White Paper
Military Pension Division and the Overdue USFSPA Improvement

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Spring of 2016, for the Fiscal year 2017 National Defense Authorization Act (NDAA), U.S. Representative Steve Russell (R-OK) introduced an amendment to adjust the USFSPA. This update was recommended by the September 2001 Department of Defense report to the Armed Service Committees, and 15 years later, someone got around to doing it! The proposal was unanimously accepted by the bi-partisan House Armed Services Committee. Subsequently, the House and Senate versions of the NDAA bill are being reconciled before becoming law. Senate version (S. 2943 Sec. 642) says,

> "In calculating the total monthly retired pay to which a member is entitled for purposes of subparagraph (A), the following shall be used:
> (ii) The member's pay grade and years of service at the time of the court order.
> (ii) The amount of pay that is payable at the time of the member's retirement to a member in the member's pay grade and years of service as fixed pursuant to clause(i)."

While the House bill (H.R. 4909 Sec. 625) says,

> "[member entitlement] is to be determined using the member's pay grade and years of service at the time of the court order, rather than the member's pay grade and years of service at the time of retirement, unless the same"

As you can see, they are functionally the same and will probably reconcile without much change.

August 26th, 2016, Mary T. Vidas, the Chair of the American Bar Association Family Law section signed and published a cheeky white paper penned by Mark Sullivan lambasting the amendment. The disclaimer at the top of the ABA publication says the white paper "…should not be construed as representing the policy of the American Bar Association." However, her signature over her ABA signature block at the bottom conveys an opposite message, and the white paper has pervasive flaws that need to be addressed. I have asked Ms. Vidas to post a rebuttal along side Mr. Sullivan's document.

Mark Sullivan's / ABA's white paper is written in the form of Q&A, so this document addresses each numbered paragraph in order.

1. A dramatic and dire distinction is claimed between the way division presently works in 90% of the states, and the new method. In fact, the only difference is that promotion enhancements earned by the military member after divorce would not be included as marital assets – that's because everybody recognizes they are earned with solo effort outside the bounds of the marriage and are therefore not marital assets. In Michigan, case law affirms

that the marital asset is not to be affected by earning effort outside the bounds of the marriage. See the 1988 Kilbride Appellate decision, quoted and re-affirmed in the Michigan 2009 Skelly Appellate court decision. Other states have similar laws. The Kilbride decision lays out the litmus test that the marital retirement asset must not go up or go down based on anything either party does after the divorce. (This is not talking about COLA increases, which both members passively receive for all time after the divorce.) Because there were no promotions in Kilbride, a single coverture fraction worked fine. However, the new law duplicates that calculation and also creates equity where there is a promotion, consistent with the foundational argument of Kilbride.

Mathematically, the **old method**, which Mr. Sullivan identifies is used 90% of the time, is:

$$marital\ asset = (\text{retirement check}) * \frac{\text{marital duty time}}{\text{total duty time}}$$

An example, if the total retirement check was $3298 in 2016 dollars, and 4700 duty points were accrued during the marriage and 5500 duty points were accrued during the entire military career, the marital asset would be $3298 * (4700/5500), or $2818.29 in 2016 dollars.

Typically 50% of the marital asset is awarded to each party. The new law is done by using an additional coverture fraction of monthly pay. Because the *ratio* is the important number (not the two dollar amounts, per se), it's really important to note that the two monthly pay amounts for the two different ranks are taken off the same year's pay chart – do not take one from the year of divorce and one from the year of retirement. The **new method** is:

$$marital\ asset = (\text{retirement check}) * \frac{\text{marital duty time}}{\text{total duty time}} * \frac{\text{pay at divorce}}{\text{pay at retirement}}$$

As you can see, this is hardly a "radical" change as indicated by the dramatic title of Sullivan's white paper, but rather a natural corrective extension as more and more divorces are exposed to division, affecting both men and women. The "pay at divorce" is the only thing fixed by paragraph (ii) in the new law quoted above. The result is a DFAS <u>percentage</u> method that is not a DFAS <u>fixed dollar</u> method. **This is a very important foundational flaw in Mr. Sullivan's white paper that corrupts most of his follow-on conclusions**.

The marital asset is not a fixed *dollar amount* because both parties receive cost of living increases proportional to the military pay table cost of living increases each year.

