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The Uniformed Services Former Spouses' Protection Act: How Military Members Are at the Mercy of Unrestrained State Courts

A more complex mix of state and federal rules would be hard to imagine.¹

A major shift in the treatment of retired members of the U.S. military occurred with the passage of the Uniformed Services Former Spouses' Protection Act² ("USFSPA" or "the Act") of 1982. This Act of Congress allows state courts to divide a service member's retirement pay during a divorce and requires the armed service pay centers to make direct payment of military retirement pay to former spouses under certain conditions. Though it provides much needed relief to many disadvantaged spouses, application of the Act over twenty years has produced unintended effects. The Act, by conferring great discretion on state courts to tailor equitable division of assets during a divorce, assigned to those state courts responsibilities that are not being fulfilled. This discretion can be particularly troublesome when a state is exercising jurisdiction over a service member in another state. This Comment will delve into the issue of whether different state interpretations of the Act result in substantially unequal treatment of service members among the several states.

A preliminary understanding of military retirement pay is necessary before an examination of the pertinent legislation. The U.S. military offers a very generous retirement benefit. In some

1. Mark E. Sullivan, *Military Pension Division: Crossing the Minefield*, 31 FAM. L.Q. 19 (1997).

2. Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. § 1408 (2000)).

respects, it can be viewed as a benefit earned for service. In other respects, it is a recruitment and retention tool for the armed forces.³ The basic entitlement is 50% of base pay at twenty years of service, increasing by 2.5% per year, up to a maximum of 75% at thirty years.⁴ The notion that a military retiree gets "half-pay" with a twenty-year retirement would be an oversimplification because specialty pays and other allowances do not carry forward into retirement. The retirement pay will be substantially less than this fraction of their last active-duty take-home pay;⁵ an amount comparable to most other non-military retirement plans.⁶

Additional justifications for this retirement system are the maintenance of a youthful force, the maintenance of predictable promotion with an "up or out system,"⁷ and compensation for the substantial hardships associated with military life.⁸ Most important, perhaps, is that retirees form a reserve manpower pool available in a national emergency.⁹ Military retirement differs from many other retirements in that retirees are still considered part of the armed forces¹⁰ subject to involuntary recall,¹¹ and still

3. The references to this are numerous, and nearly all recruiting literature will stress the retirement benefits. As a start, visit the recruiting station or view the services' recruitment web sites, at <http://www.navy.com>; <http://www.marines.com>.

4. 10 U.S.C. § 1409 (2000). For purposes of simplification, this Comment is limited to discussing regular, active-duty retired pay earned by service members who entered service before September 8, 1980.

5. A typical Air Force officer retiree might be a lieutenant colonel retiring at twenty years; his or her last month's active duty pay would be a base pay of \$6329.10, plus an additional \$1755.20 per month in allowances (at national median rates), for a total of \$8084.30 monthly gross income. Upon retirement at twenty years, the gross retirement pay would be \$3164.55, or approximately 39% of the active duty gross pay amount. This would exclude any incentive or bonus pay. Calculations are based on the January 1, 2003 Department of Defense Monthly Basic Pay Table, available at <http://www.dod.mil/militarypay/pay/bp/paytables/Jan2003.html>.

6. See *supra* notes 3-5.

7. American military officers must be promoted to certain ranks by a certain point (time in service) of their careers or they are separated from the service. This is often termed the "up or out" promotion system. See, e.g., *Ricks v. United States*, 278 F.3d 1360, 1362 (Fed. Cir. 2002).

8. See Defense Officer Personnel Management Act, 10 U.S.C. § 101 (2000).

9. S. REP. NO. 97-252, at 51 (1982), reprinted in 1982 U.S.C.C.A.N. 1555, 1634.

10. *United States v. Tyler*, 105 U.S. 244, 246 (1881).

11. 10 U.S.C. § 688(a)-(b)(1) (2000).

subject to the military justice system when receiving military retirement pay.¹² As such, the military retirement pay is also referred to as “retainer pay.”¹³ Retired members are eligible for recall, but can lose their eligibility through actions such as criminal activity.¹⁴ Military retirement also differs in that it is non-contributory, has no cash value, and cannot be passed on to heirs.¹⁵ Given the foregoing, most attempts to equate the military retirement system to other retirement systems fail.¹⁶

The military retirement system also meets other goals beyond providing a retirement annuity. Military retirees retire substantially earlier than others.¹⁷ In addition, military personnel may have combat specialties that do not translate well into civilian employment, so when a military retiree starts a second career, additional education or training is often required.¹⁸ The “needs of the service” frequently require a service member to work in a career field that may not be what they would choose for a post-service career.¹⁹ Furthermore, because of their frequent moves, military personnel often do not have community roots on which to fall back. Military retirement pay thereby also serves an important function during the transition to civilian life.²⁰ A military retiree suffers a significant drop in income immediately upon retire-

12. *Id.* § 802(a)(4).

13. *Id.* § 1408(a)(7).

14. See 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, 5 n.33 (1999).

15. See 10 U.S.C. § 1408(c)(2) (2000).

16. Just the retirement age alone is enough to make it unique without the recall procedures. Compare the military retirement eligibility – a typical military enlisted retiree may retire as early as age 38 (enlist at age 18 with 20 years service) – with federal civil service retirement at age 55 as the earliest for most people. See U.S. Office of Personnel Mgmt., Federal Employees Retirement System chart at <http://www.opm.gov/retire/html/faqs/faq11.html> (last visited Nov. 7, 2003). A search by the author has not uncovered a system similar to the military one—either in benefits or responsibilities. See also S. REP. NO. 97-502 at 50, reprinted in 1982 U.S.C.C.A.N. 1555, 1633.

17. Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 MIL. L. REV. 40, 40 n.7 (2001).

18. See S. REP. NO. 100-13 at 6 (1987).

19. See generally *Garnishment of Veterans' Benefits to Pay Child Support and Other Court-Ordered Family Obligations Before the House Veterans' Affairs Committee*, 105th Cong. 13 (1998) (testimony from multiple witnesses with regard to military life and service), 1998 WL 461086.

20. *Id.*

ment.²¹ With the average military member moving about every two to three years,²² many do not own homes and the military retirement plan is their most significant asset.²³ In short, the military retirement has other goals and purposes aside from being a mere pension plan.

The fundamental issue raised throughout this Comment is whether division of military retirement pay is a divorce or a military issue. If clearly a divorce issue, then it would be left to the states; if it is a military issue, then the federal government retains authority.²⁴ As noted at the outset, "A more complex mix of state and federal rules would be hard to imagine."²⁵ An objective look at the Act indicates that both play a role; the states, which govern marital law, may divide what the federal government, which governs military law, determines to be the divisible pay.²⁶ Congress, however, must ensure that military members are treated roughly equal in every state.²⁷ The unique recall status of the military retiree, and the lack of choice over assignments during the course of a military career, are factors unique to the military retirement system, which deserve special consideration in divorce actions.

This Comment will address this fundamental issue in five parts. Part I sets the stage by discussing the United States Supreme Court decision that brought the issue of division of military

21. See *supra* note 5.

22. GENERAL ACCOUNTING OFFICE, MILITARY PERSONNEL—LONGER TIME BETWEEN MOVES RELATED TO HIGHER SATISFACTION AND RETENTION, GAO-01-841 (2001).

23. *Garnishment of Veterans' Benefits to Pay Child Support and Other Court-Ordered Family Obligations Before the House Veterans' Affairs Committee*, 105th Cong. 19-20 (1998) (statement of Joyce Wessel Raezer, National Military Family Association), 1998 WL 461086.

24. The two views were addressed squarely in *McCarty* by Justices Blackmun and Rehnquist in the Court's opinion and the dissent, respectively. *McCarty v. McCarty*, 453 U.S. 210, 235-38 (1981).

