

**PAYING FOR THEIR DEATHS: HOW THE “WIDOW TAX”
TARGETS AND PENALIZES SURVIVING SPOUSES OF
FALLEN SOLDIERS AND RETIREES**

MAJOR JENNA C. FERRELL*

This country owes them all a debt of gratitude. The down payment on that debt is making sure that we live up to Lincoln's charge: to care for him who shall have borne the battle, and for his widow, and his orphan.¹

I. Introduction

“We regret to inform you”

Much like “I do,” these five simple words take only moments to say but carry with them a life-changing, infinite permanence. Every military spouse knows about the dreaded “knock at the door”² but, as matter of

* Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, 2d Infantry Brigade Combat Team, 4th Infantry Division, Fort Carson, Colorado. LL.M., 2019, The Judge Advocate General's School, Charlottesville, Virginia. J.D., 2014, The Ohio State University Moritz College of Law; M.A., 2006, The Johns Hopkins University; B.A., 2006, The Johns Hopkins University. Previous assignments include Brigade Judge Advocate, 7th Transportation Brigade (Expeditionary), Joint Base Langley-Eustis, Virginia, 2017-2018; Rear Brigade Judge Advocate and Trial Counsel, 2d Brigade Combat Team, 82d Airborne Division, Fort Bragg, North Carolina, 2016-2017; Chief of Legal Assistance and Special Victims' Counsel, 82d Airborne Division, Fort Bragg, North Carolina, 2014-2016; Assistant S-3, Miami Recruiting Battalion, 2d Recruiting Brigade, Miami, Florida, 2010-2011; Rear Detachment Commander, Executive Officer, and Platoon Leader, 65th Military Police Company, 503d Military Police Battalion, 16th Military Police Brigade, Fort Bragg, North Carolina, Forward Operating Base Mahmudiyah, Iraq, and Port Au Prince, Haiti, 2008-2010; Assistant Secretary of General Staff, XVIII Airborne Corps, Fort Bragg, North Carolina, 2007-2008; Author of *The Opaque Glass Ceiling: How Will Gender Neutrality in Combat Affect Military Sexual Assault Prevalence, Prevention, and Prosecution?*, 11 OHIO ST. J. CRIM. L. 319 (2014). Member of the bar of Massachusetts. This article was submitted in partial completion of the Master of Laws requirements of the 67th Judge Advocate Officer Graduate Course.

¹ Former Rep. David R. Obey, QUOTETAB (quoting Abraham Lincoln, Second Inaugural Address (Mar 4., 1865)), <https://www.quotetab.com/quotes/by-dave-obey#AFT3gVxesKmXcXFK.97> (last visited June 11, 2019).

² See Hugh Lessig, *A Death in the Military, a Knock on the Door*, DAILY PRESS (May 28, 2016, 8:27 PM), <https://www.dailypress.com/news/military/dp-nws-evg-casualty-notification-officer-20160528-story.html>; Neal Conan, *A Grim Task: Military-Death Notification*, NPR (May 27, 2013, 2:00 PM),

survival and sanity, clings to the belief that she or he will never be the recipient of that nightmarish message. Sadly, as a result of concurrent wars in Iraq and Afghanistan, more than 7,000 service members have lost their lives due to combat-related incidents alone, thereby creating over 3,600 young, wartime widows.³ The Department of Defense (DoD) has come a long way since the days of impersonal telegram notifications during the World War II, Korean War, and Vietnam War eras.⁴ However, where the DoD still fails these family members—in addition to the widows of service-disabled retirees—is in the imposition of a “tax” applicable only to the growing population of surviving spouses.⁵

Surviving spouses of retirees who pass away from a service-connected condition and of active duty service members who die in the line of duty are generally eligible for two monthly benefits: Survivor Benefit Plan payments (SBP) and Dependent and Indemnity Compensation (DIC).⁶ Under current law,⁷ family members who qualify for both benefits are subject to an offset, meaning that for every dollar paid out in DIC, payouts

<https://www.npr.org/2013/05/27/186452175/a-grim-task-military-death-notification>; Christian Burkin, *Casualty Officers Bear Heavy Burden One Door at a Time*, RECORDNET.COM (July 8, 2007, 12:01 AM), https://www.recordnet.com/article/20070708/A_NEWS/707080320.

³ *Our Mission*, AM. WIDOW PROJECT, <http://americanwidowproject.org/meet-us/mission/> (last visited June 11, 2019). See also *Fatalities by Country and Year*, IRAQ COALITION CASUALTY COUNT, <http://www.icasualties.org> (last visited June 11, 2019).

⁴ See Renita Foster, *For the Families*, U.S. ARMY (May 5, 2008), https://www.army.mil/article/8966/for_the_families; Megan Harris, *Beyond “I Regret to Inform You,”* FOLKLIFE TODAY (Feb. 23, 2015), <https://blogs.loc.gov/folklife/2015/02/beyond-i-regret-to-inform-you/>; Alex Johnson, *Breaking the Bad News*, NBCNEWS.COM (Mar. 21, 2003), <http://www.nbcnews.com/id/3340619/#.W9ZXtkxFxxd>. See also DEP’T OF DEF., INSTR. 1300.18, PERSONNEL CASUALTY MATTERS, POLICIES, AND PROCEDURES (8 Jan. 2008) (C1, 14 Aug. 2009).

⁵ See generally Lieutenant General Dana T. Atkins, USAF Retired, *The Indignity of Our Military’s ‘Widow’s Tax,’* THE HILL (Sept. 19, 2017, 6:20 PM), <https://thehill.com/opinion/finance/351438-the-indignity-of-our-militarys-widows-tax>; Collin Breaux, *‘Widows’ Tax’ Denies Some Military Survivors Full Payments*, MILITARY.COM (Nov. 14, 2017), <https://www.military.com/daily-news/2017/11/14/widows-tax-denies-some-military-survivors-full-payments.html>; Laurie Caruso, *‘Widow’s Tax’ an Unjust Law for Surviving Spouses*, ELK VALLEY TIMES (July 31, 2018), https://www.elkvalleytimes.com/news/widow-s-tax-an-unjust-law-for-surviving-spouses/article_239bd9ec-9438-11e8-9e19-dfa1e269887f.html; *The Widow’s Tax*, MIL. OFFICERS ASS’N OF AM. (on file with author) (explaining that the loss of any portion of SBP annuity is often referred to as a “widows tax”).

⁶ See generally Lindsay I. McCarl, *The Case for Concurrent Veterans Benefits: Duplicative but Not Duplicious*, 20 FED. CIR. B.J. 409, 418 (2011).

⁷ 10 U.S.C.S. § 1450 (LexisNexis 2019).

under the SBP are reduced by one dollar.⁸ In other words, a survivor “may not receive the [combined] amount of both SBP and DIC. In order to receive DIC, the survivor must waive the same amount of SBP.”⁹ While the SBP is a DoD-managed and employee-earned benefit intended to function as the equivalent of a life insurance annuity,¹⁰ DIC is a Veterans Affairs (VA)-managed indemnity payment intended to replace lost family income and serve as reparation for service-connected deaths.¹¹ Despite these distinct purposes,¹² the offset continues to penalize surviving spouses who, due to a widespread lack of knowledge and understanding,

⁸ JAMES HOSEK ET AL., AN ASSESSMENT OF THE MILITARY SURVIVOR BENEFIT PLAN 10 (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2200/RR2236/RAND_RR2236.pdf. See also DAVID F. BURRELLI & JENNIFER R. CORWELL, CONG. RESEARCH SERV., RL32769, MILITARY DEATH BENEFITS: STATUS AND PROPOSALS 6 (2006) (explaining that “[i]f the DIC benefit is larger than the SBP benefit, then the survivor receives only the DIC benefit” but “[i]f the SBP benefit is larger . . . , the surviving spouse receives the full DIC benefit and any SBP benefits less an amount equivalent to the DIC benefit”).

⁹ Kate Horrell, *Understanding the SBP-DIC Offset*, KATE HORRELL (Feb. 25, 2018), <https://www.katehorrell.com/understanding-sbp-dic-offset/>.

¹⁰ HOSEK ET AL., *supra* note 8, at 4 (explaining that SBP is “administered by DoD, and the subsidy is funded as part of DoD’s retirement accrual charge”); see also ERIC CHRISTENSEN ET AL., FINAL REPORT FOR THE VETERANS’ DISABILITY BENEFITS COMMISSION: COMPENSATION, SURVEY RESULTS, AND SELECTED TOPICS 105 (2007), https://www.cna.org/CNA_files/PDF/D0016570.A4.pdf; U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-837R, ACTUARIAL SOUNDNESS OF THE DO D SURVIVOR BENEFIT PLAN PROGRAM 1 (2006); Forrest Baumhover, *Survivor Benefit Plan Resources: Everything You Need in One Blog Post*, MILITARYPAY.ORG (Dec. 7, 2017), <https://www.militarypay.org/survivor-benefit-plan-resources/>; *Eliminating the Widows’ Tax*, MIL. OFFICERS ASS’N OF AM. (Mar. 11, 2016) (on file with author); *Understanding the Survivor Benefit Plan*, MIL. ONE SOURCE (Mar. 15, 2018, 10:10 AM), <https://www.militaryonesource.mil/-/understanding-the-survivor-benefit-plan>.

¹¹ See CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 12 (2011); HOSEK ET AL., *supra* note 8, at 9 (quoting U.S. DEP’T OF DEF., OFFICE OF THE SEC’Y OF DEF. FOR PERSONNEL AND READINESS, MILITARY COMPENSATION BACKGROUND PAPERS 693 (7th ed., 2011), www.loc.gov/rr/frd/pdf-files/Military_Comp-2011.pdf). See also Bale Dalton, Office of Sen. Bill Nelson, S. 339, SBP-DIC Offset Repeal Fact Sheet, 115th Cong. (2017) (on file with author); Patricia Berguist, *Surviving Spouse Corner: The SBP-DIC Offset—A Military Problem*, MIL. OFFICERS ASS’N OF AM., <https://www.moaa.org/content/chapters-and-councils/council-and-chapter-enewsletters/council-and-chapter-news/past-editions/the-affiliate/2017-affiliate/september/surviving-spouse-corner-the-sbpdic-offset--a-military-problem/> (last visited June 19, 2019).

¹² Caruso, *supra* note 5; see also Mike Baron, *MOAA’s Expectations for 2019 Federal Budget*, MIL. OFFICERS ASS’N OF AM. (Apr. 10, 2018), <http://www.moaa.org/Content/Take-Action/Top-Issues/Currently-Serving/MOAA-s-Expectations-for-2019-Federal-Budget.aspx>.

expected to receive both benefits.¹³ Although similar bans on receipt of concurrent benefits have been eliminated for other populations, surviving spouses comprise the only subset of federal beneficiaries who continue to bear the burden of this kind of “tax.”¹⁴ In this sense, the offset creates an incompatible incongruence with the incessant emphasis on “supporting our troops” that has pervaded the last two decades of conflict.¹⁵

Because Congress recently implemented a permanent offset to the already-existing DIC offset, the road to more meaningful change appears bleak.¹⁶ This “stop gap measure,”¹⁷ known as the Special Survivors Indemnity Allowance (SSIA), originated in 2009 as a monthly payment of \$50 and increased incrementally to \$310 until December 2018, after which the amount will be adjusted based on percentage increases in retired pay.¹⁸

¹³ To provide some anecdotal examples, every surviving spouse this author interviewed while compiling research for this article stated she was unaware of the SBP-DIC offset or its practical implications until the death of her husband. This author had a similar experience when her first husband, Captain Jonathan Grassbaugh, was killed on 7 April 2007 while serving with the 82d Airborne Division in support of Operation Iraqi Freedom. At the time of his death, this author was almost twenty-three years old, a commissioned officer with Bachelor’s and Master’s degrees, and a law student on an educational delay preparing to serve in the Judge Advocate General Corps (JAGC). Despite her educational background, prior Army Reserve Officer Training Corps (ROTC) training, and supportive family, the SBP-DIC offset remained a topic of much confusion until many years after her late husband’s death. Furthermore, a brief and very informal poll of 67th Graduate Course students revealed that none were aware of the post-September 11th extension of SBP benefits to active duty service members, much less the existence of the SBP-DIC offset.

¹⁴ See, e.g., U.S. DEP’T OF DEF., OFFICE OF THE SEC’Y OF DEF. FOR PERSONNEL AND READINESS, *MILITARY COMPENSATION BACKGROUND PAPERS* 608 (8th ed., 2018), https://www.loc.gov/rr/frd/pdf-files/Military_Comp.pdf (describing the phase-out of the ban on concurrent receipt of disability and retirement pay for veterans with a disability rating of 50 percent or more).

¹⁵ See, e.g., *We Support Our Troops*, FACEBOOK, <https://www.facebook.com/wesupportthetroops> (last visited Feb. 7, 2019). Cf. Steven Salaita, *No Thanks: Stop Saying “Support the Troops,”* SALON (Aug. 25, 2013, 3:00 PM), https://www.salon.com/2013/08/25/no_thanks_i_wont_support_the_troops/.

¹⁶ See HOSEK ET AL., *supra* note 8, at 11, 14.

¹⁷ H.R. REP. NO. 115-200, pt. 1, at 145 (2017). See also *Survivor Advocacy Issues*, MIL. OFFICERS ASS’N OF AM., <http://www.moaa.org/Content/About-MOAA/Meet-our-Leaders/Surviving-Spouse-Advisory-Committee/Survivor-Advocacy-Issues.aspx> (last visited June 12, 2019).

