

# FY2020 NDAA Analysis: Elimination of Benefits Offset for Surviving Spouses and Related Legal Issues

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Efforts to eliminate a “benefits offset” that affects surviving spouses—widows and widowers of deceased military servicemembers—gained momentum in the 116<sup>th</sup> Congress. Bills to accomplish this had been introduced for several years, and garnered [significant bipartisan](#) support in this Congress. The National Defense Authorization Act for Fiscal Year 2020 (FY2020 NDAA) ultimately included a gradual [phase-out](#) of the offset, resulting in full elimination by 2023.

This Sidebar first explains the legal background of the benefits offset, which involves two military benefits: the [Survivor Benefit Plan](#) (SBP), a taxable annuity paid by the U.S. Department of Defense (DOD) to survivors of active duty or retired servicemembers, and [Dependent Indemnity Compensation](#) (DIC), a non-taxable benefit paid by the U.S. Department of Veterans Affairs (VA) to survivors of servicemembers who died in the line of duty or had a service-connected injury or disease. This Sidebar then analyzes the FY2020 NDAA’s phase-out, including how it differs from other recent offset-elimination proposals.

## The Survivor Benefit Plan

Generally, military [retired pay ends](#) with the death of the retiree. In 1972, Congress [passed the SBP](#) as a successor to [previous programs](#), all of which gave servicemembers the means to provide continuing financial support for their dependents after the servicemembers’ deaths. With the SBP, servicemembers receive [reduced](#) retirement benefits during their lifetimes in exchange for a guarantee that their spouses (or surviving dependent children) will continue to receive—in the form of an [annuity—a portion of those retirement benefits](#) afterward.

Participation in the SBP is generally automatic; servicemembers who are married or have a child when they become eligible for retirement pay also become SBP participants [unless they opt out](#). The [standard](#) (and maximum) monthly SBP benefit is “equal to 55 percent of the base amount” of the servicemember’s monthly retirement pay. A surviving spouse’s SBP eligibility [terminates](#) upon his or her death or

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remarriage, unless the surviving spouse is age 55 or older at the time of remarriage. A surviving child's eligibility [generally](#) terminates when he or she marries or turns 18 (or until age 22 if a full-time student).

At the end of 2001, Congress [extended](#) SBP [eligibility](#) to surviving spouses of active-duty servicemembers who died in the [line of duty](#), even if the servicemembers were not yet eligible for retirement pay. (The bill was retroactively effective to [September 10, 2001](#), the day prior to the terrorist attacks targeting the Pentagon and other locations).

The SBP offers benefits similar to those offered to survivors of employees participating in non-military retirement plans. For example, the Federal Employees Retirement System (FERS) [provides](#) a monthly [annuity](#) to surviving spouses of federal employees based on the deceased employees' creditable service. Similarly, the Employee Retirement Income Security Act (ERISA) [requires](#) private companies to provide annuity benefits to the survivors of participants in certain types of retirement plans.

More information about the SBP—including facts about program size, participation rates, and costs—can be found in this [CRS Report](#).

## Dependent Indemnity Compensation

Under the [Feres doctrine](#), servicemembers and survivors generally may not sue the United States for civil remedies related to injuries or death from military service. But some form of financial compensation has been paid to survivors of servicemembers who died on active duty, during training, or from service-connected disabilities [since](#) the Revolutionary War. Rather than being calculated as a percentage of the deceased servicemember's pay entitlement (as with SBP), since 1993 the DIC has been a [flat basic rate](#), with certain additional allowances based on, for example, number of dependent children. As of December 2018, that [basic rate](#) was [\\$1,319.04](#) per month. The VA processes and pays [DIC claims](#). [Until 2004](#), a surviving spouse's remarriage (at any age) ended DIC eligibility. With the Veterans Benefits Act of 2003, Congress made an [exception](#) for surviving spouses who remarry after reaching the age of 57. In 2010, Congress [extended](#) DIC benefits to survivors of certain servicemembers who were 100% disabled due to service-connected disabilities, even if their deaths were not caused by those disabilities.

