty years, courts have settled the USFSPA rationale for division of retired pay. The courts now, however, must apply this well-settled rationale to new facts resulting from the changing society. Congress enacted the USFSPA to protect the wife of a long-term service member who devoted her entire life to supporting the service member at the sacrifice of her own career.¹⁵³ Today, former spouses are not exclusively women.¹⁵⁴ Many former spouses now have their own pension plans or retirement savings.¹⁵⁵ In the last twenty years, divorce and remarriage has not declined.¹⁵⁶ The USFSPA has not kept up with these changes in society.

¹⁵² McClure v. McClure, 647 N.E.2d 832, 841 (1994). Other courts, however, state that an employer’s motivation for the payment of benefits and an employee’s reason for accepting them are irrelevant considerations in characterizing employment benefits. *See In re Lehman*, 955 P.2d 451 (Cal. Rptr. 1998) *cited in In re Marriage of Babauta*, 78 Cal. Rptr. 2d 281, 283 (1998).

¹⁵³ *See supra* Section II.C.

¹⁵⁴ *See discussion supra* note 8.

¹⁵⁵ *See THOLE & AULT, supra* note 3, at 28

¹⁵⁶ Divorce Info, *Divorce Statistics*, at <http://www.divorceinfo.com/statistics.htm> (last visited Apr. 2, 2001).

IV. Opposing Views on the Current State of the Law

Many individuals and organizations seek further congressional revision of the USFSPA to accommodate the progressive needs of today's society. The most vocal activists are the former service members who look for significant substantive changes to the USFSPA. Former spouses, while less vocal as individuals, are well-organized and active lobbyists for procedural reform. Several issues, including terminating USFSPA payments upon remarriage, serve as battlegrounds for these opposing groups. The following sections present the positions of these parties and the focal points in the USFSPA war.

A. Issues Raised by Service Members

Anyone looking for former service members positions on the USFSPA need only search the Internet to find stories of individuals full of resentment, anger, and outright hostility.¹⁵⁷ Several of the websites are non-profit organizations advocating the positions of

¹⁵⁷ A search of the Internet revealed over fifty websites for former service members, mostly authored by individuals or unregistered organizations. See Alliance Against the USFSPA Law (AAUL), *Home Page*, at <http://www.usfspa.com> (last visited Jan. 22, 2001) [hereinafter *AAUL Homepage*] (providing this organization's thoughts on the USFSPA, sample letters to Congress, USFSPA horror stories, and plans of attacking the problem); Master Sergeant (Retired) Gordon Tatro, *The Military No-Fault Divorce and USFPA Law*, at <http://www.seacoast.com/~gordont/> (last visited Jan. 22, 2001) (compiling lengthy links, forums, chats, horror stories, and AAUL information); Terry Snyder, *Wake Up Congress!! Reform the USFSPA NOW!*, at <http://www.angelfire.com/ca2/EXTORT/index.html> (last visited Jan. 2001); Don Hollar, *If they had only known . . .*, at <http://www.geocities.com/Athens/Atlantis/2070/index.html> (last visited Jan. 22, 2001) (providing an individual's horror story with links to other web sites; this site is interesting in that the home page has a photo of the Viet Nam Memorial in Washington, D.C., with the letters USFSPA in bright red across it); John Verburt, *"Betrayal,"* at <http://www.members.nbc.com/USFSPA> (last visited Jan. 22, 2001) (providing an individual's horror story and links to the AAUL sites).

Some of these hostile feelings are found even on the private organization web sites. One example is a letter to a congressman reprinted on the American Retirees Association (ARA) web site. This letter includes the following quote:

former service members.¹⁵⁸ These lobbies began even before Congress enacted the USFSPA in 1982.¹⁵⁹ These organizations provide sample letters to Congress,¹⁶⁰ explanations of the current law and proposed legislation, and legal references to assist former service members.

This shameful and cowardly act required 'VOODOO' legislation in order to enact an unconstitutional 'EX POST FACTO' law, that gave 'PROPERTY RIGHTS' to our military retired pay to our ex-spouses, when we do not even have a property right to this pay ourselves, and it in effect created a 'NEW ENTITLEMENT' by which an ex-spouse earns 'LIFETIME PROPERTY RIGHTS' to our military retired pay for her 'Valuable Service' of even a very few years, when it requires the service member at least 20 years of service in order to earn retired pay.

Letter from Don Holland to The Honorable Robert C. Byrd (Mar. 14, 1998) *reprinted in* American Retirees Association, *Views from the Charthouse*, at <http://www.americanretirees.com/charths.htm> (last visited Jan. 9, 2001) [hereinafter *ARA Views from the Charthouse*].

¹⁵⁸ See, e.g., American Retirees Association, *Home Page*, at <http://www.americanretirees.com> (last visited Feb. 9, 2001); Fleet Reserve Association (FRA), *Home Page*, at <http://www.fra.org> (last visited Jan. 25, 2001) [hereinafter *FRA Home Page*]; Women in Search of Equity, *Home Page*, at <http://members-proxy-2.mmbprxy.home.net/skays/wise/> (last visited Jan. 23, 2001) [hereinafter *WISE Home Page*] (WISE is an association formed by women who support the rights of service members in divorce and who *are committed to equitable reform* of the "[USFSPA]").

¹⁵⁹ Since the USFSPA was proposed, the primary reason that military personnel have so vigorously criticized the USFSPA is their emotional and financial attachment to their military retirement pay. Kuenzli, *supra* note 31, at 8-9, n.65 (referencing FLORENCE W. KASLOW & RICHARD I. RIDENOUR, *THE MILITARY FAMILY* 217-25 (1984); K.C. JACOBSEN, *RETIRING FROM MILITARY SERVICE* 222-23 (1990)). See S. REP. NO. 97-502, at 50 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1633.

Military retired or retainer pay is an integral part of the military compensation system. Many, if not most, career decisions are made based on individual's perceptions of the stability, reliability, and integrity of the retirement system. Most of these groups suggested a ten-year minimum for the duration of the marriage in order for distribution of retirement pay to the former spouse.

See id. at 43, *reprinted in* 1982 U.S.C.C.A.N. at 1626-28 (statement of Sen. Denton).

¹⁶⁰ See Fleet Reserve Association, *Letter Sent to Members of the House of Representatives Who Have Not Cosponsored H.R. 72*, at <http://www.fra.org> (last visited Jan. 19, 2001); *AAUL Homepage*, *supra* note 157 (providing fourteen "samples and inspirations" for a letter writing campaign); *WISE Home Page*, *supra* note 158.

WRITE, WRITE, WRITE!!!! We can't emphasize this enough. You must contact your Congressman, in some form or another, if he/she is going to understand the full ramifications and impact the USFSPA has had, and will continue to have, on not only military retirees and their families, but armed forces morale and retention. They must also fully understand the clear facts of USFSPA reform and what it will and will not do. We need to prove to our members of Congress that military retired pay is not a pension and should not be compared to civilian retirement/pension plans of ANY KIND.

Id.

More plentiful than Internet sites of organizations are postings by individuals who voice their negative feelings about the USFSPA and the military retirement system. One such forum is entitled "Horror Stories," which provides a place for individuals to tell their personal USFSPA encounters.¹⁶¹ These sites often focus on the bottom line—"it's my money"—and do not review the law or provide suggestions for change.

In addition to Internet postings, some military retirees use the legal system to voice their animosity toward the USFSPA. These former service members persist in frivolous court claims to prevent their former spouses from receiving a portion of their retired pay.

¹⁶¹ See AAUL, *Military Betrayed Horror Stories*, at <http://www.militarybetrayed.com> (last visited Nov. 16, 2000). One of the well-known USFSPA horror stories is that of Colonel Bob Stirm, known for the heart-wrenching photo depicting his return from POW camp into the arms of his family.

Colonel Stirm was captured as a POW and sent to a North Vietnam POW camp in the Fall of 1967. He was repatriated to the in 1973. Shortly after returning home, he was served with divorce papers. According to the papers, the court declared that the "date of separation" from the spouse was 1 April 1970, during a time when he was still a POW. The former spouse did not have to repay any pay and allowances she received and spent after the "date of separation." She was entitled to his accrued leave pay; and moneys he received under the War Crimes Act for inhumane treatment. The former spouse was also awarded the home, car, 42.7% of his military retired pay, child support, and spousal support (even though the former spouse had numerous open affairs during the member's incarceration in a POW camp and marrying the attorney who prepared the divorce action on the former spouses' behalf).

Id. See also Gordon Tatro, *USFSPA Horror Stories*, at <http://www.seacoast.com/~gordont/members.htm> (last visited Feb. 5, 2001). Providing a forum for individuals to tell their USFSPA stories.

In 1990 I moved out of my home in Tucson AZ after 18 years of being married. I had retired with 21 years and 9 months in the USAF. After which my wife's boyfriend moved in. She wanted a divorce and that was that. I moved to a studio apartment. On the divorce decree she got the house and everything with it. She got custody of all three kids. I was suppose to have dental and medical insurance for the kids. Out of 1100.00 a month she gets about 565.00 a month and then received the other half of the pension for child support. Plus I was suppose to send another 250.00 to the court for the rest of the child support money. This left me a big fat zero to live on. . . . The only reason I did not make the street was because the apartment manager was a nice lady and took pity on me and waited until I went back to work and could pay the rent.

Id.

The results are generally not favorable to the former service members. For example, in *Goad v. United States*,¹⁶² the U.S. Court of Appeals for the Federal Circuit ordered Goad, a former service member, to pay double costs to the government for filing frivolous claims. Further, the court directed the clerk “not to accept for filing any notice of appeal or petition submitted by [Goad].”¹⁶³ In his most recent case, Goad presented a unique argument to the court. Because Goad had previously lost a court battle to recoup the money *paid to his former spouse* under the USFSPA, Goad’s most recent argument was to recoup the money *not paid to him* because of the USFSPA.¹⁶⁴ This series of cases is an excellent example of the persistence of some former service members to receive their full, retired pay.¹⁶⁵

Even the legitimate, non-profit organizations, however, often present their information in a slanted fashion. Looking for additional proponents of their cause, these organizations enrage the reader with the inequities of the USFSPA, but do not always provide suggestions for specific change.¹⁶⁶ Common themes elicit hostility toward former

¹⁶² 2000 U.S. App. LEXIS 20189 (July 21, 2000).

¹⁶³ *Id.* Before this court order, Goad had challenged, in various state and federal courts, the payment of a portion of his retired pay to his former spouse. After the divorce court originally ordered payment of the retired pay to his former spouse, Goad refused to pay and was imprisoned for contempt. *Id.* at *1. In an earlier and separate appeal, the Fifth Circuit noted that it was the sixth lawsuit relating to Goad’s military benefits. *Goad v. Rollins*, 921 F.2d 69, 70 (5th Cir. 1991). That suit was also dismissed as being “patently frivolous.” Goad had also appealed to the U.S. District Court for the Southern District of Texas. *Goad v. United States*, 661 F. Supp. 1073 (S.D. Tex.), *affirmed by* 837 F.2d 1096 (Fed. Cir. 1987).

¹⁶⁴ *Goad*, 2000 U.S. App. LEXIS 20189 at *3.

¹⁶⁵ Goad is not the only former service member barred from filing claims because of a series of frivolous lawsuits. See *Chandler v. Chandler*, 991 S.W.2d 367 (Tex. Ct. App. 1999) (permanently enjoining a former service member from further litigation concerning the validity of his marriage and subsequent division of his military retired pay).

¹⁶⁶ See, e.g., *Veterans Legislative Priorities Hearing Before the House Armed Service Comm.* (Mar. 1, 2001) (statement by Charles L. Calkins, National Executive Secretary, Fleet Reserve Association). “[The] USFSPA has become a one-way weapon for far too many ex-spouses and their attorneys to financially bleed our military

spouses' advocacy organizations¹⁶⁷ and emphasize that Congress should revise the USFSPA to reflect "the economic and political gains realized by women since 1982."¹⁶⁸

Despite the propaganda on former service members' websites, some of these organizations, including Women in Search of Equity (WISE),¹⁶⁹ the American Retirees Association (ARA),¹⁷⁰ the Fleet Reserve Association (FRA),¹⁷¹ and The Retired Officers

retirees The current language in the Act is offensive, inequitable and discriminating to many of our Nation's combat veterans." *Id.*

¹⁶⁷ In the bullets addressing the problems with the USFSPA, the ARA lists: "Members of Congress continue to be intimidated by the feminist voting bloc"; "Traditional male gallantry fails to produce a large enough number of female victims of the USFSPA to generate a *feminist* groundswell for a fair and equitable USFSPA." American Retirees Association, *USFPA*, at www.americanretirees.com/usfspa.htm (last visited Jan. 9, 2001) [hereinafter *ARA USFSPA Internet Page*] (emphasis in original).

¹⁶⁸ *Id.*

¹⁶⁹ Women in Search of Equity (WISE), *What is the USFSPA?*, at <http://members.home.com/skays/theusfspa.htm> (last visited Feb. 6, 2000) [hereinafter *WISE USFSPA Internet Page*]. WISE contends that awarding a former spouse a share of military retired pay, *prior to eligibility of the member*, is granting a former spouse a greater right to a lifetime divisible interest in the service member's retired pay than the service member had at time of divorce. Service member eligibility for retirement pay is dependent upon meeting specific requirements, to include twenty creditable years on active duty, which is not the case for a former spouse.

¹⁷⁰ *ARA USFSPA Internet Page*, *supra* note 167. The ARA's position is also advocated by the executive director, Captain (Retired) Frank W. Ault, U.S. Navy, in his book *Divorce and the Military II*. While one chapter is designated as the ARA's position, the entire book is slanted towards the arguments of the former service member. See generally THOLE & AULT, *supra* note 3, ch. 17. Despite its obvious leanings, this book is an excellent resource for both the former service member and the former spouse because it succinctly and effectively provides information about military divorce.

¹⁷¹ The FRA serves active duty, reserve, and retired enlisted personnel of the Navy, Marine Corps, and Coast Guard. See *FRA Home Page*, *supra* note 158. The average age of an FRA member is sixty-eight; they are all veterans of as many as three wars. *Id.* The FRA has 153,000 members. *Hearings on the National Defense Budget for FY 2001 Before the House Comm. on Appropriations Subcomm. on Defense*, 106th Cong. (May 3, 2000) (statement of Joseph Barnes, Director for Legislative Programs, Fleet Reserve Association). The FRA position on the USFSPA and proposals to amend it is as follows:

[T]he [USFSPA] made its way through Congress under suspicious circumstances and has become a one-way weapon used by many former spouses, and their attorneys, to financially bleed their military spouses of outrageous sums. . . . The current statute is offensive. It is not equitable to all it serves, and it is discriminating to many. . . . FRA strongly endorses Messrs. Stump and Norwood's proposal, H.R. 72, and urges all members of this Subcommittee to support its proposed amendments to the USFSPA. The Association believes USFSPA should be as fair to the military retiree veteran as it is for his or her spouse.

Association (TROA),¹⁷² have specific suggestions to change the USFSPA. Some of the most important issues are: determining a former spouses percent of retired pay based on date of divorce, not date of retirement;¹⁷³ revising the SBP; and extending privileges to spouses who meet the 20/20/15 test. This thesis discusses these specific suggestions at length in Section VI, proposals to change the USFSPA.

Additionally, former service member organizations suggest other, less controversial changes to the USFSPA.¹⁷⁴ These organizations state that the DOD should inform active duty and reserve personnel of the existence and possible consequences of the USFSPA both

Hearings on the FY 2001 Department of Veterans Affairs Budget Before the Senate Comm. on Appropriations Subcomm. on VA, HUD and Independent Agencies (Apr. 7, 2000) (statement of the Fleet Reserve Association). The same statement was also given to the U.S. House of Representatives on 7 April 2000, but was presented by Master Chief Terry L. Ynette, U.S. Coast Guard (Retired) National Service Officer of the Veterans Affairs Fleet Reserve Association.

The FRA also sponsored a voluntary survey. They received 327 responses from both male and female members of the Armed Forces, mostly active duty and retired enlisted personnel in pay grades E5 through E9. The survey is available online. See *FRA Home Page*, *supra* note 158. The FRA sent the survey, along with a letter, to most members of Congress and requested congressional support for amending the USFSPA.

¹⁷² See The Retired Officers Association, Legislative Initiatives, *Uniformed Services Former Spouses Protection Act (USFSPA) Reform* (Jan. 2001) [hereinafter *TROA USFSPA Reform*] (detailing TROA's position on the USFSPA), available at <http://www.troa.org/legislative/retirement/usfspa.asp>. During the 1998 Hearings on garnishment of Veterans' benefits for child support and family obligations, TROA presented a detailed statement of proposals and arguments concerning the USFSPA. See *Hearing Before the House Comm. On Veterans' Affairs Regarding Garnishment of Veterans' Benefits for Child Support and Other Court-Ordered Family Obligations* (Aug. 5, 1998) [hereinafter *1998 Hearing*] (statement of Patrick J. Kusiak, Legal Consultant, The Retired Officers Association).

¹⁷³ Service members refer to this as the "windfall" benefit. In their opinion, because a former spouse did not contribute to the service member's career after the date of divorce they receive a monetary windfall in the form of a percentage of the service member's future promotions and longevity pay increases. Ending the windfall benefit has been and continues to be one of the main issues of former service members. See THOLE & AULT, *supra* note 3, at 238-39; *WISE USFSPA Internet Page*, *supra* note 169 ("[P]ayments to former military spouses, through the [DFAS], are derived from all post-divorce career advancements and pay increases, allowing former spouses a monetary windfall when the member retires often many years after a divorce."). See also *TROA USFSPA Reform*, *supra* note 168 (supporting the award of retired pay based on the service member's years of service and pay grade at the time of divorce and not on the grade and years of service at retirement).

¹⁷⁴ An Open Letter to the Assistant Secretary of Defense from Captain (Retired) Frank W. Ault, U.S. Navy, Executive Director of American Retirees Association (Jan. 25, 1999) [hereinafter *ARA Position Letter*], available at <http://www.americanretirees.com/hotspot>.

when they begin military service and during retiree seminars.¹⁷⁵ Further, the DOD should require the service branches' judge advocate general corps to be familiar with the USFSPA and capable of providing legal advice at legal assistance offices.¹⁷⁶ While these proposed changes may assist administering the USFSPA, the position of this thesis is that these changes should not be statutory, but policy.

Former service member organizations have additional suggestions for change that this thesis does not incorporate into the legislative proposal at the Appendix. These suggestions include: (1) ending distribution of retired pay to former spouses upon their remarriage; (2) instituting a statute of limitations for USFSPA issues; (3) requiring a minimum length of marriage to qualify for benefits; (4) amending the USFSPA to include additional guidance for state courts. The following sections discuss these issues and argue that Congress should not adopt these proposals.

1. Termination of USFSPA Payments upon Remarriage

Terminating payment of retired pay to a former spouse upon remarriage was one of the primary proposals of the Equity Act of 1999.¹⁷⁷ Currently, the USFSPA does not require

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* All Army JAG basic and graduate course officers receive classes on the USFSPA. Interview with Major Michael Boehman, Professor of Legal Assistance, at The Judge Advocate School, Charlottesville, Va. (Feb. 12, 2001).

¹⁷⁷ H.R. 72, 106th Cong. (1999). All of the former service members' organizations support all or part of this proposal. *See 1998 Hearing, supra* note 172 (statement of Patrick J. Kusiak, Legal Consultant to The Retired Officers Association); *id.* (statement of C.A. "Mack" McKinney, Legislative Counsel for the Fleet Reserve Association); ARA Position Letter, *supra* note 174; *TROA USFSPA Reform, supra* note 168 (supporting the

that property payments of retired pay to former spouses terminate upon remarriage. Because the USFSPA classifies retired pay as marital property, state domestic relations laws apply when dividing military retired pay.¹⁷⁸ In a divorce, the court divides marital property and grants permanent ownership rights to the recipient; for example, a spouse or former member is not required to return a house or car to the other party upon remarriage. Thus, by characterizing retired pay as marital property and enforcing state domestic relations laws, USFSPA payments *cannot* terminate upon remarriage.

For service members to succeed in their bid to terminate USFSPA payments upon remarriage of former spouses, Congress must reclassify military retired pay as current compensation rather than retirement pay, which would result in eliminating the marital property designation. Once the marital property designation was removed, former service members could retain retired pay as separate property, which is not divisible upon divorce. This thesis explains, but refutes, each of the service members' arguments, provides additional

termination of USFSPA payments upon remarriage of the former spouse). *See also WISE USFSPA Internet Page, supra* note 169.

Should the former spouse continue to receive a division of the service member's retirement pay after remarriage, inconsistent with the other federal retirement programs? Should a former spouse be entitled to benefit financially from the member's time served after termination of the marital status? *WISE* emphatically says NO!

Id. This Equity Act provision failed, as did earlier attempts to make this statutory reform. *See, e.g.,* H.R. 2200, 105th Cong. (1997); H.R. 572, 101st Cong. (1990). *See generally* THOLE & AULT, *supra* note 3, at 228.

¹⁷⁸ With respect to domestic relations law, the Supreme Court has held that "state interests . . . in the field of family and family-property arrangements . . . should be overridden . . . only where clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied." *United States v. Yazell*, 382 U.S. 341, 352 (1966). *See Dugan v. Childers*, 2001 Va. LEXIS 9, at *6 (Va. Jan. 12, 2001) (holding that federal laws concerning SBP one year deemed election rule preempt the state court contempt holding).

arguments against the proposal, and concludes that USFSPA payments should not terminate upon remarriage of the former spouse.¹⁷⁹

a. How do Federal Statutes and State Domestic Relations Laws Interact?

Division of property during divorce has traditionally been a function of state domestic relations law.¹⁸⁰ The underlying theme of this thesis is that the USFSPA should not interfere with state domestic relations laws.¹⁸¹ Federal law that instructs states on *how* and *when* to

¹⁷⁹ In addition to the legal arguments presented in this section, this thesis mentions a social argument against terminating USFSPA payments upon remarriage. That is, including a remarriage penalty unnecessarily involves the government in the social institution of marriage. In addition to the purely preemption argument, the federal government should not influence whether a citizen marries. If Congress enacts laws that use marriage or remarriage as a trigger for losing a court-ordered entitlement, the federal government will unnecessarily be discouraging marriage. Finally, Congress must consider the effect on individual former spouses if USFSPA payments terminated upon the former spouse's remarriage. If the threat of terminating USFSPA payments upon remarriage existed, it would serve to "continue the pain of divorce as the [military] member would continue to control the life of the former spouse." NMFA Position Letter, *supra* note 6. When faced with the question of how this proposal would affect them, many former spouses said that they would never remarry, or would be forced to return to court for an award of other property in lieu of retired pay. These opinions came in response to the DOD's call for comments in the Federal Register and the DOD's USFSPA Comment Internet site. Department of Defense, *Comments for the Federal Former Spouses Protection Laws Review*, at <http://dticaw.dtic.mil/prhome/comments.html> (last visited Mar. 30, 2001). See E-mail from Mary Ellen Hines to Lieutenant Colonel Thomas K. Emswiler (Feb. 22, 1999) ("I have not remarried and now will never remarry due to the concern that this or subsequent legislation would cause the loss of my share of the pension with devastating financial effect."); E-mail from Carol Peterson to Lieutenant Colonel Thomas K. Emswiler (Mar. 2, 1999) ("If the USFSPA was changed, I would seriously consider divorcing my current husband and just living with him so that I could keep the retired pay benefits—I need this money to live on because my current salary as a teacher is low and I never had a vested in one place."); Elaine Motyl to Lieutenant Colonel Thomas K. Emswiler (Mar. 30, 1999) [hereinafter Motyl E-mail] ("Many of the remarried former spouses like myself will go back to court to acquire from their former husband's other assets the equal financial compensation that was legally awarded to them at the time of the divorce.").

