RESOLVED, That the American Bar Association urges Congress to repeal Section 641 of the National Defense Authorization Act for Fiscal Year 2017, as codified at 10 U.S.C. § 1408 (a)(4); and

FURTHER RESOLVED, That the American Bar Association opposes federal legislation that:

(a) creates a single federal rule for division of military retired pay as a fixed benefit on the date of divorce; and

(b) overrides the discretion and authority of state legislatures and courts to determine the fair, just and equitable division of military pensions.
The issue at hand is a major Congressional amendment in 2016 to the Uniformed Services Former Spouses’ Protection Act (USFSPA), restricting the fair and impartial state court administration of military pension division upon divorce. Absent overriding issues of national importance, state courts must look to state law to prescribe the rules of decision for issues such as divorce and property division. When Congress attempts to specify individual results in state court cases, it can have the unintended but inevitable effect of treating the citizens of one state differently than the citizens of another state.

The Recent Legislation

The 2016 amendment to the USFSPA is found at Section 641 of the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), which was enacted upon the President’s signature on December 23, 2016. It amends 10 U.S.C. § 1408 (a)(4) of USFSPA. The USFSPA, which was enacted in 1982, made uniformed services retired pay divisible in state courts, but left it to the states to decide whether such pensions would be considered marital or community property and how the property should be divided. Section 624 of the National Defense Authorization Act for Fiscal Year 2018 made certain technical corrections and revisions to Section 641 of NDAA 17, but there were no substantive changes.

The new statute adds language dictating a single, pre-determined outcome in divorce and property division cases involving military retired pay. That single outcome is the division of only a *fictional amount* of retired pay of the servicemember, frozen on the date of divorce, as opposed to the *actual amount* of an individual’s retired pay, the rule in most states. ¹

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¹ The text for 10 U.S.C. § 1408 (a)(4) [additions/changes in italics] is as follows:

(A) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled *(as determined pursuant to subparagraph (B))* less amounts which--

(i) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(ii) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(iii) in the case of a member entitled to retired pay under chapter 61 of this title *[10 USCS §§ 1201 et seq.]*, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(iv) are deducted because of an election under chapter 73 of this title *[10 USCS §§ 1431 et seq.]* to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(B) For purposes of subparagraph (A), the total monthly retired pay to which a member is entitled shall be--

(i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by

(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title *[10 USCS § 1401a]* between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.
In April 2016 Representative Steve Russell of Oklahoma proposed adoption of the amendment. Newspaper reports indicated that it was intended to benefit military members who divorce after the amendment is enacted into law. In that month, the amendment was inserted in the House and Senate versions of the National Defense Appropriations Bill for Fiscal Year 2017. There were no hearings and no debates. The ABA Section of Family Law was not aware of the proposed change until May 2016, at which time Section members began discussing the issue and contacting members of Congress on an individual basis to oppose passage. While such a provision is indeed controversial, there was no opportunity to raise individual voices without hearings on the proposed legislation. There are no known proposals to amend or revise the statute by members of Congress or others.

The USFSPA applies to serving members of the uniformed services. This means it applies to members of the Army, Navy, Air Force, Marine Corps and Coast Guard, the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration, and the Reserve Component (i.e., members of the National Guard and Reserves).

State Courts and Pension Division – Until Now

For a divorce occurring before retirement, only five states (Kentucky, Tennessee, Oklahoma, Texas and Florida) use a “frozen benefit rule” which fixes the divisible pension as the benefit accrued at the state’s classification date. The classification date may be the date of separation, date of filing for divorce, date of dissolution or some other date set by case law or statute.

This new statutory amendment will pre-empt the law in a majority of the states. Between 40 and 45 states use the “time rule” and divide the actual retired pay of a retiree’s pension, whether military or otherwise. This means the share of the retiree’s pension which was acquired during the marriage (often expressed as a percentage) is multiplied by the retired pay that the individual actually receives upon retirement, not a “snapshot” of what it might have been if the divorce and retirement had occurred on the same day.

No Overriding Federal Interest

Family law and domestic relations law have long been recognized by the U.S. Supreme Court as the province of state laws and judges. U.S. v. Windsor, 133 S.Ct. 2675, 2691 (2013); Sosna v. Iowa, 419 U.S. 393, 423 (1975). With respect to domestic relations law, the Supreme Court itself has stated that "state interests ... in the field of family and family-property arrangements ... should be overridden ... only where clear and substantial interests of the National Government ... will suffer major damage if the state law is applied." United States v. Yazell, 382 U.S. 341, 352 (1966).