25. Sullivan, *supra* note 1, at 19. It is possible to reconcile the two views as a military matter. In testimony regarding the USFSPA, all statements and the resulting report discussed balancing the needs of the service member and the needs of the spouse. Clearly, the military recognizes the need for equity for both. See S. REP. NO. 97-502, at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 1555, 1601.

26. The statute says the states may consider the disposable retired pay in a divorce, but never defines "disposable retired pay." 10 U.S.C. § 1408(a)(4), (c) (2000).

27. See generally *McCarty*, 453 U.S. at 234. One can argue that Congress has a duty to do so. See Part V *infra*.

retirement pay to the forefront and the immediate legislative response—the USFSPA. Part II discusses the application of the USFSPA by analyzing subsequent Supreme Court decisions and the states' role within this application. Part III identifies the shortcomings in USFSPA. Part IV outlines past attempts to modify the USFSPA and contends that further Congressional action is necessary. Part V then recommends particular measures designed to correct the noted deficiencies. The conclusion posits the USFSPA, though a needed measure, remains in desperate need of refinement.

I. THE *MCCARTY* DECISION AND THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT

A. *The McCarty Decision*

Prior to 1981, many courts differed on the issue of dividing the retirement pay during a divorce.²⁸ The Supreme Court finally decided the issue in the landmark opinion of *McCarty v. McCarty*.²⁹ Colonel Richard McCarty, an Army doctor, retired after twenty years of service.³⁰ Colonel McCarty and his wife were married for eighteen of those twenty years.³¹ During the divorce proceeding, the California Superior Court held that the military retirement pay was quasi-community property and awarded his spouse forty-five percent, based on her half-interest in the portion earned during the marriage.³² The California Court of Appeals affirmed this ruling.³³ The U.S. Supreme Court granted *certiorari*.³⁴ The question before the Court was whether federal law precluded

28. See, e.g., *Kruger v. Kruger*, 375 A.2d 659 (N.J. 1977) (holding that military retirement pay was property subject to division in a divorce); *Ellis v. Ellis*, 552 P.2d 506 (Colo. 1976) (holding that military retirement pay was not property divisible in a divorce).

29. 453 U.S. 210 (1981).

30. *Id.* at 218.

31. *Id.* at 216.

32. *Id.* at 217-18. Eighteen years is ninety percent (90%) of twenty years; dividing in half yields forty-five percent (45%).

33. *Id.* at 218.

34. *Id.* at 219.

state courts from dividing military retirement pay; the Court ruled in the affirmative and overturned the California decision.³⁵

The Court examined the history and purpose of the military retirement system in great detail, determined that it was meant to be a personal entitlement of the retiree, and held it could not be split by state courts.³⁶ In doing so, the Court reasoned that state division of military pay would have detrimental effects on the military.³⁷ The Court, however, did note the seeming inequities for the ex-spouse of a military retiree, but stated that the matter was for Congress to fix.³⁸ Congress eagerly took up this issue at its first opportunity with the Uniformed Services Former Spouses' Protection Act,³⁹ a very controversial measure throughout the initial debate, subsequent enactment and ultimate implementation.

B. The Uniformed Services Former Spouses' Protection Act

The Congressional response to *McCarty* was swift.⁴⁰ After the decision was announced, there was a great outcry over its impact on spouses.⁴¹ In the next session of Congress, the USFSPA was introduced and passed.⁴² This measure contains two major provisions: (1) state courts may consider the military pension as divisible marital property; (2) the uniformed services are required to pay any court-ordered share directly to the spouse.⁴³ The USFSPA only addresses this issue from the standpoint of defining the maximum amount the armed services are required to pay directly to the former spouse under valid court orders;⁴⁴ it does not interfere with state laws to limit the amount that states may award.⁴⁵

35. *Id.* at 210.

36. *See generally id.* at 211-27.

37. *Id.* at 234-35.

38. *Id.* at 235-36.

39. Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. § 1408 (2000)).

40. Kuenzli, *supra* note 14, at 7-8.

41. *See* DAVID CLAYTON CARRAD, THE COMPLETE QDRO HANDBOOK: DIVIDING ERISA, MILITARY, AND CIVIL SERVICE PENSIONS AND COLLECTING CHILD SUPPORT FROM EMPLOYEE BENEFIT PLANS 155 (2000).

42. *See* 10 U.S.C. § 1408 (2000).

43. *Id.* § 1408(c)-(d).

44. *Id.* § 1408(c)(1).

45. *Id.* § 1408(e)(6).

For the provisions of the Act to apply, certain thresholds must be met. First, a court must find an overlap of at least ten years of marriage with ten years of military service.⁴⁶ Retirement pay for less overlap may still be split by the state courts; however, the military is not obligated to follow the order.⁴⁷ Second, the state must be able to exercise personal jurisdiction over the service member and the USFSPA prohibits states from using the Act to extend personal jurisdiction beyond previous limits.⁴⁸

The Act was passed on September 8, 1982, but was made retroactive to be effective for divorces finalized after June 25, 1981, the day prior to the *McCarty* decision.⁴⁹ The Act also clearly addressed some of the Supreme Court concerns about the nature of the pay⁵⁰ by establishing that the Act does not create for the spouse a "right, title, or interest which can be sold, assigned, transferred, or likewise disposed of (including by inheritance) by a spouse or former spouse."⁵¹

The fifty-percent maximum split under this Act would apply whenever a marriage overlaps with the entirety of the military service.⁵² If the overlap is less, the maximum fraction available to the state courts for division will be less.⁵³ If the parties to a divorce are unable to agree on a split of the retirement pay, the maximum calculation based on the Act is a presumption for the service member to overcome.⁵⁴

The USFSPA provides other benefits as well. For the spouses, the Act also authorizes support from the military that has tradi-

46. *Id.* § 1408(d)(2).

47. Kuenzli, *supra* note 14, at 30.

48. *See* 10 U.S.C. § 1408(c)(4).

49. H.R. REP. No. 97-252, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1599.

50. *See* *McCarty v. McCarty*, 453 U.S. 210, 222-34 (1981).

51. 10 U.S.C. § 1408(c)(2).

52. *See id.* § 1408(d), (e)(1).

53. An example would be a theoretical retiree who marries his spouse halfway through a 20-year career. If they were to divorce after 20 years of marriage, she would only be entitled to a maximum of 25% because she was married to her husband for only 10 years of his 20-year career, so only 50% of the pension would be eligible for consideration. It is then split between the two parties to yield 25%.

54. *See* Bradley, *supra* note 17, at 56 n.83.

tionally been considered part of the total compensation package.⁵⁵ It allows spouses who meet the ten-year overlap rule to have continued commissary (grocery store) and exchange (shopping center) privileges where substantial savings are often available,⁵⁶ and provides continued medical and dental coverage.⁵⁷ Additionally, a benefit to the federal government is that the state authority to split the military pensions now mirrors state authority to divide pensions of the Civil Service and Foreign Service retirees, eliminating a discrepancy that concerned the Court in *McCarty*.⁵⁸

Debate over substantial modifications to the Act has not produced results. Divorced spouses are viewed as a group worthy of a great deal of sympathy because some have been wronged.⁵⁹ Although circumstances surrounding these divorces vary greatly, Congress's reluctance to step into this "minefield"⁶⁰ has resulted in only failed attempts to substantially modify the Act.⁶¹

In the end, Congress has made only minor changes to the Act. Most have been non-controversial and generally convey benefit to the spouse, not the retiree.⁶² A 1993 change for abused former spouses was welcome and needed. Prior to 1993, abused spouses

55. Total military compensation refers to all methods of compensation—pay, benefits, and tax savings. See Department of Defense Military Compensation, at <http://www.dod.mil/militarypay/pay/index.html>; *supra* note 5.

56. Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 734, Sec. 1005 (1982) (to be enacted by Department of Defense regulations).