¹⁸⁰ See *supra* note 178 explaining federal preemption of state domestic relations law.

¹⁸¹ One practitioner noted that his service member clients could not believe that they were treated the same by the state court that any other divorcing party was treated; they were sure that they were being treated differently. "Each state makes its decision on how pensions will be divided. The same rules apply to everybody, whether they work for the post office, the FAA, Lucent Technologies, the Teamsters' Union or as a school teacher." Tom Philpott, *Pentagon Report on Ex-Spouse Law Crawls Toward Completion*, NEWPORT NEWS DAILY PRESS, July 14, 2000 (quoting Edward C. Schilling, a retired Air Force colonel and lawyer in Aurora, Colorado).

When military retiree clients hear this, he said, 'they are dumbfounded. They don't believe I'm telling the truth because they've gotten the idea that the military is picked on. But the fact

divide marital property unnecessarily infringes on state domestic relations and marital property laws. In all fifty states property allocated pursuant to a divorce decree remains the property of the party, regardless of future marital status.¹⁸² Because the USFSPA classifies retired pay as marital property,¹⁸³ states laws limit reallocation after divorce.

While terminating alimony or support payments upon remarriage is fair and logical, terminating the former spouses interest in retired pay is inconsistent with the property law of a divorce. Because retired pay is “property” of a marriage, similar to a house, car, or contents of a joint bank account, a court cannot require cancellation of that property right. Provided these payments are designated as a “property” division of the divorce, this provision should not change. Former spouses organizations and the American Bar Association support the continued classification of retired pay as property.¹⁸⁴

is, if you have a U.S. senator divorcing in one courtroom and an Air Force colonel divorcing in the next, the law gives the colonel more protection.’ Some of the extra protection, Schilling said, included the law’s definition of “disposable” retired pay and its 50 percent limit on retired pay that cannot be divided as property, even when multiple ex-spouses are involved.

Id. (quoting Edward C. Schilling, a retired Air Force colonel and lawyer from Aurora, Colorado).

¹⁸² 24 AM. JUR. 2D *Divorce and Separation* §§ 477-606 (2000).

¹⁸³ 10 U.S.C. § 1408(c) (2000).

¹⁸⁴ See Position Paper, Ex-Partners of Servicemen(women) for Equality (EX-POSE), *Opposition to the Proposed Legislation H.R. 72* (n.d.) (on file with author) [hereinafter EX-POSE Position Paper]; National Military Family Association, *NMFA Issues and Actions for 2001*, at 2 (Dec. 2000) [hereinafter *NMFA Issues for 2001*], available at <http://www.nmfa.org/FactSheets/Issues2001.pdf>; Telephonic Interview with Margaret Hallgren, President, National Military Family Association, Inc. (Jan. 19, 2001) [Hallgren Interview] (Hallgren expects to testify during hearing on this and other USFSPA issues before the next Congress); Doris Mozley, Committee for Justice and Equality for the Military Wife, *Military Divorces Should be Fair, Too*, NAVY TIMES (Jan. 24, 2000), reprinted in *ARA Views from the Charthouse*, *supra* note 157. See also 1998 Hearing, *supra* note 172 (testimony of Marshal S. Willick, American Bar Association).

Congress should not create federal law that *requires* these payments to end upon remarriage of the former spouse. Military retirement payments should not be restricted in any manner different from other “property” or civilian retirement payments. State courts, not federal statutes, should determine the effect of remarriage upon property interests.

b. Is Military Retired Pay Reduced Pay for Reduced Services?

The primary argument service members make for statutorily terminating USFSPA payments upon remarriage is that military retired pay is not property, it is “reduced pay for reduced service, not a pension earned for services previously rendered.”¹⁸⁵ To make the “reduced pay” argument, former service members distinguish military retired pay from civilian pensions.¹⁸⁶ A civilian is not subject to involuntary recall to his private job; a former service member may be involuntarily recalled to active duty.¹⁸⁷ A civilian is not required to continue to comply with the company’s by-laws; a former service member must continue to comply with the Uniform Code of Military Justice (UCMJ), or risk recall and court-

¹⁸⁵ Former service members’ organizations vehemently argue this point. See ARA Position Letter, *supra* note 174; *WISE USFSPA Internet Page*, *supra* note 169. In *McCarty*, the Supreme Court agreed that retired pay was reduced pay for reduced service, but did not decide the case on that point. *McCarty v. McCarty*, 453 U.S. 210, 222 (1981). “[W]e 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 . . .” *Id.* at 223.

¹⁸⁶ See THOLE & AULT, *supra* note 3, at 34 (listing restrictions on retired military members required to receive retired pay, which are not restrictions on former spouses who receive a property interest in the retired pay); Letter to Editor from Frank Ault, Executive Director of American Retirees Association, NAVY TIMES, Jan. 19, 2000 [hereinafter Ault Letter], available at *ARA Views from the Charthouse*, *supra* note 157.

¹⁸⁷ Pub. L. 96-513, § 106, 94 Stat. 2868, cited in *McCarty v. McCarty*, 453 U.S. 210, 221 (1981).

martial.¹⁸⁸ Civilian pensions are automatically received, cannot be ended, and do not tie the recipient potential additional responsibilities.¹⁸⁹

Despite former service members' arguments, the Supreme Court does not consider military retired pay reduced pay for reduced services. In *Barker v. Kansas*,¹⁹⁰ the Supreme Court held that military retirement benefits are deferred pay for past services. In *Barker*, the Court considered the definition of military retired pay for state income tax purposes and held that although retired service members were different from civilian retirees, their pay was not reduced pay for reduced service.¹⁹¹ To reach this conclusion, the Supreme Court considered a number of factors, which can apply beyond the scope of *Barker*'s state taxation issue to refute the service members "reduced pay" argument.

First, the Court reviewed how military retired pay is calculated, and determined that retired military pay is similar to deferred compensation in that the amount of retired pay

¹⁸⁸ 10 U.S.C. § 802(4) (2000).

¹⁸⁹ Service members apparently base their argument on the overturned, lower court decision in *Barker*. *Barker v. Kansas*, 815 P.2d 46, 53 (Kan. 1991), *reversed by* *Barker v. Kansas*, 503 U.S. 594 (1992).

(1) Federal military retirees remain members of the armed forces of the United States after they retired from active duty; they are retired from active duty only; (2) federal military retirees are subject to the Uniform Code of Military Justice (UCMJ) and may be court-martialed for offenses committed after retirement; (3) they are subject to restrictions on civilian employment after retirement; (4) federal military retirees are subject to involuntary recall; (5) federal military retirement benefits are not deferred compensation but current pay for continued readiness to return to duty; and (6) the federal military retirement system is noncontributory and funded by annual appropriations from Congress; thus, all benefits received by military retirees have never been subject to tax.

Id. at 53.

¹⁹⁰ 503 U.S. 594 (1992).

¹⁹¹ *Id.* at 599.

actually received is calculated based on the service member's rank and longevity at the time of retirement.¹⁹² If retired pay were reduced pay for reduced services, the amount of compensation would be based on current service, which includes "continuing duties [the service member] actually performs."¹⁹³

Second, the Court reviewed their own precedents defining military retired pay. Citing *Tyler*¹⁹⁴ and *McCarty*,¹⁹⁵ the Court noted that their opinions had never squarely addressed characterization of military retired pay. In *Tyler*, the Supreme Court stated in dicta that retired pay was "effectively indistinguishable from current compensation at a reduced rate" but did not rely on that conclusion to hold that military retired pay should increase at the same cost of living rate that active duty members received.¹⁹⁶ In *McCarty*, the Court did not adopt the *Tyler* explanation of retired pay but reserved characterizing retired pay for a case more squarely on point. The Court did note, however, "that States must tread with caution in this area, lest they disrupt the federal scheme."¹⁹⁷ The Supreme Court was unable definitively to answer the *Barker* issue using precedents.

¹⁹² *Id.* at 599-600.

¹⁹³ *Id.* at 600. The Court also noted that military retired pay was calculated similarly to the state public employee retirement system. *Id.*

¹⁹⁴ *United States v. Tyler*, 105 U.S. 244 (1882) (holding that officers retired from active military service were entitled to the same percentage increase in pay that a statute had provided for active officers).

¹⁹⁵ *McCarty v. McCarty*, 453 U.S. 210 (1981).

¹⁹⁶ *Tyler*, 105 U.S. at 245-46.

¹⁹⁷ *McCarty*, 453 U.S. at 224 n.16.

Finally, the Court turned to a review of congressional intent.¹⁹⁸ Reviewing the USFSPA, the Court noted that “to extend to states the option of deeming such benefits as part of the marital estate as a matter of state law would be inconsistent with the notion that military retirement pay should be treated as indistinguishable from compensation for reduced current services.”¹⁹⁹ The Court also looked to congressional intent in other federal laws and discovered that some tax laws treat military retired pay as deferred compensation.²⁰⁰

Based on these three arguments, the Supreme Court concluded that for taxation purposes,²⁰¹ military retired pay is deferred pay for past services. Specifically, characterizing retired pay as “current compensation for reduced current services does not survive analysis in light of the manner in which these benefits are calculated, our prior cases, or congressional intent as expressed in other provisions treating military retirement pay.”²⁰² The Supreme Court’s *Barker* holding concerning taxation can be analogized to marital property to refute the service member’s “reduced pay” argument.

To change the characterization of retired pay, former service members must lobby Congress to repeal the USFSPA. When enacting the USFSPA, Congress characterized military retired pay as marital property. Such a characterization has withstood court

¹⁹⁸ *Barker*, 503 U.S. at 603.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 604 (citing 26 U.S.C. § 219(f)(1) and noting that military retired pay is deferred compensation for the purposes of making IRA contributions).

²⁰¹ The Supreme Court focused on interpreting 4 U.S.C. § 111, which discusses taxation of federal pay.

²⁰² *Barker*, 503 U.S. at 605.

challenges. Despite attempts, former service members have not persuaded the Supreme Court that the USFSPA is unconstitutional.²⁰³ Based on the evolution of the USFSPA and the unsuccessful court challenges, former service members will not succeed in a congressional bid to reclassify military retired pay as separate property of the service member, which is employment income rather than retirement pay.

Congress has preempted state courts from limiting the definition of retired pay. State courts must apply their own domestic relations property division laws to military retired pay, as they would any other marital property.

c. Should Military Retired Pay be Treated the Same as Other Federal Pensions?

As a follow-on argument, former service members compare military retired pay to retired pay received by other federal employees and argue that military retired pay should have the same remarriage provisions as other federal retirement programs.²⁰⁴ Specifically,

²⁰³ See *Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990). This suit argued that the USFSPA was unconstitutional based on an impermissible "taking" of property, or, in the alternative, that USFSPA was an unconstitutional infringement upon the contract between the service member and the United States. See generally WILLICK, *supra* note 6, at 27-30 (explaining the arguments and holdings in *Fern*). Only a new argument to the Supreme Court can trump Congress by opining that USFSPA is an unconstitutional law.

²⁰⁴ WISE USFSPA Internet Page, *supra* note 169.

Another invidious aspect of the USFSPA is that the law permits payments to the nonmilitary former spouse for *LIFE*, whether or not he or she has remarried. This is inconsistent with the former spouses protections for all other federal agencies, to include:

- civilian federal employees
- US Foreign Service
- Central Intelligence Agency
- Serviceman's Benefit Program of the [DOD]
- The widows' pension benefit program (DIC) of the [DOD]
- and the abused military dependents provisions of the USFSPA.

Id.

under the Foreign Service and Central Intelligence Agency (CIA) retirement annuities paid to former spouses terminate if the former spouse remarries before age fifty-five.²⁰⁵ However, former service members fail to compare the remaining federal retirement plans before distinguishing the USFSPA as unjust.

In addition to the CIA and Foreign Service, other federal retirement plans include Civil Service Retirement System (CSRS), Federal Employee's Retirement System (FERS), Railroad Retirement System, and the Federal Employees' Thrift Savings Plans (TSP). Each of these plans uniquely provides retirement benefits for qualifying employees based on the needs and circumstances of that specific federal system.²⁰⁶ Neither the CSRS, FERS, nor Railroad Retirement System (Tier II)²⁰⁷ contains statutory or regulatory provisions to terminate retired pay to former spouses upon their remarriage.²⁰⁸ However, state courts can include a remarriage provision in a property settlement or divorce decree.²⁰⁹ The TSP, which is similar to a private employee's 401K plan, is paid in a lump-sum to a former spouse; remarriage does not effect this payment.²¹⁰

²⁰⁵ Foreign Service Retirement and Disability System, 22 U.S.C. §§ 4068, 4069a(6) (2000); Foreign Service Pension System, 22 U.S.C. § 4071j(a)(1)(B); Intelligence Agency Retirement Act, 50 U.S.C. §§ 224(b), 403 (2000).

²⁰⁶ Emswiler Interview, *supra* note 7 (relying on information gathered to prepare the DOD Report to Congress Concerning Federal Former Spouse Protection Laws, which has not yet been released).

²⁰⁷ Railroad Retirement System has two "tiers." Tier I benefits terminate upon the remarriage of the former spouse, but can be reinstated in some circumstances. Tier II does not contain a remarriage provision, but one can be supplied by court order. *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

The former service member's comparison of military retired pay to other federal system retirement plans fails. Congress designed each retirement plan to meet the needs of each different differing federal agency. Former service members cannot successfully claim inequities when Congress created the retirement plans to serve different purposes.

d. Should a Remarriage Penalty Provision Apply Retroactively?

The Equity Act of 1999 proposes terminating payments upon remarriage, with an effective date of 25 June 1981, the day before the *McCarty* decision. If Congress considers such a provision, this thesis advocates that the amendment not be retroactive for several reasons. First, the state domestic relations courts would be flooded with military divorce litigation, at the great expense of former service members and former spouses.²¹¹ Considering the extent of litigation when Congress made the original USFSPA retroactive to the day before the *McCarty* decision—a window of two years—the number of cases that would be reopened, if this provision were retroactive after twenty years, would flood state courts with military divorce litigation.²¹² Second, retroactivity would create a serious inequity to former spouses, especially older women, who exist primarily on the USFSPA payments.²¹³ While the major proponents of retroactivity are surely those currently affected

²¹¹ See Motyl E-mail, *supra* note 179 (“Many of the remarried former spouses like myself will go back to court to acquire from their former husband’s other assets the equal financial compensation that was legally awarded to them at the time of the divorce.”).

²¹² See THOLE & AULT, *supra* note 3, at 23. Retroactivity was extensively litigated because the USFSPA did not prohibit reopening cases, it merely permitted state courts to reconsider judgments in light of marital property and procedural laws without the presence of *McCarty*.

²¹³ E-mail from Nola J. Morgan to Lieutenant Colonel Thomas K. Emswiler (Mar. 3, 1999) (“I was aghast to learn that your office is planning some changes to the USFSPA that would seriously affect the financial welfare of former spouses, especially elderly women such as myself.”). Mrs. Morgan further states:

by a former spouse's remarriage, even one of the leading former service member advocates does not favor retroactivity of legislation.²¹⁴

Congress should not enact legislation that terminates a former spouse's property rights to retired pay upon remarriage. Such a revision may encounter property rights constitutional scrutiny from the Supreme Court. Parties to a divorce would flood state domestic relations courts with motions to reopen finalized divorces, and individuals who relied on this property interest for support would suffer greatly.

2. Impose a Statute of Limitations to Divide Military Retired Pay

The USFSPA does not currently have a statute of limitations. The Equity Act of 1999 proposes a two-year statute of limitations for "apportionment of the retired pay of the [military] member."²¹⁵ Former service members' organizations also support having a statute

Please do not cut these benefits. This is not a handout but is my fair share of the retirement from the 25 years I devoted to my husband and to the Marine Corps and the additional 13 years we were married after he retired women who devoted their adult lives to furthering the military should not be left out in the cold in their old age.

Id.

²¹⁴ In his book on military divorce, the ARA executive director states that laws should not be retroactive.

For any law within the United States to be truly valid, it must, first, meet the requirements of the Constitution and become effective only from its actual date of passage. It cannot be postdated. To be fair, it must also be universally applied, nondiscriminatory, consistent in its application and equitable in its considerations.

See THOLE & AULT, *supra* note 3, at 52.

²¹⁵ H.R. 72, sec. 4., 106th Cong. (1999).

of limitations for all USFSPA issues.²¹⁶ “There should be some element of closure in the divorce process. Neither party should be able to persist, indefinitely, with the threat of further action.”²¹⁷ Most organizations support the Equity Act’s proposal of a two-year statute of limitations for a former spouse to claim benefits under the USFSPA.

One complaint by former military organizations is that courts routinely re-open final divorce decrees sometimes ten or fifteen years after the divorce for the sole purpose of dividing military retired pay.²¹⁸ According to these organizations, civilian federal pension plans include a statute of limitations for dividing retired pay.²¹⁹

This thesis argues that imposing a federal statute of limitations on state domestic relations courts is neither prudent nor necessary. Congress should not preempt state practices

²¹⁶ See THOLE & AULT, *supra* note 3, at 16 (noting that because there is no statute of limitations for former spouses to request a property share of retired pay, the service member is left in financial limbo); ARA Position Letter, *supra* note 174; 1998 Hearing, *supra* note 172 (statement of Master Gunnery (Retired) Sergeant Benjamin H. Butler, U.S. Marine Corps, National Association For Uniformed Services).

Placing limitations on the jurisdiction of courts to reopen divorce cases would allow fair and equitable settlements and both parties could continue their lives without the fear of cases being reopened long after the divorce and as a consequence, affecting the retiree and the standard of living of his/her subsequent spouse.

Id. See also *TROA USFSPA Reform*, *supra* note 168 (supporting a statute of limitations provision in the USFSPA).

²¹⁷ ARA Position Letter, *supra* note 174.

²¹⁸ 1998 Hearing, *supra* note 172 (statement of Mrs. Patricia Bruce, National Director, Women in Search of Equity (WISE)). However, especially in community property states, final decree or closure to the property settlement aspect of a divorce may not occur for several years after the divorce occurs. See *Mueller v. Walker*, 167 Cal. App. 3d 600, 605-06 (holding that where a divorce decree does not mention specific community property, the parties own the property as tenants in common and it may be divided in a separate partition action at any point in the future); *Henn v. Henn*, 26 Cal. 3d 323, 330-32 (1980) (same). See also *Casas v. Thompson*, 42 Cal. 3d 131, 141 (1986) (“*Henn* implicitly holds . . . that the policy favoring equitable division of marital property outweighs that of stability and finality in the limited context of omitted assets.”).

²¹⁹ 1998 Hearing, *supra* note 172 (statement of Mrs. Patricia Bruce, National Director, Women in Search of Equity (WISE)).

in the area of domestic relations unless “clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied.”²²⁰ When advocating for a federal statute of limitations, former service members have not demonstrated why Congress should enact a law to preempt state domestic relations law. These organizations do not state what federal interest would be harmed if current state statutes of limitation continued.²²¹ Former service members advocate for the convenience of a federal statute of limitations; however, convenience is not a reason for a federal statute to preempt state domestic relations laws.

Additionally, a federal USFSPA statute of limitations is not necessary; state courts should apply their own statutes of limitations to division of military retired pay based on state property-division laws. Most states have a statute of limitations that applies to division of property in a divorce.²²² In addition to the strict statute of limitations, most states apply the doctrine of laches for equity cases.²²³ Because parties must comply with state procedural

²²⁰ *United States v. Yazell*, 382 U.S. 341, 352 (1966). *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (noting that the states’ paramount role in domestic relations law and refusing to preempt that state law unless “positively required by direct [federal] enactment or “the particular law does major damage” to “clear and substantial” federal interests.”). *See also Rose v. Rose*, 481 U.S. 619, 625 (1987) (holding that VA disability benefits did not conflict with the enforcement of state child support orders even where disability benefits represented a disabled veteran’s only source of income and would thus be necessarily used to pay child support).

²²¹ *See supra* notes 178, 220 (discussing federal preemption).

²²² *See, e.g., DEL. FAMILY COURT R.* 60(b) (providing relief from a final judgment, order, or proceeding); *ILL. REV. STAT.* 1987, ch. 110, para. 2-141 (providing a two-year statute of limitations governing the modification of divorce judgments); *N.M. STAT. ANN.* § 37-1-4 (1978) (establishing a four year statute of limitations that applies to suits to divide personal property in a divorce decree).

²²³ Laches is defined as unreasonable delay or negligence in pursuing a right or equitable claim in a way that prejudices the party against whom relief is sought. *BLACK’S, supra* note 2, at 879. *See, e.g., ALASKA CIVIL R.* 60(b)(6) (motions to modify property distribution must be made within “reasonable time limits”); *Lowe v. Lowe*, 817 P.2d 453, 457 (Alaska 1991) (holding that four and a half years is not per se unreasonable, but at some point litigation must be brought to an end).

provisions even when they wish to enforce federal statutes, state statutes of limitation already apply to military retirement pay division. “[W]hether or not a party may modify a prior judgment in order to incorporate the benefits conferred by the USFSPA depends upon the particular state’s law governing the modification of judgments.”²²⁴

Former service members have effectively used state court statutes of limitations to prevent division of military retired pay. In *Vanek*,²²⁵ a two-year statute of limitations prevented a former spouse from modifying the property judgment of her divorce to seek equitable distribution of her husband’s military retired pay.²²⁶ In *Pierce*,²²⁷ a one-year statute of limitations prevented the former wife from seeking modification of a property settlement involving military retired pay.²²⁸

Some courts combine a statute of limitations with the doctrine of laches to bar suit by a former spouse. In *Field v. Redfield*,²²⁹ the Missouri state court barred a former military wife from suing the former service member for a portion of his military retired pay after the

²²⁴ *In re Marriage of Vanek*, 617 N.E.2d 329, 331 (Ill. App. 1993). See, e.g., *In re Marriage of Vest* (1991) (citing *Barnes v. Barnes*, 743 P.2d 915 (1987), which states that the USFSPA is not intended to restrict state law on the modification of final judgments); *Andresen v. Andresen* 564 A.2d 399 (1989) (holding that a petition to reopen a marriage judgment under USFSPA was denied where the petition was filed more than four years after the entry of judgment); *In re Marriage of Quintard*, 691 S.W.2d 950 (1985) (denying a petition to reopen a judgment pursuant to USFSPA for lack of compliance with state law).

²²⁵ *In re the Marriage of Vanek*, 617 N.E.2d 329 (Ill. App. 1993).

