



Military Benefits for Former Spouses: Legislation and Policy Issues

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Summary

In 1981, the Supreme Court ruled that the former spouse of a military member or retiree could not be awarded any share of that member's/retiree's retired pay as a part of a divorce property settlement in a community property state. In response, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA) in 1982. Under the USFSPA, state courts can treat disposable military retired pay as divisible property in divorce cases. In addition, certain former spouses would remain eligible to receive certain military benefits or privileges. The USFSPA has since been modified on a number of occasions.

The USFSPA allows for 'disposable' military retired pay to be divided as part of a divorce settlement. The law makes no assumption of such a division nor does it presume how much of a division should be made. However, state laws may vary on these concepts. In addition, the USFSPA allows for certain military benefits to be awarded to qualifying former spouse. These include health care benefits and commissary/exchange privileges.

Confusion exists over the distinction of 'disposable' versus 'total' retired pay. The use of disposable retired pay may have implications in terms of taxes withheld and taxes paid. In addition, recent changes in other laws that affect military retired pay may inadvertently affect the amount of retired pay a former spouse receives. For example, disability pay is not divisible under the USFSPA. Recent changes that allow certain military retirees to receive both disability pay and military retired pay (until recently, these were offsetting), increase the amount a retiree may receive and may also increase the former spouse's share in cases where the division was made on a percentage basis.

In other situations, later career and financial decisions made by military retirees may affect the availability of their retired pay. For example, military retirees who take federal civilian jobs and then retire from those jobs can waive their military retired pay and credit their military time to their civilian careers. In so doing, they eliminate their retired pay, and thereby any share that might have been awarded to the former spouse.

Since its inception, the USFSPA has remained contentious. Opponents of the law feel that it is unfair and should be modified or repealed. Proponents argue that the law protects the former spouse within nationally accepted standards and that protection should be improved in some details. These proposed modifications include (1) expanding the eligibility for commissary and exchange benefits for former spouses, (2) providing survivor benefits for certain former spouses, (3) terminating direct payments to a former spouse upon remarriage, (4) limiting judicial jurisdiction during the reopening of a settled divorce, and (5) further redefinition of "disposable" retired pay. As with the original provisions of the USFSPA, these and other proposed changes have been the source of great debate.

On October 12, 2004, a Federal Judge dismissed a case challenging the USFSPA.

Although legislation making various changes to the USFSPA has been introduced in the past, none of this legislation has allowed for retroactive change to settled cases.

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Introduction

Purpose

The purpose of this report is to provide a general discussion of legislative provisions and proposals relating to the military benefits for former spouses. It is not designed to answer detailed questions about specific issues arising in individual cases. Thus, it does not deal with case law nor does it apply legal or judicial interpretations of enacted statutes to specific situations.

What benefits can divorced spouses of members or retirees of the uniformed services receive under law? What role do the services play in facilitating delivery of those benefits? What practical problems arise in the implementation of and service involvement in claims on those benefits? How does the current system for a divorce-related division of military retired pay work? These frequently asked questions reflect confusion and controversy over social policy and economic equity issues. The administrative and legal implementation has proven complex, because large numbers of men and women, and their often complicated individual situations, are affected.

General Description of Current Law

Division of Military Retired Pay in Divorce Settlements

The Uniformed Services Former Spouses' Protection Act (hereafter referred to as USFSPA)¹ has five important provisions.

(1) It enables state courts to treat disposable military retired pay as divisible property in divorce cases.

(2) It allows direct payments by the uniformed services (Army, Navy, Marine Corps, Air Force, and Coast Guard) of up to 50% of a member's or former member's disposable retired pay to the former spouse *if the settlement involved is in compliance with the USFSPA*. "Disposable" retired pay is retired pay less withholdings, disability pay the member is entitled to on the date the member retires, or on the date the member's name was placed on the temporary disability retirement list, and Survivor Benefit Plan deductions (as discussed below).²

(3) It allows for the enforcement of alimony and child support (in conjunction with previously enacted provisions of law providing for such enforcement regarding military personnel in 42 U.S.C. 659).

¹ Title X, P.L. 97-252, approved September 8, 1982, 96 Stat. 720; Sections 643-645. The provisions of this law have been subsequently amended. This report is a summary of law and a discussion of the issues based on the original statutes as amended through October 31, 2002.

² For divorces occurring after November 5, 1990, "disposable retired pay" is total monthly retired pay less amounts owed to the United States for previous overpayments and other recoupments required by law, amounts deducted as a result of forfeitures of retired pay ordered by a court-martial, and amounts waived in order to receive compensation under title 5 U.S. Code (civil service) or title 38 U.S. Code (veterans benefits).

(4) It allows a military member or retired member to voluntarily designate a former spouse as a beneficiary under the military Survivor Benefit Plan. This provision was later modified by Congress to allow state courts, under certain conditions, to *order* a member or retiree to provide military Survivor Benefit Plan benefits to a former spouse.³

(5) It defines which former spouses are eligible to secure access to military-sponsored medical care benefits (including care at uniformed service facilities, for example), as well as commissary and exchange privileges.⁴

The USFSPA currently allows state courts to consider disposable military retired pay (excluding disability retired pay) as divisible property in a divorce settlement, and establishes procedures whereby a former spouse can receive direct payment of a part of that retired pay directly from the Defense Finance and Accounting Service.⁵ There has been some confusion about the distinction between USFSPA provisions that authorize courts to divide retired pay, and provisions that allow for the *direct payment* of divided retired pay. Under the USFSPA, state courts are free to order the division of disposable retired pay in any manner congruent with state law. *The USFSPA does not direct state courts to divide retired pay or to award a former spouse a certain percentage of disposable retired pay. Whether such a division is made, and if made, what percentage is awarded to the former spouse, is left to the discretion of the court in each individual settlement.*

The secretary of the particular military department (Army, Navy—including the Marine Corps, and Air Force, and the Secretary of Homeland Security for the Coast Guard) can make direct payments of a portion of that pay to a former spouse. In order to be eligible for *direct payment*, a former spouse must have been married to the service member or retiree at least 10 years, during which the service member or retiree must have served at least 10 years of creditable military service. In addition, the awarded division of military retired pay must be incorporated in a court ordered, ratified or approved divorce-related settlement. These provisions of the USFSPA pertain only to property settlements and do not affect provisions for alimony or child support. The USFSPA does *not* relieve the service member or retiree from the obligation to pay court-ordered alimony and/or child support payments (which are distinct from a divorce *property* settlement) whether or not the retired pay is divided.

Language was included in the National Defense Authorization Act for Fiscal Year 2007 that would (1) waive the “10-year rule” for direct payments of retired pay, (2) allow for cost of living adjustments in cases where awards of retired pay are stated in dollar amounts, and, (3) allow a member to waive the notification process when an application for payment of retired pay is made. These provisions were dropped by the Conference Committee.⁶

The service secretary concerned is required to begin payments to the former spouse within 90 days after the receipt of a valid court order. If the member has not yet retired from the armed

³ For more information on the military Survivor Benefit Plan, see CRS Report RL31664, *The Military Survivor Benefit Plan: A Description of Its Provisions*, by (name redacted).