57. 10 U.S.C. §§ 1072–1074. Children remained covered if registered as a dependent of the service member up until age 18 or age 23 if a full-time student. *Id.*

58. See *McCarty*, 453 U.S. at 230-32.

59. Divorced spouses have their own lobbying group, EX-POSE (Ex-Partners of Service Members for Equality) at <http://www.ex-pose.org>. They have had a significant impact; in testimony before the House Veteran's Affairs Committee on August 5, 1998, sixteen witnesses testified on behalf of the changes, and only two groups, including EX-POSE and another group of former spouses testified against the changes. *Garnishment of Veterans' Benefits to Pay Child Support and Other Court-Ordered Family Obligations Before the House Veterans' Affairs Committee*, 105th Cong. 22 (1998), 1998 WL 461086.

60. Sullivan, *supra* note 1, at 19.

61. See Kuenzli, *supra* note 14, at 47.

62. *Garnishment of Veterans' Benefits to Pay Child Support and Other Court-Ordered Family Obligations Before the House Veterans' Affairs Committee*, 105th Cong. 13-14 (1998) (statement of Frank W. Ault, American Retirees Association), 1998 WL 461086.

faced a dilemma if the military member had qualified for retirement but remained on active duty: either put up with the abuse until retirement or seek protection that could result in the member's dishonorable discharge from the service and loss of the retirement benefit.⁶³ The Act permits the spouse to receive benefits, even if the testimony resulted in the discharge of the active duty member without pay or benefits. One change that does benefit a military retiree provides a different method of calculating the pay subject to division—the pay remaining after any non-taxable deductions.⁶⁴

Understandably, the Act is not popular with military retirees.⁶⁵

II. APPLICATION OF THE USFSPA

A. *Post-USFSPA Supreme Court Decisions*

With *McCarty* effectively overruled by the USFSPA, the Supreme Court military divorce law jurisprudence has remained mostly dormant over the last twenty-one years, leaving much room for state interpretation. The first Supreme Court action to address the issue of military retirement pay demonstrates the divergent state court interpretations of the Act. In 1986, the Court denied *certiorari* in an appeal from a California denial of a request to reopen a divorce finalized between *McCarty* and the passage of the Act, the so-called “retroactive period.”⁶⁶ The dissent noted that two states, Arizona and Delaware, had already authorized retroactive application of the Act to reopen property settlements for divorces that were finalized between the *McCarty* decision and the

63. Kuenzli, *supra* note 14, at 42-43.

64. 10 U.S.C. § 1408(a)(4) (2000).

65. The forums for voicing such dissent are many. A typical response is captured in a private web site which provides a slanted view of the history and legality of the USFSPA. However, one interesting link includes individual stories of treatment by state courts under the USFSPA at <http://www.the-act-t-shirts.com>.

66. *Cox v. Cox*, 479 U.S. 970, 970 (1986) (White, J., dissenting). As addressed previously, the Act was passed on September 8, 1982, to take effect on June 25, 1981, one day prior to the *McCarty* decision.

passage of the Act.⁶⁷ As a result, the decision whether to apply the Act retroactively was left to the states.⁶⁸

The Supreme Court has stated, however, that the characterization of retirement pay remains within domain of Congress.⁶⁹ In *Barker v. Kansas*,⁷⁰ a 1992 tax discrimination case, the Court reiterated that military retirement pay is deferred pay for past services.⁷¹ The importance of the *Barker* decision reinforces *McCarty*'s clear direction that Congress has the responsibility to oversee spousal division of military retirement pay. Another tenet of *Barker* advises states to tread lightly in this area because of the overwhelming federal concerns in the area of military pensions.⁷²

*Mansell v. Mansell*⁷³ marked the most significant judicial treatment of military divorces since *McCarty*. The Court's decision addressed the interplay of military retired pay and military disability pay. Retirees who receive a disability rating from the Veterans Administration can elect to offset their retired pay, dollar for dollar, to receive disability pay.⁷⁴ The net effect of this is to reduce the disposable retirement pay available for division in a divorce. Though there are valid reasons for this election,⁷⁵ it can also be viewed as a one-sided option to reduce the payments to a spouse.⁷⁶ In addressing this issue in *Mansell*, the Supreme Court examined the military retirement system.⁷⁷ *Mansell* involved a retired Air Force officer receiving disability pay, who divorced in 1979.⁷⁸ In the California divorce decree, the retiree agreed to a fifty percent division of his total retirement pay including the amount of pay he had waived for the disability pay.⁷⁹ After pas-

67. *Id.*

68. *See id.*

69. *See* *McCarty v. McCarty*, 453 U.S. 210, 235-36 (1981).

70. 503 U.S. 594 (1992).

71. *Id.* at 605.

72. *See id.* at 604-05.

73. 490 U.S. 581 (1989).

74. 10 U.S.C. §§ 1201, 1401 (2000).

75. Disability pay is non-taxable and designed to compensate the disabled veteran for lost wage-earning capability. *Mansell*, 490 U.S. at 583-84. *See also* 26 U.S.C. § 104(4) (2000) (exempting from gross income any annuity for injury resulting from injury or sickness in the armed forces).

76. *Mansell*, 490 U.S. at 595 (O'Connor, J., dissenting).

77. *See id.* at 583.

78. *Id.* at 585.

79. *Id.* at 586.

sage of the Act, he requested that the courts modify this decree to reflect the statute's concept of disposable pay, which reduced the amount going to his former spouse.⁸⁰ The trial court refused to modify the decree and the California Court of Appeals upheld the lower court.⁸¹ The Supreme Court held that the Act did not grant the states, when calculating pay available for division, the right to consider retirement pay waived for disability benefits.⁸² The Supreme Court based its decision on the plain language of the Act, noting that it only addresses division of retirement pay.⁸³ The Court disagreed with the former spouse's argument that the Act's limits on pay orders should include the retirement pay that the service member voluntarily waives to get a different benefit.⁸⁴

Read together, these three Supreme Court decisions indicate that Congress intended only a limited role for the states in the division of military retirement pay.

B. *State Application*

1. *The Role of the States*

During the enactment of the USFSPA, Congress clearly indicated its basis for granting this authority to the states to divide the retirement pay. Though some discussion centered on the support that spouses provide the service members in their careers, such as entertaining or supporting other spouses in the military unit, most testimony focused on the frequent moves encountered in most military careers and the subsequent disruptions to the education and careers that spouses of service members often experience.⁸⁵ Congress reasoned that allowing the retirement pay to be split as property during a divorce provided compensation to military spouses for this disruption.⁸⁶ The Congressional hearings

80. *Id.*

81. *Id.*

82. *Id.* at 595.

83. *Id.* at 592. "The Act's definitional section specifically defines the term 'disposable retired or retainer pay' to exclude, *inter alia*, military retirement pay waived in order to receive veterans' disability payments. [10 U.S.C.] § 1408(a)(4)(B)." *Id.* at 589.

84. *Id.* at 592.

85. S. REP. NO. 97-502 at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1601.

86. *Id.* at 7.

also found the states capable of making an equitable division of this property and the existing state procedures adequate to protect the service members.⁸⁷ The Congressional hearings embraced the view expressed in Justice Rehnquist's dissent in *McCarty* that federal action normally would not be warranted, since divorce is not an enumerated power of the federal government in the U.S. Constitution and has traditionally been the province of the States.⁸⁸

When a service member must defend a divorce in a state far removed from his or her place of residence, jurisdictional issues add to the already complex application of the Act. Most states allow a spouse to file for divorce after only a short residency in that state or on the basis of a former residence.⁸⁹ A state's jurisdiction over the service member might equate to jurisdiction over the pension.⁹⁰ If the service member fails to respond in a timely manner, or subjects herself to the personal jurisdiction of the state before challenging that jurisdiction,⁹¹ state courts, in some instances, have split the pay of the military retiree.⁹² This suggests that some states may be predisposed to exercise jurisdiction over retirees. Federal law codifies some protection for the service members,⁹³ but they often do not have the resources to fight the

87. *Id.* at 2.