¹⁸ CONG. RESEARCH SERV., RL31664, *THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS* 15 (2011). See also National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 644, 122 Stat. 3, 158 (2008); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 621, 131 Stat. 1289, 1427–28 (2017).

Although intended to address the inequities in the current law,¹⁹ the SSIA has the unfortunate consequence of allowing Congress to “get around the offset regulations without fully funding a repeal.”²⁰

Overall cost is the primary reason cited for failure to repeal the SBP-DIC offset; most estimates range between \$7 and \$10 billion over ten years.²¹ Although the current DoD budget is as large as it has ever been in decades, future budget prospects remain less certain.²² Thus, if there were ever a time for Congress to make good on its promise to repeal the SBP-DIC offset, that time may already have passed. If lawmakers are unable—or simply unwilling—to make room in future budgets for a complete repeal, Congressional leaders should consider two alternate options in need of further exploration: (1) establish income-based cut-offs for the concurrent receipt of SBP and DIC payments; or (2) use a private commercial provider to better manage and administer the SBP. Either alternative would provide a superior solution to the current situation. No matter what the solution, Judge Advocates must be prepared to assume a larger role in bridging the offset knowledge gap for active duty families in need of long-term estate planning guidance. Inserting Judge Advocates into the retirement transition process would also ensure greater transparency for soon-to-be retirees and increase awareness of the risks associated with *not* opting out of the SBP.²³

¹⁹ *Survivor Advocacy Issues*, *supra* note 17; *Eliminating the Widows' Tax*, *supra* note 10.

²⁰ Leo Shane III, *Defense Lawmakers Take Aim at Fixing the 'Widow's Tax'*, MIL. TIMES (Mar. 12, 2017), <https://www.militarytimes.com/news/pentagon-congress/2017/03/12/defense-lawmakers-take-aim-at-fixing-the-widow-s-tax/>.

²¹ Breaux, *supra* note 5. Ted Painter, national legislative director for the American Military Retirees Association, noted that “we are consistently met with the same answer from members of Congress—a repeal is impossible . . . due to the cost.” *Id.* See also Memorandum from Deputy Assistant Sec’y of Navy to Co-Chairmen, Sec’y of the Navy’s Retiree Council, subject: Secretariat Response to the 2015 Sec’y of the Navy’s Retiree Council Report (12 Aug. 2016); Lisa Hammersly, *Widows say Military-Benefits 'Offset' Law Adds Insult to Injury*, ARK. DEMOCRAT GAZETTE, Apr. 1, 2018, at 10A; Tom Philpott, *Survivor Benefit Plan Still Irks Some Military Widows*, DAILY PRESS (May 3, 2018, 11:35 AM), <http://www.dailypress.com/news/military/dp-nws-military-update-0507-story.html>; Lieutenant Colonel Shane Ostrom, USA Retired, *SBP-DIC Offset After Sharp Lawsuit*, MIL. OFFICERS ASS’N OF AM. (June 2, 2010) (on file with author).

²² See Greg Myre, *How the Pentagon Plans to Spend That Extra \$61 Billion*, NPR (Mar. 26, 2018, 5:23 PM), <https://www.npr.org/sections/parallels/2018/03/26/596129462/how-the-pentagon-plans-to-spend-that-extra-61-billion>.

²³ See, e.g., *SFL-TAP Program*, U.S. ARMY SOLDIER FOR LIFE - TRANSITION ASSISTANCE PROGRAM, <https://www.sfl-tap.army.mil/pages/program.aspx> (last visited June 12, 2019).

Ultimately, after almost twenty years of the ongoing Global War on Terror, the SBP-DIC offset represents an archaic, outdated, and bizarre legal limitation that Congressional leaders acknowledge is unjust.²⁴ Despite over three decades of attempts at repeal,²⁵ the offset continues to this day. With the permanent implementation of the SSIA, some lawmakers consider the issue moot,²⁶ hence the need to reexamine complete overhaul of the benefits system within budgetary parameters and consider potential alternatives.

II. History and Development of the Survivor Benefit Plan, Dependency Indemnity Compensation, and the SBP-DIC Offset

The SBP and DIC are two entirely different survivor benefits managed by different organizations for different purposes.²⁷ Despite these distinctions, the statutorily-mandated SBP-DIC offset results in thousands of lost dollars each year in potential benefits, thereby eliminating the value of one benefit in its entirety for many surviving spouses.²⁸ As Mary

²⁴ See H.R. REP. NO. 111-89, at 72 (2009) (Conf. Rep.) (“The Senate resolution also recognizes the serious inequity in how the military death benefits system treats widows and orphans whom our servicemembers and veterans leave behind.”); ROBERT TOMKIN, FACT SHEET NO. 112-6, DEFENSE AUTHORIZATION FOR FY 2012 50 (2011), LEXISNEXIS (noting that the committee acknowledged the widow’s tax “has long denied surviving family members the payment of their SBP benefits earned by the service of their spouse and paid for through premium reductions to retired pay”). See also Caruso, *supra* note 5 (explaining that “[w]idow’s tax is a nickname for an unjust federal law”); Hammersly, *supra* note 21, at 10A (““This is an injustice!’ [surviving spouse Elly Gibbons told Congress] about the law.”); *Survivor Advocacy Issues*, *supra* note 17 (“In multiple Congresses, a majority of House and Senate members acknowledged the inequity and cosponsored corrective legislation to recognize SBP and DIC are paid for different reasons.”).

²⁵ See Hammersly, *supra* note 21, at 10A; Breaux, *supra* note 5; Caruso, *supra* note 5; Philpott, *supra* note 21; Shane III, *supra* note 20.

²⁶ Philpott, *supra* note 21.

²⁷ *Hearing on S. 1990 Before the S. Comm. on Veterans’ Affairs*, 115th Cong. 2 (2018) (statement of Dr. Vivianne Cisneros Wersel, Surviving Spouse); Breaux, *supra* note 5; Caruso, *supra* note 5.

²⁸ Colonel Steve Strobridge, USAF Retired, & Colonel Phil Odom, USAF Retired, *Vow of Honor: Protecting Today’s Survivors*, MIL. OFFICERS ASS’N OF AM. (on file with author) (explaining that for service members in the grade of E-6 and below, the offset “virtually wipes out any SBP payment, leaving most survivors with just DIC”). See also Berquist, *supra* note 11; Shane III, *supra* note 20.

Craven, whose husband retired from the Air Force after being wounded in Vietnam, asked, “[w]hy have two programs if one wipes out the other?”²⁹

A. History and Development of the SBP

The SBP originated during the post-World War II era as the Uniformed Contingencies Option Act of 1953,³⁰ intended solely to benefit the surviving spouses of deceased retirees.³¹ On 4 October 1961, Congress revised the Contingencies option plan and renamed it the Retired Serviceman’s Family Protection Plan (RSFFP).³² Finally, on 21 September 1972, another legislative act further amended the RSFFP to create what is now known as the SBP.³³ As enacted, the purpose of the SBP was to “insure that the surviving dependents of military personnel who die in retirement or after becoming eligible for retirement will continue to have a reasonable level of income.”³⁴ In addition to providing

²⁹ Strobridge et al., *supra* note 28. See also *Eliminate the Widows Tax (SBP-DIC Offset)*, HAMPTON ROADS CHAPTER MIL. OFFICERS ASS’N OF AM., http://bcsthome.net/hrcmoaa/hotnews/sbp_dic_offset.shtml (last visited June 19, 2019) (explaining that “the offset wipes out most or all of the SBP check for the vast majority of survivors”).

³⁰ James N. Higdon, *The Survivor Benefit Plan: Its History, Idiosyncrasies, Coverages, Cost, and Applications*, 43 FAM. L.Q. 439, 439 (2009).

³¹ HOSEK ET AL., *supra* note 8, at 11.

³² Higdon, *supra* note 30, at 439.

³³ Armed Forces Survivor Benefit Plan, Pub L. No. 92-425, 86 Stat. 706, 706–13 (1972) (codified as amended at 10 U.S.C.S. §§ 1447–1455 (LexisNexis 2019)); see also *Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.*, 115th Cong. 4 (2016) (statement of Edith G. Smith, Surviving Spouse) (emphasizing Congress’ recognition of the fact that surviving military spouses should be treated the same as civil service surviving spouses for benefits purposes); HOSEK ET AL., *supra* note 8, at 3 (referencing the *Inquiry into Survivor Benefits: Hearing Before the Special Subcomm. on Survivor Benefits of the H. Armed Serv.’s Comm.*, 91st Cong. (1970), in explaining that the “creation of a military benefit would bring military compensation in line with the compensation packages of public and private employers”); Higdon, *supra* note 30, at 439; Caruso, *supra* note 5 (noting that Congress intended for SBP to closely parallel the Civil Service Retirement System).

³⁴ U.S. DEP’T OF DEF., OFFICE OF THE SEC’Y OF DEF. FOR PERSONNEL AND READINESS, MILITARY COMPENSATION BACKGROUND PAPERS 727 (8th ed., 2018), http://loc.gov/frd/pdf-files/Military_Comp-2018.pdf; see also CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 1 (2011); CHRISTENSEN, *supra* note 10, at 105 (explaining that “SBP acts somewhat like an insurance plan”); HOSEK ET AL., *supra* note 8, at 3 (noting that despite eligibility for other government assistance programs, “SBP is the *only* means by which a servicemember can ensure that his or her immediate family will be provided with continued government income under any and all circumstances . . . after the member’s death” (emphasis added)).

a form of survivor protection, the House Armed Services Committee recognized that “retired pay [is] an earned entitlement, and the government ha[s] a ‘moral obligation’ to provide it to retirees and their survivors.”³⁵ Thus, the SBP became part of the DoD’s Military Retirement Fund,³⁶ which the Defense Finance and Accounting Service (DFAS) manages.³⁷ Although originally offset by Social Security payments, the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2005 mandated elimination of this offset over the next three fiscal years.³⁸

For retirees, the cost of SBP protection is “shared by the retiree (in the form of reductions from monthly military retired pay at the time of the retiree’s death), the government, and possibly the beneficiary (under certain types of coverage).”³⁹ Although service members technically have the “option” of participating in the SBP at the onset of retirement,⁴⁰ retirees are, by default, automatically enrolled and must proactively opt out of enrollment within a specified time period.⁴¹ Enrollees pay a percentage of their retired paycheck—capped at 6.5%—in exchange for the right of their dependents to receive a monthly SBP annuity following their death.⁴² This SBP annuity represents “55 percent of the base amount

(quoting U.S. DEP’T OF DEF., OFFICE OF THE SEC’Y OF DEF. FOR PERSONNEL AND READINESS, *MILITARY COMPENSATION BACKGROUND PAPERS 735* (7th ed., 2011), www.loc.gov/tr/frd/pdf-files/Military_Comp-2011.pdf).

³⁵ HOSEK ET AL., *supra* note 8, at 3 (quoting the *Inquiry into Survivor Benefits: Hearing Before the Special Subcomm. on Survivor Benefits of the H. Armed Services Comm.*, 91st Cong. (1970)).

³⁶ U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-837R, *ACTUARIAL SOUNDNESS OF THE DoD SURVIVOR BENEFIT PLAN PROGRAM 1* (2006).

³⁷ KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, *MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 1* (2018).

³⁸ HOSEK ET AL., *supra* note 8, at 12; *see also* National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 644, 118 Stat. 1817, 1960–62 (2005); Higdon, *supra* note 30, at 447.

³⁹ CONG. RESEARCH SERV., RL31664, *THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 1* (2011).

⁴⁰ 10 U.S.C.S. § 1448 (LexisNexis 2019) (describing the requirements for opting out of SBP); *Survivor Benefit Plan*, MIL. OFFICERS ASS’N OF AM., <http://www.moaa.org/sbp/> (last visited June 12, 2019).

⁴¹ HOSEK ET AL., *supra* note 8, at 5. *See also* *Changing Your SBP Coverage*, DEF. FIN. AND ACCT. SERV., <https://www.dfas.mil/retiredmilitary/provide/sbp/change.html> (last visited June 12, 2019) (describing the limited options for changing SBP coverage and cancelling SBP coverage after three years of payments).

⁴² CONG. RESEARCH SERV., RL31664, *THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 4* (2011); Higdon, *supra* note 30, at 445; *Survivor Benefit Plan – What Does it Mean to Me?*, MILITARY MONEY MANUAL,

of [their] retired pay.”⁴³ Once a retiree makes a total of 360 monthly payments over thirty years and reaches the age of seventy, the individual is considered “paid up” and no longer makes monthly payments.⁴⁴ In FY 2016, retirees paid \$1.41 billion in SBP premiums, which represented approximately fifty-five percent of the total \$2.56 billion SBP “liability.”⁴⁵

Following September 11, 2001, Congress amended the original SBP statute to allow “servicemembers’ survivors to receive SBP even if the member was not retirement eligible,” thereby providing “some measure of financial relief and support to the survivors of servicemembers who died in the line of duty”⁴⁶ Thus, in its current form, the SBP provides for the survivors of both retirees and “active duty and reserve-component military personnel upon the death of a servicemember.”⁴⁷ Annuity coverage is calculated “as if the servicemember was medically retired at

<https://militarymoneymannual.com/survivor-benefit-plan/>. See also *Survivor Benefit Plan*, *supra* note 40 (explaining that because retired pay stops with the death of the service member, SBP is “one way to ensure a continued financial benefit for . . . a . . . survivor”).