⁴ For more information on the Military Health Services System, see CRS Report RL33537, *Military Medical Care: Questions and Answers*, by (name redacted).

⁵ When enacted, each service (Army, Navy, including the Marine Corps, and Air Force) had their own pay services. Since then, DOD’s pay operations have been consolidated under the Defense Finance and Accounting Service (DFAS). DFAS Cleveland handles matters related to retired pay, to include USFSPA.

⁶ U.S. Congress, Conference Committee, John Warner National Defense Authorization Act for Fiscal Year 2007, H.Rept. 109-702, H.R. 5122, 109th Cong., 2nd Sess., September 29, 2006: 756-7.

forces at the time of the court order, the service secretary must begin payments not later than 90 days after the member becomes entitled (i.e., retires). The USFSPA “does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment . . .”⁷

Under the USFSPA, the amount of court ordered retired pay that the services can pay to a former spouse under the *direct payment* provisions is limited to 50% of disposable retired pay or to 65% if other provisions for garnishment such as alimony or child support (under 42 U.S.C. 659) exist. When the service member has more than one former spouse, payment orders are handled by the secretary on a first-come, first-serve basis. The combined amount of retired pay paid out to one or more ex-spouses through the direct payment mechanism can not exceed 65% of disposable retired pay, but this does not relieve the member or retiree of an obligation to pay any additional sums which are awarded to a former spouse.

When conflicting orders exist (e.g., retired pay subject to more than one court order), the USFSPA instructs the secretary concerned to send the amount specified in the lower of the two conflicting orders to the former spouse(s), retain the difference between the two (up to 50%), and send the balance to the retiree. Upon resolution of the conflicting order, the secretary is to allocate the retained amount in accordance with the USFSPA.

Finally, the USFSPA does not allow a court to consider military retired pay in a divorce-related property settlement unless the court has jurisdiction over the service member or retiree by reason of his/her

- (1) residence other than military assignment in the territorial jurisdiction,
- (2) domicile in the territorial jurisdiction of the court, or
- (3) consent to the jurisdiction of the court.

Survivor Benefit Plan: Benefits for Divorced Spouses

In addition to providing for the division and direct payment of military retired pay, the USFSPA allows divorced spouses of military members or retirees to draw benefits from the DOD Survivor Benefit Plan (SBP) under certain circumstances. The SBP (established by P.L. 92-425, September 21, 1972) provides financial protection for the surviving dependents of deceased military members and retirees. (Upon the death of a military member/retiree, income from the military ceases.) All personnel of the uniformed services who retire on or after September 21, 1972, are automatically enrolled in the SBP unless they elect not to participate. More recently, Congress extended SBP coverage to personnel who die while serving on active duty. Such coverage was extended to the survivors of those individuals who die while on active duty, on or after September 10, 2001. Changes concerning the SBP coverage can be made after the initial agreement only if both parties to the divorce agree to it. Any elections other than the maximum protection for a spouse made after March 1, 1986 can take place only if the spouse concurs.⁸

⁷ 10 U.S.C. 1408(c)(3).

⁸ U.S., Congress, Senate, Conference Committee, FY1986 Department of Defense Authorization Act. S.Rept. 99-118, S. 1160, 99th Cong., 1st Sess., July 29, 1985: 98.

Under the plan, retired pay is reduced to partially pay for the cost of a survivor benefit. The USFSPA provides that members or retirees may voluntarily elect to name a former spouse as beneficiary for divorces occurring before November 14, 1986. This election may be part of, or incident to, a divorce-related property settlement. If a divorce occurred on or after November 14, 1986, however, a court may order a member or retiree to provide SBP protection as part of or incident to a divorce. According to changes in law implemented by the FY1987 National Defense Authorization Act, “A court order may require a person to elect (or to enter into an agreement to elect) . . . to provide an annuity to a former spouse (or to both a former spouse and child).”⁹ This language does not require courts to make such an order, but gives them the freedom to do so.

Likewise, the surviving spouses of active duty personnel who die are provided an annuity. This annuity for an active duty (non-retirement-eligible member) is determined by assuming the individual would have been eligible to retire under sec. 1201 (“Retirement or Separation for Physical Disability, Regulars and members on active duty for more than 30 Days: retirement”), title 10 USC,¹⁰ with a 100% disability. The surviving spouse’s annuity is based on the amount of disability retired pay the service member would have received under sec. 1201. The spouse’s share is 55% of the member’s disability retired pay. Depending on when the individual entered the service, the amount used may be either the terminal monthly basic pay (for those who entered service on or before September 7, 1980) or the average basic pay for the 36 month period (also known as “high three” years) during which the member earned the highest rate of basic pay (for those who entered the service after September 7, 1980). The amount of monthly disability pay is computed either by multiplying the determined amount of basic pay by the percentage disability, or, by computing 2.5% of basic pay times the member’s years of service up to 75%, whichever is higher. Since the legislation assumes the level of disability is 100%, the amount of basic pay (or “high three”) used would be multiplied by 75%. As a result of language included in the FY11 National Defense Authorization Act (sec. 631) eliminated the 75% cap for members who retire due to disability and who have more than 30 years of service.¹¹

Miscellaneous Changes

The USFSPA and subsequent amendments also authorized military medical benefits and exchange and commissary privileges for certain former spouses of military members or retirees. Eligibility for these benefits depends on both the years of marriage and service by the member or former member and, in certain instances, the date of the final decree of divorce, dissolution, or annulment. Each set of requirements for eligibility are treated separately here.

When originally enacted in 1982, the USFSPA provided that, if a member had been married for at least 20 years to one spouse, during which time the member performed at least 20 years of creditable military service, the unremarried former spouse was eligible for military commissary and exchange privileges, as well as military medical benefits, if he or she did not have medical coverage under an employer-sponsored health program. This restriction (known popularly as the 20/20/20 restriction) was considered unfair by some because it excluded many former spouses who met most, but not all, of the time requirements. In some cases, for example, the marriage

⁹ 10 U.S.C. 1550(f)(4).

¹⁰ Under these provisions, the member’s disability may not be the result of intentional neglect or misconduct.

¹¹ P.L. 111-383, January 7, 2011.

could have lasted 20 years, the service member had served 20 years, but the two did not overlap by the required 20 years.

Legislation enacted in 1984 (as subsequently modified) established benefit eligibility provisions for former spouses who do not meet the 20/20/20 restriction (the benefits of those who *do* meet the 20/20/20/ restriction were not affected by these provisions).¹²

First, it provided full eligibility for medical care for former spouses whose final decree of divorce, annulment, etc., was dated before April 1, 1985 *and* who meet the eligibility requirements, *except* for the fact that their minimum of 20 years of marriage and 20 years of creditable service overlapped by only 15 years or more, and by less than 20 years (i.e., they meet a 20/20/15 restriction).