²²⁶ See *id.* See also *Dimsdle v. Dimsdle*, 1991 Kan. App. LEXIS 692 (Kan. Ct. App. Sept. 13, 1991) (holding that a two-year statute of limitations barred the former wife’s suit based in fraud, to receive a portion of her husband’s military retired pay that she did not know was divisible at the time of divorce).

²²⁷ *In the Matter of the Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999).

²²⁸ *Id.* (citing KAN. STAT. ANN. § 60-260(b)).

²²⁹ 985 S.W.2d 912 (Mo. App. 1999).

divorce was final. In *Field*, the original property settlement failed to address the military retired pay. Missouri has a statute that allows a divorce decree to be re-opened within five years if the terms of the property settlement or property distribution failed to address specific property. Here, the former wife waited thirteen years. She mistakenly believed that she had to wait to seek division of the retired pay until it vested.²³⁰ The court barred the former spouse from seeking division both by the statute of limitations and by the equity doctrine of laches.²³¹

Many state courts also reserve jurisdiction over the divorce and the marital property “to enforce any orders . . . made and to respond to future changes in the law.”²³² A federal USFSPA statute of limitations would not affect the delayed final resolution of divorce decrees where a state court takes and reserves jurisdiction. This theory of continuing jurisdiction also applies when a state court must enforce the terms of the divorce.²³³

²³⁰ *Field*’s failure to file timely demonstrates the legal professions’ misunderstanding of the provisions of the USFSPA.

²³¹ *Field*, at 919-20. See *Porter v. Porter*, 542 N.W.2d 448 (S.D. 1996) (holding that a former wife was barred from raising the divisibility of the husband’s military retired pay fourteen years after the divorce was final based on the doctrine of laches); *Terry v. Lee*, 445 S.E.2d 435 (S.C. 1994) (barring suit to divide military retired pay twenty-seven years after the divorce based on a doctrine of laches). But see *Raphael v. Raphael*, 1990 Del. Fam. Ct. LEXIS 67 (Del. Fam. Ct. May 31, 1990) (holding that seven years was not an unreasonable amount of time for waiting to reopen a divorce decree where the military retired pay was not address; the doctrine of laches did not apply because the husband will not be prejudiced as a result of the seven year delay).

²³² *Walters v. Walters*, 220 Cal. App. 3d 1062, 1066 (1990). In *Walters*, because the court reserved jurisdiction over the retired pay at the time of divorce, the wife was not barred from requesting reinstatement of her share of retired pay even after the statute of limitations on California Civil Code § 5124 passed.

²³³ A divorce court has jurisdiction to enforce the terms of its own decree. See *Ratkowski v. Ratkowski*, 769 P.2d 569 (Sup. Ct. Idaho 1989) (referring to IDAHO CODE § 1-1622 (1988)).

If states already have statutes of limitation, why would a federal USFSPA statute of limitations be necessary? Former spouse organizations recognize that a statute of limitations could “forever deny [former spouses] the justice to address . . . inequities [in property settlements].”²³⁴ Perhaps former service members believe they could use a federal statute of limitations to prevent post-divorce property awards, which now occur upon suit by former spouses when former service members waive a portion of their retired pay to receive VA disability pay.²³⁵ Former service member could run the statute of limitations by delaying their election to receive VA disability pay for two years. At that time, the former spouse would have no mechanism for reapportioning the divorce property division.

Manipulating a federal statute of limitations, however, would be unsuccessful. As this thesis discusses in Section VI.C.1, many courts currently require former service members to provide support or alimony equivalent to the amount of retired pay the former spouse no longer receives based on a breach of contract theory or if the original property settlement included an indemnification clause. The service members’ could succeed when using a federal statute of limitations to prevent additional property division, but would fail to prevent courts from creating or modifying support payments.

²³⁴ The argument by former spouses is that a two-year statute of limitations would impose significant hardship on former spouses, especially older women,

who have poorly written property settlement agreements. These persons were oftentimes unaware at the time of their divorces that they had a “presumption” to a portion of their ex-spouses’ retired pay; in the trauma of divorce proceedings they have signed away this presumption which could make the difference between a respectable life style and poverty.

EX-POSE Position Paper, *supra* note 184.

²³⁵ See *Clauson v. Clauson*, 831 P.2d 1257, 1261 (Alaska 1992) (stating that the financial loss to the wife after her share of the retired pay was waived is not insignificant and likely justifies a redistribution of the parties’ marital property).

State courts have specific “change in circumstances” criteria for re-opening divorces to modify support orders; this criteria is different from the statute of limitations.²³⁶ States must allow for modification of property distribution as well.²³⁷ A federal statute of limitations on division of retired pay would not affect motions to modify support aspects of a divorce decree.

Former service members mistakenly believe that a federal USFSPA statute of limitations will bring closure to military divorces and an end to re-opening and re-litigating matters in a military divorce. As long as state courts reserve continuing jurisdiction, re-open divorces because of changes in circumstances, and allow for modification of property distribution under state law, a federal statute of limitations will be ineffective. Congress

²³⁶ See ALASKA STATUTE 25.24.160(a)(4), 170 (1991) (a trial court must “fairly allocate the economic effect of divorce” and one party is entitled to modification of alimony and maintenance under a “change in circumstances”); UTAH CODE ANN. § 30-3-5(3) (1995) (noting that a court has continuing jurisdiction to make subsequent changes to orders for distribution of marital property as is reasonable and necessary, upon a showing that a substantial change in circumstances has occurred since the entry of the divorce decree); *Bumgardner v. Bumgardner*, 521 So. 2d 668 (La. Ct. App. 1988) (holding that the court retained continuing jurisdiction to partition military retired pay after the divorce); *McDonough v. McDonough*, 183 Cal. App. 3d 45; 227 Cal. Rptr 872 (1986) (holding that the court had continuing jurisdiction to partition military retired pay. *But see* *Tarvin v. Tarvin*, 187 Cal. App. 3d 56; 232 Cal. Rptr 13 (1986) (finding no continuing jurisdiction over a nondomiciliary, nonresident retiree to partition military retired pay after the decree is final).

See also *Clausen*, 831 P.2d at 1257 (vacating a divorce decree and remanding for modification based on a change in circumstances, specifically the husband’s waiver of retired pay to receive VA disability). *But see* *Toone v. Toone*, 952 P.2d 112 (Utah Ct. App. 1998) (holding that recognition of a new legal right, specifically the USFSPA divisibility of military retired pay, does not constitute a change in circumstances sufficient to reopen a divorce decree).

²³⁷ See ALASKA CIVIL R. 60(b)(6) (a party is entitled to modify the final divorce decree under “extraordinary circumstances” based on four factors: (1) the fundamental, underlying assumption of the dissolution agreement has been destroyed; (2) the parties’ property division was poorly thought out; (3) the property division was reached without the benefit of counsel; and (4) the [asset in controversy] was the parties’ principal asset). *See also* *Lowe v. Lowe*, 817 P.2d 453, 456 (Alaska 1991) (“As this is not an initial adjudication of the parties’ property rights [in a military pension], relief may be granted only within the parameters of Civil Rule 60(b).”)

should not impose an artificial time limit on the state's domestic relations laws that will inhibit the state courts' search for equity.

3. Minimum Length of Marriage to Qualify for Benefits

Another proposal by former service members requires a marriage to have a minimum length for a former spouse to receive *any* percentage of retired pay.²³⁸ Specifically, former service members advocate for an amendment to the USFSPA to require a minimum of ten years of marriage concurrently with military service to qualify for USFSPA payments. This thesis does not support such an amendment. Courts award retired pay to former spouses to acknowledge their contribution to the military marriage and the military community. Quantifying the number of years of marriage for a spouse to have made a meaningful contribution to a marriage is impossible. The question is too fact-specific and should be left to individual state courts. Consider these two hypothetical marriages:

Hypothetical A: In 1990, Private Smith marries Suzy A shortly after he completes Basic Training. After a few months, Suzy A deserts Private Smith, leaving no forwarding information. Private Smith, believing that love is not for him, focuses on his career and is selected for the green to gold program in 1992.²³⁹ After college, now Lieutenant Smith excels as an Infantry Officer, pins on for Captain, and is in line for a command. In 2000, Captain Smith meets Ellen Johnson and falls in love. He realizes he has some unfinished business because he is still married to Suzy A. Captain Smith finally obtains a divorce from Suzy A after ten years of marriage.

Hypothetical B: Assume the same facts, except that Suzy B does not desert Private Smith. Before marriage, Suzy B worked in a position where she was

²³⁸ ARA Position Letter, *supra* note 174.

²³⁹ This program assists enlisted soldiers become officers.

licensed only in her home state. She supported Smith during his enlisted time. She moved with him when he received permanent change of station (PCS) orders, forcing her to forgo her own career. Instead, she stayed at home and raised their children. Suzy *B* was a dutiful spouse who attended wives club meetings and volunteered in charitable organizations on military installations. However, Captain Smith meets Ellen Johnson and falls in love. He divorces Suzy *B* in 1999, after nine years and six months of marriage.

Comparing the hypothetical situations, which spouse should receive a portion of the retired pay? Under the “ten-year minimum” amendment, only Suzy *A* would be considered for a percentage—even though she deserted Smith. Despite Suzy *B*’s support to Smith and the military community, she would not be considered for any percentage share of Smith’s military retired pay. While this thesis does not advocate that Suzy *B* should get a certain percentage of the retirement, this thesis does advocate that state courts should have the flexibility to determine when a division of the retired pay is appropriate.

The USFSPA as written allows state courts to divide military retired pay, but it is a permissive statute.²⁴⁰ The USFSPA does not *require* division. State domestic relations courts should review the facts of each divorce and determine whether the military spouse has supported the service member and the military community. Based on these findings, the court should decide whether to divide military retired pay.

²⁴⁰ 10 U.S.C. § 1408(c) (2000). “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.” *Id.* (emphasis added).

B. Issues Raised by Former Spouses

Like former service members, some former spouses are publicly vocal about their positions on the USFSPA. Often former spouses voice their opinions in letters to the editor.²⁴¹ Many of these letters and subsequent responses demonstrate the animosity between the parties.²⁴² These letters and testimonials reiterate the primary reason that Congress enacted the USFSPA: to protect the former military spouse. The platform of the former spouse focuses on sacrifice, support to the family, and selfless dedication to the military at the expense of their own careers and pensions.²⁴³ Unlike the arguments of the former service members, spouses argue that this role has not significantly changed since Congress enacted the USFSPA.²⁴⁴

²⁴¹ See, e.g., discussion *supra* note 22; Mozley, *supra* note 184.

²⁴² A series of editorials in the *San Antonio Express-News* demonstrates this animosity. See *supra* note 22 (providing editorials debating the USFSPA). The animosity between these groups is apparent also in Mozley's article. Mozley, *supra* note 184. Rather than solely focusing her argument on the legal aspects of property in a divorce, she adds: "Would greed possibly have anything to do with husbands seeking revocation of pension shares upon their ex-wives' remarriage?" *Id.* Mozley's article constantly refers to former spouses as wives and former service members as husbands. Ault's retort to Mozley's comment about greed continues the banter: "Greed is a term more properly applied to an ex-spouse who is being supported by two marital partners (past and present), especially when the second is a well-heeled individual with no military service." Ault Letter, *supra* note 186. "[T]o insist on support from two (or more) [marital partners] is an overt manifestation of greed with, perhaps, just a tinge of revenge." *Id.*

²⁴³ See NMFA Position Letter, *supra* note 6. "Spouses . . . are often forced to move just at the time they might be in a position to advance in their career and usually must start at the bottom of the economic ladder at each new duty station." *Id.* at 1.

²⁴⁴ Discussions with current spouses of military members resulted in a finding that spouses still fulfill an essential role in the military community. While the days of the white-glove teas may be over, spouses assist the military community through other social interaction, communication networks, and support to the service member. See Diane Altenberg & Anne Huffman, Address to the Judge Advocate General's School Wives Club Coffee (Jan. 25, 2001) (noting that spouses are not expected to through big, organized social events, but still expected to form a support network). Rather than having a reduced role in the military community, spouses today are expected to do more. "It is harder now because the wife is expected to do it all: have a career, take care of a family, and act as a leader of the military families." This role is essential in today's military service that includes frequent and long-term deployments. See *id.* Spouses take a more active role in the military community during deployments out of necessity. Mrs. Altenberg and Mrs. Huffman explained that during deployments such as Desert Storm, the spouses work together to provide support and communications; some

While former service members fill the Internet with websites proclaiming the unfairness of the USFSPA, the same is not true of former spouses. Former spouses are not informally vocal about their cause,²⁴⁵ but are organized into several lobbying groups and non-profit organizations. These organizations tend to devote more time defending the USFSPA and rebuffing any suggested revisions, than filling cyberspace with horror stories.²⁴⁶

families actually moved in together; single women helped with other women's children. "Once the active duty forces were gone, you were it—and you needed the whole military family to pitch in." *Id.* Some of the spouses assisted in preparing the troops for deployment.

²⁴⁵ This is not to say that individual former spouses or advocates for former spouses do not voice their opinions. In response to the DOD request for input, nearly one thousand former spouses responded via e-mail and letter. Emswiler Interview, *supra* note 7. Lieutenant Colonel Emswiler was the designee in the on-line request for input on the USFSPA. He acted as the repository of information that DOD requested via the Federal Register.

Edward C. Schilling III, a retired Air Force colonel and lawyer in Aurora, Colorado, is known as an expert on the USFSPA who advises hundred of attorneys and their clients on military divorce and the USFSPA. According to Schilling, the problem with the USFSPA is that the current law allows many former service members to protect their retired pay from divorce settlement division and distribution. For example, former service members can accept VA disability compensation in lieu of retirement pay, thus reducing the amount of disposable retired pay available for division and distribution. *See* Philpott, *supra* note 181. Often the disability compensation is for injuries or illnesses unrelated to combat or even military service. Schilling, who was the former head of the Air Force's legal assistance program, stated that he sees "an enormous volume of cases involving long-term marriages that end when the husband dumps the wife and kids, and runs off with some young skirt." *Id.* Schilling did not clarify, however, which party to the marriage was the service member. He most likely implied that the husband was the service member and left his devoted wife who stood by him for years and years of military life and without the USFSPA would not receive her earned share of the military retired pay. This thesis suggests that the worse scenario would be if the wife was the service member. She would be forced to share her military retired pay with a man who left her and their children.

²⁴⁶ *See, e.g.,* Ex-Partners of Servicemen(women) for Equality, *Home Page*, at <http://www.angelfire.com/va/EXPOSE/> (last visited Feb. 5, 2001). Although EX-POSE is an active lobby for former spouses rights, their website merely provides general information about EX-POSE and how to contact the organization. *See 1998 Hearing, supra* note 172 (testimony of Virginia Kay Ward, Board Member of Ex-Partners of Servicemen(women) for Equality).

One of the more moderate organizations, the National Military Family Association (NMFA)²⁴⁷ supports issues favorable to the former spouse on USFSPA issues, but primarily supports the interest of military families on “appropriate quality of life for active duty and retired members of the uniformed service and their families.”²⁴⁸ The NMFA is a member of The Military Coalition,²⁴⁹ working on various military and veterans issues.²⁵⁰

The NMFA believes that the USFSPA “provides a fair and effective treatment of . . . military retired pay” and advocates primarily for status quo relating to the substance of the USFSPA.²⁵¹ The NMFA’s most significant issue, as discussed *supra* in Section IV.A.1, is maintaining the “property” designation of military retired pay.²⁵² In their *Issues* bulletin, the NMFA presents the actions anticipated in 2001. Regarding the USFSPA it states “promote the protection of the state courts’ right to divide retirement pay as marital property upon divorce, which would not be affected by the remarriage of either party” and “evaluate

²⁴⁷ The NMFA’s logo contains the phrase: “For Thirty Years—The Voice of the Military Family.” See National Military Family Association, *Home Page*, at <http://www.nmfa.org> (last visited Feb. 20, 2001). The NMFA provides information on the USFSPA law, but does not present a position paper incorporating their position on changes to the USFSPA. The NMFA is part of The Military Coalition, which also includes the FRA. Hallgren Interview, *supra* note 184 (stating that the members of The Military Coalition work together towards reform, but do not always agree on the issues).

²⁴⁸ *NMFA Issues for 2001*, *supra* note 184.

²⁴⁹ The Military Coalition is comprised of thirty-one organizations representing more than 5.5 million members of the uniformed services—active, reserve, retired, survivors, veterans—and their families. See The Military Coalition, *Home Page*, at <http://www.themilitarycoalition.org> (last visited Feb. 12, 2001). Members organizations include TROA, FRA, and NMFA. While the groups advocate different positions on the USFSPA, they work together on other military and veterans issues.

²⁵⁰ The Military Coalition successfully advocated for repealing the Dual Compensation Act. See Bruce D. Callander, *New Rules on Dual Compensation*, AIR FORCE MAG., Jan. 2000, available at <http://www.afa.org/magazine/toc/01cont00.html>.

²⁵¹ See NMFA Position Letter, *supra* note 6.

²⁵² See *id.*

proposals to change the Former Spouses Protection Act with an emphasis on maintaining equity.”²⁵³

In addition to preventing the remarriage penalty, former spouses organizations state positions on issues that include: preservation of SBP benefits,²⁵⁴ treatment of VA disability pay,²⁵⁵ date of calculating percentage of retired pay,²⁵⁶ and providing benefits to 20/20/15 spouses.²⁵⁷ This thesis discusses these issues in conjunction with the proposals in Section VI.²⁵⁸ Before the specific proposals of this thesis are discussed, however, a review of the DOD position on the USFSPA is appropriate.

C. Position of the Department of Defense

When the original USFSPA was proposed, the DOD avoided stating a position on the controversial issues. For example, when Congress originally proposed the USFSPA, DOD

²⁵³ *NMFA Issues for 2001*, *supra* note 184.

²⁵⁴ *See* NMFA Position Letter, *supra* note 6.

²⁵⁵ *See id.*

²⁵⁶ EX-POSE Position Paper, *supra* note 184 (making this proposal retroactive would gravely impact the financial security of former spouses; it is patently unjust to award a particular amount of money and to decide at a later date that the money would be allocated differently); Mozley, *supra* note 184.

²⁵⁷ The NMFA supports this proposal. *1998 Hearing*, *supra* note 172 (statement of Joyce Wessel Raezer, Senior Issues Specialist, The National Military Family Association). *See generally* THOLE & AULT, *supra* note 3, at 239-40.

²⁵⁸ According to one commentator (whose opinions tend to favor service members), former spouses groups advocate for additional reform, including: presumptive entitlement to a pro-rata share of military retired pay and eliminate the protection of disability pay now embodied in the USFSPA. *See* THOLE & AULT, *supra* note 3, at 239-40.

recognized that some legislation must protect former spouses, but did not support original USFSPA.²⁵⁹ However, the DOD did not produce an alternate version.²⁶⁰

By 1990, DOD showed lukewarm support for the USFSPA. During the 1990 USFSPA hearings, General Jones, U.S. Army, did take a position on a number of the USFSPA issues under consideration. He did not favor repealing the USFSPA and he opposed numerous amendments under consideration.²⁶¹

Based on a congressional mandate to investigate and report on the current state of the USFSPA as compared to other federal agencies, the DOD may propose changes to the USFSPA. Possibly torn between loyalties to the service members and recognition of former spouses' needs, the DOD is several years overdue with this report.²⁶²

In addition to the working group on the current report, the DOD has several organizations that review the USFSPA in the course of their duties. One such organization is the Armed Forces Tax Council. This Council has recommended many changes to the USFSPA, most of which are discussed in this thesis's proposals.²⁶³

²⁵⁹ During the review of the original USFSPA, military representatives testified "in support of an equitable solution to the problems created by the *McCarty* decision." S. REP. NO. 97-502, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1601-02.

²⁶⁰ *Id.* at 7, *reprinted in* 1982 U.S.C.C.A.N. at 1601-02. The DOD did not advocate legislative codification of the *McCarty* decision, but stated that a legislative reversal of *McCarty* would have an adverse effect on recruiting and retention and create military personnel assignment problems.

²⁶¹ H.R. ARMED SERVICES COMM. REP. NO. 101-76 (1990).

²⁶² The DOD report was due on 1 October 1999. *See* Philpott, *supra* note 181.

²⁶³ In January 2001, the Armed Forces Tax Council recommended specific changes to the USFSPA. Philpott, *supra* note 18 (discussing the Armed Forces Tax Council proposal to reform the USFSPA). Many of these

V. Proposals to Change the USFSPA

As stated in the Introduction of this thesis, with a few substantive revisions and procedural adjustments, the USFSPA can be an equitable means for dissolving military divorces. As emphasized throughout this thesis, the USFSPA can be effective if states are free to apply their own domestic relations laws.²⁶⁴ The continuing role of Congress should be to ensure that the procedural tools are in place to make the state courts' orders effective and enforceable.

The Appendix of this thesis is draft legislation that includes the proposed revisions, which are statutory in nature that are statutory changes. While the ideal goal of the proposals is equity between the parties, in an area of law deep-seeded with emotion, a solution to satisfy all parties may be impossible to attain. Rather, these proposals look toward effective and efficient operation of the USFSPA, attempting to reduce litigation and cost to the parties.

changes are similar in nature to the proposals in this thesis. In addition to the Tax Council proposals mentioned elsewhere in this thesis, the Tax Council recommends amending the USFSPA to allow "Cost of Living Allowance's (COLA) for dollar-specific awards." See Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses Protection Act to Allow COLA's for Dollar-Specific Awards (Jan. 2001) (on file with author). The USFSPA does not include language to permit COLA for dollar amount awards. Because this language is not present, most USFSPA awards in divorce orders are expressed in percentages. *Id.* While this rule limits the flexibility of the parties and the courts in negotiating property settlement agreements, the current system of percentage awards is a main feature of the USFSPA. Courts that determine a specific dollar amount is necessary to "support" a former spouse should be considering alimony, not a property award of retired pay. Percentage awards are ideal if the divorce occurs before retirement and before a disability rating; they are more flexible. Specific dollar amounts can work if the divorce occurs after retirement and after a disability rating, once the exact amount of retired pay is known. The problem with specific dollar amounts is demonstrated by *Longanecker v. Longanecker*, 2001 Fla. App. LEXIS 540 (Fla. Dist. Ct. App. Jan. 26, 2001), where the dissolution awarded the former spouse \$157.76 monthly from the net disposable retired pay from the husband. Over time, all of his disposable retirement benefits had been converted into disability benefits. *Id.* at *2.

²⁶⁴ This position is similar to the stated position of the ABA. See ABA Position Letter, *supra* note 6. "[T]he consistent ABA position has been to allow state divorce law to apply to service members and their spouses, as it does to everyone else, with the goal of avoiding any "special classes" of persons who would be wrongly deprived of, or unjustly enriched with, the fruits of a marriage." *Id.* at 2.

The first sections recommend substantive revisions, including eliminating the jurisdictional requirements, and the later sections recommend procedural revisions, including repealing the ten-year overlap requirement for direct payment. Each section presents the current problem, recommends a solution, and explains factors that Congress should consider before enacting the proposal.