There have been, however, several occasions when Congress has passed laws which amount to federal intervention in the family law field. When this has occurred, the reason for such intervention was enactment of a statute to accomplish a goal of implementing a broad national policy or issue, one transcending the rights of the parties and which prescribed general policies

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The Defense Finance and Accounting Service published rules in June 2017 specifying that the date of divorce is to be used for the fixing of the pension benefit to be divided. Department of Defense Financial Management Regulation, DoD 7000.14-R, Volume 7B, “Military Pay Policies and Procedures—Retired Pay,” Ch. 29, Sec. 290802.A.
and rules for all cases, not a goal of setting pre-determined outcomes for individual cases. Congress has usually exercised a high degree of caution and discretion to avoid making substantive decisions in federal family-law legislation which ought to be left to the courts and state laws.

Three examples will illustrate this point. The first is the Full Faith and Credit for Child Support Orders Act (FFCCSOA),\(^2\) enacted in 1994. Its purpose was to “provide that a state court may not modify an order of another state court requiring payment of child support unless the payee lives in the state in which the modification is sought or consents to the seeking of the modification in that court.” It imposed the central concept of UIFSA\(^3\) on states that had not yet enacted it. Congress could have - but did not - insert in the FFCCSOA a rule barring the use of the Basic Allowance for Housing or the Basic Allowance for Subsistence of servicemembers in setting the amount of child support in each case. Even though that issue involved a military entitlement, such a law would have been taking away the authority and discretion of the court to judge each case on its own merits.

The Family Support Act, passed by Congress in 1988,\(^4\) provided for the use of child support guidelines and expedited process for child support hearings, among other things. It could have mandated that mothers and fathers share equally in the payment of uncovered medical expenses for their children, or even pay for these costs in proportion to their incomes. It could have required (or forbidden) the use of military medical facilities in child support cases. But it didn’t, for the same reasons as stated above – such insertions into the statute would have taken away the judgment of the courts in deciding cases based on the unique situations of the parties themselves.

Congress implemented The Hague Convention on the Civil Aspects of International Child Abduction by passing the International Child Abduction Remedies Act (ICARA).\(^5\) The Act provides state and federal court remedies for the return of wrongfully abducted or retained children. Congress could have provided in ICARA for predetermined results, such as the automatic return of children who have been wrongfully retained or abducted for less than, say, six months. It also could have required that all children withheld for more than a year were beyond the court’s power for return. It didn’t - for the same reasons as above. Congress has traditionally opted for a restrained and refined rule when it passes legislation in the family law field.

In light of these three examples and the restraint of Congress, it is worth looking at the Uniformed Services Former Spouses’ Protection Act (USFSPA),\(^6\) passed by Congress in 1982 to deal with the division of military pensions in divorce. The areas in the USFSPA which touch on court powers and judicial discretion are really quite limited. The Act limits court jurisdiction over the retired pay of servicemembers in 10 U.S.C. § 1408 (c)(4), but only for the purpose of preventing servicemembers having to fight jurisdictional battles in different states having only limited present contacts with them. It limited the power of judges to divide disability compensation and military disability retired pay in 10 U.S.C. § 1408 (a)(4)(A)(ii) and (iii); however, this was to ensure that these entitlements would belong solely to the servicemember or retiree, based on his

\(^2\) 28 U.S.C. § 1738B.

\(^3\) The Uniform Interstate Family Support Act.

\(^4\) (Public Law 100-485, October 13, 1988, 102 STAT. 2343).

\(^5\) Title 22, Chapter 97, U.S. Code.

\(^6\) 10 U.S.C. § 1408.
or her prior service and service-connected conditions. It limited division of the pension to fifty percent in most cases (10 U.S.C. § 1408 (e)(1)), but this is nothing new; many states already have such limitations, enacted to ensure that the entire pension is not consumed in the court’s equitable division process.