Second, it provided a transitional medical care program for former spouses who met the eligibility requirements and the 20/20/15 restriction, but whose final decree of divorce, etc., was April 1, 1985, or later. They would be eligible for transitional care in the military medical care system for two years, followed by the right to convert to a private health insurance plan with the identical restriction on remarriage and other medical coverage.¹³ (Legislation enacted in 1988 limited the period of transitional medical care to one year.¹⁴)

Third, the 1984 legislation provided that former spouses who were otherwise eligible, but who did not meet the minimum 20/20/15 restriction would be eligible for coverage under a specifically formulated private health care plan, with responsibility for premium payments for this plan to be determined by the court in the divorce property settlement.¹⁵

Legislative History

Prior to 1981, state courts disagreed as to whether they were authorized or constrained by federal legislation or federal legal precedent in dividing military retired pay in divorce-related property settlements. Inconsistencies among the states and perceptions of unfairness and arbitrariness were common grounds for criticism of the system.

The Supreme Court ruled (6-3) on June 26, 1981, in the case of *McCarty v. McCarty*,¹⁶ that the former spouse of a military member or retiree could not be awarded any share of that member's/retiree's retirement pay as a part of a divorce property settlement in a community property state,¹⁷ because then-current federal law did not authorize the treatment of military retired pay as divisible property in such a settlement. Although there are only eight community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington), comparable reasoning would seemingly have applied in other states as well. In reaching this ruling, however, the court did not necessarily endorse its social impact. Indeed,

¹² P.L. 98-525, Sec. 645(a), September 27, 1984.

¹³ See 10 USC 1086a.

¹⁴ See P.L. 100-456, sec. 651; P.L. 101-189, sec. 731.

¹⁵ See 10 USC 1078a.

¹⁶ 453 U.S. 210 (1981).

¹⁷ Generally, a community property state is defined as one in which all property earned by either the husband or the wife during the course of the marriage is treated as jointly held property for the purposes of a settlement.

Justice Blackmun (writing for the majority), virtually invited Congress to consider a change in the law to allow such a division to be made:

We recognize that the plight of an ex-spouse of a retired member is often a serious one. See Hearing on H.R. 2187, H.R. 3677, and H.R. 6270 before the Military Compensation Subcommittee of the House Committee on Armed Services, 96th Cong., 2d Sess. (1980). That plight may be mitigated to some extent by the ex-spouse's right to claim social security benefits, cf. *Hisquierdo*, 439 U.S. at 590, and to garnish retired pay for the purposes of support. Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. The decision, however, is for Congress alone. We very recently have reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.¹⁸

Congress responded with the Uniformed Services Former Spouses' Protection Act which was enacted in September 1982.

The legislative history of the USFSPA indicates that it was the intent of Congress that the direct payment provision of the USFSPA would not be applied to cases finalized before June 25, 1981 (the date of the *McCarty* decision), and became effective after that date. It was noted in the conference report on the act that:

Although the Conference Report contains no prohibition against courts reopening decisions before [June 26, 1981], the conferees agreed that changes to court orders finalized before the *McCarty* decision should not be recognized if those changes were effected after the *McCarty* decision (and before the effective date of the new title X) to implement the holding in that decision (for example, a modification setting aside a pre-*McCarty* division of military retired pay).¹⁹

Thus, if a divorce were settled two weeks before the *McCarty* decision and the member retired after *McCarty*, divisibility of retired pay (and other provisions) would, arguably, not apply unless the original decree allowed for a division of retired pay. However, the applicability of the USFSPA, in general, to reopened cases, remained ambiguous.

Congress has no direct control or jurisdiction over state courts, which handle almost all domestic relations law (separation, divorce, adoption, etc.). However, Congress does have, and has asserted, control over the use of federal compensation and benefits, as well as administrative mechanisms, in the disbursement of federal compensation and benefits related to domestic relations law. Congress has indicated its intention that federal law govern the treatment of these benefits in divorce-related settlements.

The U.S. Comptroller General has ruled that certain former spouses, who have their pre-*McCarty* divorces reopened on or after June 26, 1981, may be ineligible to receive direct payment²⁰ from

¹⁸ 453 U.S. 210 (1981) at 235-236.

¹⁹ U.S., Congress, House, Conference Committee, Department of Defense Authorization Act for Fiscal year 1983, H.Rept. 97-749, S. 2238, August 16, 1982: 167-168.

²⁰ In a case before the Comptroller General, a pre-June 26, 1981 divorce settlement did not divide military retired pay; the settlement was modified after June 26, 1981 to include a division of military retired pay. The efforts of the former spouse to receive direct payment were rejected by the Army. The Comptroller upheld the Army's decision to reject the request for direct payment because (1) the original decree denied a division of retire pay and (2) the original decree occurred before June 26, 1981. Matter of: Phyllis M. Tharp B-229440 68 *Comp. Gen.* 116 (1988).

the military services.²¹ Nevertheless, despite congressional language to the contrary, some states continued the practice of reopening pre-McCarty divorces in order to allow for a division of retired pay. P.L. 101-510²² places explicit limits on the ability of state courts to consider retired pay as property in the reopening of a pre-McCarty divorce which did not provide for such a division. In its report on this legislation, the House Armed Service Committee stated:

The committee is concerned because some state courts have been less faithful in their adherence to the spirit of the law. The reopening of divorce cases finalized before the Supreme Court's decision in (McCarty v. McCarty) that did not divide retired pay continues to be a significant problem. Years after final divorce decrees have been issued, some state courts, particularly those in California, have reopened cases (through partition actions or otherwise) to award a share of retired pay. Although Congress has twice stated in report language that this result was not intended, the practice continues unabated. Such action is inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate.

Section 555 would provide that a court may not treat retired or retainer pay as property in any proceeding to divide or partition such pay of a member as the property of the member and his spouse if a final decree of divorce, dissolution, annulment or legal separation (including court ordered, ratified, or approved property settlement incident to such a decree) was issued before the McCarty decision and did not treat retired pay as property of the member and the member's spouse or former spouse. This provision would apply to judgments issued before, on, or after the date of enactment [November 5, 1990] of this Act, but only with respect to any requirement to make payments pursuant to such judgments after the date of enactment. Thus, individuals divorced before the McCarty decision who have their cases reopened would not be relieved of the obligation to make payments until after the effective date of this Act.²³

This change was codified at 10 USC sec. 1408(c)(1).²⁴

Military Retired Pay and Civilian Pensions

Military retired and retainer pay (hereafter referred to as military retired pay) is often compared to, and contrasted with, public or private civilian pension programs. Those aspects of military retired pay that are comparable to civilian pensions lead advocates of dividing retired pay in divorce cases to reason that military retired pay should be treated similarly, i.e., as divisible property. On the other hand, certain unique aspects of military retired pay, and military service in general, have led opponents to argue that military retired pay is qualitatively different from pensions. They maintain that to treat military retired pay as a pension would thwart much of the program's justification.

²¹ "Direct Payment of Retired Pay to Divorcees Limited," *Army Times*, January 16, 1989: 16.

²² 104 Stat. 1485, November 5, 1990.

²³ U.S. Congress, House, Committee on Armed Services, National Defense Authorization Act for Fiscal Year 1991, H.Rept. 101-665, H.R. 4739, August 3, 1990: 279; P.L. 101-510, 104 Stat. 1569, November 5, 1990.