A. Repeal the USFSPA Jurisdictional Requirements

1. *Current Problem*

Congress originally enacted the additional jurisdictional requirements necessary for a state court to divide military retired pay to ensure that parties did not “forum shop.”²⁶⁵ Because Congress enacted the USFSPA when many states did not consider retired pay or pensions as marital property, additional jurisdictional requirements were necessary and effective. Congress did not want the former spouse filing in a community property state that had jurisdiction over the service member solely because of military service.²⁶⁶ Now, however, all states treat pensions and retired pay as marital property subject to division at the time of divorce. Thus, a provision against forum shopping is no longer necessary.

While jurisdiction issues do arise, they are no longer forum shopping type issues, but confusion in applying the USFSPA requirements and forum *avoidance* by the service

²⁶⁵ See *supra* Section III.A (discussing forum shopping).

²⁶⁶ Congress enacted these jurisdiction requirements at the request of DOD. See S. REP. No. 97-502, at 8-9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1603-04 (expressing DOD’s concerns about forum shopping).

member.²⁶⁷ Rather than finding the most advantageous state to file for divorce, former service members avoid consenting to jurisdiction where the spouse files for divorce. If that state does not have USFSPA jurisdiction over the service member, the state can dissolve the marriage, but cannot divide the military retired pay.²⁶⁸ The former spouse must sue for property division in a state that would have USFSPA jurisdiction over the service member. The service member can force the spouse to expend the maximum amount of money possible by causing the divorce to occur in one state and the division of retired pay in a second state.²⁶⁹ This type of “forum avoidance” is within the legal boundaries of the USFSPA.

2. Proposed Solution

This thesis recommends repealing the jurisdictional requirements of the USFSPA. Eliminating the additional requirement will increase flexibility of the parties to file in the most convenient state where both parties either consent or have minimum contacts with that state.²⁷⁰ Further, without the additional requirement, the parties have one less issue to

²⁶⁷ One commentator noted that Congress created exactly the type of forum shopping it tried to avoid. See WILLICK, *supra* note 6, at 57. Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses’ Protection Act to Eliminate the Jurisdictional Rule (Jan. 2001) (on file with author). “The concern now is not forum shopping; instead it is ‘forum avoidance’ by the military spouse. DFAS reports that this usually occurs in cases involving members who are retired at the time of divorce.” *Id.*

²⁶⁸ See WILLICK, *supra* note 6, at 58.

²⁶⁹ See Mark Sullivan, *Military Pension Division: The Spouse’s Strategy*, SILENT PARTNER, available at <http://www.abanet.org/family/military/home.html>. See also WILLICK, *supra* note 6, at 58 (explaining the current forum avoidance problem).

²⁷⁰ Minimum contacts is defined as a nonresident party’s forum-state connections, such as business activity or actions foreseeably leading to business activity that are substantial enough to bring the party within the forum-state court’s personal jurisdiction without offending traditional notions of fair play and substantial justice. BLACK’S, *supra* note 2, at 1010. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945). Most states have developed minimum contacts tests that are incorporated into “long-arm” statutes. See *infra* note 275 for a definition of long-arm statutes.

litigate. Former service members will be less likely to resist jurisdiction, thus reducing the need for dissolution of the marriage in one state and dividing the retired pay in a separate state. Decreased litigation will reduce the costs to all parties and will reduce the expense to state courts.

The only reasonable argument for retaining the jurisdictional requirement is that it protects a service member from unknowingly having his military retired pay divided upon divorce when he is unable to attend the divorce hearing. This jurisdictional “shell” protects the military, and may be the last statutory vestige of protecting the service member.²⁷¹ However, service members who are unable to attend court hearings due to duty location or deployment have the assistance of the Soldiers’ and Sailors’ Civil Relief Act,²⁷² which is designed to prevent default civil court judgments against service members. The USFSPA already contemplates this scenario and requires, in certain situations, that the former spouse certify compliance with the rights of the service member.²⁷³ Because other federal statutes are in place to protect service members who truly cannot participate in court hearings, this argument fails.

²⁷¹ This is especially true for the retired service member who is not protected by the Soldiers’ and Sailors’ Civil Relief Act. Interview with Brigadier General (Retired) Thomas R. Cuthbert in Washington D.C. (2 Feb. 2001) (noting that he is an advocate of keeping the jurisdictional requirement).

²⁷² Soldiers’ and Sailors’ Civil Relief Act, 50 U.S.C. §§ 501-591 (2000). This law postpones or suspends certain civil obligations; members request for stay of proceeding will be granted *unless* military service does *note* materially affect the member’s ability to defend the action. *Id.* § 521 *cited in* WILLICK, *supra* note 6, at 105 (emphasis in original). *See, e.g.,* Hawkins v. Hawkins, 999 S.W.2d 171 (Tex. Ct. App. 1999) (ruling that a divorce, which included division of military retired pay, should be re-opened when a service member was unable to defend himself because of military service).

²⁷³ If the court issued the order while the service member was on active duty and the service member was not represented in court, the court order or other court document must certify that the rights of the service member under the SSCRA were complied with. 32 C.F.R. § 63.6(c)(4) (2000).

3. *Factors to Consider*

Before enacting this proposal, Congress should consider any potential hardship on the parties. The previous subsection mentions the potential hardship on current and former service members sued for divorce in a jurisdiction where they have minimum contacts.²⁷⁴ However, reducing cost and litigation outweighs this potential hardship.

This thesis proposes repealing the jurisdictional requirements because they are outdated, unnecessary, and serve only to make the process more difficult, costly, and time-consuming. Repealing the jurisdictional requirements will allow state courts to apply their long-arm statutes²⁷⁵ for personal jurisdiction, which they apply in every other divorce case.

B. Award of Retired Pay Based on the "Separate Property Date"

1. *Current Problem*

Often, a divorce occurs before the service member retires. Many courts, however, determine the percentage of retired pay based on the pay grade and length of service

²⁷⁴ An example of the minimum contacts test is that a party is subject to the jurisdiction of the court if: (1) the nonresident party must purposely do some act or consummate some transaction in the forum state; (2) the cause of action between the parties must arise out of that transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice under the due process clause of the Fourteenth Amendment, bearing in mind the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, and the benefits and protection of the laws of the forum state afforded by the respective parties, and the basic equities of the situation. *See Southern v. Glenn*, 677 S.W.2d 576, 583 (Tex. 1984).

²⁷⁵ A long-arm statute provides for jurisdiction over a nonresident party who has had contacts with the state where the statute is in effect. BLACK'S, *supra* note 2, at 953.

eventually attained by the service member.²⁷⁶ Essentially, these courts consider post-divorce promotions and longevity pay increases earned by the service member as part of the marital property. Courts treating retired pay in this fashion are considering it differently than other marital property.²⁷⁷ Courts that use the service member's pay grade and length of service at the time of divorce, do not significantly contribute to the current problem.

Using the "time of retirement" method to calculate percentage of retired pay can result in an unfair award to the former spouse. The congressional intent when passing the USFSPA was to acknowledge the spouse's contribution to the military community and individual service member.²⁷⁸ Typically, however, once the parties are separated or divorced the direct contribution ceases.²⁷⁹

How to determine the percentage of retired pay to award a former spouse creates significant contention between the parties. Former service member organizations refer to using the date of retirement when determining the percentage award as the "windfall" benefit

²⁷⁶ However, other courts determine the percentage of retired pay based on the pay grade and length of service at the time of divorce. *See, e.g., Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987). *See generally* WILLICK, *supra* note 6, at 120 (detailing enforcement of awards based on particular rank and grade when that status varies from actual retirement).

²⁷⁷ Marital property is that property acquired from the time when a marriage begins until one spouse files for divorce. BLACK'S, *supra* note 2, at 1233. In equitable-distribution states, the phrase marital property is the rough equivalent of community property. *Id.* Community property is property owned in common by husband and wife because it was acquired during the marriage by means other than an inheritance or a gift to one spouse, each spouse holding a one-half interest in the property. *Id.* at 274. Currently, nine states have community property systems: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

²⁷⁸ *See* S. REP. No. 97-502, at 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1601-02.

²⁷⁹ Under the separate property date proposal some former spouses could successfully argue for division of retired pay based on date of retirement rather than date of separation or divorce if they can show a contribution to the rank eventually attained by the service member.

and advocate strongly for reform.²⁸⁰ Former spouses organizations argue for status quo, because “but for” the previous contributions of the former spouse, the service member would never have attained the level of success reached by retirement.²⁸¹ Current or second spouses of service members, who may have also contributed to the marriage and the military community, advocate for change because using the “time of retirement” method to determine the percent of retired pay awarded to former spouses penalizes current spouses and children.²⁸²

2. *Proposed Solution*

Congress should amend the USFSPA to limit the definition of marital property to that portion of the retired pay the parties earned together during the marriage. The language of the proposed legislation should allow state courts to review the facts of the marriage and determine the date at which retired pay ceases to be marital property. This thesis designates this date as the “separate property date.” Courts will use the service member’s rank and length of service on the separate property date to determine the former spouse’s percentage of retired pay.²⁸³

²⁸⁰ See 1998 Hearing, *supra* note 172 (testimony of ARA, FRA, and WISE). See THOLE & AULT, *supra* note 3, at 31.

²⁸¹ See 1998 Hearing, *supra* note 172 (testimony of NMFA, EX-POSE, the ABA, and the Committee for Justice and Equality for the Military Wife).

²⁸² See THOLE & AULT, *supra* note 3, at 31-32; E-mail from Sue Miller to Lieutenant Colonel Thomas K. Emswiler, (May 12, 1999) [hereinafter Miller E-mail] (noting that the income of her military husband’s former spouse is triple that of her military husband because of the USFSPA payments). Mrs. Miller also argues that her husband’s former wife has an “elevated status” merely because she was the first wife during the military career. “The USFSPA is intent on protecting the wife of my husband’s former life, it expresses very little interest in protecting me the wife of my husband’s current life.” *Id.*

²⁸³ The Armed Forces Tax Council supports a proposal based on pay grade and length of service at the time of divorce. See Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax

In determining the separate property date, the federal USFSPA statute should allow state courts to consider the totality of the circumstances of the marriage.²⁸⁴ Using the totality of the circumstances test, a state court would have the flexibility to designate the separate property date as the date of divorce, the date of separation, the date of a future promotion, the date of retirement, or a date not tied to any particular event. State courts would consider all facts relevant to the marriage that attest to the degree of partnership in the military career—the court would look at the totality of the circumstances of the marriage. Designating that state courts use a totality of circumstances test, would not limit the courts to specific criteria or an arbitrary separate property date.

In applying a totality of the circumstances test to decide the separate property date, some factors the state courts could consider are date of physical or legal separation of the parties, reason for separation,²⁸⁵ date of divorce, sacrifice of the spouse towards the marriage, spouse's involvement and support of the military community, eligibility of service member for promotion, potential future success of the service member because of spouse's contributions, and sacrifices of each spouse. The list of potential factors could be as lengthy as the diversity of factors that hold a marriage together and break a marriage apart. For that

Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Require Calculation of Benefits Based on Time of Divorce Rather Than Time of Retirement (Jan. 2001) (on file with author). *See also* Philpott, *supra* note 18.

²⁸⁴ Criminal cases commonly use the totality of the circumstances test for evidentiary determinations. The test calls for the court to "focus on the entire situation . . . and not any one factor." BLACK'S, *supra* note 2, at 1498.

²⁸⁵ By considering the reason for the couple's separation, the state court could indirectly consider fault in the marriage. If the couple separated because of one spouse's misconduct, that may confirm the court's decision to use the date of separation as the "separate property date." However, if the reason for the separation was the

reason, a federal statute should not limit the state courts to a set standard, test, or criteria for determining the separate property date.

In practice, one method the state court could use to analyze a separate property date issue is to start with the date the couple physically separated. Using that date as a baseline, the court could look to events after physical separation or before physical separation to adjust the separate property date. This method is used in the following hypothetical situations, where appropriate. The following examples apply the totality of circumstances test for determining a separate property date.

Husband, service member, and wife marry before he enters activity duty. They remain married during his entire twenty-year career. The couple moves to each duty assignment together. The wife works, but is not vested in a pension plan. Several years after retirement, they divorce.

Applying the totality of circumstances to this hypothetical military divorce, the separate property date should be the date of retirement. The couple lived and worked together during the husband's military career.

Wife, service member, married husband before she came on active duty. After a few PCS moves, husband decides that he found a job he wishes to remain with and does not move. When she PCS's without him, they complete a separation agreement. She is promoted a few years after they separate. After her promotion, the wife files for divorce. She remains on active duty until retirement.

service member's misconduct, the court may consider pushing the separate property date to a date later in time, such as the date of divorce.

To determine a separate property date in this hypothetical divorce, the court would need to look at several factors, including: the separation date, the divorce date, the husband's contribution to the marriage and the military community between those dates, the level of contribution the husband made to the promotion. Using the physical separation as the baseline, the court could first look at the date of physical separation, and then question whether the husband contributed to the marriage or the military community after that date. Without additional evidence of contribution after the separation, the court may decide that the date of separate property is the date of physical separation or the date of the separation agreement.

Wife, service member, and husband are married for many years. They work together in the marriage and both support the military community. The wife deploys to a hazardous duty area for one year. During that time, the husband remains near the military installation and takes care of the children. He remains an active member of the family support group and helps other families involved in the deployment. While deployed, the wife is selected for promotion. During their one-year apart, the couple realizes that they no longer wish to be married. The divorce is finalized shortly after she returns, but before her promotion date.

This hypothetical divorce presents many factors for a court to consider when deciding the separate property date. Using the physical separation as the baseline, the court should begin with the date the couple was physically separated, which was the date the wife deployed. However, the husband has a strong argument for the court to consider a date later in time as the separate property date. After the physical separation date, the husband continued to support the marriage and the military community. Because of the husband's continuing contribution to the military community, the court should not consider any date earlier than the date of divorce. However, because the wife was selected for promotion during the

deployment, the husband may successfully argue for a separate property date that includes her rank upon promotion. Regardless of the court's final decision, the court should make a detailed findings of fact to explain the factors they considered when making the ruling.

Husband, service member, and wife are married for many years. Together they have PCS'd and supported the military community. The couple has no children. The husband deploys for six months. Shortly after he deploys, the wife meets a civilian and begins a relationship. She leaves the installation to live with him. When the husband returns from deployment they sign a separation agreement. Because of state law, they must wait one year before the divorce becomes final. The wife continues to live with her boyfriend during this time. The husband is selected for promotion and is promoted during their one year of separation.

In this hypothetical divorce, the court will have many factors to consider when reviewing the totality of the circumstances and deciding the separate property date. Using the physical separation as a baseline, the court begins with the date the husband deploys. While not determinative, the wife did not support the marriage or the military community once the husband deployed and she began a separate relationship. Without evidence of support to the marriage or the military, the court should consider the physical separation date as the date of separate property. The wife could argue that the date of their separation agreement or date of divorce is more appropriate. However, if a court used either of these dates as the separate property date, the court would be ignoring the purpose of the USFPSA. In this hypothetical divorce, the court should make a detailed findings of fact to inform the parties which factors were considered when ruling on a separate property date.

Husband, service member, and wife are married for many years. Together they have PCS'd and supported the military community. The couple has no children. The husband deploys for six months. Shortly after he deploys, he

meets a civilian and begins a relationship. When the husband returns from deployment they sign a separation agreement. Because of state law, they must wait one year before the divorce becomes final. The husband is promoted during their one year of separation.

This hypothetical divorce is opposite of the previous. Here the court may consider the service member's misconduct when deciding the separate property date. Beginning with the physical separation date as the baseline, the court must consider whether the wife contributed to the marriage or the military community after the physical separation. In this case, the wife has a strong argument for a court ordered separate property date of the date of the separation agreement or even the date of divorce. To persuade the court to order a separate property date as the date of divorce, the wife should present evidence exemplifying her support and assistance to the husband's promotion.

Husband, service member, and wife are married for twenty years, all of which while the husband was on active duty. During that time, the couple lives together and supports the military community. The wife is a member of the wives' clubs wherever they are assigned and does volunteer work on each installation. She receives awards for her contributions to the military community. The couple remained physically together until their divorce was final. After they divorce, the husband serves another five years and is promoted during that time.

In this hypothetical case, the wife has a strong argument for using the date of retirement as the separate property date because she supported the marriage and the military community for twenty years. The wife could argue that without her contributions, the husband could not have succeeded in his career, received the final promotion, and remained on active duty for twenty-five years. The court should review any factors after the physical separation date, which is the date of divorce, and make a final determination about the separate property date.

Because of the variety of factors that a court could consider, this thesis recommends that when a state divorce court determines a separate property date, the court must also make and record findings of fact²⁸⁶ to support the ruling. In the event of an appeal, these findings could be used to review the trial court's ruling for abuse of discretion.²⁸⁷

Although pay increases because of promotions or longevity after the separate property date should be considered the separate property of the service member, increases because of cost of living allowance (COLA) or annual, inflation driven pay increases should be reflected in the former spouses portion of the retired pay. The court order should include such a provision.

3. Factors to Consider

The proposal to designate a separate property date will reduce the animosity between the former service members' organizations and former spouses' organizations. The proposal will end the "windfall" benefit to the former spouse, without ending the importance and relevance of the former spouse's contributions to the marriage and the military community. Despite these beneficial outcomes, Congress must consider two factors before enacting the separate property date proposal. First, Congress must assess the potential for increased

²⁸⁶ A judge makes findings of fact, which is supported by the evidence in the record and used to reach a legal conclusion; the findings of fact are usually presented at the trial or hearing. BLACK'S, *supra* note 2, at 646.

²⁸⁷ The standard "abuse of discretion" is used when a higher court reviews a trial court's factual or legal decision-making. Typically, an appellate court will find that a trial court abused their discretion if they fail to exercise sound, reasonable, and legal decision-making. *Id.* at 10.

litigation. Second, Congress must review the potential difficulty of determining the percentage of retired pay once a court decides the separate property date. This thesis concludes that neither of these factors will prevent Congress from enacting this proposal.

If the parties draft a separation agreement or property settlement, deciding on the separate property date can be an issue bargained during the process. In divorces without separation agreements, determining a separate property date may increase litigation at the time of divorce. Determining a separate property date requires that the parties present evidence during a trial court hearing. Additional witnesses and documentation may be necessary to support each party's proposed separate property date. Further, if an individual is not satisfied with the court's finding, that party may appeal the trial court's ruling in a case that otherwise would be a final divorce.

This thesis cannot predict the actual increase of hearings and appeals because of this proposal. Arguably, the additional litigation may be insignificant. Divorces that are already contentious enough to require a hearing, may simply add one more issue to litigate. Amicably divorcing parties would simply have another issue to include in a property settlement. Finally, additional litigation would be minimal when the service member of a divorce is already retired.

If litigation does increase when Congress enacts this proposal, however, this higher level of litigation may decline over time. As state courts develop their own totality of the

circumstances tests and routinely consider certain factors when deciding the separate property date, parties to a divorce may be less willing to litigate if the outcome is foreseeable.

Congress should also consider the potential difficulty of calculating the percentage of retired pay when using the separate property date proposal. While calculating the former spouse's share of the retired pay under this method may initially sound complicated, state courts can use current methods or formulas for dividing pensions and retired pay with simple adjustments. To use a current formula to divide retired pay based on the separate property date proposal, the state trial court need only make three findings: the separate property date, and the overlap of service and marriage on the separate property date, and the service member's rank and years of service on the separate property date. To demonstrate how these three findings could be used to modify a current formula, consider this formula currently used by many state courts:

$$\frac{1}{2} \times \frac{\text{length of overlap of marriage \& service}}{\text{time in service at vesting}^{288}} \times 100 = \% \text{ of total retired pay}$$

Using the findings in the separate property date proposal, the court could redraft this current formula as follows, with the separate property information in italics:

²⁸⁸ Some courts use "time in service at retirement." For this example, the difference between time in service at vesting and time in service at retirement is irrelevant because the service member had twenty years of service at vesting and at retirement.

$$1/2 \quad \times \quad \frac{\text{length of overlap of marriage \& service at separate property date}}{\text{time in service at vesting}} \quad \times \quad 100 \quad = \quad \text{\% of pay based on rank/longevity on separate property date}$$

Courts already using this type of formula should have no difficulty modifying and using a formula based on the separate property date proposal. Consider the following example to demonstrate the use of a separate property date formula.

Assume that the parties were married on 1 January 1980. On this date, the service member also entered active duty service. The parties separated on 1 January 1985. The parties were divorced on 1 January 1990. The marriage lasted ten years, all of which overlapped with military service. The service member retires on 1 January 2000 as an Army colonel (O-6) with twenty years of service. Assume first, that the court set the date of divorce as the separate property date. On the separate property date, the service member was an Army captain (O-3) with ten years of service.

First, consider the division of retired pay using the current USFSPA and a current formula.²⁸⁹

$$1/2 \quad \times \quad \frac{10 \text{ years of overlap of marriage \& service}}{20 \text{ years of service at vesting}} \quad \times \quad 100 \quad = \quad 25\% \text{ of O-6 retired pay}$$

²⁸⁹ See *supra* note 82 for additional examples of current military retired pay division formulas.

the court would determine that the spouse was entitled to twenty-five percent of the retired pay of a colonel.²⁹⁰ Applying the separate property date formula,

$$\frac{1}{2} \times \frac{\begin{array}{c} 10 \text{ years of overlap of} \\ \text{marriage \& service at} \\ \text{separate property date} \\ 20 \text{ time in service} \\ \text{at vesting} \end{array}}{20} \times 100 = 25\% \text{ of O-3 pay} \\ \text{with 10 years of service}$$

the court would determine that the spouse was entitled to twenty-five percent of the retired pay of captain (O-3) with ten years service.

For a slightly more complicated scenario, assume now that the state court fixed the separate property date as the date the parties separated, 1 January 1985. At that time, the overlap between marriage and service is five years, and the service member was a first lieutenant with five years of service. Using an adjusted formula based on separate property date,

$$\frac{1}{2} \times \frac{\begin{array}{c} 5 \text{ years of overlap of} \\ \text{marriage \& service at} \\ \text{separate property date} \\ 20 \text{ years in service} \\ \text{at vesting} \end{array}}{20} \times 100 = 12.5\% \text{ of O-2} \\ \text{with 5 years of service}$$

²⁹⁰ Information about how to determine the specific dollar amount of retired pay can be found using DEFENSE FINANCE AND ACCOUNTING, PREPARING FOR YOUR RETIREMENT ch. 2 (June 2000), available at <http://www.dfas.mil/money/retired/PERRET00.pdf>. See generally WILICK, *supra* note 6, at 2 (providing information and charts to assist in dividing retired pay); THOLE & AULT, *supra* note 3, at 113-15 (explaining how retired pay is calculated).

the former spouse would only be entitled to 12.5% of the retired pay of a first lieutenant (O-2) with five years service. In this scenario, the marriage and service overlap was only five years because of the court's designation of the separate property date, even though the divorce occurred after ten years of service.