There was no attempt to define the formula which judges use to divide the pension when Congress passed the USFSPA. Congress did not try to establish a presumptive amount of the marital portion of the pension for the former spouse or the military member. The Act is an “authorization statute.” It allows courts to devise their own rules for division of retired pay, with certain minimum limits placed on that power due to broad policy concerns. Those concerns involve issues of national defense, manpower needs and, above all, fairness to former spouses who, under the McCarty decision,7 had been barred from sharing in an asset - retired pay which was acquired during the marriage - that was available for division in every other case involving community or marital property.

The way most states presently divide military retired pay is not a unique approach which is inconsistent with the treatment of other marital assets. All defined benefit plans (i.e., pensions) are treated in the same way, regardless of whether they belong to the husband or the wife, whether they were earned by a lifetime (or less) of service, whether they are state pensions, federal pensions, or private ones. The diversity which exists among the states regarding military pension division also exists for federal civil service pensions and those governed by the Railroad Retirement Act, the Foreign Service Pension System, and the Central Intelligence Agency Retirement Act.

Although Congress has plenary authority in matters of national defense legislation, it is clear that there is no important federal policy which is served by enactment of a statute which shifts the balance of power and of assets between the member and the former spouse at the time of divorce. A fair and reasonable balance was struck in 1982, when Congress enacted the USFSPA to allow state courts to strike a balance between the parties, recognizing the importance of those sacrifices which many spouses and former spouses make in a military marriage. State courts are in the business every day of weighing and prioritizing the property and financial decisions in marital dissolutions. Congress is not equipped to make those decisions or to decide on the best theory of marital or community property division – fixed benefit (in five states) or “time rule.” When Congress imposes a particular method of dividing military retired pay in divorce, it is exercising its constitutional authority in a manner that can work unintended consequences. By modifying the USFSPA’s delegation of authority to the states to divide military retired pay by requiring that authority to be exercised in a specific way, it has substituted its judgment over matters traditionally left to the states which do not approach matters of property distribution in divorce in the same manner.

Overriding State Pension Division Rules

Congress has created an amendment to the USFSPA which does significant damage to the present state court mechanisms as to division of military retired pay. It will take years of court decisions and legislative revisions to correct the harm and repair the damage to traditional “time

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rule” division by this effort of Congress to create a national law of pension division. There should be no preference for one system over another in federal law. That is a matter for state legislatures and appellate decisions.

Giving the military pension unique and preferential treatment which is distinct from all other pensions distorts the ability of state divorce courts to achieve equity between spouses. Many states would be forced to have two separate ways of determining spousal interests in retirement benefits – one for military cases, and one for everyone else. When there are two spouses who have pensions to be divided, there is no way to divide them in the same way, such as giving each party 50% of the marital share of the other’s pension, since the pensions can never be equivalent. The military pension will always yield a shrunken share. When only one party, the one in uniform, has the pension, then the spouse will always receive a shrunken benefit, with no consideration given to the actual retired pay of the individual (as would occur with any other deferred compensation benefit or pension).

Tying the Hands of Judges.

The rules in the various states’ family law courts are straightforward. In divorce cases, a court focuses on a fair, just and equitable division of assets according to the specific facts of the case. There are no cookie-cutter solutions, no rules about “one size fits all” in family court. Deciding property distribution and pension division on a case-by-case basis is the proper method of dividing marital and community property, keeping the focus on the individual facts and finances of the parties. Or it was until now. Unfortunately, the NDAA 2017 removes that discretion from the courts and lets Congress substitute its judgment for that usually exercised by trial court judges in the weighing of equities in a divorce case. It also bars any settlement by the parties, who may want to opt-out of this rigid rule. By attempting to adjust the scales of justice in divorce and property division cases, the NDAA 2017 removes discretion and flexibility from divorce settlements, substituting a fixed benefit approach which is incompatible with the rules in over 40 states.

With this new rule, Congress has taken control of how one particular marital asset is divided and how the division of a preferred asset is accomplished. It creates a federal law of pension division found nowhere else in the U.S. Code, and it creates a special and preferred class of parties in a divorce – servicemembers. This rule treats their pensions in a special way, but for no verifiable reason. Such an outcome runs counter to a long and unbroken history of federal deference to state courts on most issues of family law.