²⁴ That section provides: "A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981 and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse."

According to the Department of Defense, the purpose of providing military nondisability retired and retainer pay is:

To establish a nondisability retirement system and authorize the payment of retired pay for service in the armed forces of the United States in order to insure that (1) the choice of career service in the armed forces is competitive with reasonably available alternatives, (2) promotion opportunities are kept open for young and able members, (3) some measure of economic security is made available to members after retirement from career military service, and (4) a pool of experienced personnel subject to recall to active duty during time of war or national emergency exists.²⁵

The first and third purposes are directly comparable to reasons given for providing civilian pensions. The second purpose is different, in terms of the age at which military members retire. Most military members become eligible to retire between the ages of 39 and 45, while civilian pensions usually require that the beneficiary be much older before benefits become available. All of these provisions are designed to allow the military to keep the force “young and vigorous,” by permitting the involuntarily retirement of its members at a relatively young age. This is similar to retirement systems that apply to many nonmilitary police and firefighters.

The fourth purpose provides the principal argument for differentiating military retirement benefits from civilian pensions. In retirement, military retirees continue to be members of the uniformed services and, to an extent, their pay serves as compensation for reduced current services. Military retirees are generally subject to involuntary recall to active duty as well as to employment and travel restrictions. For example, approximately 2,000 retirees were called to active duty for the Persian Gulf War. They are also subject to the Uniform Code of Military Justice. Violating any of these restrictions may be sufficient cause to terminate retired pay.

Under pension plans, retirement benefits are viewed as deferred compensation. In other words, pension annuities are based on benefits earned during the period of employment, rather than during retirement. In this sense, it is at least, in part, the retiree’s own benefits, earned during the period of employment that makes these benefits possible. The money paid into or obligated to a pension plan is property that serves as a deferred benefit. The retiree and his/her family therefore have a vested interest in the pension. Since these pensions may also be earned during the period of marriage, pensions are viewed as property that is subject to division in divorce settlements.

Military retired pay is not based on deferred compensation. Military members do not contribute to their retirement. Instead, as noted above, although some features are analogous to civilian pensions, others are not. According to the Supreme Court in the McCarty decision:

The retired officer [of the Army] remains a member of the Army, see *United States v. Tyler*, 105 U.S. 244 (1881), and continues to be subject to the Uniformed Code of Military Justice, see 10 U.S.C. Sec. 802 (4). See also *Hooper v. United States*, 164 Ct. Cl. 151 326 F. 2d 982, cert. denied, 377 U.S. 977 (1964). In addition, he may forfeit all or part of his retired pay if he engages in certain activities. Finally, the retired officer remains subject to recall to active duty by the Secretary of the Army “at any time.” P.L. 96-513, sec. 106, 94 Stat. 2868 (1980). These factors have led several courts, including this one to conclude that military retired pay is reduced compensation for reduced current services.... Thus, ..., the military retirement system does not embody even a limited “community property concept.” Indeed, Congress

²⁵ U.S., Department of Defense, Office of the Secretary of Defense. *Military Compensation Background Papers*, 5th Edition, September 1996: 511.

has explicitly stated: “Historically, military retired pay has been a personal entitlement payable to the retired member himself as long as he lives.” S. Rep. No. 1480, 90th Cong., 2d Sess., 6 (1968).²⁶

Thus, the Supreme Court (and other courts) affirmed that under then-current law military retired pay was not property and, therefore, was not a pension.

In enacting the USFSPA, Congress approved language that allows a court to treat military retired pay as property—i.e., analogous to a civilian pensions—in limited circumstances. Title 10 U.S.C. sec 1408 (c) states:

(1) Subject to the limitation of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

By passing this language into law, Congress allowed military retired pay to be treated as property in most divorce cases. However, military retired pay may not be treated as property for any other purpose.²⁷

In a 1992 case that reached the Supreme Court,²⁸ however, retired pay (in part based on language under the USFSPA) was considered to be similar to pensions for reason of state tax laws. While the court noted the different status of military retirees, it held:

There are no “significant differences” between military retirees and state and local government retirees in terms of calculating retirement benefits. ... The statement in *United States v. Tyler*, 105 U.S. 244, 245, that such pay is effectively indistinguishable from current compensation at a reduced rate was made in the context of the particular holding of that case, and cannot be taken as establishing that current compensation for reduced services. And, although *McCarty v. McCarty*, 453 U.S. 210, 222, referred to *Tyler*, it did not expressly approve *Tyler*’s description of military retirement pay, but specifically reserved the question whether federal law prohibits a State from characterizing such pay as deferred compensation and urged States to tread with caution in this area.... (A)n examination of other federal

²⁶ See *McCarty v. McCarty*, Slip Opinion, No. 80-5, June 26, 1981, pp. 11, 12 and 14; U.S. Department of Defense, Office of the Secretary of Defense, *Military Compensation Background Papers*, June 1987: 417-425.

²⁷ Although this language made clear congressional intent with regard to retired pay in the situation of divorce settlements, it arguably complicated the interpretation of the status of military retired pay in other situations, i.e., state taxation of federal “pensions.” See *Barker et al. v. Kansas*, 503 U.S. 594 (1992), in which the United States Supreme Court determined, with the support of members and member organizations, that retired pay constitutes “deferred compensation” and thus cannot be taxed any differently by the states than other categories of retired pay, including retired pay received by former Government employees. Thus, the Supreme Court held that members’ retired pay should be treated the same for income tax purposes as federal and state retired pay. The USFSPA makes it clear that states may treat “disposable retired pay” as “property” subject to division in connection with divorce. The retiree, however, remains a member of the uniformed services and is considered to be holding a federal office (see U.S., Senate, Committee on the Judiciary, Hearing, *Legal Issues Raised by the Termination of Oliver North’s Retirement Pay*, S. Hrg. 101-1269, 101st Cong., 1st Sess., October, 18, 1989). The terms “retired pay” and “pension” are used interchangeably throughout these hearings.

²⁸ *Barker v. Kansas*, 503 U.S. 594 (1992).

statutes treating military retirement pay indicates that Congress for many purposes does not consider such pay to be current compensation for reduced current services. See e.g. 10 U.S.C. sec. 1408(c)(1); 26 U.S.C. sec 219(f)(1).

On October 12, 2004, a separate case challenging the USFSPA on constitutional due process and equal treatment grounds was dismissed.²⁹

Implementation of the Existing Law and Related Measures

Implementation of the provisions of the USFSPA has often been confusing and frustrating for those involved. Uneven implementation of the law, especially with respect to the direct pay provisions, and use of the term “disposable” pay as the basis for division of retired pay have been contributing factors.

In 1984, the U.S. General Accounting Office (GAO) published a report that examined the implementation of the USFSPA.³⁰ With respect to implementation procedures:

GAO found that the Department of Defense has taken various measures to help ensure fair and consistent implementation of the direct payment provisions of the act, and that the services generally have done a good job of implementing them. But, as could be expected with complex new legislation such as this, they have encountered some problems.³¹

Despite some early difficulties, each of the uniformed services has taken administrative steps to refine and streamline the processing of requests for court-ordered payments to former spouses largely in response to the GAO report.³² However, GAO also noted that many of these early problems were related to inconsistent language used in court-ordered settlements. Over the years, the courts have also overcome many of these problems.