⁴³ HOSEK ET AL., *supra* note 8, at 5 (quoting U.S. DEP’T OF DEF., OFFICE OF THE SEC’Y OF DEF. FOR PERSONNEL AND READINESS, MILITARY COMPENSATION BACKGROUND PAPERS 738 (7th ed., 2011), www.loc.gov/tr/frd/pdf-files/Military_Comp-2011.pdf); see also 10 U.S.C.S. § 1451(a) (LexisNexis 2019); CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 2 (2011); McCarl, *supra* note 6, at 417.

⁴⁴ *Survivor Benefit Plan*, *supra* note 40; see also CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 5 (2011); HOSEK ET AL., *supra* note 8, at 13.

⁴⁵ HOSEK ET AL., *supra* note 8, at 4 (quoting DEP’T OF DEF., OFFICE OF THE ACTUARY, STATISTICAL REPORT ON THE MILITARY RETIREMENT SYSTEM, FISCAL YEAR 2016 at 237 (2018),

https://actuary.defense.gov/Portals/15/Documents/MRS_StatRpt_2017%20v4.pdf?ver=2018-07-30-094920-907) (further explaining that the “government subsidy in the previous fiscal year was 64.6 percent of the SBP cost”); see also CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 16 (2011) (noting that from 1973 through 2005, “the cumulative cost [of SBP] to retirees was \$22,595,064,000 while cumulative payments to families was \$30,923,249,000,” a delta of almost \$8.5 billion).

⁴⁶ Higdon, *supra* note 30, at 446–47; see also National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107, § 642, 115 Stat. 1012, 1151 (2001); *Benefits for Survivors: Is America Fulfilling Lincoln’s Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America) (“[SBP] was expanded in the 108th Congress to include all line of duty deaths without the requirement of 20 years of active duty service after September 10, 2011.”); Berquist, *supra* note 11.

⁴⁷ Higdon, *supra* note 30, at 445.

100 percent disability,”⁴⁸ and, due to the nature of this “implied coverage,”⁴⁹ active duty members do not pay premiums.⁵⁰ In other words, because an individual who dies in the line of duty cannot fulfill either of the traditional requirements to earn retirement benefits,⁵¹ the benefit is “essentially free.”⁵² For these members, the base amount of retired pay for SBP annuity purposes is “computed as seventy-five percent of their high-thirty-six basic pay.”⁵³ High-thirty-six earnings constitute the “average basic pay for the 36-month period . . . the member earned the highest rate of basic pay.”⁵⁴ Put a different way, annuities equal fifty-five percent of the service member’s theoretical retired pay.⁵⁵

The current version of the SBP recognizes six classes of beneficiaries: (1) spouse; (2) spouse and children; (3) children; (4) former spouse; (5) former spouse and children; and (6) persons with an insurable interest.⁵⁶ For surviving spouse recipients of the SBP, benefits are paid until the surviving spouse dies but terminate upon the spouse’s remarriage before the age of fifty-five, assuming the marriage took place on or after 14

⁴⁸ *Benefits for Survivors: Is America Fulfilling Lincoln’s Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 35 (2005) (statement of Kathleen B. Moakler, Deputy Director of Government Relations, National Military Family Association). See also CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 11, 12 (2011) (explaining that “the legislation assumes the level of disability is 100”).

⁴⁹ Higdon, *supra* note 30, at 447; see also 10 U.S.C. § 1448(d) (LexisNexis 2019).

⁵⁰ HOSEK ET AL., *supra* note 8, at x, 5, 7; see also Major Heidi M. Steele, *Making the Most Out of Your Pay and Allowances: Military Income and Tax-Free Benefits*, ARMY LAW., Oct. 2016, at 45; *Survivor Advocacy Issues*, *supra* note 17.

⁵¹ McCarl, *supra* note 6, at 418. See also *Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.*, 115th Cong. 4 (2016) (statement of Edith G. Smith, Surviving Spouse) (quoting former Sen. Kay Bailey Hutchison).

⁵² CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 15 (2011); see also *Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.*, 115th Cong. 4 (2016) (statement of Edith G. Smith, Surviving Spouse); HOSEK ET AL., *supra* note 8, at x; McCarl, *supra* note 6, at 418.

⁵³ HOSEK ET AL., *supra* note 8, at 7 (quoting DEP’T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 7B, ch. 46 (Mar. 2018), https://comptroller.defense.gov/Portals/45/documents/fimr/Volume_07b.pdf); see also Steele, *supra* note 50, at 45 (noting that “[t]his is effectively equal to seventy-five percent of full retired pay”).

⁵⁴ CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 12 (2011).

⁵⁵ See 10 U.S.C.S. § 1451(a) (LexisNexis 2019).

⁵⁶ CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 2 (2011); Higdon, *supra* note 30, at 447.

November 1986.⁵⁷ If the surviving spouse's second marriage "ends by death, divorce, or annulment, DFAS will reinstate the SBP[] annuity"⁵⁸

In FY 2016, the SBP had 1.1 million enrollees and 321,476 annuitants, of which 10,442 represented annuitants of active duty deaths.⁵⁹ Most of the survivors of active duty members were categorized as "young survivors" (under the age of forty), though this group typically accounts for only three percent of the total survivor population in any given year.⁶⁰ Thus, despite the concurrent wars in Iraq and Afghanistan, the majority of the surviving spouse population remains over the age of sixty-five.⁶¹

B. History and Development of DIC

In 1956, the Servicemen's and Veteran's Survivor Benefit Act established the VA Dependency Indemnity Compensation.⁶² Dependency

⁵⁷ *Guide to Survivor Benefits*, DEF. FIN. AND ACCT. SERV. 6 (Aug. 2014), https://www.dfas.mil/dam/jcr:fbbe66f5-e3c2-4e17-90d2-7681e1de3ddc/Draft_SBP%20Guide%20Book%20Aug%202014_20150323.pdf; *see also* 10 U.S.C.S. § 1450(b) (LexisNexis 2019); CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 5 (2011); HOSEK ET AL., *supra* note 8, at 8; *Survivor Benefit Plan*, *supra* note 40.

⁵⁸ *Guide to Survivor Benefits*, *supra* note 57, at 6.

⁵⁹ HOSEK ET AL., *supra* note 8, at xi, 3. *See also* KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 1 (2018). According to the slightly more recent Kamarck study, the FY 2017 figures were as follows: 276,820 survivors received SBP annuity payments, which translated to \$3.7 billion in DoD expenditures. Of this group, 10,295 represent survivors of active duty service members, including 3,377 spouses and 6,918 children. *Id.*

⁶⁰ *See* CHRISTENSEN, *supra* note 10, at 99. Note that these statistics are associated with "survivors" as defined by those surviving spouses receiving DIC. Because, however, SBP annuitants of members who died on active duty are, in the vast majority of cases, almost always also entitled to DIC, the available data associated with this particular category of surviving spouses is practically identical for both SBP and DIC purposes. *See, e.g., Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America) (explaining that "practically all active duty deaths result in the survivor receiving only a DIC payment" due to the effect of the offset on line-of-duty deaths).

⁶¹ *See* CHRISTENSEN, *supra* note 10, at 100.

⁶² The Servicemen's and Veterans' Survivor Benefits Act, Pub. L. No. 84-881, 70 Stat. 857, 862-67 (1956) (codified as amended at 38 U.S.C. §§ 1310-1318 (2012)). *See also*

Indemnity Compensation “provid[es] a modest annuity for survivors whose death is determined to have been caused by military service.”⁶³ As amended, DIC is paid to three categories of survivors of service members or veterans who died on or after 1 January 1957 from: “(1) a disease or injury incurred or aggravated in the line of duty while on active duty or active duty training; or (2) an injury incurred or aggravated in the line of duty while on inactive duty training; or (3) a disability compensable under laws administered by the VA.”⁶⁴ Unlike the SBP, DIC has always been available to non-retirees.⁶⁵ In addition, between the SBP and DIC, the latter “tends to be [the] better benefit” because it is nontaxable and need not be reported in gross income.⁶⁶ The SBP, on the other hand, is taxable.⁶⁷

Eligible DIC beneficiaries include the service member’s surviving spouse, children, and parents.⁶⁸ For surviving spouse annuitants, DIC is

CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 12 (2011).

⁶³ *SBP Offset for Survivors*, MIL. OFFICERS ASS’N OF AM., <http://takeaction.moaa.org/survivors> (last visited June 12, 2019); *see also* HOSEK ET AL., *supra* note 8, at 9 (“The purpose of DIC is ‘to authorize a payment to the surviving dependents of a deceased military member partially in order to replace family income lost due to the member’s death and partially to serve as reparation for death.’”) (quoting U.S. DEP’T OF DEF., OFFICE OF THE SEC’Y OF DEF. FOR PERSONNEL AND READINESS, MILITARY COMPENSATION BACKGROUND PAPERS 693 (7th ed., 2011), www.loc.gov/rr/frd/pdf-files/Military_Comp-2011.pdf); Gina Harkins, ‘Widow’s Tax’ Costs Families of Fallen Servicemembers \$15,000 Each Year, MIL. OFFICERS ASS’N OF AM. (Mar. 21, 2017) (on file with author) (noting that DIC is intended to compensate for “economic losses . . . suffered as a result of a veteran’s death”).

⁶⁴ CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 12–13 (2011); *see also* 38 U.S.C. § 1310 (2012) (defining those service member and retiree deaths that entitle survivors to dependency and indemnity compensation).

⁶⁵ McCarl, *supra* note 6, at 418.

⁶⁶ *Benefits for Survivors: Is America Fulfilling Lincoln’s Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America); McCarl, *supra* note 6, at 418; Steele, *supra* note 50, at 46; *Survivor Benefit Plan*, *supra* note 40.

⁶⁷ *Survivor Benefit Plan*, *supra* note 40 (noting, however, that SBP [p]remiums are tax-deductible and subsidized by the federal government.”); *see also* HOSEK ET AL., *supra* note 8, at 10; McCarl, *supra* note 6, at 418.

⁶⁸ 38 U.S.C. § 1310(a) (2012). Note that DIC will only be paid to a parent if he or she was financially dependent on the deceased service member or veteran, subject to income limitations. *See Parents Dependency and Indemnity Compensation*, U.S. DEP’T OF VETERANS AFFS., http://benefits.va.gov/Pension/current_rates_Parents_DIC_pen.asp (last visited June 12, 2019).

awarded at a flat rate of \$1319.04—or just over \$15,000 per year—regardless of the rank or time-in-service of the service member at time of death.⁶⁹ In addition, spousal beneficiaries are eligible to receive \$311.64 per dependent child and a “two-year flat-rate monthly transition allowance of \$270 . . . [for] any dependent children.”⁷⁰ Spousal DIC ceases upon remarriage before age fifty-seven, though the termination of the remarriage by death or divorce restores the surviving spouse’s eligibility to receive DIC.⁷¹

As of FY 2017, a total of 411,390 survivors received service-connected death benefits for an estimated \$6.53 billion in annual payments.⁷² Of the total number of survivors, 394,028 represented surviving spouses.⁷³ Approximately 1.13% of these spouses were under the age of thirty-five, 7.15% were between the ages of thirty-six and fifty-six, 50.93% were fifty-seven to seventy-five years old, and 40.29% were over the age of seventy-five.⁷⁴

C. Effects of the SBP-DIC Offset

As the genesis and development of each benefit suggests, the SBP and DIC are far from one in the same. While the SBP is a “voluntary, member-purchased annuity provided by DoD, allowing a continuation of a portion

⁶⁹ *Dependency and Indemnity Compensation – Effective 12/1/18*, U.S. DEP’T OF VETERANS AFFS., https://benefits.va.gov/Compensation/current_rates_dic.asp (last visited June 12, 2019); see also CHRISTENSEN, *supra* note 10, at 107 (noting that “because the goal of DIC . . . is not well defined, we cannot determine definitively whether DIC is about at the right level”). For sources citing previous DIC rates, see also 38 U.S.C. § 1311(a) (2012) (specifying that DIC will be paid to a surviving spouse at the monthly rate of \$1,154); *Survivor Advocacy Issues*, *supra* note 17 (referencing DIC payments of \$1,258 per month); *The Widow’s Tax*, *supra* note 5 (also referencing DIC payments of \$1,258 per month).

⁷⁰ HOSEK ET AL., *supra* note 8, at 10; see also 38 U.S.C. § 1311 (2012) (specifying that surviving spouses will receive \$286 for each dependent child under the age of eighteen, plus an additional \$250 monthly payment, subject to inflation adjustments, for two years following the service member’s death).

⁷¹ 38 U.S.C. § 103(d) (2012); see also HOSEK ET AL., *supra* note 8, at 10; *Dependency and Indemnity Compensation – Effective 12/1/18*, *supra* note 69 (noting that “a surviving spouse who remarries on or after December 16, 2003, and on or after attaining age 57, is entitled to continue to receive DIC”).

⁷² U.S. DEP’T OF VETERANS AFFS., VETERANS BENEFITS ADMINISTRATION ANNUAL BENEFITS REPORT FISCAL YEAR 2017 at 70 (2017), https://www.benefits.va.gov/REPORTS/abr/docs/2017_abr.pdf.

⁷³ *Id.* at 114.