When the service member retires, DFAS would use the court's findings to calculate the dollar amount, and begin direct payment.²⁹¹ Awards based on information other than the service member's rank and length of service at the time of divorce are known as "hypothetical" awards or formulas.²⁹² According to DFAS, hypothetical awards are currently processed and honored.²⁹³ Once DFAS makes the initial calculation, it would only be required to adjust the amount directly paid to the former spouse based on percentage adjustments of congressional pay increases and COLA increases.²⁹⁴

While many former service members support a change to the way a spouse's percentage of the retired pay is calculated,²⁹⁵ they would not be satisfied with this

²⁹¹ See *infra* Section V.G (proposing expanding DFAS direct payment of retired pay).

²⁹² An example of a hypothetical award is: "The former spouse is awarded _____ % of the disposable retired pay of the member had the member retired on _____ (date—usually the divorce date) at the rank of _____ with _____ years of creditable service." DFAS E-mail, *supra* note 123.

²⁹³ See *id.* (acknowledging that this type of award is routinely paid by DFAS provided it complies with the proposed rule to 32 C.F.R. §§ 63.1-63.6 (1995)). While the USFSPA specifically states that the award must be in a percentage or fixed amount, it does not affirmatively reject formulas.

²⁹⁴ The Armed Forces also supports a version of this proposal. Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Require Calculation of Benefits Based on Time of Divorce Rather than Time of Retirement (Jan. 2001) (on file with author).

²⁹⁵ Former service members refer to this as the former spouses "windfall." This issue is one of the former spouses groups main fights in the USFSPA battle. See discussion *supra* Section IV.B.

amendment unless it applied retroactively. However, applying this proposal retroactively would force “recalculation of tens of thousands of divorce settlements.”²⁹⁶

While this thesis is reluctant to propose a change to the USFSPA that may result in additional litigation, this proposal answers the concerns of the parties without preempting the state court’s discretion in property division. Despite the lack of retroactivity in this proposal, this change would have a significant impact on equity in future military divorces. Congress should enact this thesis proposal as recommended in the legislation at the Appendix.

C. Allow for Concurrent Receipt of VA Disability Pay and Military Retired Pay

1. *The Current Problem*

As discussed in Section III.C, disability pay is not included in the definition of disposable retired pay.²⁹⁷ Service members who are entitled to VA disability pay must waive a portion of their retired pay to receive the tax-free disability pay.²⁹⁸ The purpose of the

²⁹⁶ Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces , subject: Amend the Uniformed Services Former Spouses’ Protection Act to Require Calculation of Benefits Based on Time of Divorce Rather than Time of Retirement (Jan. 2001) (on file with author); *see also* Philpott, *supra* note 18.

²⁹⁷ 10 U.S.C. § 1408(a)(4)(B) (2000) (excepting out VA disability pay); *id.* § 1408(a)(4)(C) (excepting out DOD disability pay). The difference between VA disability pay and DOD disability pay is the source of the funds and the taxability. *See* THOLE & AULT, *supra* note 3, at 32-33 (explaining disability benefits).

²⁹⁸ Former service members argue against the required off-set.

Another issue of great concern to military retired veterans is the fact that they must offset their retirement pays dollar for dollar to the amount of VA disability they receive. This issue, commonly called Concurrent Receipt, places military retirees in a class of their own when it comes to receiving VA disability. Unfortunately, this is a class that is punished for twenty or more years of military service, not rewarded for it. No other veteran, whether a federal

required waiver is to prevent the concurrent receipt of disability-retired pay from the DOD and VA compensation for the same disability.²⁹⁹ Often, the VA disability rating increases as the former service member ages.³⁰⁰ As the disability rating increases, the service member must waive additional retired pay, which results in a reduction of disposable retired pay. The former spouse retains a property interest in a percentage of the disposable retired pay, but the actual dollar amount decreases as the disposable retired pay decreases. Thus, if a service member receives a disability rating of one hundred percent, the former spouse would be entitled to a court ordered percentage of nearly zero disposable retired pay.³⁰¹

employee or private sector employee, has their retirement offset if they receive VA disability. According to the Department of Defense, there are presently over 400,000 retired enlisted members of the uniformed services who are forced to offset their retirement. Often, these disabled veterans are unable to work due to conditions, which are connected, to the military service. The reward that these veterans receive is a deduction in their retirement. It is imperative that something be done to assist these veterans' live better lives It is also important to remember that the payment received from the Department of Veterans Affairs is not retired pay, but compensation for a disability sustained in service to our country.

Hearing Before the House and Senate Veterans' Affairs Comms. on Veterans Legislative Priorities, 107th Cong. (Mar. 1, 2001) [hereinafter *Hearing on Legislative Priorities*] (testimony by Vincent B. Niski, Senior Master Sergeant, U.S. Air Force (Retired) National President of the Retired Enlisted Association).

²⁹⁹ See 38 U.S.C. §§ 5304-5305 (2000). Most members elect to receive VA disability rather than DOD disability because VA disability is not included in income tax, which DOD disability is included in income tax.

³⁰⁰ See, e.g. *Ex parte Billeck*, 2000 Ala. LEXIS 192 (Ala. May 12, 2000); *Ashley v. Ashley*, 990 S.W.2d 507 (Ark. 1999); *In re Marriage of Krempin*, 83 Cal. Rptr. 2d 134 (1999); *In the Matter of the Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999); *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000); *Johnson v. Johnson*, 1999 Tenn. App. LEXIS 625 (Tenn. Ct. App. Sept. 14, 1999); *In re the Marriage of Harper*, 2000 Wash. App. LEXIS 333 (Wash. Ct. App. Feb. 25, 2000).

³⁰¹ EX-POSE provides a good example of this:

Let us suppose that the amount of the retired pay is \$2,000 and the former spouse is awarded 50% of that retired pay; let us further suppose that after the divorce decree is finalized and he has retired the service member contacts the VA and is awarded 30% VA Disability (which is, of course, tax free). The calculation is now as follows:

$$\$2,000 - (30\% \text{ VA Disability or } \$279) \times 50\% = \$861$$

Therefore, instead of the original amount awarded (\$1,000), the former spouse now receives \$861.00 and the member now receives only \$721 of his former retirement pay from Defense Finance Center PLUS \$279 (tax free) from the VA.

The Supreme Court predicted this current problem in *Mansell*,³⁰² the case interpreting the USFSPA statutory definition of disposable retired pay as excluding VA disability pay. The Court acknowledged that the USFSPA definition of disposable retired pay greatly reduces the amount of pay available for distribution as property when a disabled member is involved. The dissent in *Mansell* recognized the potential harm to former spouses if the disabled former service member was allowed to unilaterally shift money away from consideration as property.³⁰³ The dissent argued that the majority's interpretation of "disposable retired pay" was too narrow and inconsistent with congressional intent to completely overrule *McCarty* and protect former spouses.³⁰⁴ The original congressional intent was to restore to states the full authority to divide military benefits in any appropriate manner.³⁰⁵ Despite the harm to former spouses, *Mansell* is the current law.

Thus, the former spouse is subsidizing a VA disability claim which was not in effect at the time of their divorce!!

Additionally, the amount of this VA Disability may be increased again and again over the time of the member's retirement, until it reaches 100%, or \$1,964.

EX-POSE Position Paper, *supra* note 184.

³⁰² 490 U.S. 581 (1989). Major (MAJ) Mansell divorced his wife in California, before the *McCarty* decision, after twenty-three years of marriage and service. The state trial court divided Mansell's retired pay equally. However, when MAJ Mansell retired, he elected to receive VA disability pay, and therefore he waived a portion of his military retired pay. Following the USFSPA, MAJ Mansell successfully returned to court to limit the amount paid to his former spouse.

³⁰³ *Mansell*, 490 U.S. at 595 (dissenting opinion, J. O'Connor). "The harsh reality of this holding is that former spouses . . . 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." *Id.*

³⁰⁴ *Id.* at 596-97 (O'Connor, J., dissenting).

³⁰⁵ See *supra* Section II.C (discussing congressional intent in passing the USFSPA).

The equity problem with *Mansell* diminishes if the service member is retired or has a VA disability rating at the time of divorce. Under these facts, a court is more likely to equitably divide property because the court can consider the disability compensation as income of the former service member, but not a property of the marriage. In many of these cases, courts grant former spouses a form of support or property in lieu of what their share of the retired pay would have been if not for the disability determination. Most divorces, however, occur before retirement and before VA disability determinations.³⁰⁶ If the divorce occurs after the disability determination, the limitations of the USFSPA apply.³⁰⁷

Mansell and the USFSPA definition of disposable pay began a new source of litigation in state domestic relations courts. Some courts simply refer to the former spouse's decrease in retired pay as an "award of an asset which has significantly declined in value."³⁰⁸ These courts hold that a party to a divorce should not be allowed to reopen a divorce decree simply because the value of the property is less than expected.³⁰⁹

Inaction in state courts, however, is not the norm. In most states, if a former service member unilaterally waives retired pay to receive VA disability pay, the courts will not stand

³⁰⁶ See JA 274, *supra* note 13, at 9.

³⁰⁷ The USFSPA 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*, 831 P.2d 1257 (Alaska 1992).

³⁰⁸ In the *Matter of the Marriage of Pierce*, 982 P.2d 995, 999 (Kan. Ct. App. 1999) (holding that the wife was barred by the statute of limitations from reopening the property settlement of the divorce decree after the husband began to take his military retired pay as disability pay).

³⁰⁹ See *Pierce*, 982 P.2d at 999. See also *Marriage of Jennings*, 958 P.2d 358 (Wash. Ct. App. 1998); *Matter of Marriage of Reinauer*, 946 S.W.2d 853 (Tex. Ct. App. 1997). The Kansas appellate court in *Pierce* noted that the majority of other state courts grant relief in military retired pay off set by disability pay cases, but that rationale is inconsistent with Kansas state law. *Pierce*, 982 P.2d at 1000.

idly by. While state courts recognize that *Mansell* prevents actual division of disability pay, it does not prevent the courts from “taking into account veterans’ disability benefits when making an equitable allocation of property.”³¹⁰

Extending this argument, some courts look to circumvent the *Mansell* restrictions by awarding “alimony” to the former spouse in an equivalent amount of the property award they would otherwise have received. A former service member must pay an award of alimony regardless of the amount of disposable retired pay available to the service member after recharacterizing the VA disability compensation. The alimony payment need not come from retired pay or disability pay, however.

Many of these courts, concerned about the harm to the former spouse,³¹¹ look for a legal reason to make an additional or alternate award to former spouse by using the terms of the original divorce; specifically, an indemnity clause³¹² or a property settlement

³¹⁰ The *Clauson* court stated:

We are persuaded that neither the USFSPA nor prior Supreme Court decisions required our courts to completely ignore the economic consequences of a military retiree’s decision to waive retirement pay in order to collect disability pay. The statute merely speaks to a state court’s power to “treat” this type of military benefit “either as property solely of the [armed forces] member or as property of the member and his spouse.

Clauson, 831 P.2d at 1257 (citing 10 U.S.C. § 1408(c)).

³¹¹ “[T]he rule established in [*Mansell*] allows the retiree to unilaterally make an election that diminishes the former spouse’s share of marital property. This is patently unfair to former spouses, especially when retirees have designated them as beneficiaries under their Survivor Benefits Plan, as in this case.” *Pierce*, 982 P.2d at 1000-01 (Green, J., dissenting). See generally JA 274, *supra* note 13, at 9.

³¹² Indemnity is defined as the duty to make good any loss incurred by another based. BLACK’S, *supra* note 2, at 772.

agreement.³¹³ By including an indemnity clause in a property settlement, the service member agrees not to take action to convert or change the interest of the retired pay without indemnifying the former spouse.³¹⁴ If a divorce includes such an indemnity clause, the court may order the service member to pay support or alimony in an equivalent amount to what the USFSPA payment would have been.³¹⁵

Under the contract theory, where there is a separation agreement between the parties forming the basis for the property settlement, courts impose a contractual obligation to essentially make whole the former spouse for portions of retirement waived to receive disability payments.³¹⁶ Courts recognize that although a former spouse cannot receive that

³¹³ A property settlement is a judgment in a divorce case determining the distribution of the marital property between the divorcing parties. *Id.* at 1234.

³¹⁴ This is also known as the “constructive trust” theory. Under the constructive trust theory, once the divorce is final the service member essentially holds in constructive trust that portion awarded to the former spouse and cannot take action to convert or change that interest without indemnifying the former spouse. *See* JA 274, *supra* note 13, at 9; *see, e.g., In re Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995).

³¹⁵ *See, e.g., Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (holding that although the former wife could not receive a property share of the retired pay because of disability offset, because of an indemnity agreement in the separation agreement the court could order support payments in an amount equivalent to the percentage of retired pay).

³¹⁶ *See Abernethy v. Fishkin*, 699 So. 2d 235 (Fla. 1997) (holding that although a former wife cannot receive the percentage of retired pay agreed upon in a separation agreement because the former husband is now receiving his retired pay as disability pay, she could receive the amount as alimony because the intent of the parties was to maintain a monthly level of payments); *Longanecker v. Longanecker*, 2001 Fla. App. LEXIS 540 (Fla. Dist. Ct. App. Jan. 26, 2001) (holding that although the retired pay was waived because of VA disability pay, because of a property settlement agreement the former wife is still entitled to receive that portion of disability pay as alimony); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993) (holding that a separation agreement is a contractual obligation between the parties; the service member must make whole the former spouse for portions of retirement waived to receive disability payments); *Dexter v. Dexter*, 661 A.2d 171 (Md. 1995) (holding that a separation agreement is a contractual obligation between the parties; the service member must make whole the former spouse for portions of retirement waived to receive disability payments); *In re the Marriage of Stone*, 908 P.2d 670 (Mont. 1995) (holding that a separation agreement is a contractual obligation between the parties; the service member must make whole the former spouse for portions of retirement waived to receive disability payments). *But see Kutzke v. Kutzke*, No. 95 CA66, 1996 Ohio App. LEXIS 1480 (Ohio Ct. App. Apr. 12, 1996):

portion of retired pay, the original intent of the parties was for the former spouse to receive a certain amount of support each month. The court recharacterizes this amount as alimony rather than retired pay.³¹⁷ “Federal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits.”³¹⁸

One example of the contract theory involving a separation agreement is *McLellan v. McLellan*.³¹⁹ The divorce occurred after the husband was retired and receiving disability pay. The separation agreement incorporated division of military pay, where the wife was to receive “42% of the Husband’s monthly retirement pay, . . . Said percentage of the monthly payment currently totals \$ 699.00. Husband agrees to . . . [make payments] directly to the Wife at his expense.”³²⁰ The separation agreement included and divided the disability pay,

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.

Id.

³¹⁷ See *Abernethy*, 699 So. 2d at 235 (holding that the former wife could receive the retired pay amount as alimony). The court did not note, however, that an award of alimony does not carry the absolute ownership of a property award. Most states require alimony to terminate upon the remarriage of the recipient. See also *Choat v. Choat*, 2000 Wash. App. LEXIS 1288 (Wash. Ct. App. July 3, 2000). “We affirm the trial court’s orders imposing a direct obligation . . . to pay . . . her one-half share of the combined total of the military retired pay and disability pay.” *Id.* The *Choat* court enforced the original property settlement agreement, even though the former service member was now receiving disability benefits after waiving a portion of his retired pay. The court ordered that Mr. Choat pay the amount due out of money other than his disability benefits.

³¹⁸ *Owen*, 419 S.E.2d at 270. See also *Holmes v. Holmes*, 375 S.E.2d 387 (1988). “The judge did not specify that the payments had to come from the husband’s excluded disability benefits. . . . [T]he husband is free to satisfy his obligation to his former wife by using other available assets.” *Id.* at 395.

³¹⁹ 533 S.E.2d 635 (Va. Ct. App. 2000).

³²⁰ *Id.* at 636. The court also noted that the parties agreed to a payment from husband to wife rather than directly from DFAS, arguably because they knew the agreement would not be approved by DFAS.

without distinguishing it from any retired pay. The court held that the separation agreement showed a clear intent that the parties wished the former wife to receive certain payments monthly. The court enforced the provision of the separation agreement.³²¹

Although some courts divide VA disability pay, irrespective of *Mansell*, most courts carefully write these rulings.³²² They cannot simply grant the former spouse a share of the VA disability benefits.³²³ Some courts acknowledge that the service member must necessarily pay spousal support from the VA disability benefits because that is the only source of income for the member.³²⁴ Courts justify these awards using the Supreme Court's family support logic in *Rose v. Rose*,³²⁵ a child support case. In *Rose*, the Supreme Court

³²¹ *Id.* at 639. The *McLellan* court should have converted this payment to "support" or "alimony" and should have clearly indicated that this payment was not a percentage of disability pay. Without this qualifying language, the court arguably violated the USFSPA.

³²² THOLE & AULT, *supra* note 3, at 17 n.2. California and New Mexico courts have divided VA disability pay in violation of *Mansell* and the USFSPA. Other courts order alimony payments even VA disability compensation is the former service members only source of income.

³²³ The *Clauson* court noted:

We are aware of the risk that our 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. Disability benefits should not, either in form or substance, be treated as marital property subject to division upon the dissolution of marriage.

Clauson v. Clauson, 831 P.2d 1257, 1264 (Alaska 1992).

³²⁴ See 10 U.S.C. § 1408(e)(6) (2000).

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.

Id. See, e.g., *Clauson*, 831 P.2d at 1257.

³²⁵ 481 U.S. 619 (1987).

noted that VA disability benefits are “intended to support not only the veteran, but the veteran’s family as well.”³²⁶

Former service members organizations believe that the USFSPA does not sufficiently protect disability compensation,³²⁷ and that courts are ignoring or circumventing Congress’s prioritizing of disability pay using awards for alimony or spousal support.³²⁸ One suggestion for change is to limit the garnishment of retired pay to child support only, not alimony as the USFSPA currently provides.³²⁹ Second spouses of former service members also believe that the USFSPA does not protect the VA disability benefits and that a service member’s first spouse receives a protected status, even if the second marriage lasted longer.³³⁰

³²⁶ *Id.* at 634.

³²⁷ The president of the Retired Enlisted Association recently stated:

[J]udges have failed to recognize the fact that VA disability compensation is not retirement pay. Disability compensation should not be garnished to pay court-ordered obligations. Now, military retirees who are disabled, the more severely disabled the worse situation, are forced to surrender up to all of their already reduced retirement pay and a portion of their disability pension. This in spite of the fact that the USFSPA is supposed to protect disability pay from being garnished and that the United States Supreme Court reinforced this fact in its ruling in *Mansel vs. Mansel* in May, 1989. . . . [Congress should] pass legislation, which will strengthen the protections of VA disability compensation because it is obvious that they are being ignored today.

Hearing on Legislative Priorities, *supra* note 298 (testimony by Vincent B. Niski, Senior Master Sergeant, U.S. Air Force (Retired), National President of the Retired Enlisted Association).

³²⁸ Despite evidence that courts circumvent *Mansell*, the number of direct alimony payments do not support that a widespread problem exists. Of the 62,046 USFSPA cases that DFAS currently makes, only 3813 are alimony payments. See DFAS E-mail, *supra* note 123 (providing statistics on USFSPA payments as of October 2000).

³²⁹ ARA Position Letter, *supra* note 174.

³³⁰ Miller E-mail, *supra* note 282 (noting her husband’s former wife has an “elevated status” merely because she was the first wife during the military career.) “The USFSPA is intent on protecting the wife of my husband’s former life, it expresses very little interest in protecting me the wife of my husband’s current life.” *Id.*

Former spouses organizations are also not satisfied with the current state of the law, and some organizations advocate for repealing the VA disability protection.³³¹ Many former spouses must re-litigate property awards or request alimony in lieu of their diminished property award, at a great expense and emotional burden. Even if successful in receiving alimony, the former spouse loses a property interest in the retired pay.³³² For every former spouse that seeks modification of a court order after a unilateral waiver of retired pay, there are countless spouses who cannot afford to reopen their divorce or are unaware of their right to fight for their share.

2. Proposed Solution

Congress could easily remedy this problem by amending the USFSPA to change the definition of disposable retired pay to include VA disability payments received in lieu of military retired pay.³³³ Currently, federal statutes allow for payments of child support and

³³¹ See THOLE & AULT, *supra* note 3, at 33.

³³² The value of having a property interest in the retired pay, rather than just receiving alimony payments was explained by the ABA as follows:

Different state courts have described the distinction (between property division and alimony) in different ways, but typically they consider the distribution of property at divorce as a permanent division of assets created by efforts during the marriage, while alimony is discretionary, is dependent upon the need and abilities of the parties, and is subject to review upon changed circumstances after divorce.

ABA Position Letter, *supra* note 6, at 3.

³³³ Amending the USFSPA to include VA disability payments as part of disposable retired pay would require repealing 10 U.S.C. § 1408(a)(4)(C).

alimony from VA disability pay.³³⁴ Congress could allow former spouses to receive their share of retired pay from VA disability as well. If enacted, a service member who waived a portion of retired pay as VA disability compensation could receive the income tax benefits, but the VA disability amount would still be considered as part of disposable retired pay.

While revising the definition of disposable retired pay would easily resolve the USFSPA problem, Congress is not likely to pass such a proposal. When enacting the VA disability compensation statutes,³³⁵ Congress prioritized VA disability benefits ahead of former spouses benefits. Congress has historically treated compensation owed to service members who were injured or disabled while serving the country as a high priority. For example, VA disability benefits are not subject to federal income tax or claims of creditors.³³⁶

While Congress has allowed claims for spousal and child support against VA disability compensation, USFSPA benefits are deemed “property” of the marriage rather than spousal support. While the designation as property has given former spouses greater entitlement in many ways, it has removed it from the purview of spousal support and reduced the priority of the benefits to below that of disability pay.

³³⁴ Social Security Act, 42 U.S.C. § 659 (2000) (stating that VA disability pay can be garnished to provide child support or alimony payments).

³³⁵ See 38 U.S.C. § 5301 (2000). This statute requires a specific exemption exist for assignment of VA disability benefits; such an exemption exists for child support and alimony, but not for distribution as marital property. Thus, Congress treats VA disability as a higher priority than former spouses rights to military retirement.

³³⁶ Disability pay is nontaxable to the member and is protected from certain creditors. See 38 U.S.C. § 5301.

For all of these reasons, the interrelationship of VA disability compensation laws and the USFSPA must be re-prioritized through congressional action to both statutes. The question becomes how to ensure that former spouses receive the benefits to which they are entitled, without lowering the priority of VA disability compensation.

The recommended solution eliminates the service member's requirement to waive a portion of retired pay to receive the VA disability compensation. Thus, a former service member who is entitled to receive VA disability benefits would concurrently receive that full benefit and their retired pay. Perhaps this seems like the proverbial "windfall" in favor of the former service member; however, with congressional emphasis on the importance of these benefits to veterans of combat who were injured while fighting the wars of this country, such a windfall does not seem to be out of line. This solution would then allow a former spouse to receive a percentage of the military retired pay without interfering with the VA disability benefits to the former service member.