“Disposable” Retired Pay and the Federal Income Tax

The GAO identified problems arising from the USFSPA’s provisions for the division of “disposable” retired pay.³³ GAO noted that this provision “may be producing results not initially contemplated by the Congress.”³⁴ IRS withholding provisions, GAO pointed out, can work to the advantage of the member or former spouse. Moreover, changes in the tax liability of the member can influence benefits to the former spouse in ways that the court order would not have anticipated.³⁵

²⁹ Adkins et al, v. Rumsfeld, 1:04cv494 (JCC), U.S. District Court (Eastern District of Virginia), October 12, 2004.

³⁰ U.S. General Accounting Office, Implementation of the Uniformed Services Former Spouses’ Protection Act, October 24, 1984, GAO, NSIAD-85-4, B-214076.

³¹ GAO, pp. i-ii.

³² GAO, p. vii.

³³ The definition of disposable retired pay was modified, effective February 4, 1991, to eliminate many of the problems created by excluding tax withholdings from the definition.

³⁴ GAO, p. 19.

³⁵ GAO, p. 20.

It is important to remember that taxes withheld are not necessarily the same amount as taxes owed—tax liability. Final tax liability and the payment of these taxes is determined when tax forms are filed with the IRS. The amount determined to be payable at the time of filing may be substantially different from the sum of withholdings from each check. Because “disposable” retired pay may be determined and divided on the basis of the amount paid in each military retirement check less withholdings and not on actual tax liability (for those pre-February 4, 1991, settlements), the amount received by the former spouse may vary from the amount receivable if retired pay were divided based on actual tax liability.

For example, consider a case in which a service divides the disposable part of retired pay of \$24,000 equally between the service member and the former spouse as directed in a hypothetical court order on the assumption that each will benefit equally (see **Table 1**). For simplicity, assume that each is single, under age 65, does not itemize deductions, and has no other source of income. In this situation, the government will withhold from the retiree approximately \$3,400 in federal income taxes—calculated on the basis of \$24,000 of income. The remaining “disposable” pay of \$20,600 will be divided between the ex-spouse and the retiree with each receiving \$10,300. The military retiree is liable for tax of about \$1,319 on \$13,700 (gross retired pay less the former spouse’s share) and so receives a refund of about \$2,081 (\$3,400-\$1,319). The former spouse, however, must still pay taxes of about \$809 on the amount of retired pay received. Thus, the military retiree receives \$12,381 in after tax income while the former spouses receives \$9,491; the retiree therefore gets 56.6% of total after tax income, the former spouse receives 43.4%.³⁶

In addition, the payments to the former spouse depend on the tax status of the retired service member. A former spouse whose circumstances are identical to those in the hypothetical case above, but whose (retired service member) ex-spouse has remarried and now has three dependents, receives \$659 more after taxes than does the ex-spouse in the first example (see Tables 1 and 2). This occurs because the former member’s additional dependents allow him or her to reduce tax withholding which, in turn, increases “disposable” retired pay, and thus, the former spouse’s share.

As this example suggests, the ex-member could, if he or she chooses, reduce the benefits to the former spouse by increasing tax withholding on the retired pay to the highest permissible levels and realizing unshared reimbursement in the tax refund. In an effort to curb abuse of this practice, the Comptroller General issued a ruling “that retirees with outside incomes would still be able to increase withholding on their retired pay, but only up to a percentage justified by their ‘projected effective tax rate.’ That rate would be based on the ratio of the retiree’s anticipated total income tax to anticipated total gross income from all sources.”³⁷

The FY1987 DOD Authorization Act (P.L. 99-661, November 11, 1986) modified the definition of disposable retired: life insurance deductions were eliminated. In other words, retired pay that was used to pay life insurance premiums was thereafter considered disposable pay and, therefore, subject to division. This may have the effect of reducing the amount available to the retiree while increasing pay to the former spouse. For example, assume that a hypothetical retiree receives \$1,000 per month in military retired pay, has \$200 withheld in taxes, pays \$50 in life insurance

³⁶ GAO, in similar calculations, but assuming the retired member had a dependent, estimated a 58.4% - 41.6% split (GAO, pp. 24-25).

³⁷ Comptroller General of the U.S., ruling B-213895, April 25, 1984.

premiums which benefit the former spouse, and has one-half of disposable retired pay. The amount available to both the retiree and former spouse is computed as follows:

Table 1. Income Tax Implications: Division of Disposable Retired Pay—Retiree Single

	Military Retiree	Former Spouse
Total retired pay		\$24,000
Federal tax withholding		3,400
Disposable retired pay remaining		20,600
50% division	10,300	10,300
Tax liability	-1,319	-809
Retiree's tax refund (withholding less tax liability)	+2,081	0
After tax income	12,381	9,491
Actual percentage division of total after-tax retired pay of \$20,600	56.6%	43.4%

Notes: Figures are approximations. This example applies only in cases where a strict property distribution occurs. Other factors included in a divorce settlement could affect the final outcome in ways that could not be anticipated without knowing the specific issues involved. Therefore, both Tables 1 and 2 are intended for exemplary purposes only.

Table 2. Income Tax Implications: Division of Retired Pay—Retiree Remarries, Now Has a Spouse and Two Dependents

	Military Retiree	Former Spouse
Total retired pay		\$24,000
Federal tax withholding		1,856
Disposable retired pay remaining		22,144
50% division	11,072	11,072
Tax liability	-318	-922
Retiree's tax refund (withholding less tax liability)	+1,538	0
After tax income	12,610	10,150
Actual percentage division of total after-tax retired pay of \$20,600	55.4%	44.6%

Notes: Figures are approximations. This example applies only in cases where a strict property distribution occurs. Other factors included in a divorce settlement could affect the final outcome in ways that could not be anticipated without knowing the specific issues involved. Therefore, both Tables 1 and 2 are intended for exemplary purposes only.

\$1,000 total monthly retired pay
 -200 tax withholdings
 -50 life insurance premiums
 \$750 disposable, divided in half
 Each receives \$375

When life insurance payments are included in the definition of disposable retired pay, the amount each receives changes as follows:

\$1,000 total monthly retired pay
 -200 tax withholdings
\$800 disposable, divided in half
 Each receives \$400

From the retiree's portion, \$50 is deducted for life insurance payments. Thus, the retiree receives a net of \$350 (or \$25 less) and the former spouse receives \$400 (or \$25 more). Therefore, the beneficiary of the life insurance policy will continue to benefit, while the entire cost is borne by the retiree.

Conversely, the former exclusion of life insurance premiums in the definition of disposable retired pay may have benefitted the retiree. When insurance premiums were excluded, a post-divorce retiree could legally reduce the amount a former spouse received. In this hypothetical situation, a retiree could take out an insurance policy naming a second spouse, dependents, or him/herself as beneficiary. (By naming himself/herself as beneficiary, the retiree could use the insurance policy as a savings account.) Retired pay could then be directed to insurance premiums and, thereby, reduce the amount of retired pay available to a former spouse.