⁷⁴ *Id.* at 115.

of military retired pay upon the death of the service member,” DIC is a “VA-paid monetary benefit for eligible survivors whose sponsors died of a service-connected injury or disease.”⁷⁵ Families of active duty members are often entirely unaware of their post-9/11 eligibility for the SBP, in part because they pay no premiums. As a result, the loss of this benefit is inconsistent with public policy but potentially less financially onerous than the penalties paid by retirees.⁷⁶ For these family members, the loss of decades of monthly payments is devastating, especially when they have no idea at the time of electing to retain SBP coverage that the retiree might eventually pass away from a latent, service-connected ailment. One can imagine the public outrage if, for instance, “a private life insurance company refused to pay the beneficiary of a life insurance policy, simply because the policy holder had other coverage.”⁷⁷ However, in simplified terms, that is the reality of the SBP-DIC offset.

⁷⁵ Lieutenant General Dana T. Atkins, USA Retired, *Eliminate the “Widows Tax” (SBP-DIC Offset)*, MIL. OFFICERS ASS’N OF AM., (on file with author); see also Breaux, *supra* note 5 (noting that the two benefits serve two different populations, which, in a small percentage of cases, happen to overlap). Cf. PATRICK MACKIN, RICHARD PARODI, & MARK DYE, REVIEW OF MILITARY DEATH BENEFITS FINAL REPORT 45 (2004) (on file with author) (“[B]oth SBP and DIC replace income lost to the family because of a service-connected disability resulting in the death of the member [for active duty deaths]. We found no evidence that other employers provide overlapping benefits in such a manner.”). Notably, however, the Mackin report did not consider the effect of the SBP-DIC offset on survivors of retirees and “offer[ed] no recommendations in this area.” *Id.*

⁷⁶ On the other hand, expanding eligibility for what was previously a retirement benefit (SBP) and combining it with the receipt of a contingency-based annuity payment (DIC) has arguably caused more confusion and contentious backlash than it was worth. These two types of benefits are as different as apples and oranges; they are intended for differently situated populations and serve different purposes. Unfortunately, in electing to extend SBP to active duty survivors in the aftermath of September 11th, lawmakers inadvertently created false expectations for these individuals without anticipating the problems inherent in funding and managing a benefit originally created for a very different survivor scenario. Instead, perhaps lawmakers should have created a separate, long-term compensation program for active duty survivors to ensure financial stability, particularly in the years following the unexpected death of a young service member. Alternatively, Congress could also have revamped and increased DIC to make it a more generous form of income replacement for active duty deaths. Either way, what was originally a well-intentioned policy decision has now mushroomed into a public relations fiasco. At this point, it has become increasingly difficult, if not impossible, to turn back the clock on the extension of SBP to the active duty survivor population. Instead of taking ownership of the ongoing conundrum, lawmakers tend to avoid the issue entirely or attempt to make minor amends year after year without addressing the root of the problem. See discussion *infra* Section IV.B.

⁷⁷ Caruso, *supra* note 5.

Understanding the legal basis for the offset is somewhat complicated and requires the concurrent reading of several different statutes. The DIC eligibility statute pertaining to surviving spouses of veterans states that, “notwithstanding any other provision of law . . . , no reduction of benefits under such provision of law shall be made by reason of such individual’s eligibility for benefits under this section.”⁷⁸ Enter then the highly controversial “other provision of law,” namely the SBP annuity payment structure:

If . . . the surviving spouse or former spouse of [the eligible service member] is also entitled to dependency and indemnity compensation . . . , the surviving spouse or former spouse may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.⁷⁹

In other words, read together, these statutes require that “money paid from SBP . . . be reduced dollar-for-dollar by the amount paid by the VA’s DIC.”⁸⁰

As defenders of the offset correctly assert, “the DIC-SBP offset is not a new rule; it’s been part of the SBP program since it was created in its current form. It was part of the program when each retiring military family decided to elect SBP.”⁸¹ That being said, institutional knowledge of the offset is incredibly limited;⁸² most surviving spouses only learn of its existence once already subject to its penalties, and the reality of its

⁷⁸ 38 U.S.C. § 1311(e) (2012).

⁷⁹ 10 U.S.C.S. § 1450(c) (LexisNexis 2019); *see also* 10 U.S.C.S. § 1448 (LexisNexis 2019) (outlining the requirements for opting out of SBP, possible elections, and rules associated with changing beneficiaries).

⁸⁰ Baron, *supra* note 12. *See also* KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 15–16 (2018) (explaining that SBP, when first enacted in 1972 was intended to serve as a substitute or supplement for existing federal benefits, like Social Security and VA payments, rather than providing an *additional* financial benefit that did not previously exist).

⁸¹ Horrell, *supra* note 9, comment to Don Berry (July 25, 2018); *see also* Hammersly, *supra* note 21, at 10A (noting that a spokesman for the DoD claimed “information about the VA’s payment’s impact is provided to service families in meetings and in printed materials”).

⁸² Hammersly, *supra* note 21, at 10A. According to a former Veterans Affairs benefits counselor, despite the DoD attempts at sharing information about the offset through pamphlets, “many new widows [are still] blindsided by it.” *Id.*

financial impact is, for many of them, debilitating.⁸³ Often forced to visit numerous administrative agencies to sign a mountain of paperwork within days of their husbands' death, surviving spouses in a "Widow's Fog"⁸⁴ are unable to comprehend the convoluted SBP-DIC offset until months or even years later.⁸⁵ John Tilford, a retired Army Reserve Colonel and part-time VA counselor, described the offset notification process to new widows as follows:

You start out speaking to a lady who's in horrible shape because she's just lost her husband When you fully describe [the offset], the widows raise their eyes and look at you like 'You've got to be kidding.' If the widows aren't already crying, they start. They suddenly realize they will be punished for the remainder of their lives because their spouse gave his life for their country.⁸⁶

As a result, the majority of surviving spouses find themselves blindsided by the long-term consequences of the offset, and, for those who have no plans to remarry, these consequences are palpable.⁸⁷ For example,

⁸³ See Hammersly, *supra* note 21, at 10A (explaining that "too many widows . . . don't know the law's impact, or even its existence until their spouses die"). Taronia Stanfield, whose husband died in 2009 from injuries related to military service, said she was in "total shock Those [SBP] premiums were paid in good faith. Not once in the meeting selling us the [SBP] annuity did anyone mention an 'offset' or 'Widow's Tax.'" *Id.* See also Berquist, *supra* note 11 (noting that most military retirees and active duty service members "have never heard of SBP, DIC, the offset, or how it financially could affect their own spouses").

⁸⁴ Janine Boldrin, *Their Forever War: Milspouses Continue to Carry the Burden of the Widow's Tax*, MIL. SPOUSE (Dec. 18, 2018), <https://militaryspouse.com/spouse-101/widows-tax/>. See also Telephone Interview with Dawn Wilson, surviving spouse of Captain Patrick Wilson (Nov. 3, 2018) ("I was in a fog at the time and I didn't care. I didn't want to talk about money and how I was benefiting from my husband's death.").

⁸⁵ See, e.g., Questionnaire Answers of Theresa Morehead, surviving spouse of Master Sergeant Kevin Morehead (Oct. 24, 2018) (on file with author) (noting that no one explained the SBP-DIC offset when she filled out paperwork with DFAS and VA representatives following her husband's death). When Theresa Morehead finally learned of its existence and experienced its impact, she felt "ANGRY, so unfair and should be illegal. They would not do that to any other government employee or anyone in congress." *Id.*

⁸⁶ Hammersly, *supra* note 21, at 10A.

⁸⁷ See, e.g., Telephone Interview with Teresa Priestner, surviving spouse of Chief Warrant Officer 4 John Priestner (Oct. 28, 2018) ("John sat me down and went through exactly what he thought I'd receive in benefits if anything ever happened to him. He believed I would receive SBP plus DIC, and we had no reason to think otherwise."). See also Hammersly, *supra* note 21, at 11A. To provide another example, Kathy Prout, who

Susie Brodeur, whose children were three and seven at the time of her husband's death in Afghanistan, has been alone for over six years and "does the job of two people and then some. It's not easy. When the government takes away the money from the lone survivor—the spouse—it really hurts."⁸⁸ Dan Merry, the vice president of the Military Officers Association of America (MOAA), characterized the SBP-DIC offset as "grossly unfair" and argued it "should be repealed. When military service causes the death of the servicemember, VA indemnity pay should be paid in addition to the SBP annuity—not subtracted from it."⁸⁹ Expressing stronger sentiments, Ted Painter, the national legislative director for the American Military Retirees Association (AMRA), referred to the offset as "arguably the most egregious and unfair theft of military related benefits currently in existence."⁹⁰

Approximately 67,000 surviving spouses are impacted by the offset,⁹¹ which represents approximately seventeen percent of all survivors.⁹² Of those affected, "65 percent receive zero in SBP and only \$15,095 a year in [total] income."⁹³ In other words, due to the offset, most surviving spouses lose out on approximately \$15,000 annually in expected government benefits, hence the moniker of the 'widow's tax.'⁹⁴ Those

had three children when her husband was killed in an aviation crash in 1995, suffered a 75 percent drop in household income due in large part to the offset; in her words, "[h]ow do you live on this?" *Id.*

⁸⁸ Harkins, *supra* note 63. Susie Brodeur described the loss of her husband's income as a "big adjustment," noting that "[t]he fact that the government is withholding from us is really sad . . . It really surprises me that they're not taking care of all families as well as they possibly can." *Id.*

⁸⁹ Harkins, *supra* note 63.

⁹⁰ Breaux, *supra* note 5. In addition, Rep. Dean Dunn, a cosponsor of H.R. 846, the Military Surviving Spouses Equity Act, called the offset an "appalling injustice" that punishes families who dutifully paid for SBP. *Id.*

⁹¹ Atkins, *supra* note 75.

⁹² CHRISTENSEN, *supra* note 10, at 100; *see also* Boldrin, *supra* note 84 (noting that the total number of affected survivors is a "relatively small group, and that makes solving the offset harder because it can be easily dismissed").

⁹³ Berquist, *supra* note 11. *See also* Hammersly, *supra* note 21, at 10A ("More than three of five affected widows and widowers lose every dollar of their expected survivor annuities according to Defense Department data."); Shane III, *supra* note 20 (noting that the loss of thousands of dollars of dollars a year in benefits "creates significant financial problems for families who are already dealing with the death of a loved one").

⁹⁴ Boldrin, *supra* note 84; Harkins, *supra* note 63; Leo Shane III, 'Widow's Tax' Fix in Defense Budget Compromise Would Raise Some Tricare Co-pays, MIL. TIMES (Nov. 8, 2017), <https://www.militarytimes.com/news/pentagon-congress/2017/11/08/widows-tax-fix-in-defense-budget-compromise-would-raise-some-tricare-co-pays/>. *See also* Hammersly, *supra* note 21, at 10A (noting that the DoD defends the offset by pointing

spouses of “lower-rank and long-retired service members” tend to be hit hardest by this “reduction in expected income.”⁹⁵ In theory, “the total of DIC and offset SBP payments combined is, at least, equal to the full SBP benefit.”⁹⁶ That is of little comfort, however, to retiree survivors, for most of whom the offset wipes out the annuity the military retiree paid for over several decades.⁹⁷ To add insult to injury, although retiree survivors receive a proportional refund of SBP premiums, this refund includes no interest,⁹⁸ thereby amounting to the equivalent of a “tax-free” loan for the government.⁹⁹ Furthermore, many service-disabled retirees have “limited

out that widows “receive the higher of the two annuities,” which generally allows them to benefit from DIC’s tax-exempt status); Strobridge et al., *supra* note 28. In speaking of her late husband, surviving spouse Mary Craven asserted that “[t]he service caused his death. The service should pay extra for that, rather than cancelling part of the insurance he bought for me. It’s as if they’re saying that it was his own fault he died.” *Id.* Similarly, for Sarah Castile, whose husband died in 2011 due to service-related illness, she and her husband paid a total of twenty-six years for the SBP annuity, totaling approximately \$90,000. *Id.* She has now lost approximately \$100,000 in expected benefits since her husband’s death: “We’re paying for their death.” *Id.* Caruso, *supra* note 5.

⁹⁵ Hammersly, *supra* note 21, at 10A. See also U.S. GOV’T ACCOUNTABILITY OFF., GAO-HEHS-95-30, VETERANS’ BENEFITS—BASING SURVIVORS’ COMPENSATION ON VETERANS’ DISABILITY IS A VIABLE OPTION 10 (1995) (noting that SBP benefits for the surviving spouses of higher ranking service members “are less likely than the payments of survivors of enlisted personnel to be totally offset by DIC benefits”).

⁹⁶ CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 13 (2011).

⁹⁷ *SBP Offset for Survivors*, *supra* note 63; see also Breaux, *supra* note 5. In the case of Debra Tainsh, whose husband died of an illness caused by Agent Orange exposure during his service in Vietnam, she receives a monthly income of \$2,000 instead of the \$3,525 she expected: “It’s a matter of the Department of Defense . . . not being fair by any means to the widows of retired military personnel who died of service-connected issues.” *Id.* For additional examples of the financial impact on retirees, see *Legislative Presentations of NASDVA, FRA, GSW, BVA, JWV, MOPH, MOAA: Hearing Before the S. Comm. on Veterans’ Affairs*, 116th Cong. (2019), <https://www.veterans.senate.gov/imo/media/doc/3%20-%20GSW%20Testimony%2003.12.19.pdf> (statement of Crystal Wenum, National President, Gold Star Wives of America).

⁹⁸ Hammersly, *supra* note 21, at 10A (“[T]hat refund [in premiums] doesn’t include interest on premiums paid, often for decades.”). See also Horrell, *supra* note 9; Strobridge et al., *supra* note 28; *Survivor Advocacy Issues*, *supra* note 17.