88. See *McCarty v. McCarty*, 453 U.S. 210, 237 (1980) (Rehnquist, J., dissenting).

89. See DANIEL SITARZ, *LAW OF THE UNITED STATES: DIVORCE* (1999) (providing a state by state breakdown on requirements).

90. *Delrie v. Harris*, 962 F. Supp. 931, 934 (W.D. La. 1997) (equating jurisdiction over the service member or retiree for the divorce with allowing continuing jurisdiction for the retired pay). However, a recent court case in California provides an excellent argument that the service member should be able to participate in other aspects of the divorce and not consent to division of his retired pay if the court otherwise lacks jurisdiction over him or her. See *In re Marriage of Stroup*, No. D030869, 2003 Cal. App. Unpub. LEXIS 4687 (Cal. Ct. App. May 13, 2003).

91. See *Sullivan*, *supra* note 1, at 29-31. See also *Wagner v. Wagner*, 768 A.2d 1112, 1115-17 (Pa. 2002) (discussing in dicta measures that an out-of-state respondent might take to avoid inadvertently consenting to jurisdiction, but also noting that a service member taking these measures might run contrary to the military custom of following the laws).

92. See, e.g., *Burt v. Burt*, 53 P.3d 101 (Wyo. 2002).

93. See 10 U.S.C. § 1408(c) (2000). This statute states that, "[a] court may not treat the disposable pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member" *Id.*

proceedings.⁹⁴ As a result, the service members may have to defend a divorce action in a state far from their residence.

Another factor that can work against the military retiree is timing. In a divorce action near retirement, the military member may find herself at a financial low point.⁹⁵ The divorce action would then make the transition to civilian life even more difficult.

A number of state court cases first examined the implementation of the USFSPA, then later explored the limits of the states' ability to divide the retirement pay under the Act. Although there have been a flurry of cases, many legal issues remain unresolved. Widely varying state court decisions create confusion as to the proper interpretation of the Act.

2. Differing State Interpretations of the USFSPA

Only the USFSPA addresses the issue of division of military retirement pay in a divorce. The Supreme Court has yet to interpret the Act as placing a limit on state division of the military retirement as the state courts see as equitable. In the absence of such interpretation, state courts have interpreted the Act differently.⁹⁶ The examples below illustrate this point.

First, state courts have subjected the operative words of the statute to different interpretations. The statute allows state courts to "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."⁹⁷ Although this statutory language would seem to leave much discretion to the state courts to divide the military retirement pay as they see fit, another school of thought holds that this provision should be limited by another provision that states that direct payments to the spouse from military pay centers "may not exceed [fifty] per-

94. See Sullivan, *supra* note 1, at 29-31 (discussing possible pitfalls in the jurisdiction battle).

95. See generally MARSHA L. THOLE AND FRANK W. AULT, DIVORCE AND THE MILITARY, 123-48 (1998) (describing the issues involved in a military divorce).

96. The basic provision allowing state courts to divide the pay as marital property states no specific limit. 10 U.S.C. § 1408(c). However, a later provision limits the military pay centers to paying only fifty percent directly to the spouse and may reflect the true intent of Congress. See *id.* § 1408(e)(1). Without interpretation, this may remain a distinction without a difference.

97. *Id.* § 1408(c)(1).

cent of such disposable retired pay."⁹⁸ The following two lines of cases illustrate these divergent interpretations.

A number of states have found that these two subsections, when read together, impose a limit on state court authority to divide retirement pay. The Washington Supreme Court, in the case of *In re Marriage of Smith*,⁹⁹ held "a court may award up to [fifty] percent of the disposable retired or retainer pay to the nonmilitary spouse"¹⁰⁰ The Idaho Supreme Court later echoed this approach when it held the "USFSPA prohibits a state court from awarding the non-military spouse the right to collect more than [fifty] percent" of the retirement pay.¹⁰¹

Other states have taken the opposite view and interpreted the fifty-percent cap as a limitation only on the amount of payment that can be made directly by the military, rather than a limitation on the division of the retirement as marital property by state courts. The Minnesota Court of Appeals in the case of *Deliduka v. Deliduka*,¹⁰² stated that any amounts above fifty percent awarded by the state court would be paid by the retiree directly to the former spouse.¹⁰³ The North Dakota Supreme Court also addressed this issue, stating the text of the statute supported the former spouse's argument that a higher division was possible.¹⁰⁴

A decision from the Kansas federal district court, *In re MacMeeken*,¹⁰⁵ addressed this issue and recognized that state courts were split on their interpretations of the fifty-percent cap.¹⁰⁶ In overturning a bankruptcy court determination that an award to the former spouse in excess of fifty percent of the retire-

98. *Id.* § 1408(e)(1).

99. 669 P.2d 448 (Wash. 1983).

100. *Id.* at 451.

101. *Beesley v. Beesley*, 758 P.2d 695, 699 (Ida. 1988). However, the court went on to say that other assets might then be awarded disproportionately to ensure an equitable division of marital assets. *Id.* This author would have no objection to that interpretation. Alternatively, a military retiree could agree to a higher division of retirement pay in exchange for another valuable asset, such as a house.

102. 347 N.W.2d 52 (Minn. 1984).

103. *Id.* at 55.

104. *Bullock v. Bullock*, 354 N.W.2d 904, 909 (N.D. 1984) (interpreting 10 U.S.C. § 1408(e)(6) (2000)).

105. 117 B.R. 642 (D.Kan. 1990).

106. *Id.* at 643 n.1 (citing *Smith*, 669 P.2d 448; *Beesley*, 758 P.2d 695; *Deliduka*, 347 N.W.2d 52; *Bullock*, 354 N.W.2d 904).

ment pay was not supported by the Act, the Court held the fifty-percent limitation applied only to the direct payments from the service pay center.¹⁰⁷ In doing so, the Court also noted that nothing in the legislative history "mandated" a contrary interpretation.¹⁰⁸

The second area where state courts have arguably differed from the Act or Supreme Court precedent is in the offset of retirement pay for disability pay. Although *Mansell* clearly set precedent that this pay should be excluded,¹⁰⁹ a 1999 Washington Supreme Court decision, *in re Marriage of Jennings*,¹¹⁰ allowed modification of the divorce decree to grant alimony to the former spouse to compensate for the service member's election of disability pay.¹¹¹ The court reasoned that an equitable division of property had been made at the time of the divorce decree and held that the Veterans Administration's action to grant a disability benefit unfairly altered that decision.¹¹² Therefore, the trial court was allowed to award alimony in the amount of the retirement pay exchanged for disability pay.¹¹³ Although the *Jennings* decision does not conflict with the letter of the *Mansell* decision, it certainly would seem to conflict with its spirit,¹¹⁴ as well as Congress's desire, through federal veterans' compensation statutes,¹¹⁵ to provide for those injured during the course of military service. It is disingenuous for the state courts to reconstruct divorce decrees well after the fact, absent some sort of fraud or surprise, to avoid federal statutory restrictions or Supreme Court precedents.

With contradictory state court interpretations of the Act, military members in like circumstances are being treated differently by different states.

107. *Id.* at 644-45.

108. *Id.* at 647.

109. *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989).

110. 980 P.2d 1248 (Wash. 1999).

111. *Id.* at 1256-57.

112. *Id.* at 1255-56.

113. *Id.* at 1256.

114. The rationale is that disability pay decreases the amount of disposable retired pay; the USFSPA (and *Mansell*) only allow for division of the military retired pay. The spirit of *Mansell* is that disability pay is excluded from the calculation. See *Mansell*, 490 U.S. at 594-95.

115. The basic provisions for veteran's disability benefit for wartime and peacetime injuries are contained in 38 U.S.C. § 1110 (2000) and 38 U.S.C. § 1131 (2000), respectively.