The FY1991 National Defense Authorization Act further modified the definition of "disposable retired pay." Specifically, amounts owed to the federal government "for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay"³⁸ are excluded from this definition. In addition, amounts withheld from federal, state or local taxes may not be excluded. In other words, pre-tax withholding retired pay is considered "disposable" and subject to division effective February 4, 1991.

"Concurrent Receipt" and the USFSPA

In recent years, Congress has addressed an issue concerning the payment of military retired pay to retirees who qualify for disability compensation from the Department of Veteran's Affairs (VA). As noted above, disability payments have been excluded from the definition of disposable retired pay. In 1891, Congress enacted language prohibiting what it regarded as "dual compensation" for either past or current service and a disability pension.³⁹ As modified in 1941, the law prevented the concurrent receipt of both military non-disability retired pay and veteran's disability compensation. For those eligible for both, military retired pay was offset or reduced, dollar for dollar, by VA disability benefits which are tax free.

As noted, the definition of disposable retired pay excludes disability benefits. Prior to 2004, certain individuals were eligible to retire either under the provisions of longevity retired pay or disability retired pay. Therefore, an eligible retiree could choose to retire under the disability provisions and, thereby, reduce or eliminate the amount of retired pay available for division in a property settlement. A disabled individual is considered qualitatively in a different category than his/her able-bodied peers (including his/her former spouse). This is based on the assumption that such an individual does not have the same opportunities to reenter the work force. Disability pay

³⁸ P.L. 101-510; 104 Stat. 1569; November 5, 1990.

³⁹ See CRS Report 95-469, *Military Retirement and Veterans' Compensation: Concurrent Receipt Issues*, by (name redacted), April 7, 1995: 3-4.

may be his/her only source of income. It was reasoned that if this pay were divided, and the retiree had no other source of income, the retiree could be forced onto public assistance.

The FY1987 National Defense Authorization Act stated that the “disability exclusion would be eliminated to the extent that it excludes retired pay that is only nominally related to disability.” A person eligible for military retired pay for length of service who had a disability rated as 10% at the time of retirement is eligible for disability retirement.⁴⁰ This means that the retiree may have had the amount of his/her retired pay computed based on his/her years of service but paid as disability retired pay. This modification would exclude from disposable retired pay only so much of the retired pay received under Chapter 61 as would actually relate to the extent of the disability.⁴¹ In other words, the above retiree who had a disability rated at 10 % has only a portion of retired pay defined as disposable retired pay.⁴²

As concurrent receipt has evolved, it now falls into two distinct categories: Combat-Related Special Compensation (CRSC) and Concurrent Retirement and Disability Program (CRDP). CRSC is paid to those with combat-related disabilities with a VA rating of at least 10 percent. Service members must apply for this compensation and it is not taxable.

CRDP is paid to those with any service-connected disability that is rated at least 50 percent or greater by the VA and who retire with 20 or more years of service. Full implementation of these program has been phased in over a 10-year period (to 2014) and those who are 100 percent were integrated on January 1, 2005. CRDP is taxable income to the retired servicemember.

As currently structured, Congress has not defined the special pay provisions for those with qualifying disabilities as “disposable property” subject to division in divorce related settlements. However, the phase-in of allowing concurrent receipt over 10 years creates some concerns. During this period, eligible retirees will see their retired pay increase. For a retiree who is divorced and whose spouse has been awarded a percentage of the retired pay, the former spouse could arguably see an increase in the dollar amount received. Conversely, for those former spouses who were awarded a specific dollar amount of retired pay, changes in the total amount received by the retiree will, arguably, not affect the amount the former spouse receives. Perceptions of unfair treatment resulting from such a change will possibly encourage further legal consideration of already settled divorces as well as calls for remedial legislative action.⁴³

The USFSPA and “Dual Compensation”

At one time, the amount of military retired pay available for division could be reduced by statutes concerning “dual compensation”⁴⁴ of retired military members employed by the federal

⁴⁰ See chapter 61, title 10 U.S. Code, entitled “Retirement or Separation for Physical Disability.”

⁴¹ U.S., Congress, House, Committee on Armed Services, National Defense Authorization Act for Fiscal Year 1987, H.R. 4428, H.Rept. 99-718, 99th Cong., 2nd Sess., July 25, 1986, p. 211.

⁴² According to Title 10 U.S.C. sec. 1021, a disabled member must either have 20 years of service or be at least 30% disabled (regardless as the number of years at service) in order to qualify for disability retired pay. A member with more than 20 years of service may receive disability retired pay if less than 30% disabled.

⁴³ For more information on concurrent receipt, see CRS Report R40589, *Concurrent Receipt: Background and Issues for Congress*, by (name redacted).

⁴⁴ P.L. 88-448; 78 Stat. 484, August 19, 1964, Dual Compensation Act only applies to warrant officers and commissioned officers and is not affected by the receipt of disability retired pay. Other dual compensation laws affect all retirees in certain situations.

government as civilians. Dual compensation statutes provided that the retired pay of certain retirees, depending on their status as regular or reserve officers, or when they entered federal civilian service, was to be reduced or capped at certain limits. There were two categories of dual compensation. The first applied only to *retired regular officers* (i.e., reserve officers and enlisted personnel were not affected). Under this restriction, as of December 1, 1993 for example, retired regular officers employed by the federal civil service were entitled to the first \$9,310.17 (or \$8,700.93 for those who entered the service after August 1, 1986) of their annual retired pay, plus 50% of the remainder (the dollar figure is adjusted each year by the same formula used to calculate cost-of-living adjustments—COLAs—for military retired pay).

A second dual compensation restriction applied to *all* retired military members who were first employed by the federal civil service after January 11, 1979. Such retirees who were employed by the federal civil service had their combined civil service pay and military retired pay “capped” so that it was not equal to or greater than level V of the Executive Schedule (\$108,200 as of January 1, 1994). If the combined pay exceeded this level V, military retired pay was reduced.

A former spouse who was awarded a percentage share of a retiree’s military retired pay would necessarily receive a reduced amount when total retired pay was reduced because of dual compensation restrictions. Such a reduction may have thwarted a court’s intentions and, therefore, required the former spouse to seek a court ordered adjustment of the property settlement.⁴⁵

In 1999, Congress repealed the above “dual compensation” restrictions allowing affected retirees to receive their full military retired pay.⁴⁶ The situation is noteworthy in that in some cases repeal had an effect on benefits available to certain former spouses. Hypothetically, a divorce property settlement that provided a fixed amount of retired pay to the former spouse would not be affected by this repeal. However, had the spouse been awarded a portion of retired pay (stated as a percentage), the amount available would have increased following the repeal. Therefore, in this latter scenario, both the retiree and former spouse would have experienced an increase in their benefits.