⁹⁹ *Benefits for Survivors: Is America Fulfilling Lincoln’s Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America); see also Breaux, *supra* note 5. According to Kathy Prout, whose late husband died in the line of duty after serving in the Navy for twenty-nine years, the DoD “is not honoring the contract the deceased purchased People are paying premiums for a benefit they may not get.” *Id.*

opportunities to purchase additional life insurance, and [private] policies . . . impose exorbitant premiums,”¹⁰⁰ which makes the decision *not* to opt out of SBP look more like a contract of adhesion. For others, the lost opportunity to benefit from private life insurance represents an added source of frustration. Take, for example, retired Chief Master Sergeant John Gibbons and his wife, Elly Gibbons, who were entirely unaware of the offset until John passed away from a service-connected illness.¹⁰¹ At this point, Mrs. Gibbons wished they had invested in a private insurance plan not subject to the federal offset; however, she and her late husband both believed “until too late that the military’s plan was ‘a guaranteed source of income.’”¹⁰²

Between retiree surviving spouses and active duty surviving spouses, the offset arguably penalizes the former to the greatest extent of the law; for years, retiree families elect to forfeit a portion of their monthly retirement check in exchange for a benefit they expect to receive. On the other hand, Congress extended the SBP benefit to active duty surviving spouses in response to the challenges of a sudden, unexpected loss for which a family cannot adequately prepare; thus, the loss of this relatively new entitlement ultimately does little to help those Congress intended for

¹⁰⁰ *Eliminating the Widows’ Tax*, *supra* note 10.

¹⁰¹ Some might argue that the Gibbons family could have researched the offset and asked more questions about its potential effect on receipt of SBP before subjecting themselves to its provisions. The problem, in large part, is the uncertainty of DIC payments. Unless a retiree knows at the time of retirement that he or she will succumb to a service-related illness at some point in the future, choosing to remain invested in SBP often seems like the safest and surest financial option available at the time; SBP ensures that whether the survivor dies from a service-connected condition or passes away from unrelated causes, the surviving spouse will receive *some* financial benefit, though perhaps not as much as the retiree anticipated. Furthermore, despite a persistent lack of knowledge regarding the existence of the offset in the military community, some of the tools now available to families to assist them in planning for the future did not exist at the time retirees chose not to opt out of SBP. See, e.g., *SBP Financial Analysis Tools*, OFF., OF THE ACTUARY, <https://actuary.defense.gov/Survivor-Benefit-Plans/> (last visited June 12, 2019); MY ARMY BENEFITS, <https://myarmybenefits.us.army.mil/> (last visited June 12, 2019).

¹⁰² Hammersly, *supra* note 21, at 11A. See also *Legislative Presentations of NASDVA, FRA, GSW, BVA, JWV, MOPH, MOAA: Hearing Before the S. Comm. on Veterans’ Affairs*, 116th Cong. (2019), <https://www.veterans.senate.gov/imo/media/doc/3%20-%20GSW%20Testimony%2003.12.19.pdf> (statement of Douglas Greenlaw, National Commander, Military Order of the Purple Heart) (referring to SBP as a “personal decision by each retiree to sacrifice a portion they receive over their lifetime in order to provide some financial stability to their survivors . . . similar to the decision to purchase a life insurance policy”).

it to benefit.¹⁰³ In theory at least, SBP has the potential to provide an invaluable “income supplement” to active duty surviving spouses, many of whom “are on the move, and . . . don’t have steady careers.”¹⁰⁴ As the last two decades of patriotic fervor suggest, supporting the sacrifices of active duty family members who “have to put down roots every few years in a new place, make new friends, [and] learn new school systems . . . alone”¹⁰⁵ is the equivalent of supporting the troops themselves. Due to the interplay of SBP and DIC, however, most surviving spouses never see a dime of what Congress authorized them to receive in recognition of the exigencies of military life after September 11th.¹⁰⁶ Surviving spouse Traci Voelke, whose husband was killed in Afghanistan, summarized the human cost for those families who have already sacrificed more than most: “I lost my husband in the middle of his career, along with his income and earning potential. Without the additional SBP, my monthly payments aren’t even half of what he was earning.”¹⁰⁷

¹⁰³ *Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.*, 115th Cong. 4 (2016) (statement of Edith G. Smith, Surviving Spouse) (quoting former Sen. Kay Bailey Hutchison) (noting that Congress “recognized that those active duty service members who died the youngest paid the ‘highest price’ and made the ‘greatest sacrifice’”).

¹⁰⁴ Harkins, *supra* note 63 (quoting surviving spouse Traci Voelke).

¹⁰⁵ *Id.*

¹⁰⁶ *See Benefits for Survivors: Is America Fulfilling Lincoln’s Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America) (noting that “this expanded SBP eligibility [is] a hollow benefit to the younger widows” because practically all active duty deaths result in the survivor receiving the equivalent of a DIC payment due to the mandatory SBP reduction); *see also* Questionnaire Answers of Theresa Morehead, surviving spouse of Master Sergeant Kevin Morehead (Oct. 24, 2018) (on file with author) (“I feel cheated in more ways than you can imagine.”). Put another way, because most active duty deaths are considered to be “in the line of duty,” active duty surviving spouses qualify for DIC and, therefore, are subject to the SBP-DIC offset. For a more detailed discussion on line-of-duty determinations and their effect on the receipt of benefits, see Major Aaron Lancaster, *Line of Duty Investigations: Battered, Broken, and in Need of Reform*, 225 MIL. LAW REV. 597 (2017); Major Melvin L. Williams, *In the Line of Duty? A Primer on Line of Duty Determinations and the Impact on Benefits for Soldiers and Families*, ARMY LAW., Nov. 2014, at 20.

¹⁰⁷ Harkins, *supra* note 63; *Cf. Benefits for Survivors: Is America Fulfilling Lincoln’s Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 77 (2005) (statement of Hon. Charles S. Abell, Principal Deputy Under Secretary of Defense) (asserting that “taken together, the surviving spouse with minor children will typically qualify for monthly benefits that are equal to or even exceed the former income of the member”). *See supra* note 76, discussing the problems inherent in attempting to extend SBP, a retirement benefit, to the active duty survivor population. Again, perhaps lawmakers should have considered

Although personal anecdotes provide powerful examples of the human consequences of the offset, the numbers also speak volumes. Consider, for instance, a retired Lieutenant Colonel (O-5) who served on active duty for twenty-two years. Theoretically, his retiree-purchased SBP annuities would total \$26,974 annually at the time of his death. For service-connected deaths, however, DIC totals approximately \$14,580 per year. As a result, his surviving spouse loses the difference of \$12,394 and keeps only the total amount of DIC, which although the higher of the two amounts, still results in an almost fifty percent reduction in potential benefits. Similarly, on the active duty side, for a Staff Sergeant (E-6) with fourteen years of active duty service, annual SBP annuities would equate to \$15,271, but DIC payments total \$14,580 annually. Thus, the Staff Sergeant's surviving spouse receives \$15,271, the higher of the two amounts, but he will still pay taxes on the \$691 difference between the two benefits.¹⁰⁸

A key point of contention among surviving military spouses is the fact that other service members, survivors, and surviving spouses of federal employees are not "penalized" for receipt of two separate benefits.¹⁰⁹ Former Senator Bill Nelson, who was once an insurance commissioner, stated that he knows of "no purchased annuity [like SBP] that would deny payment based on receipt of a different payment."¹¹⁰ Framed this way, the SBP-DIC is a blatant inequity. Notably, "no other federal surviving spouse is required to forfeit his or her federal annuity because military service caused his or her sponsor's death."¹¹¹ Although recipients of other concurrent federal benefits previously faced similar limitations, Congress has since eliminated comparable offsets. For example, before 2004, the "VA offset" prevented veterans from collecting both retirement pay and

increasing DIC payments in accordance with spousal income to cover the unanticipated costs of losing a young service member and his or her future earning potential. Instead, however, conflating the circumstances of retiree Families with those of active duty surviving spouses has only created more confusion and frustration among these two populations regarding what they are entitled to receive and why.

¹⁰⁸ Examples are adapted from the SBP and DIC figures provided in Strobridge et al., *supra* note 28. Note that these figures are based on prior calendar year rates for retirement pay purposes and DIC. Current DIC rates total \$1,319.04 per month and \$15,828.48 per year. See *Dependency and Indemnity Compensation – Effective 12/1/18*, *supra* note 69. For a similar example using current retirement, SBP, and DIC rates, see *infra* Appendix A.

¹⁰⁹ See Hammersly, *supra* note 21, at 10A.

¹¹⁰ Philpott, *supra* note 21.

¹¹¹ Boldrin, *supra* note 84.

VA disability pay; however, veterans who are at least fifty percent disabled and retired after twenty years can now collect both benefits.¹¹²

Similarly, when a disabled former service members retires from the Federal Civil Service, “the survivor [is] entitled to both the Civil Service survivor benefit and DIC, with no offset.”¹¹³ Kayce Lee, the surviving spouse of an active duty service member who died during physical training in 2011, finds this discrepancy particularly galling; she noted that “[t]he widows of federal civil service employees do not have [an] offset, nor would your wife if you died while a Congressman.”¹¹⁴ In addition, if surviving children are designated as SBP beneficiaries, “the surviving

¹¹² See *Concurrent Retirement and Disability Pay (CRDP)*, DEF. FIN. AND ACCT. SERV., <https://www.dfas.mil/retiredmilitary/disability/crdp.html> (last visited June 12, 2019). See also CONG. RESEARCH SERV., RL31664, *THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS* 14 (2011) (“[S]ome have claimed that if concurrent receipt or “special pays” for military retirees is allowed, such should also be afforded their survivors.”); McCarl, *supra* note 6, at 417 (“Concurrent Retirement and Disability Pay replaced Special Compensation Pay for Severely Disabled Military Retirees and is a ten-year phase-in program, designed for military retirees with 50% to 100% disability ratings to receive full concurrent benefits by 2014.”); Hammersly, *supra* note 21, at 10A. (“Congress changed the VA offset law in 2004 to allow veterans who were at least 50 percent disabled and retired after 20 years to collect both benefits without penalty.”); Philpott, *supra* note 21 (pointing out that the same military retirees advising lawmakers on the SBP-DIC offset “have themselves gotten legislative relief from dual compensation laws and the lifting of bans on concurrent receipt of both military retired pay and VA disability compensation”). See generally *Findings of the President’s Commission on Care for America’s Returning Wounded Warriors: Hearing Before the H.R. Comm. on Veterans’ Affairs*, 110th Cong. (2007).

¹¹³ *Benefits for Survivors: Is America Fulfilling Lincoln’s Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America); see also *Legislative Presentations of NASDVA, FRA, GSW, BVA, JWV, MOPH, MOAA: Hearing Before the S. Comm. on Veterans’ Affairs*, 116th Cong. (2019), <https://www.veterans.senate.gov/imo/media/doc/3%20-%20GSW%20Testimony%2003.12.19.pdf> (statement of Crystal Wenum, National President, Gold Star Wives of America) (“Cost of Living Adjustment (COLA) increases have been the only change in DIC since the flat rate was implemented in 1993. When DIC is compared to payments to surviving spouses of other federal employees, DIC lags behind by almost 12%.”); Atkins, *supra* note 75 (“No other federal annuity is structured with this offset; DIC is not deducted from federal survivor annuities for military veterans in civil service jobs.”); Strobbridge et al., *supra* note 28 (“No survivors of civilian retirees who also are disabled military veterans and die of a service-connected cause must forfeit any of their purchased survivor benefits to receive DIC.”); *The Widow’s Tax*, *supra* note 5 (emphasizing that “no other federal annuity [is] structured with this offset”).

¹¹⁴ Breaux, *supra* note 5. Kayce Lee also noted that her drastic change in financial circumstances has been an incredibly difficult adjustment: “We went from my husband making close to \$4,000 a month, to no husband or daddy period.” *Id.*

spouse avoids any offsets from the receipt of [DIC],”¹¹⁵ subject to age and disability cut-offs associated with minor SBP recipients.¹¹⁶ In this scenario, the surviving spouse has the option of collecting DIC while designating a child as the SBP beneficiary until the child reaches the age of eighteen.¹¹⁷ Even in this configuration, however, the surviving spouse is eventually limited to DIC as their sole source of income because the SBP benefit terminates when the child reaches the age of majority.¹¹⁸ Thus, in the case of a child who is already fourteen years old at the time of the service member’s death, the family collectively receives four years of “concurrent” SBP and DIC payments, followed by a lifetime of less than \$1,500 in monthly income for the surviving spouse.¹¹⁹ For surviving spouses without children at the time of the active duty service member’s death, there is no equivalent option for temporary relief; the offset takes effect immediately.¹²⁰ Thus, despite the prevalence of “support our

¹¹⁵ CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 12 (2011); *see also* Hammersly, *supra* note 21, at 10A (noting that children and parents of armed forces members are also exempt from any equivalent of the offset, as are “survivors of other federal workers who die in connection with their service”); *Eliminating the Widows’ Tax*, *supra* note 10 (emphasizing the offset does not apply to surviving military children, only to the spouse); *Survivor Advocacy Issues*, *supra* note 17 (explaining the exception for military children).

¹¹⁶ Due to these age cut-offs, designating a child as the recipient of the SBP benefit is not, in most cases, a viable option for the majority of retiree surviving spouses. *See* CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 6 (2011) (“A child becomes ineligible for an SBP benefit upon reaching age 18 (or 22, if a full-time student). A child who marries becomes ineligible to receive SBP benefits regardless of age.”).