Congress is currently considering several forms of concurrent receipt of these benefits. During the first week of the 107th Congress,³³⁷ Congressmen Bilirakis and Norwood introduced a bill that would "allow military retirees to receive full military retired pay concurrently with VA disability compensation."³³⁸ Specifically, House Bill 303 would

³³⁷ House Bill 65 was reintroduced on 11 January 2001. House Bill 303, and its companion Senate Bill 170, were reintroduced on January 2001. These bills are slightly different than the similar bills that were introduced in the 106th Congress in that the new bills include retirees who were retired for disability and those who retired with fifteen to nineteen years of service as a result of military downsizing (for example, Temporary Early Retirement Authority). See Fleet Reserve Association, *News-Bytes 01-18-01*, at <http://www.fra.org/news> [hereinafter *FRA News-Bytes 01-18-01*]; Fleet Reserve Association, *News-Bytes 01-25-01*, at <http://www.fra.org/news>.

³³⁸ See *FRA News-Bytes 01-18-01*, *supra* note 337.

allow receipt of VA disability compensation without reduction in the former service member's retired pay if the retired pay is based on twenty or more years of service. It would not apply to DOD disability retired pay.³³⁹ Thus, VA disability, DOD disability, and retired pay would be paid concurrently. If House Bill 303 were enacted, the former spouse could receive their court ordered allocation of retired pay without an initial reduction in the former service members disposable retired pay.

An alternate concurrent receipt bill, House Bill 65, would permit retirees to receive retired pay and VA disability compensation without a full corresponding reduction in retired pay.³⁴⁰ Under House Bill 65, as a former service member's disability rating increased, the amount of the reduction in retired pay would be proportionately decreased.³⁴¹

If Congress passed concurrent receipt legislation, former spouses could receive most or all of the marital property awarded by state courts, without interfering with the former service member's VA disability compensation. One commentator believes, however, that

³³⁹ H.R. 303, 107th Cong. (2001).

³⁴⁰ H.R. 65, 107th Cong. (2001).

³⁴¹ As House Bill 65 explains, the former service member's retired pay would not be reduced "dollar for dollar." The bill suggested a proportionate decrease in retired pay based on the disability rating percentage. If a service member has a 10% disability rating, then the retired pay would be reduced by 90% of the dollar amount of disability pay. For example, a service member with a 10% disability rating who is entitled to \$100 per month in disability pay would only reduced their retired pay by \$90.

As the disability rating increased, the percentage of that pay reduced from retired pay would decrease. For example, the retired pay would be reduced "if . . . the disability is rated 20%, by the amount equal to 80% of the amount of the disability compensation paid such person." *Id.* The bill explains that "[t]he retired pay of a person entitled to disability compensation may not be reduced . . . if and while the disability of such person is rated as total." *Id.*

concurrent receipt would just result in “declaration of an open season on an ex-spouse’s share of *both* payments.”³⁴²

3. *Factors to Consider*

The most significant factor Congress must consider before passing any concurrent receipt legislation is the government expense. Congress must weigh the cost of the various proposals before enacting any of the concurrent receipt legislation. When reviewing the cost of concurrent receipt, Congress must consider the current cost to the parties of litigating and re-litigation VA disability issues. At present, the most frequently reported cases concerning the USFSPA involve inequities to former spouses concerning waiver of retired pay in lieu of VA disability compensation.³⁴³ Congress has routinely advocated for the disabled Veteran, however, that same Veteran is expending significant amounts of money litigating this issue simply to retain their statutory right to receive and retain disability compensation.

While Congress contemplates the various concurrent receipt proposals, courts should apply an equity standard to these cases. Ideally, when parties prepare a separation agreement or property settlement, they should contemplate the eventual receipt of VA disability compensation and create provisions for property distribution and spousal support.

³⁴² THOLE & AULT, *supra* note 3.

³⁴³ In a LEXIS search of cases decided in the last two years, eleven out of twenty-six state and federal USFSPA cases involved VA disability compensation. The LEXIS search database included all federal and state cases between 1 April 1999 and 1 April 2001. Using this database, the terms “USFSPA” and “FSPA” yielded twenty-seven cases, one of which was a bankruptcy case. Of the twenty-six USFSPA cases, disability awards were at issue in eleven cases.

However, if a former service member unilaterally elects to receive VA disability pay in lieu of retired pay, the former spouse should petition the court for review of the property determination (if within the statute of limitations for such modifications) or request spousal support or alimony. The state trial court could then review the circumstances of the parties, including any indemnity clauses or property-settlement contracts in the original divorce, and modify the divorce decree as warranted. While this solution would not decrease litigation on USFSPA issues, it is a realistic, equitable, interim solution.

Congress should enact the proposed legislation for concurrent payment of military retired pay and VA disability compensation. As concurrent receipt legislation is currently pending before Congress, this thesis does not include concurrent receipt language in the proposed legislation at the Appendix.

D. Include Separation Bonuses and Incentives in the Definition of Disposable Retired Pay

1. Current Problem

At present, the USFSPA only controls military retired pay as divisible upon divorce. The USFSPA does not address early separation benefits and pre-retirement benefits such as Career Status Bonus (CSB/REDUX),³⁴⁴ Variable Separation Incentive (VSI), and Special

³⁴⁴ See *REDUX Information*, *supra* note 145 (explaining the Career Status Bonus or “REDUX” retirement plan). Under this plan, when service members who entered after 1 July 1986 reach their fifteen-year mark, they have the option of converting to the pre-1986 retirement plan or keeping the new plan and accepting a \$30,000 bonus, which carries a commitment to remain on active duty until the twenty-year point. Because of the “bonus” payment while on active duty, these payment can be analogized to enlistment bonuses and judge advocate continuation pay.

Separation Bonus (SSB).³⁴⁵ Service members receive these bonuses and incentives based on length of service; these separation benefits are paid either at specific career points, at separation, or upon early retirement as an annuity.

Courts, however, are inconsistent in their treatment of early separation benefits and lump-sum bonuses. Some courts view separation benefits as the separate property of the service member.³⁴⁶ These courts distinguish separation benefits from retired pay or pension pay because they are similar to "severance payment . . . and compensate a separated service member for future lost wages."³⁴⁷ Many of these courts hold that separation benefits should be the separate property of the service member if received after divorce.³⁴⁸

However, most courts have used the rationale of USFSPA cases and state division of pensions to divide VSI and other separation benefits.³⁴⁹ The rationale of these courts is that

³⁴⁵ These programs are explained *supra* Section III.H. See generally WILLICK, *supra* note 6, at 95-99 (detailing separation benefits and early retirement programs).

³⁴⁶ See, e.g., *Mackey v. Mackey*, No. 20,010, 2001 Ohio App. LEXIS 98 (Ohio Ct. App. Jan. 17, 2001) (holding that VSI payment was separate property of the service member).

³⁴⁷ *McClure v. McClure*, 647 N.E.2d 832, 841 (1994).

³⁴⁸ See, e.g., *Mackey*, 2001 Ohio App. LEXIS at 98. In *Mackey*, a man who received a VSI payment upon leaving the Air Force after fourteen years of service was not required to divide the payment upon his divorce. The court distinguished the VSI payment from a pension plan because the payment was made after divorce.

³⁴⁹ See *In re Marriage of Crawford*, 884 P.2d 210 (Ariz. 1994); *In re Marriage of Babauta*, 66 Cal. App. 4th 784 (1998) (holding that VSI pay is divisible); *In re Marriage of Heupel*, 936 P.2d 561 (Colo. 1997) (holding that a lump sum SSB payment is divisible as marital property); *Kelson v. Kelson*, 675 So. 2d 1370 (Fla. 1996) (holding that VSI payments were not covered by the USFSPA, but finding that as a practical matter VSI payments are the functional equivalent of the retired pay in which the former spouse has an interest); *Lykins v. Lykins*, 2000 Ky. App. LEXIS 137 (Ky. Ct. App. Nov. 17, 2000) (holding that payments under the VSI were marital property and therefore the former spouse could be awarded a share of the payments); *Blair v. Blair*, 894 P.2d 958 (Mont. 1995); *Kulscar v. Kulscar*, 896 P.2d 1206 (Okla. Ct. App. 1995); *Marsh v. Wallace*, 924 S.W.2d 423 (Tex. Ct. App. 1996) (holding that a lump sum SSB payment was divisible and granting the former spouse the same percentage of the SB she would have received of retirement pay. The court found that the SSB was "in the nature of retirement pay, compensating him now for the retirement benefits he would have received

the separation benefit received by the service member are divisible as marital property because these benefits are equivalent to an advance on retired pay or present compensation in lieu of future retirement benefits.³⁵⁰ Courts have not yet reviewed the interaction between the USFSPA and the recently approved CSB/REDUX retirement plan to determine whether the bonus as well as the actual retirement pay are divisible upon divorce.

2. *Proposed Solution*

Pre-retirement bonuses, separation benefits, and early retirement incentives should be included in the statutory definition of disposable retired pay because they are similar to retired pay in key aspects.³⁵¹ Service members are only eligible for these benefits after serving a specific time. The DFAS distributes these benefits; VSI annuities are distributed similarly to retired pay. Because of the eligibility for and the distribution of bonuses and incentives, the USFSPA should consider these benefits analogous to military retired pay. Many state courts already treat civilian severance pay as marital property.³⁵²

in the future.”); *Marsh v. Marsh*, 973 P.2d 988 (Utah Ct. App. 1999) (holding that the separation benefit received by the service member was divisible and property of the marriage because it was equivalent to an advance on his retirement pay).

³⁵⁰ See *Wallace*, 924 S.W.2d at 423 (holding that SSB was “in the nature of retirement pay, compensating him now for the retirement benefits he would have received in the future.”); *Marsh*, 973 P.2d at 988 (holding that the separation benefit were equivalent to an advance on his retirement pay).

³⁵¹ But see *THOLE & AULT*, *supra* note 3, at 42. Separation bonuses are subject to the domestic family laws of each state. As such, Congress does not need to pass new legislation when judges now have the authority to divide such an asset according to state law. *Id.*

³⁵² See *id.*

Both courts and DFAS should treat separation benefits the same as retired pay to prevent a prospective award of retired pay from being considered worthless.³⁵³ For example, if a divorce occurs before the service member is retired, the court should divide retired pay where appropriate. Because the proposal to amend the USFSPA contemplates separation benefits in the definition of retired pay, that separation benefit will be divided by DFAS if the service member elects an early retirement, receives separation benefits, or receives a retirement-linked bonus. Currently, because early retirement benefits are not contemplated by definition of disposable retired pay, parties must re-litigate division of separation benefits if the divorce is already final.

One argument against including separation benefits in the USFSPA definition of disposable retired pay is that Congress did not include these benefits in the original USFSPA. That is, if Congress intended to define separation benefits as marital property, Congress would have included such language. This argument fails, however, because separation benefits and pre-retirement awards such as VSI, SSB, and CSB/REDUX were not statutorily available at the time Congress enacted the USFSPA.³⁵⁴ In the 1990s alone, three such programs were created to “prune the military population” without unnecessary harsh outcomes.³⁵⁵ Thus, Congress could not include in the definition of disposable retired pay a benefit that did not exist.

³⁵³ Currently, the court order to divide retired pay as part of a property settlement becomes worthless to the former spouse if the military member elects early retirement. *See id.* at 41.

³⁵⁴ These are relatively new programs resulting from downsizing the military. *See* WILLICK, *supra* note 6, at 94; THOLE & AULT, *supra* note 3, at 41-42.

³⁵⁵ *See* WILLICK, *supra* note 6, at 95.

Former spouses organizations also agree with this proposal. “Since both the [VSI] and [SSB] are based on the years of service of the member, and were used to more fairly separate service members who otherwise might have served to retirement, . . . it [is] rational to allow courts to treat such entities as property.”³⁵⁶ The ABA also supports this proposal.³⁵⁷

3. *Factors to Consider*

Congress should consider any difficulty administering this program. Theoretically, the DFAS can treat VSI annuity payments as they treat retired pay. The more difficult scenario is the SSB lump-sum payments and the CSB/REDUX pre-retirement bonus. If a court awarded division of a lump-sum payment, DFAS could only divide and directly make the payment if the court order was sufficiently in advance of government payment of the SSB benefits.³⁵⁸

Congress must also consider the interplay between division of these benefits and use of the separate property date formula for dividing retired pay.³⁵⁹ Although this proposal would allow for division of these benefits, such division is not mandatory. Once the court determined a separate property date, the court could determine whether benefits are separate

³⁵⁶ NMFA Position Letter, *supra* note 6.

³⁵⁷ ABA Position Letter, *supra* note 6. The ABA would extend benefits further and argues that the “the same medical, exchange and commissary benefits should be provided to former spouses of members that would be enjoyed by members who have taken VSI or SSB, and their current spouses.” *Id.*

³⁵⁸ DFAS currently has ninety days to process court orders and arrange for direct payment. 10 U.S.C. § 1408(d)(1) (2000).

³⁵⁹ See *supra* Section V.B for a complete discussion of the proposed use of separate property date for dividing military retired pay.

property or marital property. If the court determines that separation benefits and pre-retirement incentives are marital property, they could be divided using the same formulas as retired pay.

Because a system is in place for dispersing direct payment of these funds,³⁶⁰ costs to the government would be minimal. Congress should enact this provision of the thesis legislation that proposes including separation benefits and pre-retirement awards in the definition of USFSPA disposable pay.

E. Granting Benefits to 20/20/15 Category Spouses³⁶¹

1. *Current Problem*

Currently 20/20/20 spouses are entitled to certain benefits including commissary and exchange privileges and medical care.³⁶² Many consider this rule too restrictive; these benefits should be extended to 20/20/15 spouses.³⁶³ One government agency explained that the 20/20/20 requirement was too “harsh [because] enlisted members typically don’t get married until a year or two after entering service. Most retire, however, at [twenty]. That

³⁶⁰ Section V.G *infra* proposes direct payment for all divisions of retired pay without the “ten-year overlap” requirement.

³⁶¹ A 20/20/15 spouse is married to a service member for at least twenty years and the service member has at least twenty years of active service, but only fifteen of those years overlap. *See* discussion *supra* Section III.G.

³⁶² 10 U.S.C. § 1072(2)(F)(1). *See* discussion *supra* Section III.G.2.

³⁶³ *See* ABA Position Letter, *supra* note 6. *See* Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses’

pattern keeps too many enlisted ex-spouses from qualifying for full benefits, which they likely need more than do longer-serving officer wives.”³⁶⁴

2. Proposed Solution

This thesis recommends changing federal law to allow certain benefits to spouses who were married for at least twenty years to a service member who served at least twenty years, even though only fifteen years of the marriage overlapped with the service, that is 20/20/15 former spouses.³⁶⁵ The benefits they receive would be identical to those benefits currently received by 20/20/20 spouses, and would include commissary and post-exchange (PX) and medical benefits.³⁶⁶

This 20/20/15 solution is the most logical way to resolve the problem. While the requirement of twenty years of active service cannot be changed because of retirement eligibility, the overlap period can be reduced. A feasible option is to require twenty years of marriage, but require a shorter “overlap” period to include those marriages occurring before

Protection Act to Grant Benefits to Certain 20/20/15 Spouses (Jan. 2001) [hereinafter Tax Council Proposal to Grant Benefits to 20/20/15 Spouses] (on file with author).

³⁶⁴ See Tax Council Proposal to Grant Benefits to 20/20/15 Spouses, *supra* note 363 (discussing a recommended change to the USFSPA). See also Philpott, *supra* note 18.

³⁶⁵ This recommendation would require a change to 10 U.S.C. § 1072(2)(F).

³⁶⁶ The Tax Council’s proposal is slightly different on the medical benefits eligibility requirements. They recommend: “medical benefits by having each month of marriage after the member’s retirement count toward satisfaction of the 20-year marriage/service overlap.” See Tax Council Proposal to Grant Benefits to 20/20/15 Spouses, *supra* note 363.

active service or extending after active service.³⁶⁷ This option acknowledges that these spouses contribute to the military during the majority of the active service.

The benefits to 20/20/15 former spouses would be significant. Currently, 20/20/15 spouses have transitional medical benefits from the military, but are later forced to find health insurance. If they do not have their own careers, they have a difficult time finding reasonable health insurance, especially if they have pre-existing health problems. An additional benefit is shopping at the post-exchange and commissary. If this shopping is available, these facilities offer twenty to twenty-five percent savings over civilian retailers.

This proposed revision to former spouses benefits does not cause significant controversy. Former service member organizations, former wives organizations, and DOD working groups,³⁶⁸ support this proposal.

3. Factors to Consider

Currently, approximately 2200 un-remarried 20/20/15 spouses would benefit from this amendment.³⁶⁹ This number, however, does not distinguish which 20/20/15 spouses have employer health insurance and would not be entitled to military health care benefits.

³⁶⁷ This proposal had been unsuccessfully introduced during the 98th Congress. A House report at that time suggested that the reason that many military marriages never reach the 20/20/20 requirement is that many service members do not marry until after they enter the armed forces, but retire promptly at twenty years of service. H.R. REP. 98-1080, at 299-300, 98th Cong. (1985).

³⁶⁸ See Tax Council Proposal to Grant Benefits to 20/20/15 Spouses, *supra* note 363. See also Philpott, *supra* note 18.

³⁶⁹ See Tax Council Proposal to Grant Benefits to 20/20/15 Spouses, *supra* note 363.

Even assuming 2200 former spouses would qualify, the cost of this amendment would be relatively low. Further, because one of the purposes of the exchange system is to “generate earnings to supplement appropriated funds for the support of the DOD’s morale, welfare, and recreation programs,”³⁷⁰ the cost to the DOD may be indirectly paid by those former spouses who use the exchange services.

Because of the wide support for this proposal³⁷¹ and the relative low cost, Congress should introduce and pass legislation to effect this change. Proposed legislation to make this revision is found at the Appendix to this thesis.

F. Amend the Language of the Dependent Victims of Abuse Provision

1. Current Problem

Congress enacted the Dependent Victims of Abuse Provision was enacted in October 1992³⁷² to ensure that victims of domestic abuse were not stifled in reporting the abuse because of fears of losing financial support.³⁷³ However, a spouse is eligible for these support payments only if the service member is retirement-eligible based on years of creditable service before the convening authority takes action on the case. Any imprisonment, including pretrial confinement, is not creditable service towards retirement.

³⁷⁰ See 10 U.S.C. § 1065(e).

³⁷¹ Emswiler Interview, *supra* note 7.

³⁷² 10 U.S.C. § 1408(h).

³⁷³ See discussion *supra* Section III.

What should the trial counsel do when the service member is nearly retirement eligible, but safety of the victim warrants confinement before action? The statute does not allow for a waiver of creditable service requirement or a provision counting confinement as creditable service solely for USFSPA support payments. "In these cases former spouses have lost the opportunity to receive an allocation of retired pay because the members were confined prior to convening authority action on their case."³⁷⁴

Currently in situations where decision-making authorities are aware of the USFSPA provisions and the effect of confinement on retirement eligibility, those authorities may need to choose between the short-term safety of the victims and the victims' long-term support needs. In one case, the court-martial safely ordered restriction less than confinement to ensure that the service member reached retirement eligibility before the convening authority took action.³⁷⁵ While the decision-making authorities in that case could provide for current safety of the victims *and* future USFSPA payments, not all decision-making authorities will have such flexibility. This difficult decision is not in the spirit of the Dependent Victims of Abuse Provision of the USFSPA.

³⁷⁴ Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act Dependent Victims of Abuse Provisions (Jan. 2001) [hereinafter Tax Council Victims of Abuse Proposal] (on file with author). Confinement is not considered creditable service for the purpose of retirement.

³⁷⁵ E-mail from Kenneth Asher, Senior Associate Counsel, Defense Finance and Accounting Services to Major Mary J. Bradley (Feb. 26, 2001) [hereinafter Asher E-mail] (on file with author).

2. *Proposed Solution*

Congress should amend the Dependent Victims of Abuse Provisions of the USFSPA to expand eligibility to those former spouses of service members who would have been eligible to retire at the time of losing retirement eligibility because of the abuse—with periods of confinement before convening authority action considered creditable service.³⁷⁶ This amendment should be retroactive to the date Congress enacted the Dependent Victims of Abuse Provisions to provide for any former spouses who were previously deemed ineligible because of this gap in the law. Although the current loophole in the USFSPA may affect only a handful of former spouses, it is an amendment to the USFSPA that is uncontroversial and completely within the spirit of the provisions already in place. Further, this proposal should be effective retroactively to the date Congress enacted the Dependent Victims of Abuse provisions.³⁷⁷

3. *Factors to Consider*

Congress should consider the cost of this revision. However, this change will effect very few former spouses; the cost to the government will be nominal.³⁷⁸ Congress should enact this proposal as presented in the legislation in the Appendix of this thesis.

³⁷⁶ Tax Council Victims of Abuse Proposal, *supra* note 374.

³⁷⁷ *Id.*

³⁷⁸ The actual number of former spouses this amendment will affect is difficult to predict. Because there are fewer than twenty-five former spouses in the entire program, Asher E-mail, *supra* note 375, this amendment will not likely affect more than a handful of people.

G. Revise the Requirements and Procedure for Direct Payment of Retired Pay Allocations

1. *Current Problem*

Currently, DFAS will make direct payment of property awards to former spouses only if they meet the “ten-year-overlap” rule, which requires that at least ten years of marriage overlapped with ten years of service creditable toward retirement.³⁷⁹ Former spouses that do not qualify for direct payment do not have a mechanism to enforce court ordered retired pay. An additional restriction on direct payment is that only the former spouse can apply to DFAS for direct payment. The confusion, lack of enforcement, and application requirements have caused problems that result in costly litigation for parties. This section provides a detailed explanation of each of these problems.

The ten-year-overlap rule often confuses parties, and even courts, into believing that a ten-year overlap is necessary for *any* division of military retired pay as property.³⁸⁰ Service members have made this argument to trial and appellate courts. Courts still address service members’ positions as serious arguments and are compelled to examine and explain fully the

³⁷⁹ 10 U.S.C. § 1408(d)(1) (2000). The USFSPA does not require the ten-year overlap for direct payment of child support payments or alimony. *See generally* discussion *supra* Section III.D.