Prior to the enactment of the NDAA 2017, there was diversity among state courts and legislation regarding how pensions are divided, and this applies to all federal pensions (as well as state pensions and private ones, not just military pensions). In some states, military pensions cannot be divided unless they are “vested” (i.e., at least 20 years of creditable service). In Puerto Rico the military pension is entirely exempt from division. In North Carolina and Alabama the military pension cannot be divided unless a present value has been presented in court. And in about 10 states the judge has the power to award present payments to the former spouse if the military member has attained retired-pay eligibility, even if he or she is not yet receiving retired pay. This lack of uniformity is built into the federal-state system of government in the United States. It is not a reason
for Washington to start setting down rules for property distribution, divorce and pension division in state courts.

There is no reason to wield this club over state courts. Congress should be guided by this important principle of deferring to state courts and legislatures in a field that involves their unique perspective and their expertise in weighing and balancing the equities, rather than attempting to federalize the law of pension division when a servicemember is involved.

The States Have Already Addressed Fairly the Division of Military Pensions

The present state-law solutions in dividing retired pay for uniformed service personnel represent by far the better and more effective remedy. All state courts allow the division of uniformed services retired pay. And all states provide in some way for an adjustment or reduction of the pension to be divided in order to account for the portions earned after the divorce and acquired during the marriage. The rules are robust and have stood the test of time. They have been in place for 35 years—since the 1982 passage of USFPSA—and longer.

The NDAA 2017 amendment will do substantial damage to the significant array of state cases setting out the rules and requirements for military pension division, as this federal law preempts any state statute or decision to the contrary. The statute is an unprecedented departure from the long history of state dominion over family law, divorce and property division disputes. This legislation from Washington mandates pension division outcomes in the county courthouse from afar, giving no consideration to the unique factors in individual cases. The current cases, statutes and decisions in most of the states mean nothing when military pension division enters the courtroom, due to this misguided proposal. Congress should establish no single method for dividing retired pay. Congressional legislation should show no preference for a specific rule, any more than it should show favoritism for any particular party in a divorce.

USFSPA and Uniformed Services Pension Division

As originally written, USFSPA provides clear protections for servicemembers and spouses as to division of military retired pay as marital or community property. This should not be changed through the insertion of prescribed results for pension division state-court divorce cases.

In the complex world of family financial relationships, creating a new nationwide rule which will fit all property division cases in all states is a tall order indeed. The proposed standard turns on its head the accepted rule that courts must consider all of the factors in a divorce case. It sets aside the delicate balance achieved in USFSPA regarding state powers and federal rules. This deviation represents a dangerous precedent that ultimately serves no one’s interests, including those of servicemembers or their spouses.

Conclusion

Today as always, the American Bar Association is as resolutely committed to the legal rights of American military personnel as it is to fair treatment of servicemembers and spouses in the divorce process. For this reason, Congressional rule-making in the field of divorce through
legislation which pre-ordains an outcome and supplants the historic primacy of the states in domestic relations law, treating military spouses differently than other spouses in pension division disputes should not go without action. This is especially true when the result of the legislation is a rejection of the support for former spouses provided by the USFSPA and articulated by Senator Jeremiah Denton in supporting the Act in 1982: “Those wives who have loved and served as wives and mothers for many years deserve more than mere recognition. They are entitled to a degree of security.” Whether wives, husbands or simply “former spouses,” these citizens need the protection of the law.

The American Bar Association recognizes the importance of the contributions of servicemembers and spouses to the defense of the nation. We owe them many things, but laws that treat them differently from other spouses is not one of them. The American Bar Association should urge repeal of this federal legislation which interferes with state court rules and decisions regarding divorce and the division of military retired pay. The American Bar Association should urge Congress to reverse this unnecessary incursion into the realm of the states, specifically their primacy and expertise to divide marital or community property. The rights of servicemembers and spouses are best served within the existing framework of state laws and court rules regarding division of military retired pay.

Respectfully submitted,

Roberta S. Batley
Chair, Section of Family Law
January 2018
1. **Summary of Resolution(s).**

   The Resolution calls for the American Bar Association to oppose the 2016 amendment to the Uniformed Services Former Spouses’ Protection Act (USFSPA), 10 U.S.C. § 1408, specifically Section 641 of the National Defense Authorization Act for Fiscal Year 2017, as codified in 10 U.S.C. § 1408 (a)(4), and to urge Congress to repeal the amendment. The amendment requires that, in divorce cases involving members of the uniformed services, the court may only divide a hypothetical amount of retired pay, as if the servicemember had retired at the date of divorce. This is contrary to the rules for division of all pensions in a large majority of the states. It would create a federal law of military pension division, tying the hands of judges in these cases and creating a special class of pensions to be divided in divorce. Long the province of state courts, the rules for divorce and property division need to remain in the hands of state and local judges. They need not be imposed in a rule which creates a fictional freeze of the pension at the date of divorce. The new statute will cause substantial disruption to state pension-division schemes and overturn a substantial body of state laws which comprehensively and appropriately address the division of military pensions.