The USFSPA and Other Federal Retirement Systems

1. Introduction

The problems and potential inequities in dividing military retired pay in a divorce-related property settlement are particularly complicated when the service member is, or becomes, entitled to a pension under the Federal Civil Service Retirement (CSRS), Federal Employees Retirement System (FERS), or social security. Since 1957, military personnel have paid into and been completely covered by social security. Thus, military retirees draw benefits from two systems completely independent of each other. Most federal civilian employees hired before January 1, 1984, by contrast, do not receive social security for their period of civil service employment.⁴⁷

⁴⁵ For additional information on dual compensation and other changes to the military retirement system, see CRS Report 87-702, *The Military Retirement Reform Act of 1986: Issues and Implications*, (name redacted), July 27, 1987 (out of print; available only from author).

⁴⁶ P.L. 106-65; 113 Stat. 512 at 664, October 5, 1999.

⁴⁷ Civil servants hired on or after January 1, 1984, pay social security taxes and are fully covered by social security. Under the Federal Employees Retirement System-FERS, social security is integrated into the total retirement package. This retirement system applies to post-January 1, 1984, hires and pre-January 1, 1984, employees who have voluntarily (continued...)

This does not preclude these federal civilian employees from receiving social security benefits earned during other periods of employment covered by social security.

However, various provisions of law (1) permit the transfer of creditable military service to civil service for the purpose of computing civil service retired pay, (2) require the reduction of civil service retired pay at age 62 (when the retiree becomes eligible for certain social security retirement payments), and/or (3) permit retroactive payment into the Civil Service Retirement Fund (or the Federal Employees Retirement System) in order to eliminate a recomputation that can take place at age 62 for those with military service credited to civil service (see below for more details).

A military member who, after retirement, becomes entitled to a civil service annuity can elect one of three options pertaining to military retired pay, social security, and a civil service annuity. In each situation, the total income received both by the military retiree and by his/her divorced spouse from all federal retirement systems, civilian and military, could be affected by decisions made by the retiree.

a. Receipt of both military and civil service retirement pay, as well as social security benefits based on the years of military service. This will provide the retiree with *three* separate retirement benefits—military retired pay, a civil service annuity, and social security. Coverage of military service under social security entitles spouse and former spouse (if the marriage lasted at least 10 years) of deceased military retirees to receive social security spouse survivor benefits based on the deceased retiree’s military service.

b. Waiver of military retired pay and crediting of all military service to civil service retirement, with the amount of civil service pension to be based on total federal service (including military service), as well as receipt of social security benefits based on his/her military service. Under this option, the military retiree would receive *two* separate benefits—civil service retirement and social security. However, when the retiree reaches age 62, the years of military service can no longer be counted toward the civil service annuity because they are counted toward social security. Therefore, the civil service pension is reduced at age 62 when social security becomes payable. (This reduction in civil service benefits is known as “Catch 62.”)⁴⁸

c. Selection of the above option (b), and deposit of a lump sum into the Civil Service Retirement Fund (or FERS) to avoid a reduction in civil service retired pay which would otherwise occur when the retiree reached age 62. Under this option, the military retiree would also receive *two* separate annuities—civil service retirement and social security, but the civil service pension would not be reduced at age 62.⁴⁹ Section 306 of the Omnibus Budget Reconciliation Act of 1982 (P.L. 97-253, September 8, 1982) allows federal civilian employees who, because of their prior

(...continued)

switched to FERS.

⁴⁸ See CRS Report 84-68 EPW, *Federal Civil Service Retirement for People with Military Service and Social Security: “Catch 62,”* by Carolyn L. Merck, July 27, 1984 (out of print; available only from author).

⁴⁹ “Catch 62” does not affect only retired military personnel. When a retiree from the federal civil service with any previous military service which is credited toward a civil service retirement annuity—regardless of whether or not he or she has also retired from a military career—reaches age 62 and becomes eligible for social security, the civil service pension is recalculated to exclude the years of military service. In some cases, this means a substantial reduction in civil service retirement benefits, and also in total retirement income received from federal sources (i.e., civil service retirement plus social security), even with social security added.

military service, would face “Catch 62,” to avoid the reduction in their civil service annuity at age 62 by allowing them to deposit into the retirement fund an amount equal to what the retiree would have been required to pay into the civil service pension plan had he or she been a civilian federal employee during the time he or she actually performed military service. *The deposit must be made before the civilian employee actually retires from federal civil service.*⁵⁰

“Catch 62” affects military retirees only if they elect to waive receipt of military retired pay in order to credit their military service toward federal civil service retirement. Military retirees who continue receiving separate military and civil service retirement annuities are not affected by “Catch 62” because none of their military service is credited toward civil service retirement.

2. The USFSPA and the Waiver of Military Retired Pay

If a military retiree is divorced, later retires from the federal civil service, and elects to waive his or her military retired pay and credit his or her military service toward a single civil service pension, problems arise in the implementing a court-ordered division of military retired pay under the USFSPA.

Prior to 1996, the waiver of military retired pay reduced the amount of such pay to zero; therefore, no direct payments under the USFSPA could be made to the divorced spouse. Whether or not it was the intent of the retiree to do so, he or she thereby deprived the former spouse of retired pay awarded by a court. The federal civil service pension could then be divided, but neither the retiree nor the ex-spouse would receive any military retired pay after the retiree began to collect his or her civil service benefits. It was/is possible for the former spouse to ask the court to reconsider the property settlement in order to provide for the division of the civil service pension given the new circumstances. However, that was an uncertain process.

In 1996, Congress approved language that would allow a former spouse to continue to receive payments based on a division on military retired pay in instances wherein the retiree waived military retired pay in order to credit military service toward a single civil service pension. This change was prospective beginning January 1, 1997.⁵¹

3. Person Affected by “Catch 62” and the USFSPA

The impact of the USFSPA on military retirees in the “Catch 62” situation and on their former spouses is extremely complex. The *decision* to make a lump-sum payment into the Civil Service Retirement Fund (or the Federal Employees Retirement System) so as to avoid a reduction in civil service retired pay at age 62, and the *liability* for making the payment, belong to the federal civilian employee alone, regardless of his or her marital status. Retirees receive a larger annuity by making this deposit. Thus, the retiree and possibly the former spouse can benefit when the deposit is made. If such a military retiree’s ex-spouse’s property settlement entitles him/her to a share of the retiree’s civil service pension, the ex-spouse can receive this share without incurring part of the cost of making the deposit required to avoid the “Catch 62” reduction in civil service retirement at age 62. As noted above, prior to 1997, the former spouse whose property settlement

⁵⁰ This section can only allude to some of the extraordinary complicated situations that arise due to the interaction of military service, civil service retirement, and social security. For more information, see CRS Report 91-463, *Benefits to Individuals Based on Previous Employment: Interactions and Offsets in Selected Programs*, by Carolyn L. Merck, updated June 3, 1991 (out of print; available only from author).

⁵¹ P.L. 104-201; 110 Stat. 2580; September 23, 1996.

entitles him/her *only* to a share of military retirement would be deprived of all such retired pay. The relevance and weight given these liabilities and benefits need to be evaluated on a case-by-case basis.

Thus, the divorced military retiree employed by the federal government as a civilian employee, and potentially subject to the provisions of the USFSPA, faces numerous retirement-related decisions that include the complex interactions of the different retirement systems.