³⁸⁰ *See* THOLE & AULT, *supra* note 3, at 13-14 (stating that one common misconception about the USFSPA is that the parties must be married for ten years to qualify for benefits); WILLICK, *supra* note 6, at 81 (noting that the 20/10/10 requirement is not a limitation on subject matter jurisdiction). During a “letter to the editor” debate in the San Antonio Express-News, a former spouse wrote a letter correcting the facts of an editorial about the horrors of the USFSPA. However, she incorrectly stated that “the couple must have been married at least ten years before the act will award any portion of the service member’s retirement to the spouse.” *See* Karen Silvers, *Get the Facts Straight* (Editorial), SAN ANTONIO EXPRESS-NEWS, July 18, 2000, at 4B (responding to Verburgt’s letter of 8 July).

ten-year-overlap provision of the USFSPA.³⁸¹ One court correctly stated: “Although husband and wife have not met the ten-year requirement, that is ‘not a barrier’ to a court’s division of the former spouse’s military retirement pay. It is but a ‘factor in determining how the entitlement is to be collected.’”³⁸²

State courts continue to struggle with the requirements for direct payment.³⁸³ Some courts saw an ambiguity in the language of the direct payment provision, and contemplated congressional intent and legislative history to reach their conclusion.³⁸⁴ As recently as June 2000, a state appellate court overturned a trial court decision that failed to allow division of retired pay because the marriage did not have a ten-year overlap with service.³⁸⁵

³⁸¹ See, e.g., *Bryant v. Bryant*, 762 P.2d 1289 (Alaska 1988) (holding that the retired pay was divisible, despite the service member’s argument that they had not been married ten years; however, the court stopped the garnishment order for the property award because the ten-year-overlap rule had not been met); *Beltran v. Beltran*, 183 Cal. App. 3d 292 (1986) (noting that the service member argued that the ten-year rule applied to whether retired pay was divisible as marital property); *Pacheco v. Quintana*, 730 P.2d 1 (N.M. Ct. App. 1985) (rejecting the service member’s argument that his former wife should not be entitled to any of his retired pay because they were married less than ten years); *In the Matter of the Marriage of Wood*, 676 P.2d 338 (Or. Ct. App. 1984) (holding that the service member’s interpretation of the ten-year rule was “totally lacking in merit”); *Cook v. Cook*, 446 S.E.2d 894 (Va. Ct. App. 1994) (noting that the service member’s argument was that his former wife should not receive a share of his retired pay because they hadn’t been married ten years); *Parker v. Parker*, 750 P.2d 1313 (Wyo. 1988) (holding that despite the service member’s argument, the ten-year rule applied only to the direct-pay process).

³⁸² *Cook*, 446 S.E.2d at 896 (Va. Ct. App. 1994) (citing *Carranza v. Carranza*, 765 S.W.2d 32, 33-34 (Ky. Ct. App. 1989)).

³⁸³ See, e.g., *Stone v. Stone*, 725 S.W.2d 145 (Mo. Ct. App. 1987) (holding that the trial court incorrectly concluded that “federal statute imposes a ten year marriage requirement as a pre-condition to distributing a military pension as marital property”).

³⁸⁴ See, e.g., *Beltran*, 183 Cal. App. 3d at 296 (reviewing the legislative history of the USFSPA before deciding that the ten-year rule applied to direct-pay rather than whether retired pay was divisible as marital property); *In the Matter of the Marriage of Konzen*, 693 P.2d 97 (Wash. 1985) (Brachtenbach, J., dissenting) (concluding that the term “section” in 10 U.S.C. § 1408(d)(2) meant the entire § 1408, not just § 1408(d)(2) and thus the ten year overlap was required for any division of retired pay as marital property); *Parker*, 750 P.2d at 1313 (reviewing legislative history of the USFSPA before ruling that the ten-year rule applied only to the direct-pay process).

³⁸⁵ *In re Marriage of Deason*, 611 N.W.2d 369 (Minn. Ct. App. 2000). “The district court erred in concluding that 10 U.S.C. § 1408(d)(2) (1994) precludes the division of military pensions in dissolution actions where the party with a military pension did not complete ten years of creditable service during the marriage.” *Id.*

Even when courts correctly apply the ten-year overlap rule and award retired pay to spouses who were married less than ten years, the direct payment restriction causes enforcement problems.³⁸⁶ Some service members agree to a voluntary allotment, to create a direct payment-like situation.³⁸⁷ Such allotments, however, can be modified or discontinued at the will of the service member. In the absence of direct payment from DFAS, former service members can thwart the system by refusing to give former spouses their portion of retired pay. Civil hearings for contempt can follow,³⁸⁸ which make the process more time-consuming and costly for the government and the parties. Some former service members will endure prison rather than pay their retired pay directly to a former spouse.³⁸⁹ Other former service members live overseas where former spouses may have difficulty collecting their portion of retired pay. One commentator explained this enforcement problem best: “These awkward enforcement mechanisms often led to extended games of cat-and-mouse for embittered ex-spouses, where members executed allotments to get out of jail and then

³⁸⁶ One commentator advises attorney how to handle this situation. WILLICK, *supra* note 6, at 84-86. One suggestion he provides is to off-set the retirement award; use the present value of the spouses interest in the retired pay and offset against other marital property, or cash to be paid off. Another suggestion is to request permanent alimony rather than a share of marital property; he recommends agreeing to a lesser amount of alimony to have the service member agree. This settlement would be an irrevocable, unmodifiable alimony in an amount measured by the military retired benefits, in exchange for a waiver by the former spouse of any property interest in the retirement benefits themselves.

³⁸⁷ See generally WILLICK, *supra* note 6, at 121-22 (discussing voluntary allotments).

³⁸⁸ See *Goad v. United States*, 2000 U.S. App. LEXIS 20189 (Fed. Cir. July 21, 2000) (noting that in an earlier court case, Goad had been found in contempt of court for failure to pay his former spouse her share of his retired pay).

³⁸⁹ See *id.* (noting that in an earlier court case, Goad had been imprisoned following a ruling that he was in contempt of court for failure to pay his former spouse her share of his retired pay).

revoked or reduced the allotments once released, effectively daring the former spouse to spend the time and money to start the process over again.”³⁹⁰

While enforcing payment of retired pay without direct payment is a problem for former spouses, failure to apply for direct payment is a problem for former service members. When a state court orders a property award of retired pay that meets the ten-year-overlap rule, the former spouse must submit an application to DFAS for direct payment.³⁹¹ Currently, service members cannot submit this application, even if the court orders direct payment or if they prefer direct payment. Many service members prefer direct payment to ensure compliance with the court order and to prevent having to interact with their former spouses. Further, direct payment ensures accuracy in payments as the cost of living allowances occasionally increase the total divisible retired pay. Service members do not wish to risk inaccurately determining actual dollar amounts based on federal taxes, occasional increases in allowances, and court formulas.

However, if former spouses wish to avoid direct withholding of federal taxes on their percentage of retired pay, they can refuse to apply for direct payment. Thus, DFAS deducts the total federal taxes from the former service member’s portion and the entire amount is taxable income to the former service member.³⁹² Some former spouses to escape federal

³⁹⁰ *Id.* at 123.

³⁹¹ 10 U.S.C. § 1408(d) (2000).

³⁹² See *Jordan v. Jordan*, 2000 Ohio App. LEXIS 1048 (Ohio Ct. App. Mar. 17, 2000) (resolving in favor of the former spouse the issue of whether the dollar amount of a former spouses percentage retired pay should be determined before or after the federal government withholds taxes).

taxation of their property interest because the federal government does not have a direct report of former spouses' taxes paid and withheld.

2. Proposed Solution

This thesis proposes repealing the ten-year overlap requirement for direct payment from DFAS.³⁹³ Eliminating this rule would serve several purposes.³⁹⁴ It would end confusion about the applicability of the USFSPA to former spouses who were married less than ten years. Processing applications for retired pay would be easier and more efficient for DFAS because they would not need to review and reject applications that do not meet the direct pay requirements.³⁹⁵

Additionally, the federal government would have better accounting for income tax purposes.³⁹⁶ While a court order requires each party to pay all federal, state, and local income tax on their specific allocations of the retired pay, DFAS does not account for specific amounts unless the spouse is receiving direct payment. When DFAS makes direct payment, it withholds federal income tax from each party's payments in accordance with

³⁹³ 10 U.S.C. § 1408(d)(2). See Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Allow Either Members or Former Spouses to Submit an Application for Direct Payment of Benefits (Jan. 2001) (on file with author).

³⁹⁴ The Armed Forces Tax Council supports this proposal. Philpott, *supra* note 18.

³⁹⁵ DFAS currently reviews and rejects applications that do not meet the ten-year overlap rule. DFAS E-mail, *supra* note 123.

³⁹⁶ DFAS could not report the former spouses military retired pay income to IRS. This change could aide accounting for DFAS, retirees, and ex-spouses when divorce court orders involve spouses married to members for less than ten years. Philpott, *supra* note 18.

Internal Revenue Service (IRS) schedules and reports the payments directly to the IRS.³⁹⁷ As current tax provisions stand, alimony is not included as income to the former spouse, but retired pay is income.

This proposal is further justified because no other federal or private retirement plan includes a direct payment limitation.³⁹⁸ Based on the congressional request to study the USFSPA as compared to the other federal agencies and civilian sector,³⁹⁹ Congress intends to amend the USFSPA to make it more comparable to other agencies.

In addition to repealing the ten-year overlap requirement for direct payment from DFAS, the direct payment procedures should be amended to allow either parties to apply for direct payment. This proposal would benefit all parties involved and ensure that any party could initiate the benefits of direct payment without having to rely on the other party. The result would be that DFAS rather than individual parties could manage income tax withholding and accounting.

³⁹⁷ Reporting is typically done on an IRS Form 1099-R.

³⁹⁸ Emswiler Interview, *supra* note 7 (noting that based on information compiled for the DOD Report, other federal and private retirement plans do not include a direct payment limitation); Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniform Services Former Spouses' Protection Act to Repeal the "10-year Rule" for Direct Payment of Retired Pay Allocations (Jan. 2001) (on file with author).

³⁹⁹ Act of Nov. 18, 1997, Pub. L. 105-85, 111 Stat. 1799 (requiring the Secretary of Defense to review and report on the protections, benefits and treatment afforded retired uniformed services members compared to retired civilian government employees).

3. *Factors to Consider*

While DFAS would incur costs of processing the additional applications generated by this revision, because the system for direct payments is already in place, the administrative costs would likely be nominal.⁴⁰⁰ The cost to the federal government as a whole may be reduced because the IRS would have a better reporting record of these former spouses income. If DFAS cannot make direct payment to the former spouse, the service member receives all of the retired pay from DFAS and is taxed on the full amount.⁴⁰¹

Allowing either the former service member or the former spouse to submit an application for direct payment of benefits would remedy the secondary issue. Because DFAS already has an application process in place, the cost of allowing either party to apply for direct payment would be nominal. If both parties filed, DFAS may be burdened with unnecessary applications, however.

Congress should repeal the ten-year overlap rule for direct payment from DFAS and allow either party to submit an application for direct payment of benefits. These proposals are reflected in the legislation in the Appendix of this thesis.

⁴⁰⁰ *But see* DFAS E-mail, *supra* note 123 (noting that there is no way to determine the additional volume of court orders or the additional cost).

⁴⁰¹ *See id.* (noting that DFAS withholds income tax from retired pay).

H. Waiver of Recoupment from Former Spouses Overpayment Resulting from Retroactive Disability Determinations⁴⁰²

1. *Current Problem*

The VA often makes disability determinations that are retroactive in effect.⁴⁰³ In the same procedure as receipt of current disability pay, a former member who receives a retroactive disability determination must waive retired pay to receive VA disability pay. When a service member waives retired pay based on a retroactive disability determination, DFAS recomputes the USFSPA payment from the effective date of the disability, and adjusts the amount of money that the former spouse is entitled to receive.⁴⁰⁴ Then, DFAS posts the amount of retroactive VA disability payment overpaid to a former spouse as a debt to the former spouse's account. At the same time, DFAS credits the former service member for the total amount of the overpayments to the former spouse.⁴⁰⁵

Next, DFAS notifies the former spouse of the debt, in accordance with debt collection procedures.⁴⁰⁶ The standard debt notice letter also informs the former spouse about

⁴⁰² Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Waive Recoupment of Overpayment to Former Spouses Resulting from Retroactive VA Disability Determinations) (Jan. 2001) [hereinafter Tax Council Recoupment Waiver Proposal] (on file with author).

⁴⁰³ See, e.g., *Kramer v. Kramer*, 567 N.W.2d 100 (Neb. 1997) (noting that a service member's 1995 disability rating was made retroactive to 1992).

⁴⁰⁴ See DFAS E-mail, *supra* note 123.

⁴⁰⁵ See *id.*

⁴⁰⁶ See *id.*

requesting a waiver of the debt.⁴⁰⁷ Recoupment can be waived “when collection of the erroneous payment would be against equity and good conscience, and not in the best interest of the United States.”⁴⁰⁸

2. Proposed Solution

If a court properly ordered the original UFSPA award, DFAS should automatically waive former spouses’ debt from retroactive VA disability determinations. Currently, DFAS cannot automatically waive these debts, but the waiver requests are routinely granted when the payment was properly made to the former spouse at the time of the award.⁴⁰⁹ Proper payments are those that when initially made to former spouses were correctly computed based on information available at the time. Thus, the payments were not “erroneous.”⁴¹⁰ To prevent penalizing either the former member or the former spouse, the government should not attempt to collect overpayments.

3. Factors to Consider

Because DFAS routinely grants waivers, implementing this proposal would not result costs to the government not already contemplated.⁴¹¹ Further, automatic waivers would save

⁴⁰⁷ See 10 U.S.C. § 2774 (2000).

⁴⁰⁸ Tax Council Recoupment Waiver Proposal, *supra* note 402.

⁴⁰⁹ Emswiler Interview, *supra* note 7 (noting that DFAS typically grants waivers of debt if the original award was properly made).

⁴¹⁰ Tax Council Recoupment Waiver Proposal, *supra* note 402.

⁴¹¹ *Id.*

DFAS the administrative burden of notifying the former spouse and processing the waiver. Congress should enact this proposal, included in the legislation at the Appendix.

I. Mandating a Reduction in DFAS Processing Time and Efficiency

1. *Current Problem*

The USFSPA provides that DFAS has ninety days to process applications for direct payment based on court awards of property, alimony, and child support.⁴¹² This delay in processing results in the service member accumulating arrears before the direct payment begins. Thus, the former service member is in arrears even though all parties have complied with the court order. If the service member does not willingly pay these arrears, the former spouse may return to court to enforce the arrears. Upon a court order for arrears, DFAS can garnish the service members retired pay; DFAS will not garnish arrears of property awards.

Former service members and former spouses complain that DFAS processes USFSPA applications slowly.⁴¹³ Several solutions have been recommended to remedy this problem. The Armed Forces Tax Council recommended that the service member should be allowed to waive the thirty-day response period.⁴¹⁴ State bar associations suggested that Congress enact

⁴¹² 10 U.S.C. § 1408(d)(1); 32 C.F.R. § 63.6(c)(2) (2000).

⁴¹³ Emswiler Interview, *supra* note 7. In response to requests for comment on the USFSPA, the working group on the DOD report received numerous complaints about DFAS processing time. These complaints came from both former spouses and former service members.

⁴¹⁴ Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act Protection Rules Pertaining to Notification of Members (Jan. 2001) (on file with author).

legislation to permit DFAS to make retroactive payments to former spouses when arrearages result from the time expended in processing the order.⁴¹⁵ The ABA recommended that DFAS withhold the former spouse's share pending its final approval of the order and that once the application was approved the withheld funds would be forwarded to the former spouse.⁴¹⁶ Both the ABA and several bars recommended that DFAS conduct preliminary reviews of proposed court orders for administrative sufficiency.⁴¹⁷ If DFAS found the court order insufficient, errors or omissions could be corrected before the order was executed and filed.⁴¹⁸

2. Proposed Solution

Before analyzing a solution to the statutorily authorized delay in processing of USFSPA applications, this thesis must review the actual processing of USFSPA applications. Currently, when DFAS receives an application for payment of retired pay, along with a court order, DFAS attorneys conduct a legal review. If the application meets the requirements of

Members occasionally request that payments start immediately. Amending the statute will clarify the member's rights in this respect. The proposal would also amend the USFSPA to delete the requirement that a copy of the court order be sent to the member. DFAS will instead notify the member that, upon request, it will send the member a copy of the order.

Id. The Tax Council provides an example of how this provision has worked for child support. Since the child support waiver provision took effect, DFAS has process approximately 10,000 orders but received only approximately 300 requests for copies of the court order. The Tax Council's recommendation would reduce DFAS's administrative costs and ensure prompt payment of USFSPA payments to former spouses.

⁴¹⁵ Emswiler Interview, *supra* note 7.

⁴¹⁶ *Id.* This process is similar to the process that the IRS and ERISA require for private retirement plans.

⁴¹⁷ *Id.* Currently, pre-approval of court awards is not allowed by statute or the implementing regulation. However, DFAS is planning to provide "standard" approved formats for formulas and hypothetical awards, which will be available to the public. See DFAS E-mail, *supra* note 123.

the statute and the regulation, DFAS sends a notification to the former spouse and the member stating that the case will be honored. Although the USFSPA allows DFAS thirty days, it typically takes only eight to twelve days to conduct the legal review and send the “honor letter,” which states that DFAS will honor the application for USFSPA payments.⁴¹⁹ The service member then has thirty days from receipt of the “honor letter” to respond to the application.⁴²⁰ The USFSPA provides thirty days for DFAS to hold its determination in abeyance for the member to demonstrate irregularity in the order.⁴²¹ After the thirty days, DFAS initiates the USFSPA payment as soon as possible based on pay system monthly deadlines.⁴²² The actual processing time plus the deadlines in the pay system often push the start of USFSPA payments to the second month following the receipt of an application.

Further, an understanding of the number of applications that DFAS processes is necessary before this thesis can discuss remedial action. As of October 2000, DFAS was making 62,046 USFSPA payments.⁴²³ Property awards made up 56,359, while child support and alimony were 1874 and 3813, respectively.⁴²⁴ Every year, DFAS processes between

⁴¹⁸ Parties can return to court to obtain clarifying orders. See WILLICK, *supra* note 6, at 24.

⁴¹⁹ See DFAS E-mail, *supra* note 123.

⁴²⁰ 10 U.S.C. § 1408(g) (2000). “A person receiving effective service of a court order . . . 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 . . . to the member affected by the court order . . .” *Id.*

⁴²¹ *Id.*

⁴²² Specific “cut-off” dates for processing retired pay garnishment each month trigger when the actual payment will start. See DFAS E-mail, *supra* note 123 (explaining the legal review of USFSPA applications and court orders).

⁴²³ See *id.*

⁴²⁴ See *id.*

18,000 and 20,000 applications for award of retired pay.⁴²⁵ After legal review, DFAS rejects approximately twenty-three percent of the applications for a variety of administrative and legal reasons.⁴²⁶

This thesis supports policies that will decrease processing time, and thus, decrease litigation over arrears. However, such revisions should not be statutory in nature. At most, changes in processing should be regulatory.⁴²⁷ Any regulatory changes must be flexible guidance, which includes DFAS review and comment. Because of its direct work with the USFSPA process, DFAS understands the needs of the parties and the economic feasibility of any proposed policy that may improve processing.

Policy-makers at DFAS recommend changes to the implementing regulations that will decrease processing time. In the past, DFAS has recommended a process to allow electronic applications and recognizes that electronic applications could streamline the process.⁴²⁸ In the child support collection arena, DFAS recently developed a process that allows states to send wage withholding orders to DFAS via the Internet.⁴²⁹

⁴²⁵ *See id.* Some of these applications are those that were previously rejected submissions that are re-submitted with further documentation or a clarifying order. *Id.*

⁴²⁶ *See id.* The rejected applications are not categorized by “reason for rejecting.” However, many are rejected for incomplete or unclear applications. Others are rejected because the former spouse does not qualify for direct payment or because the jurisdictional requirement was not met.

⁴²⁷ The DFAS implementing regulation is 32 CFR pt. 63 (2000).

⁴²⁸ *See* DFAS E-mail, *supra* note 123.

⁴²⁹ *See id.*

Further, DFAS looks to internal mechanisms to increase efficiency and assist the parties. Soon, DFAS will implement a new interface between the garnishment department and the retired pay system, called Integrated Garnishment System (IGS).⁴³⁰ According to DFAS, IGS will dramatically speed up the process of implementing the withholding into the service member's pay.⁴³¹ The DFAS website provides information to assist parties when preparing applications and property settlements.⁴³² In the future, DFAS will be putting out guidance on formats for "formula" and "hypothetical" awards.⁴³³

This thesis advocates for additional regulatory changes. First, to decrease processing time, the service member should be able to waive the thirty-day notice and response period. Arguably, a waiver provision could be problematic for DFAS to implement because it changes a well-functioning process. This thesis contends, however, that a waiver contained directly on the application for retired pay would actually ease the review. The application for retired pay should contain a provision that allows a service member to waive notice and the thirty-day response time. The current DD Form 2293, Request for Former Spouse Payments from Retired Pay,⁴³⁴ does not contain a block for the service member to waive notice rights. If a signed waiver is contained on the application, DFAS can quickly and easily separate

⁴³⁰ *See id.*

⁴³¹ *See id.*

⁴³² Defense Finance and Accounting, *Garnishment*, at <http://www.dfas.mil/money/garnish/> (last modified Mar. 21, 2001) (providing a fact sheet, frequently asked questions, and DD Form 2293).

⁴³³ *See* DFAS E-mail, *supra* note 123.

⁴³⁴ DD Form 2293, Application for Former Spouse Payments from Retired Pay (Jan. 1999).

those applications that need notice and a thirty-day response and those that do not. The DOD should modify this form.

In addition to modifying DD Form 2293 to include a waiver provision, this form should also become an electronically transmittable application. With increased technological advances, such as digital signatures, DFAS should work to establish a means of receiving electronic applications and court orders.⁴³⁵ Electronic service of process will increase the efficiency of the USFSPA process.

3. Factors to Consider

While critics can provide logical solutions to the delay in processing time, only DFAS can understand what their organization can support. Further, DFAS works with former service members and former spouses every day, and is the only organization that can provide a realistic solution that can be implemented with as minimal cost as possible. Rather than detail specific statutory rules for DFAS to follow, the USFSPA should allow DFAS the flexibility to continuously review and improve processing of USFSPA applications.

⁴³⁵ A similar proposal is made by the Armed Forces Tax Council. See Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Allow for Electronic Transmission of Court Orders and Applications for Payments (Jan. 2001) (on file with author).

J. Amend the Survivor Benefits Plan

1. Current Problems

The SBP and the USFSPA programs are discussed together because both USFSPA payments and SBP premiums are typically taken from military retired pay.⁴³⁶ While the SBP program runs smoothly, several changes can improve its efficiency as well as compatibility with today's society where multiple marriages are common.

This thesis recommends that Congress make two amendments to the SBP. First, more than one spouse should be eligible to receive the SBP benefits. Second, Congress should repeal the one-year deemed election rule, which limits the time to designate a former spouse as SBP beneficiary.⁴³⁷ Former spouse organizations,⁴³⁸ former service member organizations,⁴³⁹ and government working groups,⁴⁴⁰ all support amending the SBP.

⁴³⁶ The USFSPA implementing regulation also discusses the SBP. *See* 32 C.F.R. pt. 63 (2000).

⁴³⁷ The Armed Forces Tax Council has recommended an additional change to the SBP. *See* Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Uniformed Services Former Spouses' Protection Act to Allow Automatic "Cash-out" of "Small Benefits" and Optional "Cash-out" of SBP and "Large Benefits" (Jan. 2001) (on file with author). The primary aspect of this recommendation is to decrease the DFAS workload created by many small monthly payments to former spouses. These benefits could be automatically cashed out as a lump-sum payments to former spouses. An additional plan could be established for larger lump-sum payments. A discussion of this Armed Forces Tax Council proposal is beyond the scope of this thesis.

⁴³⁸ One former spouses' organization recommends changing the method of premium payments. NMFA Position Letter, *supra* note 6. Currently, former members have SBP premiums for current or former spouses deducted from disposable retired pay. According to NMFA, this has lead to inequities.