Also, the marital asset is not a *pre-fixed percentage at time of divorce* because the fraction is not possible to calculate until retirement is reached. For example, if no military duty is done after the marriage, the ex-spouse would get 50% of the total retirement. However, if post-divorce duty is done, the time-based or duty-based coverture fraction allows one to break out the unchanged marital asset from a retirement check and the spousal award will be less than 50% of the bigger retirement check. The traditional 90% coverture solution Mr. Sullivan advocates is mathematical precise and exact calculation designed to keep the divisible marital asset *the same*, not to dilute it in any way (again, we're not talking about COLA increase

which happen for both parties each year and accrues even during the years before retirement pay starts).

Okay, so a single coverture fraction works fine if there are no promotions. However, if promotion happens outside the marriage, **inequity happens with the old formula**. For example, if the total retirement check at higher rank was $5000 in 2016 dollars, and everything else stays the same, the old formula would calculate a marital asset of $5000 * (4700/5500), or $4272.72 in 2016 dollars. This is a 51.6% inequitable windfall to the ex-spouse even though they had nothing to do with the promotion and contributed nothing after the divorce! I've never heard a good explanation of why a spouse should get such a windfall, hence the windfall is an inequity.

At this point, some people say the promotion enhancement is "based on" early marital work and therefore it IS a marital asset even though it occurs from active effort outside the marriage. The phrase "based on" is used by some to tap an intentionally undefined phrase meant to keep things confusing and twist court understanding one way or the other. In this context "calculated from" is much more precise and legally meaningful.

Much more is written critiquing the phrase "based on" in other papers I've written. For now, look at the divorce decree award language and realize that the standard threshold for a marital asset includes the phrase "earned during" or "accrued during". Two quick case studies: if after divorce an ex-spouse writes a book "based on" the military marriage, are proceeds divided? No. If a military pilot gets a commercial job after divorce "based on" their military training and flight hours, is the civilian retirement divided? No.

The other way I've seen the inequitable 51.6% windfall perverted is in at least one case, I found an attorney citing a legal reference awarding *passively earned* interest after divorce as a marital asset, as an argument to divide *actively earned enhancements*. Not the same! In Michigan, the 2009 Skelly Appellate court even clarified that even an asset already received during marriage is not a marital asset if additional post-divorce work is required to keep it.

Now, see what happens with the new formula from the method proposed in the **new NDAA law**. The higher rank retirement pay is $5000 and everything else stays the same, the marital asset would be $5000 * (4700/5500) * ($3298/$5000), or $2818.29 in 2016 dollars. Notice **the marital asset is exactly and precisely preserved, down to the penny**. These results are all in 2016 dollars, and the marital asset goes up proportional to military pay charts each year, and **both** parties benefit from this same COLA bump-up.

THIS is the equity and simplicity proposed by the new law. Do not be confused by FUD (Fear of the Unknown and Deception) arguments of the law's opponents. The only argument you can legitimately make against the law is if you want to grab as marital asset all the promotion benefits individually and actively earned without partnership after divorce – and that is contrary to almost every state law.

2. A sexist assertion that "most former spouses are women" and that the new law takes advantage of them contradicts facts. As of March 2011, there were more than twice as many

military women divorcing than men (http://www.intrepidcreativity.com/articles/division-military-coverture-value/Female-GI-rates.pdf). Among enlisted, the military women divorce rate is about 3x that of men. The sexist innuendo also fails to recognize that the new method can increase the benefit of *either* party, dependent on whether the military career extends before or after the marriage. Facts and mathematics are hard to dispute.

Both the new and old methods are calculated using the ACTUAL military retirement. The only difference is HOW the marital asset is calculated. With the new method, what "goes out the window" (Mr. Sullivan's words) is that the marital asset does not include promotion enhancements actively and competitively earned *after* the divorce. Please realize that an enhancement due to promotions does not even fully manifest until 3 *additional* years after the promotion, which already happened after the divorce. If emotional appeals to sacrifices during a military career give an ex-spouse carte-blanche to take a cut in everything the military member earns later in life, that is absurd. Also, Mr. Sullivan fails to point out that it's Federal law that **both** parties have retirement disbursement "put off" until retirement, and **both** parties get COLA increases from the time of divorce for any percentage division method – including the new proposal.