Early Separations

With the end of the Cold War in 1989-1990, the United States began to reduce the size of the armed forces. In order to meet congressionally mandated manpower endstrengths (i.e., the number of personnel in uniform at the end of the fiscal year), DOD had been provided with a number of options that may be relevant to former spouses. These options included involuntary separation pay, incentives for early voluntary separation, and early (pre-20-year) retirement. These options may have import to former spouses and military members, since (1) a court may consider or may have considered future retired pay as divisible property, although the member may not have actually retired to receive those benefits because of the drawdown, (2) the potential amount available under these programs may be substantially less than would have been available under longevity retirement (retirement after a military career of 20 years or more), (3) Congress has neither authorized nor prohibited the courts from considering these separation benefits as divisible property,⁵² and (4) national interests (i.e., the size and composition of the military) removed from the domain of domestic relations concerns of state courts, are at issue.

Separation Pay (Severance Pay) for Personnel Involuntarily Separated from the Service⁵³

Involuntary separation pay was calculated at 10% of final monthly basic pay, multiplied by 12, and then multiplied by the military member's total years of service. It was available for involuntarily-separated officers and enlisted personnel with 6 or more years of service, who were not in their initial enlistment or initial obligated period of service. The FY1992 National Defense Authorization Act provided similar pay for certain personnel who voluntarily left active duty, calculated on the basis of 15%, rather than 10%, of military basic pay for each year of service.

Options for Early Voluntary Separation

The FY1992 National Defense Authorization Act (P.L. 102-190, December 5, 1991) included benefits for certain personnel who voluntarily leave service before reaching retirement eligibility. One was known as the Voluntary Separation Initiative (VSI); another was the Special Separation Benefit (SSB). VSI and SSB were envisioned as temporary and were only used as management

⁵² <http://www.pensionappraisers.com/specialissues/retinventionsseverancepay.shtml> provides a state-by-state consideration of separation pay in divorce. In a few cases, state courts have considered these military benefits in the divorce process.

⁵³ The following sections on Separation Pay, Options for Early Voluntary Separation (including VSI and SSB), and Early (Pre-20-Year) Retirement, are edited from CRS Report RL33449, *Military Retirement, Concurrent Receipt, and Related Major Legislative Issues*, by (name redacted).

tools as part of the post-Cold War decrease in the size of the armed forces, including the career force.

Both the VSI and SSB were available to military members with as little as six years of active duty. The option of voluntary separation before the 20-year mark in return for receiving either VSI or SSB benefits was offered by each military service (Army, Navy, Marine Corps, and Air Force) to selected groups of individuals (based on years of service, occupational skill, or pay grade) as necessary to reduce active duty military manpower strengths during the 1990s. Election of early separation and receipt of VSI or SSB was voluntary on the individual member's part, although failure to elect VSI or SSB might leave the individual vulnerable to later involuntary separation, for which the individual could receive much less liberal separation pay. Individual military members were notified that they were eligible to receive VSI or SSB; the choice as to which benefit they receive was entirely up to them.

VSI: Summary. Each service member electing to voluntarily separate under VSI received an annual payment equal to 2.5% of final monthly basic pay, multiplied by 12, and then multiplied by the member's total years of service. The member would receive the payments for a period twice the number of years of service the member had upon retirement. Thus, a major or lieutenant commander (pay grade O-4) with 14 years of service would receive an annual VSI payment of 2.5% of the monthly basic pay of an O-4 with 12 years of service, multiplied by 12, and then multiplied again by 14, and would be entitled to receive the VSI payments for 28 years (2 x 14 years of service).

VSI recipients were to be transferred to the Individual Ready Reserve (IRR) of the armed forces and, thus, were subject under several different statutes to involuntary orders to active duty by either the President or the Congress for as long as they receive their VSI payments. They could join the Selected Reserve (reservists who are paid and regularly train), although they would have to forfeit most or all of their reserve pay, either at the time of receipt of VSI or later, upon receipt of reserve retired pay, if they became eligible for the latter. If they later rejoin the active duty military they would have to repay their VSI bonus through regular deductions from their active duty pay or from military retired pay received after retiring from an active duty career.

SSB: Summary. The Special Separation Benefit (SSB) consisted of a single lump-sum separation payment, calculated at 15% of final monthly basic pay, multiplied by 12, and then multiplied by the member's total years of service. As noted above, the formula was the same as that used for involuntarily separated personnel (those forced out), except the involuntary separation pay formula was based on 10% rather than 15% of basic pay. The SSB payment was, thus, 50% higher than the payment for an involuntary separation. SSB recipients were to serve in the IRR for a period of three years after separation from active duty. In addition, SSB recipients could join paid-status reserve units and receive full reserve pay for their reserve service, unlike VSI recipients.

Most service members eligible for a voluntary separation benefit opted for the lump-sum SSB, rather than the longer-term VSI. This appeared to result from concerns over various restrictions on reserve participation and non-monetary separation benefits placed on VSI recipients, as well as the natural human desire for "cash up front."

Both VSI and SSB were closed to new participants on December 31, 2001.⁵⁴

Selective Early Retirement

The FY1993 National Defense Authorization Act authorized DOD, on a temporary and discretionary basis, to allow active duty military members to retire, and immediately begin receiving a reduced amount of retired pay, with a minimum of 15, rather than the preexisting 20, minimum years of service years of service. DOD could use such factors as grade, precise years of service, and occupational skill in determining whether a military member was allowed to retire with no less than 15 years of service. Such early retirement had been used in the 1930s to assist in removing a surplus of officers with 15-20 years of service. Retirees were eligible for the full range of medical, commissary and exchange, and other benefits that current 20-year retirees receive.

Early retirees were to have their retired pay computed in accordance with a two-step formula: (1) the existing formula for computation was applied (2.5% of basic pay for each year of service multiplied by the number of years of service); (2) the resulting amount was reduced by 1/12 of one percent for each month of service (or one percent for each year of service) less than 20 years. For example, applying the current formula to a 16-year retiree, who had four years of service less than the usual 20 years of service minimum, would otherwise result in the retiree receiving 40% of final basic pay upon retirement. However, because the retiree was retiring early, his or her retired pay would be reduced by one percent for each of the four years below the 20 years of service mark. The retiree would thus be entitled to 96% (100% - 4%) of the retired pay to which he or she would otherwise be entitled, or 38.4% of final basic pay (40% x 0.96).

A second aspect of the early retirement statute provided additional, deferred retired pay for early military retirees who took certain critical public sector jobs after leaving the military. Persons who retired with less than 20 years of service could receive up to five years of additional service credit for jobs in fields such as law enforcement, education, or public health. At age 62, their retired pay would be recalculated to reflect their additional service credit. For instance, the 16-year retiree who received 38.4% of basic pay upon retirement, and who took an approved public sector job for at least four years after leaving military service, would have his or her retired pay recalculated at age 62 to reflect 20 (16 + 4) years of service—or 50% of basic pay, without the additional one percent per year reduction.

Authority for granting selective early retirement expired on September 30, 2001.

Author Contact Information

(name redacted)
Specialist in Military Manpower Policy
[redacted]@crs.loc.gov, 7-....

⁵⁴ 10 USC 1174a(h), 1175(d)(3).

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