2. **Approval by Submitting Entity.**

   This Recommendation was approved by the Council of the Section of Family Law on October 5, 2017.

3. **Has this or a similar resolution been submitted to the House or Board previously?**

   No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

   There are no existing Association policies which are relevant to this Resolution. However, the Association passed a Resolution in 1979 calling upon the Secretaries of the Armed Forces to recognize state court divorce decrees which determine spousal interests and divide retired pay. The Association also passed a Resolution (Report No. 112) at the Midyear Meeting in 1982 which called upon Congress to enact legislation making all federal pension plans subject to state property law, except as specifically exempted by explicit federal legislation.

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?** N/A
6. **Status of Legislation.**


7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.**

   If the Resolution is adopted by the House of Delegates, it will be used by the Section of Family Law to educate Senators, Representatives and their principal staffers, to urge Congress to repeal this ill-advised amendment to USFSPA, and to help persuade other entities to lobby Congress toward this same goal.

8. **Cost to the Association.** (Both direct and indirect costs) None

9. **Disclosure of Interest.** (If applicable) None

10. **Referrals.**
    Civil Rights & Social Justice Section
    Govt. & Public Sector Lawyers Division
    Litigation Section
    Real Property, Trust and Estate Law Section
    Solo, Small Firm & General Practice Division
    Young Lawyers Division
    Standing Committee on Armed Forces Law
    Standing Committee on Legal Assistance for Military Personnel
    Commission on Veterans Legal Services
    Judge Advocates Association
    Labor Law and Taxation

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)
    - **Anita Ventrelli, Esq.**
      Schiller, DuCanto & Fleck, LLP, 200 N. LaSalle Street, Suite 3000, Chicago, IL 60601-1098
      Phone: 312-609-5506
      E-mail: aventrelli@sdflaw.com

    - **Scott Friedman, Esq.**
      Friedman & Mirman Co., L.P.A.
      1320 Dublin Rd.
      Columbus, OH 43215
      Phone: 614-221-0090
12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution calls for the American Bar Association to oppose the 2016 amendment to the Uniformed Services Former Spouses’ Protection Act (USFSPA), 10 U.S.C. § 1408, specifically Section 641 of the National Defense Authorization Act for Fiscal Year 2017, as codified in 10 U.S.C. § 1408 (a)(4), and to urge Congress to repeal the amendment. The amendment requires that, in divorce cases involving members of the uniformed services, the court may only divide a hypothetical amount of retired pay, as if the servicemember had retired at the date of divorce. This is contrary to the rules for division of all pensions in a large majority of the states. It would create a federal law of military pension division, tying the hands of judges in these cases and creating a special class of pensions to be divided in divorce. Long the province of state courts, the rules for divorce and property division need to remain in the hands of state and local judges. They need not be imposed in a rule which creates a fictional freeze of the pension at the date of divorce. The new statute will cause substantial disruption to state pension-division schemes and overturn a substantial body of state laws which comprehensively and appropriately address the division of military pensions.

2. Summary of the Issue that the Resolution Addresses

The issue which the Resolution addresses is the imposition of a nationwide method of dividing uniformed services retired pay upon divorce. The method involves freezing the pension benefit as of the date of divorce, a rule which only five states have adopted. Congress amended the USFSPA in 2016 to require this division by all courts. This is an area where the states have primacy and where Congress has traditionally opted for a restrained and refined rule when it passes legislation in the family law field. As James Madison wrote in *The Federalist* No. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The statutory amendment is an unwise exercise of authority which will set aside the rules for pension division in 40-45 states (in military cases) for no good reason, no purpose of substantial importance which would justify requiring local and state judges to adopt a single uniform method as to how this one asset would be divided in divorce court.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The proposed policy will influence the U.S. Senate and House of Representatives to modify or repeal the amendment to USFSPA.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

We are aware of no minority views within the ABA or any external opposition.