3. The statement that there have been no hearings or committee analysis belies reality. As far back as Sep 2001, the DOD published a congressional report supporting the new method after consulting with dozens of national organizations – even a letter from Mr. Sullivan himself. The present amendment unanimously passed by both Democrats and Republicans in the Armed Service Committees. There are dozens of co-sponsors of the bill. Regarding the "problems" Mr. Sullivan points out:
   - The Department of Defense regulation agrees that COLA is given to both parties for any percentage method, which disagrees with Mr. Sullivan. If anybody looks at the calculations provided in Answer #1, it's immediately obvious that the dollar amount is not "like a fly frozen in amber." As the military pay chart goes up each year, retirement checks go up, and the dollar amount for each spouse goes up. See the Department of Defense regulation, DOD 7000.14-R Chapter 29, Paragraph 29061, which says, "A retired pay award expressed as a percentage will automatically receive a proportional share of the member's cost of living adjustments, while one expressed as a fixed amount will not."
   - It's hypocritical to critique "one size fits all," while simultaneously advocating USFSPA be left in place, which presently applies to everybody. Reference to "fixed benefit" is a red herring. The new proposal is not a fixed dollar amount, but rather advocates a percentage method as demonstrated above, and it's untrue and therefore unethical to assert that DFAS rejects anything other than a fixed benefit method.
   - Immediate payment is another red herring, besides being applicable only to a minority of places like California. Forcing a military member to start making immediate retirement payments on some hypothetical retirement date – before Federal law even allows them to receive payments yet – has its own problems. But in any case, it doesn't matter because COLA adjustments apply to both parties from the day of divorce, so the time-value of

money is corrected for both parties. The entire argument goes up in smoke and there is no impending uproar.

- Disdain for Federal mandates is inconsistent with a desire to keep USFSPA unchanged. USFSPA is a Federal mandate. The Supreme Court decision that forced legislatures to pass USFSPA is a Federal mandate. Making a single adjustment to USFSPA after 15 years of inequity is certainly appropriate for Federal legislatures. ABA's ostensible position is to shun Federal intervention, but it's noticeable that this position excepts the biggest elephant in the room: USFSPA.

4. The argument seems to be "Since it's broke, keep it broke or fix it later." In fact, there is no crisis of radical change – simply a second coverture fraction to account for promotions earned after divorce as shown in Answer #1. If other, more complicated state methods have created huge differences, inequities, misunderstanding, and jurisdiction shopping, it would seem a rational person would want the chaos to stop with a standardized and equitable method.

   There is nothing forcing a double discount on the spouse. Defining a percentage method with a dual coverture fraction to include both a time fraction and a rank fraction is the essence of the new law, and this precisely ensures that the marital asset is NOT discounted nor decreased nor frozen because of actions of either party after divorce. See the mathematical example in Answer #1 above. An assertion to fix the coverture denominator in a percentage based division shows huge misunderstanding. In fact, the increasing denominator precisely and exactly preserves the marital asset as shown in the example in Answer #1 above. It does not dilute it. It does not enhance it. It preserves it exactly. Done correctly, the only change to the marital asset is that COLA raises the asset for both parties each year.

5. The claim that nobody in Congress is aware of these problems disrespects the DOD Sept 2001 report to the Armed Services Committee, which recommended the change after consulting dozens of national organizations and attorneys. The claim blatantly ignores reports such as Kristy Kamarck's "Military Benefits for Former Spouses: Legislation and Policy Issues" published by the Congressional Research Service, dated 1 July 2016. Also, in 2016, both House and Senate Armed Service Committees have reviewed the law change and unanimously recommended it.

6. Regarding Congressional dictates, it's hypocritical to welcome Federal USFSPA law while saying Congressional expertise is "NONE" (capital in the original). Uncle Sam (in your words) has already stepped in with USFSPA and it's off-kilter to suggest that slightly adjusting a piece of Federal law is too invasive of an action for Congress to take. All that aside, the argument ignores that USFSPA is optional. As we all know, the Supreme court forbade division of any military retirement, then USFSPA forcefully allowed division, but does not require division. Nobody is forcing the hands of the States. However, if a state chooses to do it, they must not do it in an inequitable manner.

7. The new method is not a "frozen accrued benefit" nor "fixes the retirement benefit" as of the date of divorce. That is a false and misleading straw-man set up in order to throw darts at it. Instead, with the new method the actual dollar amount is not fixed and is never fixed. Even the percentage is not fixed until retirement actually occurs. Please take a moment to actually read and understand the mathematical example in Answer #1 above. I welcome communication on these issues and would be happy to walk you through the calculations.