III. CONSTITUTIONAL IMPLICATIONS

As a preliminary matter, the USFSPA was challenged as unconstitutional based on the Takings Clause of the Fifth Amendment. The U.S. Court of Appeals for the Federal Circuit held the Act to be facially constitutional.¹¹⁶

*A. Unequal Treatment and Equal Protection*¹¹⁷

As discussed above, states are unfairly subjecting service members to unequal treatment under the USFSPA. Our American military tradition dictates that the military owes allegiance to the federal, not a state, government.¹¹⁸ Since allegiance to each of the fifty states, as part of the nation, is uniform, the treatment of a military member within each state, and among the states, should also be uniform. Not only does this follow from the military obligation, it follows from the Fourteenth Amendment to the Constitution, which prohibits the states from denying persons the "equal protection of the laws."¹¹⁹ Although this clause is most often invoked with regard to the application of a state's laws within the borders of that state, the clause's plain language would suggest applicability to divergent state court interpretations of federal law. Equal protection is just that—all persons are to be assured equal application of and equal standing under the laws, federal or state. Hypothetically speaking, if two military members, John Navy, a resident of Washington, and Jane Army, a resident of Minnesota, were to both seek divorce within their respective states, Jane's spouse could be awarded a much higher percentage

116. *Fern v. United States*, 908 F.2d 955, 959-60 (Fed. Cir. 1990).

117. The term "equal protection" normally applies to similarly situated individuals being treated differently by a single governmental entity. However, since the ability to split the retirement pay stems only from an act of Congress, states can be thought of as agents of the federal government and unequal treatment in division of military by differing states lends itself to standard equal protection arguments. The author acknowledges that viewing equal protection in this manner is an extension from traditional constitutional analysis, but is warranted in these circumstances because the argument that follows upholds the spirit of the Equal Protection Clause.

118. Military service members swear to "defend the Constitution of the United States." *Garnishment of Veterans' Benefits to Pay Child Support and Other Court-Ordered Family Obligations Before the House Veterans' Affairs Committee*, 105th Cong. 16 (1998) (testimony of Major Neita Armstrong, United States Marine Corps), 1998 WL 461086.

119. U.S. CONST. amend. XIV, § 1.

of the retirement pay.¹²⁰ The State of Washington arguably could have violated Jane's equal protection right to be treated equally to John and every other military member throughout the country.

The combination of military members moving from state to state, low thresholds for states establishing personal jurisdiction over service members not currently residing in that state, and the Full Faith and Credit Clause of the Constitution,¹²¹ exacerbate the potential severity of this violation of equal protection. Slightly altering the above hypothetical, if both John Navy and Jane Army live in Washington, but Jane is subject to personal jurisdiction in Minnesota, then, by virtue of full faith and credit, two military members who live in the same state would be subject to conflicting interpretations of the Act. Equal protection should shield members of our military from conflicting divisions of marital property based upon different state interpretations of federal law.

B. *The USFSPA in Light of Apprendi*

As a result of a recent Supreme Court decision that emphasized the role of juries, a substantive due process challenge may be in the offing. In *Apprendi v. New Jersey*,¹²² the Supreme Court overturned a New Jersey statute that allowed a judge to enhance a criminal sentence based on his or her evaluation of the defendant's motive.¹²³ The Court held that such enhancement was an issue of fact that should have been decided by a jury.¹²⁴ Although *Apprendi* has primarily impacted criminal cases,¹²⁵ at least one federal district court has discussed the possible application of *Apprendi* in civil cases. In *Reliance National Insurance Company (Europe) Ltd. v. Hanover*,¹²⁶ the United States District Court for the District of Massachusetts discussed, in *dicta*, the possible application of *Apprendi* to admiralty cases, where a plaintiff's choice of the admiralty forum precludes a defendant's right to a jury

120. See *supra* Part II.B.2.

121. U.S. CONST. art. IV, § 1.

122. 530 U.S. 466 (2000).

123. *Id.* at 472-74.

124. *Id.* at 467.

125. As of September 26, 2003, more than 5,000 decisions in all the circuits and 44 states had cited *Apprendi*. Search for case and citations by title at <http://www.lexis.com>.

126. 222 F. Supp. 2d 110 (D. Mass 2002).

trial.¹²⁷ The essence of the district court's argument posited that some areas of the law have distinct procedures that deviate from American legal norms, such as the right to trial by jury, and may not conform to constitutional guarantees like those addressed in *Apprendi*.¹²⁸

This same line of reasoning could be extended to USFSPA cases. Divorce cases may be handled in summary proceedings by marital masters without a jury.¹²⁹ The stakes in a military divorce can be quite high because the pension may be the only asset of value in the divorce.¹³⁰ In enacting the USFSPA, Congress intended to help spouses disadvantaged in their own education and careers because of their spouses' military careers.¹³¹ In addition, the Act assumes an equal contribution of the spouses to the military career, but like the time element,¹³² is a rebuttable presumption that could be overcome with evidence to the contrary.¹³³ With questions of fact regarding the spouse's actual contribution to the military career determining the division of possibly the sole substantial marital asset, in this context *Apprendi* could be extended to constitutionally require that a jury find these facts. If a state does not allow a jury trial on such an important issue, then a procedural due process challenge to a state court's application of the Act, in light of *Apprendi*, might be successful. Based on the number of cases that have applied *Apprendi* and its potential applications to civil cases, divorce proceedings may be ripe for such a challenge. As discussed in the introduction,¹³⁴ divorces of military personnel are unique, and the value of the military pension in terms of length of the pension (early start age), timing (right as one transitions to civilian life after a long military career), and the conditions associated with it (post-military employment and vul-

127. *Id.* at 116 n.12.

128. *See id.* at 115-16.

129. *See Witte v. Justices of the N.H. Superior Court*, 831 F.2d 362 (1st Cir. 1987) (holding that the use of marital masters is constitutional because the masters act under the authority and supervision of a judge).

130. Bradley, *supra* note 17, at 41-42.

131. *See S. REP. NO. 97-502*, at 6 (1982), reprinted in 1982 U.S.C.C.A.N. 1595, 1601.

132. *See supra* note 54 and accompanying text.

133. *See S. REP. NO. 97-502*, at 10-11.

134. *See supra* notes 7-23 and accompanying text.

nerability to recall), make likely that *Appendi* will be used with regard to the Act in the foreseeable future.

IV. SHORTCOMINGS OF THE USFSPA

The USFSPA may be most striking in what it does not address—the interplay of the division of retirement pay with other issues, most notably child support. If the parties to a divorce have minor children, the retirement pay takes on a dual personality. The retirement pay is considered to be both (1) joint property under the Act when determining equitable distribution of assets and (2) current income for calculation of child support.¹³⁵ If the retirement pay is the primary income source for the retiree and is split fifty-fifty, state courts may then award up to another fifteen percent of that amount as child support.¹³⁶ Additional unlimited charges may also be levied for children's extracurricular expenses or medical bills.¹³⁷ With sixty-five percent, or greater, of the retired pay designated for the ex-spouse, the retiree bears a heavy burden which can limit post-military opportunities. The Act seems to accept the fact that states may award more than sixty-five percent of the retirement pay to the spouse even though such an award would exceed the direct payment limits contained within the Act.¹³⁸

The Act also does not address any special incentives to reduce the size of the armed forces, such as was used in 1992.¹³⁹ To encourage voluntary departures, Congress created the Voluntary Separation Incentive (VSI) and the Special Separation Bonus (SSB), which provide, respectively, a reduced annuity for twice the number of years of service and a one-time bonus for departure from the military prior to normal retirement qualification.¹⁴⁰ State divorce proceedings have viewed these special incentives differ-

135. See 10 U.S.C. § 1408(c)(1)–(2) (2000).

136. *Id.* § 1408(e)(4)(B). A maximum of sixty-five percent of the disposable retirement pay may then be paid directly to the spouse to cover his or her share of the retirement and child support together.