¹¹⁷ *See Understanding SBP, DIC, and SSIA*, DEF. FIN. AND ACCT. SERV., <https://www.dfas.mil/retiredmilitary/survivors/Understanding-SBP-DIC-SSIA.html> (last visited Feb. 7, 2019).

¹¹⁸ *See Survivor Benefit Plan Overview*, MIL. COMPENSATION, <https://militarypay.defense.gov/Benefits/Survivor-Benefit-Program/Overview/> (last visited June 12, 2019).

¹¹⁹ *See SBP Costs and Benefits Spouse Coverage*, MIL. COMPENSATION, <https://militarypay.defense.gov/Benefits/Survivor-Benefit-Program/Costs-and-Benefits/Spouse-Coverage/> (last visited June 12, 2019) (noting that SBP is “designed to provide a *lifetime* monthly income for your surviving spouse after you die”) (emphasis added)).

¹²⁰ *See Office of Survivors Assistance FAQs*, U.S. DEP’T OF VETERANS AFF., <https://www.va.gov/SURVIVORS/FAQs.asp#FAQ8> (last visited June 12, 2019).

troops” rhetoric,¹²¹ in perhaps the ultimate irony, “[m]ilitary spouses are the only ones subject to this offset in the entire government.”¹²²

As if these discrepancies weren’t enough, a federal appeals holding delivered another “slap in the face” to the already beleaguered widow community and, in doing so, created yet another inequity.¹²³ Though worded somewhat unartfully, the DIC statute, as amended in 2003, states:

[I]n the case of an individual who is eligible for dependency and indemnity compensation under this

¹²¹ See, e.g., *Show Your Support for America’s Troops and Their Families*, USO, https://secure.uso.org/OM_RGR/?sc=WF18SRCH68&utm_source=bing&utm_medium=cpc&utm_campaign=Search_Nonbrand_Donate&utm_term=military%20%2Btroops&utm_content=Donate-Troops (last visited June 12, 2019); SUPPORT OUR TROOPS, <https://supportourtroops.org/> (last visited June 12, 2019). See also Lisa Hammersly, *Military Widows, Including Those in Arkansas, Still Fighting to Get Annuity with New Congress, Work Starts Anew*, ARK. DEMOCRAT GAZETTE (Dec. 30, 2018, 4:30 AM), https://www.arkansasonline.com/news/2018/dec/30/military-widows-still-fighting-to-get-a/?news-national&fbclid=IwAR07iEJyPDn0-YCBY_JkJKwevb7QgVNRDUtU9_0tIrZDNUnyBHhVUAM0nU0 (describing how some surviving spouses “cringe[] to hear congressional members and president speak glowingly of their support for military members and families”).

¹²² Berquist, *supra* note 11. For a detailed explanation of how SBP and DIC benefits compare generally to those available in the civilian sector, see CHRISTENSEN, *supra* note 10, at 27 (comparing benefits by salary level and employer type, including federal, military, large private employers, and small private employers); HOSEK ET AL., *supra* note 8, at 45 (concluding that cumulative SBP benefits tend to be comparable or greater than those benefits offered to survivors of federal civilian employees under FERS and those offered to survivors of private industry employees); MACKIN ET AL., *supra* note 75, at 66 (comparing death benefits across employers, to include military service members, federal civilian employees, contractors, and county police officers); U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-62, ANALYSIS OF VA COMPENSATION LEVELS FOR SURVIVORS OF VETERANS AND SERVICEMEMBERS 6 (2009) (finding that DIC generally provides higher payments than the Civil Service Retirement System (CSRS) and the Federal Employees’ Retirement System (FERS) but that DIC payments are typically lower than “payments to comparably paid federal employees under the federal workers’ compensation program known as [the Federal Employees’ Retirement System (FERS)]”); U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-814, SURVIVOR BENEFITS FOR SERVICEMEMBERS AND FEDERAL, STATE, AND CITY GOVERNMENT EMPLOYEES 4–5 (2004) (concluding that military survivor benefits compare in type but not amount to benefits offered by federal, state, and city government entities who die in the line of duty and noting specifically that supplemental benefits paid to survivors of deceased government employees in high-risk occupations “can result in lump sum and recurring payments . . . being generally higher than those for survivors of servicemembers”).

¹²³ See Hammersly, *supra* note 21, at 10A. See also Boldrin, *supra* note 84; *Survivor Advocacy Issues*, *supra* note 17 (noting that “no other federal survivor is required to remarry to avoid a reduction in his or her survivor annuity eligibility”).

section by reason of [remarriage after the age of 57] who is also eligible for benefits under another provision of law by reason of such individual's status as the surviving spouse of a veteran, then . . . no reduction in benefits under such other provision of law shall be made by reason of such individuals' eligibility under this section.¹²⁴

Thus, as of 1 January 2004, surviving spouses who remarry after attaining the age of fifty-seven are technically no longer subject to the SBP-DIC offset and can collect full SBP and DIC payments simultaneously.¹²⁵ This “bizarre” technicality¹²⁶ is the combined result of the Veterans Benefit Act of 2003, federal law, and *Sharp v. United States*, a 2009 federal appeals case that reiterated what the plain language of the law already stated.¹²⁷ Although the government in *Sharp* argued that Congress could not have possibly intended to implement this “ridiculous remarriage rule,”¹²⁸ the court found otherwise, citing the lower court's opinion: “The 2003 legislation in all likelihood reflected Congress's intent to repeal the DIC-SBP offset for a small group of surviving spouses as a first step, until such time as Congress could be persuaded to repeal the offset altogether.”¹²⁹ Not surprisingly, the appellees won. Not only did the court hold that the law is written to allow for receipt of both benefits for surviving spouses who remarry after age fifty-seven, but the government also had to pay thousands of dollars in back pay to the appellees for years of denied benefits.¹³⁰

¹²⁴ The Veterans Benefit Act of 2003, Pub. L. No. 108-183, § 101, 117 Stat. 2651, 2652–53 (2003) (codified as amended at 38 U.S.C. §§ 1310–1318 (2012)).

¹²⁵ See CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 13 (2011); Boldrin, *supra* note 84.

¹²⁶ Caruso, *supra* note 5; see also Boldrin, *supra* note 84 (calling the remarriage offset elimination rule “odd”); *Survivor Advocacy Issues*, *supra* note 17 (referring to the *Sharp* holding as the “ultimate irony”).

¹²⁷ The Veterans Benefit Act of 2003, Pub. L. No. 108-183, § 101, 117 Stat. 2651, 2652–53 (2003); 38 U.S.C. §§ 1311(e) (2012); *Sharp v. United States*, 580 F.3d 1234 (Fed. Cir. 2009) [hereinafter *Sharp II*].

¹²⁸ Horrell, *supra* note 9 (calling the remarriage offset elimination rule a “strangely-written law”).

¹²⁹ *Sharp v. United States*, 82 Fed. Cl. 222, 227, n. 1 (2008) [hereinafter *Sharp I*]. The *Sharp II* court noted that the statutory provision allowing for the receipt of both benefits upon remarriage after age fifty-seven, may “represent[] a first step in an effort to eventually enact full repeal. After all, the servicemember paid for both benefits: SBP with premiums; DIC with his life.” *Sharp II*, 580 F.3d at 1239.

¹³⁰ *Sharp II*, 580 F.3d at 1235; *Sharp I*, 82 Fed. Cl. at 23.

Although an apparent victory for a small subset of surviving spouses, many others feel that current law, as clarified by *Sharp*, “punishes” those who remarry before age fifty-five by ending their SBP and DIC eligibility and punishes those age fifty-seven or older who do not remarry by continuing to impose the offset.¹³¹ Optimistic advocates continue to hope that the *Sharp* holding “at least opened the door to the possibility of receiving both annuities,”¹³² but, after ten years, that possibility has yet to come to fruition.

Ultimately, the uncomfortable and frequently-avoided questions shrouding the offset boil down as follows: what is it about a remarried surviving spouse’s situation that makes her or him so different from every other potential beneficiary, including children and parents? The offset cannot be premised solely on presumed financial security at the time of remarriage or else the *Sharp* remarriage exception would be meaningless. Furthermore, why is a remarried widow severed from all financial connections to her first spouse while a divorced spouse, in contrast, continues to retain an interest in her former husband’s retirement income? Consider, for instance, a former spouse whose marriage overlapped for any period of time with her ex-husband’s active duty service. Under these circumstances, the former spouse may still receive up to fifty percent of the member’s retired pay.¹³³ Thus, “a discrepancy exists between that of a widow and that of a divorcee. Upon remarriage, that divorcee is still entitled to half of her husband’s retired pay. Upon remarriage, a widow is not entitled to anything”¹³⁴ If divorcees can seek SBP benefits during divorce proceedings without offsetting any other sources of income, one has to wonder why legally married spouses are made to feel as if they are

¹³¹ *SBP Offset for Survivors*, *supra* note 63; Telephone Interview with Laura Monk, surviving spouse of Specialist Austin Monk (Nov. 4, 2018) (noting that although she is in a committed relationship with another service member with whom she has a daughter, the loss of all benefits deters her from considering remarriage before the age of fifty-seven).

¹³¹ McCarl, *supra* note 6, at 419.

¹³³ See 10 U.S.C.S. § 1408 (LexisNexis 2019) (authorizing, though not requiring, state courts to award a portion of military retired pay to former spouses in divorce proceedings); *Former Spouses’ Protection Act Frequently Asked Questions*, DEF. FIN. AND ACCT. SERV., <https://www.dfas.mil/garnishment/usfsa/faqs.html> (last visited June 12, 2019).

¹³⁴ *Benefits for Survivors: Is America Fulfilling Lincoln’s Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 15 (2005) (statement of Jennifer McCollum, Surviving Spouse).

asking for more than they have earned.¹³⁵ Given the government's adamant pledge to care for the families of the fallen,¹³⁶ the persistence of the offset also leaves one wondering whether this disparate treatment of surviving spouses has—or will have—negative effects on recruiting future generations of service members. Due to the alarming lack of knowledge of the offset, the answer, for now, is still to be determined.¹³⁷ On its face, however, the SBP-DIC offset raises questions about the military's commitment to “taking care of its own” when the families of those who die in connection with service are treated as second-class citizens for benefits purposes.¹³⁸ The DoD—and the Government generally—cannot

¹³⁵ See, e.g., *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 31 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America).

¹³⁶ See, e.g., *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 79 (2005) (statement of Hon. Charles S. Abell, Principal Deputy Under Secretary of Defense) (“Our objective is to ensure that we fully support our servicemembers when we send them in harm's way, and that we properly support the family's needs if the servicemember dies on active duty.”).

¹³⁷ See, e.g., MACKIN ET AL., *supra* note 75, at 30 (“There is no available evidence linking the level of survivor benefits to recruiting and retention behavior.”). *But see id.* at 39 (noting that certain additional benefits recognizing the risks of service “could conceivably improve recruiting and retention into the military's most hazardous front-line jobs”).

¹³⁸ See *Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.*, 115th Cong. 5 (2016) (statement of Edith G. Smith, Surviving Spouse) (describing the loss of SBP compensation as a “disservice,” both to the service member who makes the ultimate sacrifice and to the family members for whom this service member “may not now be able to provide”). This discrepancy raises other troubling questions about the persistence of the offset: is it a sign that society still views widows, particularly those over the age of fifty-seven, as being reliant on their husbands for financial support? Alternatively, does it mean that lawmakers consider remarriage an “invalidation” of the widow's first marriage? In theory, the very existence of the widow's first marriage entitled her to long-term financial benefits like SBP and DIC. Why then does the continued receipt of any earned benefits after remarriage appear to be premised on what is essentially a lifestyle choice? Is the point of the law to disincentive remarriage or, at the very least, force widows to wait until after turning fifty-seven to take this step? For many surviving spouses, both young and old, that certainly seems to be the message. See, e.g., Telephone Interview with Dawn Wilson, surviving spouse of Captain Patrick Wilson (Nov. 3, 2018) (stating that the remarriage and offset rules are particularly harsh for young widows, who stand to lose over \$1 million if they choose to remarry before the age of fifty-seven). Interestingly, other countries have “recognized the remarriage concern” and “have taken steps to alleviate the remarriage issues.” *Legislative Presentations of NASDVA, FRA, GSW, BVA, JWV, MOPH, MOAA: Hearing Before the S. Comm. on Veterans' Affairs*, 116th Cong. (2019), <https://www.veterans.senate.gov/imo/media/doc/3%20->

have it both ways: either they are committed to providing in full for these families or they are not, in which case survivors deserve to hear the truth so that they might divert their relief efforts elsewhere.

Whether couched in the dire financial challenges faced by many surviving families or general principles of equity, the consequences of the SBP-DIC offset for surviving families are palpable. Affected spouses insist they are not seeking a “handout,” but, rather, recognition of a sacrifice that is unique to military service.¹³⁹ Despite successful efforts at reform for other concurrent federal beneficiaries, the SBP-DIC offset remains unique in its unforgiving application to retiree and active duty surviving spouses alike; as advocates often point out, “[w]hile retired members pa[y] SBP premiums, earlier active duty deaths often cause[] more family disruption and financial penalties. In each case, military service extract[s] the ultimate premium from member and spouse—the very life of the servicemember.”¹⁴⁰

III. Implementation of the Special Survivors Indemnity Allowance (SSIA)

A. The Genesis of the SSIA

To further complicate matters, those surviving spouses whose DIC payments are reduced by SBP are also eligible for another related benefit: the Special Survivor Indemnity Allowance (SSIA).¹⁴¹ Special Survivor Indemnity Allowance is “an additional taxable benefit meant to partially make up for the compensation lost due to the offset.”¹⁴² Congress

%20GSW%20Testimony%2003.12.19.pdf (statement of Crystal Wenum, National President, Gold Star Wives of America) (explaining that, for example, the United Kingdom “changed a similar law recognizing unfair treatment of surviving spouses” and emphasizing that “current [U.S.] law . . . binds young surviving spouses to widowhood” by imposing restrictions on those who remarry by the “arbitrary age” of fifty-seven).