## The SBP-DIC Offset for Surviving Spouses

Prior to the FY2020 NDAA, a surviving spouse's SBP benefit was "[offset](#)" dollar-for-dollar by the amount of any DIC received from the VA. Specifically, under the statute, "[i]f, upon the death of a person to whom [the SBP] applies, the surviving spouse or former spouse of that person is also entitled to [DIC]," then "the surviving spouse or former spouse may be paid [a SBP] annuity . . . , but only in the amount that the annuity otherwise payable under this section would exceed that [DIC]." As evident from this language, the offset applied only to surviving spouses, not to other SBP recipients, such as surviving dependent children. As a result, this offset is [sometimes referred](#) to as the "[widows' tax](#)," although offsets may more accurately be described as reductions in paid benefits rather than [taxes](#).

[Some](#) justified this particular offset by comparing it to laws prohibiting "[double dipping](#)," or collecting federal funds from two sources for the same purpose (such as billing two federal agencies for the same work). Other observers may characterize the offset as somewhat consistent with federal practices in other non-military contexts where benefit entitlements can have complex interactions. For example, one's own [Social Security](#) entitlement may prevent one from collecting benefits based on status as someone else's dependent. On the other hand, one may receive [both](#) a FERS annuity and Social Security dependent benefits, and private pension annuities are generally independent of any life insurance or other indemnity payments. In the military context, which may be more closely analogous to the situation of surviving spouses, retired veterans with a disability rating of 50% or more [currently](#) receive [both](#) retired pay from the DOD and disability payments from the VA, which arguably means that military retirement and

disability are treated as separate entitlements, [at least to some extent](#). The question whether that should change when those payments are received by the surviving spouse rather than the veteran may be open to debate.

The other primary obstacle to eliminating the offset appeared to be cost: in 2009, the Congressional Budget Office (CBO) [estimated](#) that ending the offset would cost approximately \$7 billion over ten years. On June 25, 2019, the CBO revised its estimate of the cost of eliminating the SBP-DIC offset to approximately \$5.7 billion over ten years; the difference appears to be due to the introduction of the Special Survivor Indemnity Allowance (discussed below), which reduced the amount of offset to be eliminated.

## Effect of Surviving Spouse Remarriage on Applicability of the Offset

As noted, surviving spouses who remarry before age 55 lose SBP eligibility, while surviving spouses who remarry before age 57 lose DIC eligibility. However, [the law](#) that restored DIC eligibility to surviving spouses who remarry *after* age 57—38 U.S.C. § 1311(e)—contained [language](#) that appeared [to contradict](#) the SBP offset provision: “notwithstanding any other provision of law . . . no reduction in benefits under such other provision of law shall be made by reason of such individual’s eligibility for benefits under this section.” The DOD, arguing that § 1311(e) [did not apply to](#) the SBP offset and that Congress [did not intend](#) otherwise, nonetheless [continued to apply](#) the offset to surviving spouses who remarried after age 57. At least one court, [describing](#) the matter as “a close question of statutory interpretation,” acknowledged the Government’s argument that prohibiting the offset only for surviving spouses who remarried after age 57 seemed “arbitrarily disparate” and “arguably unreasonable.” But in *Sharp v. United States*, the U.S. Court of Appeals for the Federal Circuit determined that DOD’s interpretation was ultimately unlawful. As that court [put it](#):

Perhaps Congress intended to encourage marriage for older surviving spouses. Perhaps section 1311(e) simply represents a first step in an effort to eventually enact full repeal. After all, the servicemember paid for both benefits: SBP with premiums; DIC with his life. . . . Whatever the reason, the government has failed to make the “extraordinary showing of [Congress’s] contrary intentions” that would permit this court to construe section 1311(e) in a way that eviscerates its plain language.

As a result, prior to the FY2020 NDAA, surviving spouses who remarried before age 55 received neither SBP nor DIC; surviving spouses who remarried between the ages of 55 and 57 received SBP but not DIC; surviving spouses who never remarried received SBP subject to the offset of whatever DIC they received; and surviving spouses who remarried after age 57 received both SBP and DIC in full.

## Prior Measures to Address the Offset

Congress [provided an option in 2003](#) for surviving spouses of active-duty servicemembers to transfer SBP benefits to surviving dependent children if the spouses are either ineligible for SBP or “determine[] it appropriate” to make the transfer. (As noted, the benefit entitlement of children is [not the same](#) as a spouse’s lifetime or remarriage entitlement, which may shorten the term of the SBP annuity.)