137. *Id.* § 1408(e)(6). Payments above sixty-five percent do not have to be paid directly, but are still the responsibility of the service member. See also THOLE AND AULT, *supra* note 95, at 15-16.

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

139. See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, §§ 661-64, 105 Stat. 1394 (1991).

140. See 10 U.S.C. §§ 1174–1175 (2000).

ently. The decisions have focused on whether VSI or SSB may be considered compensation for a service member's non-vested military pension.¹⁴¹ An Ohio court has held the VSI to be non-divisible in a divorce because it has more the character of a severance pay than a reduced retirement benefit, even though it is paid in yearly increments rather than as one lump sum.¹⁴² Timing was critical to the court's decision; the military member's decision to separate from the military, made before the divorce, distinguished it from a situation where a voluntary decision to separate from the military occurred after the divorce was final.¹⁴³ State courts may not appreciate that a separation from the military that appears to be voluntary may in fact be involuntary or one taken in lieu of an anticipated involuntary action, making it a voluntary separation in name only.¹⁴⁴ Other states have not made such a distinction and elected to treat the VSI and SSB payments as retirement benefits, using the authority provided by the Act to divide the VSI and SSB between the retiree and the spouse.¹⁴⁵ This problem may arise more with the annual VSI annuity, which could appear to be similar to the actual retirement benefit.¹⁴⁶ Whichever treatment is proper, the inconsistencies must be settled with finality to avoid inconsistent treatment of service members by the states.

The language of the Act regarding one aspect of the division of retirement pay has been found to be ambiguous. The military pay tables are based on rank and length of service.¹⁴⁷ The retirement

141. *McClure v. McClure*, 647 N.E.2d 832, 841 (Ohio Ct. App. 1994). Service pensions do not "vest" similar to other pension plans until a service member qualifies for military retirement. *Kelly v. Kelly*, 78 P.3d 220, (Wyo. 2003).

142. *McClure*, 647 N.E.2d at 841.

143. *Id.* at 841-42.

144. The characterizations used by the military may be misleading to the uninformed. An analogous situation exists in the "up or out" promotion system for officers. Though they must leave by a specified point in their career, there is some flexibility in the timing. The officer uses a "Voluntary Application for Retirement" to set the procedure in motion, even though such a separation is characterized as involuntary by 10 U.S.C. § 632(b) (2000). State courts may not accept such a characterization if there is anything but a drumming out of the service, at midnight, at bayonet point!

145. *See In re Marriage of Crawford*, 884 P.2d 210, 213 (Ariz. Ct. App. 1994); *Kelson v. Kelson*, 675 So. 2d 1370, 1372 (Fla. 1996).

146. *See Kuenzli, supra* note 14, at 34 n.234.

147. *See* Monthly Basic Pay Table, effective Jan. 1, 2003, at <http://www.dod.mil/militarypay>.

pay, like regular pay, is based on the table incorporating rank and length of service calculated.¹⁴⁸ In the interpretation of the Act, courts are divided on whether to base the retirement pay division on the entitlement at the time of the divorce (if before the end of the career) or the final rank and length of service when the service member retires.¹⁴⁹ Though an argument has been made that the final rank is determined by earlier career actions during the marriage and a former spouse should benefit from her contributions, the former would be more logical because it would award the former spouse the benefit actually earned during the time of the marriage.¹⁵⁰

Service members may enter educational or vocational training programs upon retirement from military service. To encourage post-service education,¹⁵¹ Congress enacted the Montgomery G.I. Bill to provide educational benefits, based on a small contribution from the service member combined with a larger contribution from the government.¹⁵² If the circumstances of a divorce decree make it impossible for a military retiree to continue to attend school, state interpretation of the Act can thwart the goals of the Montgomery Bill. The post-service educational benefit (often referred to as the "G.I. Bill") was first enacted to ease World War II veterans back into society¹⁵³ and, although it has changed over the years, such a benefit is available today,¹⁵⁴ reflecting its continuing importance in the eyes of the services and Congress.¹⁵⁵ Therefore, any state application of the Act that would effectively negate this important educational benefit would be unsound. Under normal tenets of

148. Retirement pay is just a percentage of the active duty pay at the time of retirement. *See supra* Part I.

149. Bradley, *supra* note 17, at 102.

150. *Garnishment of Veterans' Benefits to Pay Child Support and Other Court-Ordered Family Obligations Before the House Veterans' Affairs Committee*, 105th Cong. 19-20 (1998) (statement of Joyce Wessel Raezer, National Military Family Association), 1998 WL 461086.

151. S. REP. NO. 100-13, at 3-4 (1987).

152. *See generally* 38 U.S.C. §§ 101-8528 (2000). However, this benefit is not available to all. Officers who graduated from the service academies (e.g. West Point or Annapolis), or received a Reserve Officers Training Corps (ROTC) scholarship to study at a non-military university, are not eligible to participate. *Id.* § 3011(c)(3).

153. *See* S. REP. NO. 100-13, at 5.

154. *Id.*

155. *Id.*

statutory construction,¹⁵⁶ the current G.I. Bill, because it was enacted after USFSPA, should have priority. Although the courts could help with this apparent conflict, case law has yet to shed light on this apparent conflict.

As a result of these and other issues, there have been numerous calls to modify the USFSPA. Some have been successful;¹⁵⁷ most have not.

V. CONGRESSIONAL ACTION

A. Attempts to Modify the USFSPA

In 1997, Representative Bob Stump (R-AZ) introduced the Uniformed Services Former Spouses Equity Act of 1997 to correct some perceived inequities.¹⁵⁸ This measure had two major provisions: (1) to stop the payments to former spouses upon their remarriage and (2) to calculate any division of retired pay upon the rank and length of service at the time of the divorce decree.¹⁵⁹ The measure languished in the House Ways and Means Committee and the House National Security Committee.¹⁶⁰

In 1999, Representative Stump tried again. In addition to the provisions of the 1997 bill, the Uniformed Services Former Spouse Equity Act of 1999 would also have limited both the jurisdiction of courts over out-of-state service members,¹⁶¹ as well as the time for spouses to have their divorce decrees modified to reflect the Act. Without such a time limitation, some service members could be exposed to further court actions,¹⁶² seemingly *ad infinitum*. This bill also died in the two committees.¹⁶³

In the next Congress, Representative Cass Ballenger (R-NC) introduced the Uniformed Services Former Spouse Equity Act of 2001, containing the same provisions of the 1999 act.¹⁶⁴ Hearings

156. Courts presume Congress is aware of existing law when it passes a statute, so the more recent statute controls in the event of a conflict. *Farmer v. McDaniel*, 98 F.3d 1548, 1556 (9th Cir. 1996).

157. See *supra* notes 62-64 and accompanying text.

158. H.R. Res. 2537, 105th Cong. (1997), WL 1997 CONGUSHR 2537.

159. See *id.*

160. See Bill Tracking Report, H.R. 2537 (1997).

161. See H.R. 72, 106th Cong. (1999).

162. *Id.*

163. See Bill Tracking Report, H.R. Res. 72.

164. Compare H.R. 1983, 107th Cong. (2001) with H.R. 72.

were held in early 2002, but the bill remained in committee.¹⁶⁵ Re-introduced in 2003,¹⁶⁶ it still has not moved from committee.¹⁶⁷

The measures proposed in the last four Congresses would be logical limits on the Act, but the political process has unfortunately prevented any such refinement. The current burdens on the service members continue, creating, in the words of one witness before Congress, "an even larger class of victims than the former spouses it was designed to assist"¹⁶⁸ These small measures, though would be a good start, would not address all the problems with the Act.

B. Congress Has a Duty to Act

As shown in Part II.B. above, there exists ambiguity in interpreting the current language of the USFSPA. Through this legislation, Congress clearly intended to allow state courts to consider the military retirement pay as marital property in divorce settlements.¹⁶⁹ As clear as the denotation of "may" is in the Act's authority for the states,¹⁷⁰ debate exists about the extent to which Congress intended to create a certain presumption of division and whether the level of *payments* authorized by the statute¹⁷¹ was intended to be a limit on the *states* as well.