¹³⁹ Caruso, *supra* note 5. As surviving spouse Sarah Castile emphasized, “[w]e are not asking for welfare We have paid both in the loss of military spouse due to serving our country and in premiums paid for many years.” *Id.*

¹⁴⁰ *Eliminate the Widows Tax (SBP-DIC Offset)*, *supra* note 29.

¹⁴¹ Steele, *supra* note 50, at 45; *see also Guide to Survivor Benefits*, *supra* note 57, at 9.

¹⁴² *Survivor Benefit Plan*, *supra* note 40. *See also* KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 18 (2018) (noting that SBP and SSIA are both taxable benefits, unlike DIC, which is non-taxable).

introduced SSIA in the NDAA for FY 2008.¹⁴³ Although the original authorization contained a sunset provision, the NDAA for FY 2018 implemented SSIA as a permanent benefit.¹⁴⁴ Because SSIA technically offsets the DIC offset, some refer to it as the offset to the offset¹⁴⁵ or a “stop gap measure.”¹⁴⁶ At the outset, SSIA was intended only as a temporary solution “in hopes of eliminating the SBP-DIC offset.”¹⁴⁷ Given its permanent implementation, however, the future of full repeal now appears as uncertain as ever.

B. Dollar Value of SSIA

In its infancy, the SSIA annuity totaled only \$50 a month with payments set to increase to \$100 by 2014.¹⁴⁸ Lawmakers then extended the benefit and again increased SSIA payments in staggered increments from 2014 through 2017, at which point the SSIA reached a high of \$310 per month.¹⁴⁹ In any given month, the amount of SSIA may not exceed the annuity amount subject to the DIC offset.¹⁵⁰ For those spouses who elect to transfer SBP to their children, there is no SBP-DIC offset; thus, these survivors do not receive SSIA.¹⁵¹

¹⁴³ See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 644, 122 Stat. 3, 158 (2008) (implementing the original version of the SSIA); National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 631, 122 Stat. 4356, 4492–93 (2008) (extending the SSIA to survivors of active duty members).

¹⁴⁴ See National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 621, 131 Stat. 1289, 1427–28 (2017) (permanently implementing the SSIA with variance for COLA at the beginning of each calendar year beginning in 2019); see also KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 17–18 (2018).

¹⁴⁵ HOSEK ET AL., *supra* note 8, at 11, 14.

¹⁴⁶ *Survivor Advocacy Issues*, *supra* note 17.

¹⁴⁷ *Id.*

¹⁴⁸ See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 644, 122 Stat. 3, 158 (2008).

¹⁴⁹ Family Smoking Prevention and Tobacco Control and Federal Retirement Reform, Pub. L. No. 111-31, § 201, 123 Stat. 1776, 1857–58; 2019 *Cost of Living Adjustment*, DEF. FIN. AND ACCT. SERV. (Dec. 12, 2018), <https://www.dfas.mil/retiredmilitary/newsevents/newsletter/2019-Cost-of-Living-Adjustment.html> (noting that the current SSIA monthly payment rate, with adjustments for COLA, is \$318). See also KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 18 (2018).

¹⁵⁰ *Guide to Survivor Benefits*, *supra* note 57, at 10.

¹⁵¹ *Understanding SBP, DIC, and SSIA*, *supra* note 117; see also *Survivor Advocacy Issues*, *supra* note 17.

At its core, SSIA serves as a “rebate, giving spouses about 25 percent of what they lose from the SBP/DIC offset.”¹⁵² For eligible beneficiaries, this translates roughly to an additional \$3,700 each year.¹⁵³ Compared with what the majority of these spouses would receive without the offset, however, this “modest rebate” is viewed as somewhat insulting.¹⁵⁴ Thus, despite the best intentions of the lawmakers who originally crafted this “special” financial benefit, the current \$318 “rebate” is generally considered “a poor effort at restitution.”¹⁵⁵

C. Practical Consequences and Long-Term Prognosis

Some long-time advocates of offset repeal are optimistic that the SSIA represents “one foot in the door.”¹⁵⁶ Although a 2008 House Armed Services Committee press release referred to SSIA as the “latest step” in the quest to eliminate the widow’s tax offset,¹⁵⁷ other advocates fear Congressional leaders—and even some widows—consider the issue moot.¹⁵⁸ The press release promised that the House Committee “will continue to explore every opportunity to pursue legislation that brings us closer to eliminating the ‘widow’s tax.’”¹⁵⁹ Ten years after the initial

¹⁵² Harkins, *supra* note 63. The DoD estimates that “about 3,000 of 64,000 survivors impacted—those who are older and saw sponsors opt for minimal SBP coverage—have been made whole by the SSIA.” Philpott, *supra* note 21. Note that critics consider SSIA a form of “triple-dipping” in that surviving spouses receive three benefits—SBP, DIC, and SSIA—for the same period of service. CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 15 (2011).

¹⁵³ Hammersly, *supra* note 21, at 10A; *see also* Shane III, *supra* note 93 (pointing out that \$3,700 is still “only a fraction of their offset losses”).

¹⁵⁴ *Eliminate the Widows Tax (SBP-DIC Offset)*, *supra* note 29.

¹⁵⁵ *The Widow’s Tax*, *supra* note 5; Questionnaire Answers of Katie Utley, surviving spouse of Captain Daniel Utley (Oct. 23, 2018) (on file with author) (“I feel like the ‘stop gap’ is a joke. [Congress] recognize[s] it is wrong and validate[s] the issue by paying the small amount of money owed, but will not end it completely or take steps to end it.”); Telephone Interview with Laura Monk, surviving spouse of Specialist Austin Monk (Nov. 4, 2018) (describing how SSIA feels like a “band aid on a really big wound, like Congress is saying ‘here’s this—we’re very sorry’”). *See also* Strobridge et al., *supra* note 28 (describing the outrage of those who qualify for the offset). As surviving spouse Mary Craven pointed out, “[i]t’s almost an insult to take away \$1,215 and then expect us to be grateful to get back \$90 in FY 2013.” *Id.*

¹⁵⁶ Ostrom, *supra* note 21 (noting that the *Sharp* case is “another foot in the door”).

¹⁵⁷ *SBP Offset for Survivors*, *supra* note 63.

¹⁵⁸ Ostrom, *supra* note 21 (explaining that the permanent implementation of SSIA may “leav[e] full repeal of the offset forever out of reach”); Philpott, *supra* note 21.

¹⁵⁹ *SBP Offset for Survivors*, *supra* note 63.

implementation of SSIA, however, repeal of the offset remains out of reach;¹⁶⁰ in fact, with the permanent implementation of SSIA, the issue is, in the minds of some Congressional leaders, resolved.¹⁶¹ Given recent budget crises, SSIA, both in its temporary and permanent forms, may represent the extent of Congress' willingness to address the issue.¹⁶² Tellingly, the House of Representatives failed to offer a solution to the pending expiration of SSIA in its version of the FY 2018 NDAA,¹⁶³ calling into question lawmakers' genuine commitment to further reform.¹⁶⁴

Although the House version of the FY 2018 NDAA noted that Congress must work to eliminate the widows' tax entirely, this language simply parroted the promises of previous Congressional committees.¹⁶⁵ The practical concern, as always, is cost: the permanent implementation of SSIA is estimated to require approximately \$2.8 billion in funding over

¹⁶⁰ See Caruso, *supra* note 5 (noting that "SSIA was initiated . . . with the expectation that the total offset would be settled within the 10-year period, but Congress has failed to do that").

¹⁶¹ Philpott, *supra* note 21. Congressional leaders expressed confusion when The Military Coalition—one of many advocacy groups—continued to list resolving the SBP-DIC offset as a legislative priority because lawmakers mistakenly believed the offset had already been eliminated with the implementation of SSIA. *Id.* See also Ostrom, *supra* note 21.

¹⁶² Ostrom, *supra* note 21 (noting that despite acknowledging the offset is "wrong," Congress authorized SSIA as a supplemental payment and "compromise" in order to avoid eliminating the offset due to prohibitive costs); see also Shane, *supra* note 93 (calling SSIA a "partial fix to an ongoing benefits problem that has frustrated military advocates for decades").

¹⁶³ H.R. REP. NO. 114-404, at 838-39 (2017) (Conf. Rep.) (noting that the House version of the NDAA included only an "express[ion] of the sense of Congress that the [SSIA] was created as a stop gap measure" while "[t]he Senate amendment contained a provision . . . that would amend section 1450 of title 10, United States Code, to permanently extend the authority to pay the [SSIA] . . ."). See also Berquist, *supra* note 11.

¹⁶⁴ See Shane, *supra* note 93 ("House lawmakers had made finding a solution to the SSIA issue a priority in negotiations this year, given the pending May 2018 expiration of the program.").

¹⁶⁵ H.R. REP. NO. 115-200, pt. 1, at 145 ("This section would also state that the dollar-for-dollar reduction in payments to surviving spouses should be fully repealed at the first opportunity."). See also, e.g., H.R. REP. NO. 111-89, at 72 (2009) (Conf. Rep.) ("Congress recognized the injustice of the SBP-DIC offset in the National Defense Authorization Act for Fiscal Year 2008 when it authorized a special payment to SBP-DIC-affected survivors, but this payment is far below the full amount that is offset."); DAVID F. BURRELLI & JENNIFER R. CORWELL, CONG. RESEARCH SERV., RL32769, MILITARY DEATH BENEFITS: STATUS AND PROPOSALS 6 (2006) (pointing out that the "[l]anguage . . . in the Senate version of the National Defense Authorization Act for Fiscal Year 2006 to repeal this offset . . . was dropped by the Conference Committee"); ROBERT TOMKIN, FACT SHEET NO. 112-6, DEFENSE AUTHORIZATION FOR FY 2012 50 (2011), LEXISNEXIS.

the next decade.¹⁶⁶ The fact that lawmakers have already struggled to fund this minimal benefit, much less full repeal, is further proof that meaningful reform remains a distant goal.¹⁶⁷

IV. Current Status of the Offset and Potential Solutions

As surviving spouses have long pointed out, why have both the SBP and DIC if one benefit wipes out the other?¹⁶⁸ Advocates and lawmakers alike have offered possible alternatives to the offset, though many advocates understandably hesitate to push for anything less than full repeal.¹⁶⁹ Critics maintain that repeal will allow survivors to “double” or even “triple-dip” into federal benefits,¹⁷⁰ while surviving spouses continue

¹⁶⁶ Shane, *supra* note 93.

¹⁶⁷ *Survivor Advocacy Issues*, *supra* note 17. Rep. Susan Davis introduced and later withdrew an amendment to increase TRICARE pharmacy fees for all beneficiaries in an effort to fund SSIA, which drew sharp criticism from various advocates. *Id.* See also Shane, *supra* note 93 (describing the disappointment of MOAA President, Dana Atkins, at the idea that the funding solution for SSIA “[may] require[] military beneficiaries, not the government, to bear the costs”). Under Rep. Davis’ proposal, co-pays for name-brand drugs would almost double, and co-pays for generic drugs would increase from \$10 to \$14, thereby creating nearly \$3 billion in revenue over the next eight years. *Id.*

¹⁶⁸ See Harkins, *supra* note 63 (quoting Mary Craven, the surviving spouse of an Air Force officer who died from a service-connected illness in 1978).

¹⁶⁹ See, e.g., Atkins, *supra* note 5. Other proposed alternatives to repeal of the offset include the following: (1) instituting a single death benefit for all active duty deaths, *Benefits for Survivors: Is America Fulfilling Lincoln’s Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 27 (2005) (statement of Edith G. Smith, Member, Gold Star Wives of America); (2) eliminating the offset for surviving spouses of retirees who paid SBP premiums while maintaining the offset for survivors of active duty service members, Tom Philpott, *Widows Left Out of ‘Concurrent Receipt’ Reforms*, MONTGOMERY ADVERTISER (Mar. 4, 2007); (3) adding a new SBP option under which members would fully fund SBP costs in exchange for elimination of the offset, FINAL REPORT OF THE MILITARY COMPENSATION AND RETIREMENT MODERNIZATION COMMISSION 44–45 (2015), <https://docs.house.gov/meetings/AS/AS00/20150204/102859/HHRG-114-AS00-20150204-SD001.pdf>; see also KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 19 (2018).

¹⁷⁰ CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 14 (2011). The authors of this report describe the concept of double-dipping as follows:

Critics contend that concurrent receipt was originally barred because Congress viewed it as “double dipping” or paying someone twice for the same period of service. These critics reason that allowing concurrent receipt to the retiree or the retiree’s survivor are forms of

to stress the inequity of the offset in comparison with other concurrent benefit recipients, a tactic which, to date, has gained little headway.¹⁷¹

“double dipping” that are inherently unfair to the taxpayer
Eliminating the SBP-DIC offset, they contend, would lead to “triple dipping” in that survivor(s) would be eligible to receive three overlapping government benefits [SBP, DIC, and Social Security] based on the same military career.