   A single time-based coverture fraction could be equitable if there are no promotions. However, if any promotions are involved, a single time-based coverture fraction is not equitable – to one party or the other, dependent on whether a military career extends before or after the marriage. The time-only coverture fraction is not cast aside but rather extended in the only way possible to accommodate promotions. The math clearly shows the only way to preserve (not raise or lower) the marital asset in constant year dollars is to do the two coverture fractions (and then COLA raises it for both parties each year).

   Making a constitutional appeal to keep "hands off" the states is inconsistent with defending the USFSPA as-is. Both before and after USFSPA, chaos has raged, with many state variances, substantial conflicting case law, perpetual arguments between opposing counsels, and jurisdiction shopping by both spouses. The states have done poorly. The new law is a standardized method that is equitable to both parties. Either advocate repealing the USFSPA entirely, or welcome the Congressional lawmakers as they try to fix it.

8. Comparing military retirement mandates to other Federal retirement systems and suggesting Congress should leave the military alone, like it has left the others alone, is disingenuous. The author knows that the only system where divorce division is legislated is military retirements, so *of course* it's the only one the new law attempts to amend.

9. USFSPA is accurately identified as 10 USC 1408. In 1982, some chaos was standardized when USFSPA was introduced. Every state division order recognizes its authority. Now, 34 years later, it's time to update it to ensure equity as men and women, military and civilian, are equitably treated during divorce.

10. Yes, according to the news release you quote from the Spring of 2016, 15 years after being recommended by the DOD, the change was finally submitted via amendment to the 2017 NDAA. It was unanimously accepted by both Republicans and Democrats in committee. Long overdue.

11. In this context, a "windfall" is any inequitable distribution. Although any attorney is responsible for their client's interests, it's difficult to ethically advocate intentional lack of equity. It's unfathomable that anybody wants the marital asset to change based on what happens years after divorce. Because of all the chaos and variance among the states and U.S. territories, it's high time a standard equitable method be used.

12. As the author points out, each time the USFSPA has been up for modification, the American Bar Association has asked "Why?" and criticized the change. Notably, this has repeatedly been the pen of Mark Sullivan and Marshall Willick. The ABA, so far, has declined to give

voice to opposing views that reduce the chaos, remaining stuck with "Why?" because answers have not been given fair audience. If the USFSPA can be improved, "What's your beef with fixing USFSPA? Why does the ABA have a problem with equity? Why does the ABA love disparate confusing jurisdictional divorce issues? Why won't the ABA publish opposing view points?"

13. Why is it a problem that the time rule creates windfall inequity? Please see Answer #1! Understand that many law makers believe the marital asset should not be retro-actively changed as a result of work done by only one of the parties years after the divorce. Or, read through the September 2001 Department of Defense report. Of course this is a documented problem! If a case does not include promotions, then a single time coverture can be fine. If promotions are involved, a dual coverture or more advanced method such as Dual Coverture Value or Area Method must be used – if the goal is equity.

14. The desire to bridle or gag Congress is silly while simultaneously defending the status quo USFSPA, which is a Federal law.

15. Only military retirements have been affected by USFSPA, so the new modification to USFSPA affects only military retirements. Isn't that self-evident? Again, the emotional sexist and factually incorrect appeal to abused women is inappropriate. See the quoted reference in Answer #2. The narrative about the female spouse is bordering on deceit because a military pension divided via the new proposed method IS divided according to actual retired pay. LOOK at the formula in Answer #1. See that the first thing in the formula is actual retired pay.

16. The "marital foundation theory" is a wisp in the author's mind, documented and defined nowhere, and introduced only to produce a sense of authority. What I advocate is based on dozens of quantitative examples and demonstrations. The time rule is wonderful. No argument there …unless promotion enhancements are earned outside of the marriage. In that case, a plethora of case law suggests that assets (such as promotion enhancements) actively earned outside the marriage are not marital assets. Therefore, with promotions, a dual coverture method must be used if equity is the goal. Additionally, a dual coverture method can be used without promotions, too, in which case, the results will be identical to single time-based coverture methods.

17. Quoted as an expert, Mark Sullivan has propagated a faulty narrative of "four choices" for decades. These four choices have been on his client indoc sheet for years, over and over again forcing limitations on his clients. Because he publishes widely, it misleads other courts and attorneys. For example, one of his paralegals who went on to get a law degree echoed the same error in her publication. Instead, a military pension award may be done (a.k.a. is allowed by DFAS) one of TWO (2) ways: fixed dollar amount or percentage of retired pay. See the Department of Defense regulation, DOD 7000.14-R Chapter 29, Paragraph 290601:

> "If the order contains a retired pay award, then that award must be expressed as a fixed dollar amount or as a percentage of disposable retired pay."