Recognizing the *dicta* in *McCarty*, *Barker*, and *Mansell*, Congress's authority and responsibility to remedy the problems with

165. H.R. 1111, 108th Cong. (2003).

166. See Bill Tracking Report, H.R. 1111.

167. *Id.*

168. *Hearing Before the House Armed Services Committee*, 107th Cong. (2002) (statement of Dennis M. Duggan, Deputy Director of the National Security and Foreign Relations Committee of the American Legion), 2002 WL 414432 (F.D.C.H.).

169. H.R. REP. No. 97-305, at 10 (1982).

170. "Subject to the limitations of this section, a court may treat disposable retired pay payable to the member . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1) (2000).

171. "The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay." *Id.* § 1408(e)(1). "Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section . . . may not exceed 65 percent of the amount of the retired pay payable to such member." *Id.* § 1408(4)(B).

the USFSPA can be directly inferred from the Constitution.¹⁷² Inherent in the power "to raise and support armies"¹⁷³ and "provide and maintain a Navy"¹⁷⁴ lies the power to provide compensation for members of those forces. In addition, the Constitution provides strong support for the notion that Congress, with the powers discussed above, possesses the primary responsibility for military compensation. In the Preamble, one of the first justifications for the Constitution is to "provide for the common defense."¹⁷⁵ The boundaries between the federal and state governments are drawn later in the document since the states may not "without the Consent of Congress . . . keep Troops."¹⁷⁶ Given the express delegation to Congress, one can logically assume the Framers intended for the states to retain only limited authority in this area. These provisions also recognize that an individual state might fail to embrace the national concerns inherent in military law issues. For example, if a divorce would result in payment of state benefits to one of the parties, the state would have an incentive to maximize the payments from the out-of-state party.¹⁷⁷ After all, it is logical to anticipate that the state courts would feel a responsibility towards the spouse living in their state, not only through his or her citizenship, but also for the protection of any minor children in-

172. The Department of Defense conducts a survey of total military compensation every four years and reports to Congress on the results. 37 U.S.C. § 1008(b)(2000). This survey, titled the Quadrennial Review of Military Compensation, is used to target money where it will do the most good in recruiting and retention of armed forces personnel. United States Dep't of Def., Press Release 248-02, "Ninth Quadrennial Review of Military Compensation Released," May 17, 2002, http://www.defenselink.mil/news/May2002/b05172002_bt248-02.html. There has been only one study done of the Act and that was at the direction of Congress by the National Defense Authorization Act of 1998. This report found that Congress's goals with the Act have largely been fulfilled, but that substantial inequities remained. A Report to Congress Concerning Former Spouse Protection Laws, U.S. Dep't of Def., 1, 69, *available at* <http://www.dod.mil/prhome/docs/finalrpt.pdf>.

173. U.S. CONST. art. I, § 8, cl. 12.

174. *Id.* cl. 13.

175. *Id.* pmbl.

176. *Id.* art. I, §10, cl. 3.

177. This problem goes to the very heart of diversity jurisdiction in federal courts and removal provisions for out-of-state residents. *See* *China Basin Props. v. Allendale Mut. Ins. Co.*, 818 F. Supp. 1301, 1304 (N.D. Cal. 1992); *see also* 16 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 107.03 (3rd ed. 1997) (discussing rationale for removal jurisdiction to protect out-of-state residents from prejudice in state courts).

volved. The protection of the service members, however, must be a concern as well. This concern goes beyond equitable considerations and extends to the impact that these unresolved issues could have on the readiness of the nation based on the potential effect on the armed forces.

C. Impact of Congress's Failure to Act.

Although the division of military retirement pay might seem a fairly narrow issue, it carries broad implications. To avoid a number of practical issues in the administration of the armed forces, the federal government must protect service members from abuse by the states. Rather than disparate treatment from state to state, federal intervention would offer equal treatment to all military personnel.

Service in the armed forces obligates one to serve throughout our nation and abroad. Traditionally, individual desires have some influence on the assignment process, but the needs of the service always take precedence.¹⁷⁸ In order to be promoted, the service members' desires will normally conform to a "desired" career path set out by each service.¹⁷⁹ In reality, the service member's freedom of choice may actually be quite limited.¹⁸⁰ As a result, service members can be assigned in states not of their choosing. Some states exercise jurisdiction over marriages to the maximum extent allowed by the Constitution.¹⁸¹ To the extent states exercise jurisdiction over a marriage, they also exercise jurisdiction over marital property such as a pension.¹⁸² Therefore, one potential unintended consequence of military service is that a service member could be subject to jurisdiction in various states

178. See Sullivan, *supra* note 1, at 18 (illustrating that the military can determine where military members reside).

179. For example, desired career paths for all Air Force officer careers are well-defined and specific. They are published on the Internet at <http://www.afpc.randolph.af.mil/ofcr-cpguide/default.htm>.

180. Accompanying verbiage in these career path depictions, as well as logic, advises that the suggested career paths reflect personal development of the service members as well as the needs of the service. See *id.*

181. See Rosemarie T. Ring, *Personal Jurisdiction and Child Support: Establishing the Parent-Child Relationship as Minimum Contacts*, 89 CAL. L. REV. 1125, 1139-1140 (2001).

182. See SITARZ, *supra* note 89.

employing widely varying interpretations of federal laws, specifically the USFSPA.

Although certainly it would be contrary to the military tradition of obedience to authority, continued divergent interpretations of the Act could result in service members avoiding assignments in certain states.¹⁸³ Such extreme measures could force Congress's hand to remedy state by state variations in military divorce law.¹⁸⁴

VI. PROPOSED SOLUTIONS

The discussions above would tend to indicate that USFSPA requires some fine-tuning, both in substance and procedure. This Comment has highlighted many of these issues. This final section offers some solutions, each would provide some relief if enacted. Although these proposals could complicate the application of the Act for both the state courts and the military pay system, both entities have an obligation to treat military retirees equitably. Past attempts to improve the USFSPA have yet to yield the necessary results.¹⁸⁵ The first and best solution is for Congress to ensure a single interpretation of the USFSPA by the states to prevent disparate treatment of military retirees.

A. Supremacy Clause

One simple way for Congress to control inappropriate state division of military retirement pay is to provide further guidance to the states regarding the interaction of the USFSPA with other statutes, such as the Montgomery GI Bill.¹⁸⁶ A supremacy clause offers clear guidance for the courts, states, and the public to reconcile competing statutes. As the Supreme Court held in *McCarty*, Congress must provide this clarity.¹⁸⁷

183. The Supreme Court acknowledged such a possibility in *McCarty v. McCarty*, 453 U.S. 210, 234 (1981).

184. Although the military can influence legislation through the President, military members, through their First Amendment right to association, have a lobbying forum – the Military Coalition – a coalition of organizations committed to a strong national defense and support for service members. See The Military Coalition Online at <http://www.themilitarycoalition.org>.

185. See generally Kuenzli, *supra* note 14; Bradley, *supra* note 17. These articles provide an in-depth look at the various legislation.

186. See *supra* Part notes 151-56 and accompanying text.

187. *McCarty*, 453 U.S. at 236.

A supremacy clause should be simple and direct. Congress has included a supremacy clause in federal legislation in anticipation of problems with state laws. For example, the Employee Retirement Income Security Act (ERISA) of 1974 provides, "... the provisions of this title . . . shall supercede any and all State laws insofar as they may now or hereafter relate"¹⁸⁸ Although the supremacy clause in ERISA established federal law supremacy over state law, a similar provision could prioritize interaction between federal laws.

A supremacy clause could read: "In division of military retirement pay in divorces, state courts are to ensure that military members have reasonably sufficient income to make the transition to civilian life upon retirement from active military service, including post-military education and disability considerations."