Beginning in 2009, Congress [created](#) the Special Survivor Indemnity Allowance (SSIA) to partially “offset the offset”—giving an additional \$50 per month to those whose SBP was offset by DIC, and gradually increasing the monthly SSIA amount to \$100 over several years. Additional increases were [later authorized](#), bringing the monthly SSIA amount to \$310 in 2017. Congress [permanently](#) authorized that SSIA along with annual cost-of-living adjustments in the FY2018 National Defense Authorization Act; for 2019, the maximum SSIA benefit was [\\$318](#) per month, with no adjustment for number of dependents. Accordingly, for a surviving spouse whose SBP is offset by the base amount of DIC ([\\$1,319.04](#)), the 2019 SSIA will functionally restore approximately 24% of the benefits that were subtracted by the offset.

## The FY2020 NDAA and Other Offset-Elimination Proposals

The Military Surviving Spouses Equity Act (H.R. 553) and the Military Widow's Tax Elimination Act of 2019 (S. 622) were nearly identical bills that would have eliminated the SBP-DIC offset wholesale by striking the provisions in 10 U.S.C. §§ 1450-51 that required it. Both bills contained a virtually identical set of additional revisions to eliminate other references to the offset.

Both bills also specified that these changes would not entitle survivors to retroactive benefits; in other words, surviving spouses would not receive any compensation for the time during which the offset was applied. However, surviving spouses who previously received refunds of SBP premiums under subsection 1450(e) would not be required to return those refunds.

Both H.R. 553 and S. 622 would have eliminated the option in section 1448(d)(2)(B) for an otherwise-eligible surviving spouse to designate a child beneficiary for SBP payments. The bills would have then restored SBP eligibility to surviving spouses who previously designated child beneficiaries—even if the child's entitlement has expired—as long as the surviving spouses continue to meet remaining eligibility requirements.

The FY2020 NDAA adopted most of the same measures as the standalone bills, namely:

- **Striking** the language requiring the offset;
- **Prohibiting** retroactive benefits;
- **Prohibiting** recoupment of SBP premiums refunded to surviving spouses;
- **Repealing** the authority for designating dependent children as SBP recipients; and
- **Restoring** eligibility for spouses who previously designated their children as SBP recipients.

The most salient difference between the FY2020 NDAA and the standalone bills lies in the timing of the offset elimination. Rather than eliminate the offset all at once, Congress opted to **phase out** the offset over several years. In place of § 1450(c)(1)'s requirement that SBP payments be made only to the extent the amount of SBP owed exceeds DIC, the FY2020 NDAA **reduces** the offset's impact to a surviving spouse by one-third in 2021, by two-thirds in 2022, and eliminates the offset entirely in 2023. For 2020, the full offset remains in place.

Further, the provisions repealing the child designation authority and restoring eligibility to spouses of such children **do not take effect** until the offset is fully eliminated. Thus, children previously designated as SBP recipients will continue to receive SBP payments until 2023, or as long as they continue to be eligible, while surviving spouses who designated their children as SBP recipients will again become eligible to receive SBP benefits at that time. The restoration of eligibility for surviving spouses specifically includes spouses whose children's eligibility terminates before 2023. (As discussed above, child SBP benefits generally terminate when a child marries or ages out of eligibility.)

The FY2020 NDAA, like H.R. 553, leaves intact subsection 1450(m)—the provision establishing SSIA. Accordingly, surviving spouses currently receiving SSIA should generally continue to receive it until the offset is completely eliminated in 2023. However, in setting up the SSIA, Congress provided that the amount of SSIA paid to a survivor “may not exceed the amount of the annuity for that month that is subject to offset” under subsection 1450(c)(1). Surviving spouses thus will only receive SSIA in 2021 and 2022 to the extent that their SBP

benefits are still being offset by DIC. Once the offset is eliminated, the statutory SSIA provision will no longer apply, leaving subsection (m) a [dead letter](#).

Unlike both standalone bills, the FY2020 NDAA also leaves intact subsection [1450\(e\)](#)—regarding refunds of SBP premiums for surviving spouses affected by the offset—and subsection [1450\(k\)](#)—regarding loss of DIC eligibility due to remarriage after the age of 55. Like subsection 1450(m), these subsections will lose their operability once the offset is eliminated, because they apply only to surviving spouses affected by the offset.

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