The other material Mark espouses are simply examples that DFAS provides in Paragraph 290607(D). Although the regulation text says, "The sample MRPDO provides examples…", Mr. Sullivan repeatedly blurs *examples* ("provides examples") and *requirements* ("must be"). DFAS will accept any method if it produces a percentage, calculated from numbers DFAS has available or are provided by the parties. See Paragraph 290607(A) for the variety of ways parties can provide numbers. In addition to the division order itself, parties can even provide variables in a notarized statement signed by both parties.

To continue promulgating Mr. Sullivan's list of "4 acceptable methods" contrary to national regulations is embarrassing for the American Bar Association.

The new proposal would absolutely not torpedo the two DFAS methods of fixed or percentage methods. The new proposal IS a percentage method.

18. Of course the new method is easy to do. See Answer #1. Mr. Sullivan's entire paragraph is red herring because it propagates the falsehood about fixed benefit divisions. The new method is a percentage method and is shown in a single line calculation in Answer #1. The comments about Excedrin and farming out the division order are subjective opinion, and indicate that the author is not cut out to do division orders and should stop if it bothers him greatly. For example, to reference calculating High-3 compensation for any percentage method is misleading and irrelevant and wrong because any percentage method is automatically applied to a retirement check, whether the check it's reduced by High-3 or not. If you *choose* to do a DFAS hypothetical method to calculate the percentage, you have to calculate High-3, but why would you? The new law does the same numerical result so much easier! The exact same percentage can be obtained by doing a Dual Coverture (see Answer #1) or better the Dual Coverture Value or Area Method. Search Google for my on-line documentation about how to do these methods and proof that they give the same results as Hypothetical. With these modern methods, no calculation of High-3 is necessary.

19. Nobody is trying to stop the time rule, so no need for the goose chase. The new law *extends* the time rule coverture when there are promotions. If there are no promotions involved, the new method is identical to the single time coverture rule. More information can be found here: http://www.intrepidcreativity.com/articles/division-promotion-enhancement/. Read any of the 10 or so web pages offering clarifying explanations, discussion, demonstrations, and sample calculations resulting from more than 10 years of technical research about dividing military retirement. In fact, if you're interested, read about the Dual Coverture Value or "Area Method". It is the best method out there – capable of equitably handling any life situations (http://www.increa.com/articles/division-military-coverture-value). The Assistant General Counsel of DFAS thought well of it and upon her recommendation, the proposal is going to the office of Hon. Mike McCord, the DOD Comptroller.

20. The House bill is H.R. 4909 Sec. 625. The Senate version is S. 2943 Sec. 641/2.

21. The ABA claims opposition to any attempt to "federalize" the means of dividing military retired pay. Yet, USFSPA exists. It is a Federal law. Removing equities is incumbent on the legislatures and should be supported by ABA. ABA should certainly stop promulgating

untruths and factual errors from Mr. Sullivan. If the ABA really doesn't like federalization, then advocate eliminating the USFSPA.

22. If you have a preference about this law, contact your Senators and Representatives. However, please be accurately informed first! Look at the actual text and realize Mark Sullivan's analysis, adopted by the ABA, is ripe with confusion. If you also see the fundamental flaw that Mr. Sullivan sets up a fixed benefit as a straw-man and then confuses people, please feel free to contact him and ask for better. Look at the text of the bill quoted above, and look at the example calculations I provided. See if facts and math speak with more authority than innuendo and oblique emotional appeals.

Conclusion

These USFSPA rewrite proposals contain serious clarification and simplification and are equitable law. The American Bar Association says their position shuns Federal intervention, so the ABA should advocate repealing the USFSPA or support improving it. Passing a the new modification in the Department of Defense Authorization Act for Fiscal year 2017 would lead to unification and simplification for military members, spouses, courts, and protect interests of both spouses and the Federal government. Because of simplification and standardization, it will save dearly in time and money spent with courts and attorneys. Individuals should contact their representatives in the House and the Senate. Let your voice be known regarding this is an appropriate clarification of a law that has been on the books since 1982 and has not yet been revised even after a chorus of voices have advocated revision. If enough voices are heard in Washington, these necessary changes may quickly become federal law.

The most recent copy of this white paper is available from the References section at the bottom of web page http://www.increa.com/articles/division-2017NDAA-USFSPA-tutorial