Current law does not allow the former spouse to pay the SBP premium directly, even when the ratified agreement includes the provision that the former spouse is responsible for the payment. NMFA believes that both parties in the divorce would be better served if, in these situations, the former spouse could pay the premium directly to DFAS. In almost all cases, DFAS would be able to deduct the premium from the amount provided by DFAS to the former spouse.

2. Allow More than One SBP Beneficiary

a. Proposed Solution

Currently, a service member can designate only one SBP beneficiary. In today's society of multiple marriages, if a service member remarries, his second spouse cannot receive an annuity interest in SBP.⁴⁴¹ Service members and their second spouses advocate for this change based on fundamental fairness, especially where the current spouse is married to the service member longer than the former spouse.⁴⁴²

Id. This thesis does not disagree with NMFA's position on this issue; however, no evidence exists that would warrant this change.

⁴³⁹ The ARA supports changes to the SBP. See ARA Position Letter, *supra* note 174.

⁴⁴⁰ The Armed Forces Tax Council supports changes to the SBP. See Legislative Initiative for Unified Legislation and Budgeting, originated by the Armed Forces Tax Council, subject: Amend the Survivor Benefit Plan Rules (Jan. 2001) [hereinafter Tax Council SBP Proposal] (on file with author). The Tax Council specifically recommends amending the SBP as follows: permit the designation of multiple SBP beneficiaries; establish a presumption that multiple beneficiary designations and related allocations of SBP benefits must be proportionate to the allocation of retired pay; permit the courts to establish and designated responsibility for payment of premiums related to SBP coverage; repeal the one-year deemed election period requirement. *Id.*

⁴⁴¹ Second spouses are a vocal proponent of reforming the SBP. See E-mail from Diane M. Ungvarsky to Lieutenant Colonel Thomas K. Emswiler (Feb. 19, 1999) [hereinafter Ungvarsky E-mail] (noting that if husband dies on active duty, his SBP will go to ex-wife). "The USFSPA hurts too many second spouses. The new spouse is left without coverage and support." *Id.* Miller E-mail, *supra* note 282 (noting that even though she was with her husband during most of his military career and ended up making significant PCS moves, his first wife is awarded an "elevated status merely because she was my husband's first wife during his military career"). Former service members also support this amendment. See E-Mail from John L. Milliken, U.S. Navy (Retired) to Lieutenant Colonel Thomas K. Emswiler (Feb. 20, 1999) [hereinafter Milliken E-mail] (supporting SBP to more than one spouse). Some individual former spouses, however, disagree with multiple beneficiaries. See, e.g., E-mail from Nancy R. Jones to Lieutenant Colonel Thomas K. Emswiler (Mar. 2, 1999) [hereinafter Jones E-mail].

⁴⁴² Changing the SBP to allow for more than one beneficiary was frequently mentioned in letters and e-mails the DOD received in response to its request for input on revising the USFSPA. See Ungvarsky E-mail, *supra* note 441 (noting that her husband's ex-wife will receive the full SBP if her husband dies while on active duty); Milliken E-mail, *supra* note 441 (noting that the SBP should change to "allow more than one spouse" as beneficiary). But see Jones E-mail, *supra* note 441 ("According to my divorce decree I get all of the SBP and I want it to stay that way!").

Congress should amend the SBP statute to allow for multiple beneficiaries of SBP annuities. The statute should contain a presumption that multiple beneficiary designations and related allocations of SBP benefits are proportionate to the allocation of retired pay.⁴⁴³

b. Factors to Consider

As with all changes involving pay and benefits, Congress must consider the cost to implement this plan. These changes will not likely incur any additional costs to the government, other than administrative expenses.⁴⁴⁴ Further, because SBP payments are based on actuarial tables similar to insurance rates, tables must be developed to determine appropriate premiums for multiple beneficiaries.

One foreseeable problem with allowing multiple beneficiaries is the impact on the initial property settlement and state court division of marital property. The potential for multiple beneficiaries devalues the SBP annuity; it becomes less of a bargaining tool. State courts must also ensure that parties properly implement the change and provide that the pro

⁴⁴³ This presumption should be built into the statute, but allow the parties to agree otherwise. The Tax Council made a similar recommendation. Tax Council SBP Proposal, *supra* note 440. See ARA Position Letter, *supra* note 174 (supporting a pro rata share of SBP annuity equal to the percentage share of retired pay). Some former spouses also agree that current spouses should receive pro-rata share of the SBP annuity. See, e.g., Letter from Janelle G. Macdonald to Lieutenant Colonel Thomas K. Emswiler (Feb. 21, 1999) (stating that the SBP pro-rata share should occur in the same manner as the monetary division of the retirement, based on the length of the marriage for each spouse leading up to retirement; however, "if a current spouse has married after the retirement of the former military person then no SBP entitlement should be granted to the current spouse, as that was not married to the individual during the military career").

⁴⁴⁴ The Armed Forces Tax Council supports changes to the SBP. See Tax Council SBP Proposal, *supra* note 440.

rata share presumption takes effect *only* if the service member designates a second beneficiary.

3. Repeal the One-year Deemed Election Rule

a. Proposed Solution

If a court designates a former spouse as beneficiary of the SBP, the service member must notify DFAS of the election. If the service member who is required to make an SBP election fails or refuses to make that election, the member is “deemed” to have made the election if DFAS receives both a written request from the former spouse and a copy of the court order.⁴⁴⁵ The current law requires the former spouse to make the election within one year of the date of the court order, or the election is not effective.

The one-year deemed election rule is complicated and illogical. The harsh results of this rule are demonstrated in this example:

Assume three identical divorces on the same day: In the first case, the lawyer, who knew almost nothing about military retirement benefits law, did not even know there was an SBP to allocate. The second knew that something had to be done, and so put a statement in the order verifying that the former spouse was the irrevocable beneficiary of the benefit. The third not only knew to secure the right, but knew about the deemed election procedure, sent the required notice, and so on.

⁴⁴⁵ See *supra* Section III.F (providing a complete discussion of the one-year deemed election rule).

One year and one day after the divorce, the third former spouse's rights would be secure. The first former spouse could go back to court at any time (before the member's death) to get a valid order for SBP beneficiary status, and then serve the pay center. The second former spouse, however, whose rights were supposed to be "secured" by the judgment, would be entirely without a remedy (except a malpractice claim against the divorce lawyer).⁴⁴⁶

Any law that benefits the party who is most ignorant of the law over another party who secures rights upon divorce, must be reconsidered and revised. The DOD has also recognized the harsh results that the current law produces.⁴⁴⁷

Unfortunately, the harshness of the one-year deemed election rule are found beyond hypothetical situations. In *Dugan v. Childers*,⁴⁴⁸ a former spouse failed to make the deemed election within one year. Although the court order designated the former spouse as the beneficiary in the divorce decree ending the thirty-six-year marriage,⁴⁴⁹ the service member changed his SBP beneficiary when he remarried.⁴⁵⁰ However, the former spouse's failure to make the deemed election prohibited her from receiving the SBP annuity.⁴⁵¹ Rather, the

⁴⁴⁶ WILICK, *supra* note 6, at 154-55.

⁴⁴⁷ *See id.* at 155 n.72 (citing DEPARTMENT OF DEFENSE REP. ON THE SURVIVOR BENEFIT PLAN (Aug. 1991)).

⁴⁴⁸ *Dugan v. Childers*, 539 S.E.2d 723 (Va. 2001).

⁴⁴⁹ The couple was married in 1951. The service member retired in 1975, at which time he designated his wife as the beneficiary of the SBP annuity. Upon their divorce in 1987, the former service member agreed that his former wife was entitled to one-half of the retirement benefits and the SBP annuity. *See id.* at 723-24

⁴⁵⁰ The former service member remarried in 1994 and changed his SBP beneficiary to his current wife. In 1996, the former service member was found guilty of contempt and directed to change his SBP beneficiary back to his former spouse. However, he died before he complied with the court order. *See id.*

⁴⁵¹ *See id.* at 727.

former service members' current wife of five years received the SBP annuity.⁴⁵² The inequitable conclusion in *Dugan* was the correct legal outcome based on the current law.

Additionally, many former spouses are unaware that they must make a deemed election within one year of divorce where they were previously designated as the "spouse beneficiary." The beneficiary status does not "carry over" to the former spouse status. In the recent case, *Woll v. United States*,⁴⁵³ a spouse of twenty-three years who failed to make a deemed election lost entitlement to the SBP annuity. Woll argued that the Army should have notified her that her status as the SBP beneficiary changed upon divorce. In dicta, the court stated: "The elaborate statutory scheme for SBP insurance does not place [a] burden on the Army, and makes it incumbent on the spouse to trigger modification for a deemed election of former spouse benefits."⁴⁵⁴ Congress should not place the burden of an "elaborate statutory scheme" on former spouses. Congress should repeal the one-year deemed election period requirement.

⁴⁵² The state court's contempt holding was preempted by 10 U.S.C. § 1450, which governs the subject of former spouse's entitlement to the survivor's benefits of a military retiree. *See id.* at 725. Concerning pre-emption in general, the Supreme Court has said that "if Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Because Congress has occupied the field of military retirement benefits, state courts cannot make laws that contradict the federal laws.

⁴⁵³ 41 Fed. Cl. 371 (1998).

⁴⁵⁴ *Id.* at 375.

b. Factors to Consider

If Congress repeals the one-year deemed election rule, a former spouse should still be required to complete the beneficiary election before the service member dies. Even though a current or second spouse is on notice of the former spouse's interest in the SBP because of the court order, the current spouse who begins to receive benefits must be able to rely on those benefits. Once the service member dies, the designated beneficiary should not change.

Repealing the one-year deemed election rule may also reduce litigation. While not prevalent in reported cases, former spouses and current spouses litigate beneficiary status before and after the service members' death.⁴⁵⁵ Repealing the one-year deemed election rule should not cost the government any additional money. Any additional cost, specifically overdue or unpaid premiums, would fall to the party designated by the original court order requiring the former spouse to be the SBP beneficiary. Currently, DFAS processes SBP elections by service members and deemed elections by former spouses.

VI. Conclusion

Individually, each proposal in this thesis improves the equity of the USFSPA and military divorces. Combining these proposals, however, realizes that potential for equitable resolution of division of military retired pay upon divorce. While Congress must consider

⁴⁵⁵ See, e.g., *Woll*, 41 Fed. Cl. at 371; *Nicholas v. United States*, No. 96-394 (1999 U.S. Claims LEXIS 99); *Sumakeris v. United States*, No. 96-5069, 1996 U.S. App. LEXIS 16170 (Fed. Cir. July 8, 1996); *Wise v. Wise*, 765 So. 2d 898 (Fla. Dist. Ct. App. 2000); *King v. King*, 483 S.E.2d 379 (Ga. App. 1997); *Silva v. Silva*, 509 S.E.2d 483 (S.C. Ct. App. 1998); *Dugan*, 539 S.E.2d at 723.

each proposal separately, presenting the combined effect of all of these proposals emphasizes the importance of continuing the legislative effort toward total reform. To emphasize this point, this thesis presents a hypothetical military divorce situation. Applying the current USFSPA law, this thesis reviews the potential litigation and financial outcome for the parties. Then, the same review is conducted using the proposed changes. Consider the following hypothetical situation:⁴⁵⁶

1990: John and Anne are married in Colorado, which is John's domicile, where he votes, and where he owns property. In that same year, John enters military service as a second lieutenant.

1997: John is assigned a one-year unaccompanied tour.

1998: John and Anne file for separation, John is a captain.

John's next duty assignment is in California; John has lived in California only because of military service. Anne returns to her parents' home in California.

1999: Anne files for divorce. John and Anne divorce just before John is promoted to major.

Anne is awarded a share of John retired pay; the court orders John to elect Anne as the SBP beneficiary. Neither John nor Anne file for the deemed election of SBP within one year.

2001: Sally learns that John did not designate her as beneficiary of the SBP.

2004: John has a training accident that injures his knee and hip.

2005: John accepts a lump-sum payment of \$30,000 from the CSB/ REDUX retirement plan.

2008: John marries Sally.

⁴⁵⁶ This hypothetical military divorce is unable to capture all of the proposed changes to the USFSPA. This hypothetical involves a marriage that lasts less than ten years. Thus, certain changes are automatically excluded from consideration. Proposals not addressed include: granting benefits to 20/20/15 spouses, the Dependent Victims of Abuse Provision, and the improved DFAS processing and efficiency.

2010: John retires as a colonel. Upon retirement, John elects Sally as the SBP beneficiary. John does not make a voluntary allotment of Anne's percentage of retired pay; John refuses to pay Anne any of the retired pay.

2015: John receives a VA for a disability rating of 30%, which the VA determines should have been retroactive to the date of John's retirement. As John gets older, his injury causes increased hardship and he is unable to work. The VA gradually increases his disability rating over the years until it is 100%.

2025: John dies.

A. Applying the Current USFSPA

Applying the current USFSPA and SBP laws, John and Anne could enter court numerous times before and after their divorce. At the time of the divorce, neither party can contemplate what the future may hold either personally or professionally. Could Anne predict that John would be injured and elect to receive VA disability rather than retired pay? Could John predict that he would retire as a colonel, and that he would remarry? The current USFSPA does not contemplate personal or professional variables after divorce, and requires parties to re-litigate issues to preserve their original interests in retired pay. As this hypothetical military divorce demonstrates, controversy can arise at every stage of litigation under the current USFSPA.

The USFSPA jurisdictional requirements are the first problem for Anne. Because of these requirements, Anne could not file for divorce in California if she wished to have the court divide the military retired pay. Anne could dissolve the marriage in California, but would have to go to another jurisdiction, such as Colorado, to divide the retired pay. John

could force Anne to litigate in two states or force her to file for divorce and property division in Colorado.

At divorce, the Colorado court may divide John's military retired pay based on a formula that will incorporate John's rank and time in service at retirement. Even though John and Anne were apart for the last two years of their nine-year marriage, the court determines that the marriage lasted nine years, all of which overlapped with military service. The court determines that Anne is entitled to 22% of John's retired pay (as a colonel with twenty years in service).

In 2005, Anne sues John for a share of the lump-sum payment under the CSB/REDUX plan. The court orders John to give Anne 22% of the payment. When John retires, he refuses to make a voluntary allotment or give Anne the court ordered 22% of his disposable retired pay. Because Anne does not qualify for direct payment of retired pay, she has no means to enforce the court ordered 22%. Anne files a civil suit for contempt. John refuses to pay; John remains in prison until he creates an allotment.

The amount of the allotment, however, is not the amount Anne originally contemplated. John gives Anne 22% of his disposable retired pay, which is reduced because of his disability rating. As his disability rating increase and Anne's allotment decreases, Anne returns to court for a modification of property settlement. The court orders John to pay Anne alimony in the amount that she originally would have received before the disability rating. Anne files an application with DFAS for direct payment of alimony. By the time the

application is processed, John is already two months in arrears. Anne sues John for alimony arrears.

Finally, because neither John nor Anne elected Anne as the beneficiary of the SBP, Anne does not receive an annuity upon John's death. Anne files a claim against the United States to receive the SBP. Anne also sues Sally to prevent her receipt of the SBP.

Under the current USFSPA, despite their divorce John and Anne remain tied in costly litigation until and after John's death. John is not happy with how the court divided his retired pay, payment of his CSB/REDUX bonus to Anne, and payment of alimony. Anne is not happy that she had to file for divorce in Colorado, that she cannot enforce the court order, and that she did not receive the court ordered SBP annuity.

B. Applying the Thesis Proposals

The theme of the individual and collective thesis proposals is to provide states with the means to effectively and efficiently adjudicate military divorces, through federal administrative, procedural, and enforcement mechanisms. With these mechanisms in place, parties to a military divorce should not need to re-litigate issues after the original divorce is final.⁴⁵⁷ To demonstrate the combined effect of the thesis proposals, consider how the proposals apply to the hypothetical military divorce.

⁴⁵⁷ The exception being "changes in circumstances" for alimony or child support modifications, which are outside the scope of this thesis.

With the jurisdictional prerequisites repealed, Anne could file for divorce in California, where John and Anne are currently living. California could dissolve the marriage and divide the retired pay.

At divorce, the court would divide John's military retired pay based on the separate property date. John and Anne would litigate this issue during the divorce hearing. John would argue that the separate property date should be the date he left for his unaccompanied tour; Anne would argue for the date of John's promotion to major. The court would review the totality of the circumstances of the marriage, and would likely decide that the date of legal separation should be the separate property date. Using the separate property date in a formula, the court would award Anne 20% of the retired pay of a captain with eight years of service.⁴⁵⁸ Because the separate property date was set as 1998, Anne would not be entitled to any share of John's CSB/REDUX bonus.

At John's retirement, Anne begins to receive direct payment of her share of the retired pay. When John receives his VA disability rating, DFAS does not recoup the

⁴⁵⁸ The court could use the following formula:

$$\frac{1}{2} \times \frac{\text{length of overlap of marriage \& service at separate property date}}{\text{time in service at vesting}} \times 100 = \% \text{ of pay based on rank/longevity on separate property date}$$

and insert the hypothetical information into the formula,

$$\frac{1}{2} \times \frac{8}{20} \times 100 = 20\% \text{ of O-3 with 8 years service}$$

the court would determine that Anne is entitled to 20% of the retired pay of a captain (O-3) with eight years service.

overpayments previous paid to Anne. John is not required to waive a portion of his retired pay to receive the VA disability compensation. Anne continues to receive her 20% share of John's retired pay, that is as a captain with eight years of service.

When Anne discovered that John failed to elect her as beneficiary under the SBP, she made the election with DFAS in 2001. After John married Sally, he followed the requirements to make her a second beneficiary. Anne and Sally each received a pro-rata share of the SBP annuity.

If Congress adopts all of the proposals in this thesis, John and Anne would only litigate USFSPA and SBP issues once: at their divorce. After that date, the procedural and enforcement mechanisms would accommodate all of the changes in circumstances suggested in this hypothetical. With the end of costly litigation, hopefully, the animosity between John and Anne would decrease. At the time of divorce, both would know the continuing terms and conditions of the property division.

Regardless of legislative changes, however, parties to a divorce may never be content. Will John and Anne ever be "happy" with the outcome? John is still required to give Anne a portion of his retired pay; Anne will not benefit from John's future promotions and longevity. While Congress, lobbyist, private organizations, and scholars have spent the last twenty years searching, a solution that will satisfy all parties to every military divorce may not exist. Despite reforms in the law, nothing can change the emotional aspects of military divorce. A service member should reap the benefits after twenty hard years, which could have included

difficult duty and combat experiences; a military spouse who sacrificed a lucrative career to support a spouse, a unit, and a nation, should also be rewarded and considered an equal partner.

Perhaps all Congress can do is search for a solution that will be the most fair to the most people. This thesis proposed several changes to the USFSPA, which are supported by law and practice. Individually, each proposal will move military divorce one step closer to equity. Together, these proposals will make proceedings under the USFSPA more equitable for all parties to a military divorce.

APPENDIX

Uniformed Services Former Spouses Reform Act of 2001

107th CONGRESS

1st Session

H.R. XX, S. XX

To amend title 10, United States Code, to revise the rules relating to the court-ordered apportionment of the retired pay of members of the Armed Forces to former spouses, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES/ SENATE

A BILL

To amend title 10, United States Code, to revise the rules relating to the court-ordered apportionment of the retired pay of members of the Armed Forces to former spouses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Uniformed Services Former Spouses Reform Act of 2001'.

SECTION. 2. REPEAL JURISDICTION REQUIREMENT

(a) IN GENERAL- Section 1408(c)(4) of title 10, United States Code, is repealed.

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to marriages terminated by court orders issued on or after the date of the enactment of this Act.

SECTION. 3. AWARD OF RETIRED PAY BASED ON LENGTH OF SERVICE AND PAY GRADE ON THE SEPARATE PROPERTY DATE.

(a) Section 1408(c) of title 10, United States Code, as amended by section 2, is further amended by adding at the end the following new paragraph:

'(4) In the case of a member as to whom a final decree of divorce, dissolution, annulment, or legal separation is issued before the date on which the member begins to receive retired pay, the disposable retired pay of the member that a court may treat in the manner described in paragraph (1) shall be computed based on the pay grade, and the length of service of the member while married, that are creditable toward entitlement to basic pay and to retired pay as of the separate property date. Amounts so calculated shall be increased by the cumulative

percentage of increases in retired pay between the date of the final decree and the effective date of the member's retirement.'

(b) Section 1408(a) of title 10, United States Code is amended by adding the following new paragraph:

'(8) The term "separate property date" means the date upon which the parties cease to contribute to the marriage. To determine the separate property date, the court will used a totality of the circumstances test and consider all relevant aspects of the marriage.'

(c) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after the date of the enactment of this Act.

SECTION 4. INCLUDE RETIREMENT, PRE-RETIREMENT, OR SEPARATION BENEFITS IN THE DEFINITION OF DISPOSABLE RETIRED PAY

(a) Section 1408(a)(4) of title 10, United States Code is amended by inserting after 'total monthly pay' the following: 'including any benefits or bonuses tied to retirement, early retirement, or separation'

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after the date of the enactment of this Act.

SECTION 5. REPEAL THE DIRECT PAYMENT LIMITATIONS

(a) Section 1408(d)(2) of title 10, United States Code is repealed.

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after June 25, 1981.

SECTION 6. AMEND THE LANGUAGE OF THE DEPENDENT VICTIM OF ABUSE PROVISION

(a) Section 1408(h)(A) of title 10, United States Code is amended by inserting after 'while a member of the armed forces and after' the following: 'either (i)' and after 'the basis of years of service' the following: 'or would be eligible to retire from the armed forces on the basis of years but for noncreditable retired time due to confinement directly related to the misconduct.'

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after the date specified in Section 1408(h) of title 10, United States Code.

SECTION 7. EXTEND BENEFITS TO 20/20/15 SPOUSES

(a) Sections 1072(F) and (G) of title 10, United States Code are repealed.

(b) Redesignated Section 1072(F) of title 10, United States Code is added as the following new paragraph:

“(F) the unremarried former spouse of a member or former member who (i) on the date of the final decree of divorce, dissolution, or annulment, had been married to the member or former member for a period of at least 20 years, at least 15 of which were during the period the member or former member performed service creditable in determining the member or former member’s eligibility for retired or retainer pay (ii) does not have medical coverage under an employer-sponsored health plan;”

(c) Section 1072(H) of title 10, United States Code is redesignated as Section 1072(G) of title 10 United States Code.

(d) Section 1072(I) of title 10, United States Code is redesignated as Section 1072(H) of title 10 United States Code.

(e) EFFECTIVE DATE- The amendment made by subsections (a)-(e) shall apply with respect to court orders issued on or after the date of the enactment of this Act.

SECTION 8. REPEAL THE ONE-YEAR DEEMED ELECTION PERIOD FOR FORMER SPOUSES TO FILE AS SURVIVOR BENEFIT PLAN BENEFICIARIES

(a) Section 1450(f)(3)(c) of title 10, United States Code is repealed.

(b) EFFECTIVE DATE- The amendment made by subsection (a) shall apply with respect to court orders issued on or after the date of the enactment of this Act.