B. *Shift in Approach*

The calls for changes to the USFSPA likely will not cease until some fundamental changes have been made.¹⁸⁹ The proposed legislative amendments have generally sought substantial reductions in payments to the spouse rather than procedural changes to ensure fairness for the service member.¹⁹⁰ Any proposal to terminate an ex-spouse's right to payments is untenable from a practical standpoint and enflames a great deal of passion.¹⁹¹ The implementation of changes to the Act will require a cooperative approach, rather than the adversarial approach currently employed, to emphasize equitable settlements.¹⁹²

Provisions should be made to ensure that the division of retirement pay adequately reflects Congress's intent in passing the

188. 29 U.S.C. § 1144(a) (2002).

189. A bill proposing major changes has been introduced in the last four Congresses. See *supra* Part V.A.

190. *Id.*

191. See Kuenzli, *supra* note 14, at 2; see also Bradley *supra* note 17, at 42. The authors note the passions and inequities, generally favoring the spouse. *Id.*

192. It will be necessary to bring in all interested parties, perhaps with the American Bar Association (ABA) ensuring a balanced approach. There is precedent for the ABA to assist in proposing military legislation. See generally Jack Finney Lane, Jr., *Evidence and the Administrative Discharge Board*, 55 MIL. L. REV. 95 (1972) (recounting the role of the ABA in recommending changes in the military justice system).

Act. Relating back to the concerns about the disruption to the non-military spouse's education and career, the division of retirement pay should compensate the spouse for only the actual impact of that disruption. If the spouse suffered no disruption, the compensation should be reduced, particularly if the spouse acquired an education and established a career during the marriage. Such an interpretation follows from the well-accepted concept of American law to recover only for harms actually suffered, thereby preventing unjust enrichment.¹⁹³

C. Minimize the Impact of Disparate Treatment

1. Delay of the Division

If unable, or unwilling, to create a uniform interpretation of the USFSPA among the states, Congress could take a number of steps to minimize the impact of the disparity.

One measure would be to delay the division of military retirement pay until typical civilian retirement age.¹⁹⁴ By this point, the military retiree should have successfully transitioned to civilian life and started a new career. This would address the inequity of the divorced military retiree having the same recall commitment as the non-divorced retiree for a lesser compensation.¹⁹⁵ It should also reduce the number of retirees experiencing a division of retirement pay and child support simultaneously. The advance notice of the division of retirement pay would allow the retiree to plan for the loss of income and compensate for any "surprise" divorces that severely disrupt financial planning. While arguments certainly would be made that such a provision would hurt the spouse, fairness to the service member should override the ability of the spouse to insist upon a pension, not directly earned by that spouse, so early in life.

Alternatively, establishment of a "safe zone" for the retiree would harmonize the Act with the difficult transition to civilian life. As many retirees experience a temporary pay setback upon

193. See *United States v. Miller*, 317 U.S. 369 (1943) (discussing the concept of unjust enrichment under federal law).

194. For active duty retirements, military retirement pay starts immediately; reserve pay starts at age 60. This statement refers to a typical retirement age of 55-65. See *supra* Introduction.

195. See *supra* note 11 and accompanying text.

retirement, retirees with predominately military-specific skills face a more difficult transition best solved by education or vocational training. Delay of the retirement pay division of up to five years would allow the service member to complete an educational degree and would equalize the disparity between those retirees possessing skills transferable directly to the civilian job market and those possessing only possessing combat-oriented skills.

2. Review of the Division

Another strategy to reduce the impact of disparate state treatment would be to review the division of the retirement pay at a reasonable time after the divorce. Since the division of military retirement pay is viewed as a property settlement, the court divides the pension once and never reviews the division again. Although technically considered a property settlement, the payment of military retirement pay over a period of time takes on the characteristic of compensation for loss of earnings analogous to alimony. As child support payments and alimony are normally reviewed on a regular basis, the division of retirement pay should also be reviewable on a set-time basis or triggered by a change in the former spouse's financial situation. A substantial inheritance by the former spouse would represent one extreme scenario that would make the continued division of the service member's retirement pay morally suspect. This measure would put a "check and balance" in the system and could potentially overcome disparity in the divorce process for the military retirees.

D. Procedural Due Process

Part III.B. identified a possible extension of *Apprendi* into USFSPA applications on due process grounds. Although introduction of juries into military divorce actions may meet with substantial resistance, other procedural changes could better protect military respondents from states eager to jump into the fray to divide the military retirement pay.

First and foremost is the need for competent legal counsel, experienced in military divorce actions, paid for by the state exer-

cising jurisdiction over out-of-state military retirees.¹⁹⁶ Second is assurance that trial court judges are fully aware of the unique characteristics of the military retirement system when making divisions under the Act.¹⁹⁷ Third, out-of-state military retiree respondents need to have an automatic right of appeal, without fees, to adequately balance federal and state concerns.¹⁹⁸ Fourth, a bifurcated approach could help solve the problems of unequal settlements. Local courts could remain responsible for granting the divorce, calculation of child support, and alimony under existing rules in one court procedure, but a specially-designated court would address the division of retirement pay.¹⁹⁹ Although these measures could be costly, protection of our military requires nothing less.

Congress should factor the treatment of the military by state courts in decisions on military basing and major contract awards. Since these decisions correspond to the exposure of military members to a state's courts, a rational relationship exists for such an approach. The more bases and contracts in a state, the more military personnel required, thereby increasing the number of people exposed to that state's court system. While a politically difficult measure, it is one that could be easily implemented by Congress and the civilian leadership of the military.

196. The question of qualification for these attorneys arises. The American spirit will most likely provide the answer in some sort of certification program as soon as the requirement is established.

197. The author's own experience shows that courts may try to analogize military retirement to police and firefighter retirement systems. See *Akins v. U.S. R.R. Ret. Bd.*, 721 F.2d 652, 653 (9th Cir. 1983). Such an analogy must fail based on the characterization of military retired pay in the Introduction. Most states have continuing legal education requirements for judges and this could be incorporated therein. See National Organization for Women Legal Defense and Education Fund, *National Judicial Education Program*, at <http://www.nowldef.org/html/njep/index.shtml>.

198. Eleven states do not have an intermediate appeals court – Delaware, Maine, Montana, Nevada, New Hampshire, Nevada, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming. Peter L. Murray, *Maine's Overburdened Law Court: Has Time Come for a Maine Appeals Court?*, 52 ME. L. REV. 43, 67 (2000). In New Hampshire and West Virginia, there is no right of appeal. *Id.*

199. The divisible divorce doctrine stems from *Rice v. Rice*, 336 U.S. 674 (1949), where the Court held that a state may grant a divorce, but may not divide property of the out-of-state spouse without personal jurisdiction. See *id.* at 678-679 (Jackson, J., dissenting).

CONCLUSION

This Comment has taken a focused approach to a complex mix of state and federal law. While the issues are not overly difficult technically, they are difficult politically and emotionally. The importance of this issue, however, requires substantial refinements of a fundamentally good idea. The pendulum of military divorce law swung from the service members, in the aftermath of *McCarty*, to the spouses, in the aftermath of the USFSPA. The time has come for the pendulum to swing back towards the middle.

The USFSPA was a needed measure to ensure that spouses could have all marital assets considered in a divorce settlement—certainly a laudable goal. At the time of enactment, Congress included safeguards for the service members, but experience has shown these to be inadequate. In addition to the law being potentially inequitable as written, the state courts have interpreted the USFSPA in divergent ways, resulting in disparate treatment of service members. Congressional attempts to substantially modify the USFSPA have yet to reach fruition. Congressional action is necessary to protect the rights of service members in state courts, particularly when those courts exercise jurisdiction over out-of-state service members. Not only does Congress have a moral duty to act, but since this is a military issue, it has a Constitutional one.

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