Id. See also *Benefits for Survivors: Is America Fulfilling Lincoln’s Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. 87 (2005) (statement of Thomas R. Tower, Assistant Director of Compensation, Office of the Deputy Under Secretary of Defense) (noting that because “[b]oth SBP and [DIC] for active duty deaths are fully funded by the Government . . . the offset of DIC from SBP avoids the duplication of Government benefits”); KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 19 (2018) (describing how critics argue that “because the federal government pays the full DIC cost and subsidizes the SBP coverage, allowing survivors to receive both SBP and DIC is inherently unfair to the taxpayer”); MACKIN ET AL., *supra* note 75, at iv (noting that the key argument against elimination of the offset is “that both DIC and SBP provide a disability annuity to survivors and would therefore constitute dual compensation”); Memorandum from Deputy Assistant Sec’y of Navy to Co-Chairmen, Sec’y of the Navy’s Retiree Council, subject: Secretariat Response to the 2015 Sec’y of the Navy’s Retiree Council Report (12 Aug. 2016) (arguing that eliminating the offset “would create inequity compared to beneficiaries who are not eligible for both by creating a group of survivors receiving two government-subsidized survivor annuities”); Hammersly, *supra* note 21, at 10A (noting that “Department of Defense spokesmen have argued that it wouldn’t be fair for these widows and widowers to collect both benefits when other survivor usually are entitled to one or the other”). *But see* MACKIN ET AL., *supra* note 75, at 6 (listing Servicemember Group Life Insurance (SGLI) as one of several “income replacement military benefits). Although SGLI is not a traditional annuity but, rather, a one-time lump sum payment, one has to wonder why opponents of repeal do not argue that receipt of SGLI for active-duty surviving spouses is also a form of “double,” “triple,” or even “quadruple” dipping.

¹⁷¹ See Tom Philpott, *Military Update: House Eyes Giving Widows More Relief from ‘SBP-DIC Offset,’* STARS AND STRIPES (Dec. 30, 2015), <https://www.stripes.com/news/us/military-update-house-eyes-giving-widows-more-relief-from-sbp-dic-offset-1.386519>. Mr. Philpott explained this lack of progress as follows:

The creaky logic behind the offset is that widows, though rightly compensated for loss of a spouse from service-related injury or ailment, shouldn’t also get a government-subsidized annuity. That logic collapsed a decade ago when Congress ended a similar ban on “concurrent receipt” for military retirees who qualify both for longevity retirement and VA compensation for serious service-connected disabilities or combat-related injuries or ailments Most members of Congress agree but so far leaders refuse to remove the offset, citing costs.

Despite recognition of the risks inherent in military service and the emphasis on honoring the sacrifices of survivors, the SBP-DIC offset persists with no clear end in sight.¹⁷² The vicious cycle of promises and inaction over the last few decades raises some troubling questions: do lawmakers simply not care about this population? Are there too few vocal opponents who are willing to bang on Congress' doors until their demands are met? Do lawmakers require more raw data to be convinced to take action? Or perhaps the simplest of explanations is ultimately the only one that matters: lawmakers remain unwilling to divert funds from another project or population, nor will they impose new taxes to generate additional revenue, thereby leaving repeal of the offset forever beyond reach.¹⁷³

Id.

¹⁷² See, e.g., MACKIN ET AL., *supra* note 75, at 39 (explaining that “none of the benefits available to survivors of members who die on active duty recognize deaths directly related to the hazardous nature of military service). As the authors note, “survivors of a member who dies of an illness are eligible for the same benefits as the survivors of a member who is killed in action,” nor does the equivalent of a workers’ compensation death benefit exist. *Id.*

¹⁷³ Despite advocacy efforts urging lawmakers to “do the right thing,” arguments premised on “moral obligation” or “equity and justice” have proven ineffective to date. See, e.g., *Hearing on S. 979 Before the S. Subcomm. on Pers. of the Comm. of Armed Servs.*, 115th Cong. 10 (2016) (statement of Edith G. Smith, Surviving Spouse) (noting that “[c]orrecting this offset . . . is a moral obligation that now stands before Congress and the President”); Lisa Hammersly, *Issues with Law, Congress’ Lack of Action*, ARK. DEMOCRAT GAZETTE (Dec. 30, 2018, 3:20 AM), <https://www.arkansasonline.com/news/2018/dec/30/widow-s-tax-issues-in-congress-20181230/?news-arkansas> (quoting Kathy Prout, founder of the SBP-DIC Offset Facebook group, who asserts that “[t]he moral compass has gone askew . . . [Congress] could fix this.”). For example, financial analyst Kate Horrell points out that those who claim that surviving spouses lose money due to the offset are incorrect: “You just don’t get MORE money due to the offset.” See Horrell, *supra* note 9. In responding to user comments, Horrell also makes the following assertions regarding the “losing money” argument:

[It is] factually incorrect, and it hurts the cause of repealing the offset to continue [to repeat] it . . . Survivors and lobbying group have been trying for years to repeal the offset using emotionally charged testimony and claiming that they’re “losing” money. It’s been unsuccessful so far, and I believe that is in part because of the tactics being used. Congress, and its staffers, are interested in factually accurate information. It weakens the case to repeal the offset to present math that just doesn’t add up.

Id.

A. The Fiscal Year (FY) 2019 Department of Defense Budget

Not surprisingly, money is almost always the reason for doing—or not doing—anything to effectuate change. Notwithstanding the Army’s prediction that the military be prepared to do “more with less,”¹⁷⁴ the FY 2019 DoD budget was one of the “biggest defense budgets in modern American history,”¹⁷⁵ if not “*the* largest.”¹⁷⁶ With \$686 billion of the FY 2019 \$716 billion defense funding budget dedicated to the DoD,¹⁷⁷ the armed forces enjoyed an \$82 billion increase in spending compared with FY 2018.¹⁷⁸ Despite a dramatic slowdown in recent combat deployments, this defense budget rivals spending surges used to fund troop buildups in 2003 and 2008 during the height of Global War on Terror.¹⁷⁹ Interestingly, the budget is also approximately \$60 billion *more* than what was originally requested for 2018,¹⁸⁰ though some lawmakers feel it is still “not enough to fix the problems.”¹⁸¹ Whether it proves to be “enough” is yet to be determined; regardless, the fact remains that since President Trump took office, “the defense budget will have grown by \$133 billion, or 23 percent.”¹⁸²

¹⁷⁴ *The Army Vision*, U.S. ARMY (June 7, 2018),

https://www.army.mil/e2/downloads/rv7/vision/the_army_vision.pdf?_st.

¹⁷⁵ Jeff Stein, *U.S. Military Budget Inches Closer to \$1 Trillion Mark, as Concerns Over Federal Deficit Grow*, WASH. POST (June 19, 2018),

https://www.washingtonpost.com/news/wonk/wp/2018/06/19/u-s-military-budget-inches-closer-to-1-trillion-mark-as-concerns-over-federal-deficit-grow/?utm_term=.fb40b7f83056.

¹⁷⁶ Myre, *supra* note 22.

¹⁷⁷ Press Release, Dep’t of Def., DoD Begins Fiscal Year with Funding for First Time in 10 Years, (Sept. 28, 2018), <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1648774/dod-begins-fiscal-year-with-funding-for-first-time-in-10-years/>.

¹⁷⁸ Stein, *supra* note 175.

¹⁷⁹ Myre, *supra* note 22; *see also* Lawrence J. Korb, *Trump’s Defense Budget*, CENTER FOR AMERICAN PROGRESS (Feb. 28, 2018, 9:02 AM),

<https://www.americanprogress.org/issues/security/news/2018/02/28/447248/trumps-defense-budget/> (comparing the current budget to FY 2010 when the United States still had more than 200,000 troops deployed to Iraq and Afghanistan).

¹⁸⁰ Daniel Goure, *Can Trump Rebuild the Military as Deficits Balloon?*, BREAKING DEF. (Oct. 18, 2018, 3:53 PM), <https://breakingdefense.com/2018/10/can-trump-rebuild-the-military-as-deficits-balloon/>. *See also* Myre, *supra* note 22 (noting that the budget increase is “more than the Trump administration originally requested”).

¹⁸¹ Myre, *supra* note 22 (quoting Rep. Mac Thornberry, the head of the House Armed Services Committee).

¹⁸² Korb, *supra* note 179. *Cf.* Stein, *supra* note 175 (noting that the “increase in military spending is one of the largest in modern U.S. history, jumping by 9.3 percent from 2017 to 2019”) (emphasis added).

Less than one month after President Trump approved the FY 2019 budget, however, he announced that the FY 2020 defense budget will likely drop to approximately \$700 billion due to exorbitant increases in the national deficit.¹⁸³ Furthermore, because spending caps implemented pursuant to the Budget Control Act of 2011 will resume in 2020, additional funds for new or previously unfunded projects will likely be limited.¹⁸⁴ Theoretically, funding the repeal of the SBP-DIC offset would be simple if military budgets continue to increase or, at the very least, remain at current levels.¹⁸⁵ Given predictions for the future state of the DoD budget, however, repeal seems unlikely in the short term. Thus, despite continued calls for elimination of the SBP-DIC offset, advocates may find that their opportunity to capitalize on the all-time high in defense spending has passed, which raises questions about the alternatives to full repeal.

B. Prognosis for Repeal and Reform

1. *Option 1: Repeal the Current Law*

Despite expected budgetary constraints, dedicated advocates will almost certainly continue to push for nothing less than full repeal of the SBP-DIC offset. These hardened survivors already have plenty of experience with arguing to myriad audiences that surviving spouses should receive their full SBP annuity in addition to DIC.¹⁸⁶ Multiple

¹⁸³ Goure, *supra* note 180 (describing how the national debt “ballooned 17 percent to \$779 billion this year”); see also Aaron Mehta, *It’s Official: DoD Told to Take Cut with FY20 Budget*, DEF. NEWS (Oct. 26, 2018),

<https://www.defensenews.com/pentagon/2018/10/26/its-official-dod-told-to-take-cut-with-fy20-budget/> (noting that the \$700 billion defense budget estimate represents a 4.5% cut below the projected \$733 billion for FY 2020, but “still exceeds the \$576 billion budget caps for discretionary defense spending, set under the Budget Control act”).

¹⁸⁴ Claudia Grisales, *Trump Says 2020 Defense Budget will Drop to \$700 Billion*, STARS AND STRIPES (Oct. 17, 2018), <https://www.stripes.com/news/us/trump-says-2020-defense-budget-will-drop-to-700-billion-1.552276> (describing how although Congress lifted Budget Control Act spending limits for 2018 and 2019, those limits are slated to return for FY 2020, which will decrease the defense budget to \$576 billion if no action is taken).

¹⁸⁵ See Shane III, *supra* note 20 (“Fixing [the offset] would cost about \$1 billion a year, a small fraction of the country’s \$600 billion-plus in annual defense funding.”).

¹⁸⁶ See, e.g., *Repeal of the Survivor Benefit Plan/Dependency Indemnity Compensation Offset*, H. COMM. ON THE BUDGET (June 20, 2018, 9:45 AM),

<https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/15%20-%20Repeal%20SBP%20DIC%20Offset.pdf> (“The survivors of military servicemembers who gave their lives for the nation deserve fair treatment and full receipt of their SBP

advocacy groups have poured many years and thousands of dollars into the fight to repeal the current law;¹⁸⁷ individuals affected by the offset's provisions have petitioned to raise awareness of the issue;¹⁸⁸ and a Facebook group designed to promote awareness and encourage lobbying efforts currently has over 1,800 members.¹⁸⁹ Of note, a majority of House and Senate members in multiple sessions of Congress have "acknowledged the inequity and cosponsored corrective legislation to recognize SBP and DIC are paid for different reasons."¹⁹⁰

Undoubtedly, advocacy efforts garner attention from lawmakers,¹⁹¹ but these voices continue to take a back seat to the demands of larger populations. Optimistic advocates believe the SBP-DIC offset is an oversight, "that it's not what Congress intended for the families of fallen military personnel."¹⁹² After years of passionate advocacy by surviving

benefits. When military service causes a servicemember's death, DIC should be paid in addition to the SBP benefits." See also *The Widow's Tax*, *supra* note 5.

¹⁸⁷ See, e.g., *Legislative Action Center*, MIL. OFFICERS ASS'N OF AM., <http://takeaction.moaa.org/?4> (last visited Mar. 10, 2018); *SBP-DIC Offset*, AIR FORCE SERGEANTS ASS'N, <http://www.hqafsa.org/sbp---dic-offset.html> (last visited Dec. 20, 2018).

¹⁸⁸ See, e.g., Kathy Prout, *Stop denying earned survivor benefits to military surviving spouses*, CHANGE.ORG, <https://www.change.org/p/stop-denying-earned-survivor-benefits-to-military-surviving-spouses> (last visited June 12, 2019); The MOAA Channel, *Repeal SBP DIC Offset, End Sequestration MOAA "Storms" 535 Congressional Offices in 6 Hrs.*, YOUTUBE (June 8, 2017), <https://www.youtube.com/watch?v=CnZ0AvPup5M>.

¹⁸⁹ *Military Widows: SBP-DIC Offset*, FACEBOOK, <https://www.facebook.com/groups/MilitarySurvivingSpouses/> (last visited June 12, 2019). See also Hammersly, *supra* note 21, at 11A; Breaux, *supra* note 5; Caruso, *supra* note 5.

¹⁹⁰ Caruso, *supra* note 5; *Eliminating the Widows' Tax*, *supra* note 10; *SBP Offset for Survivors*, *supra* note 63. See also Bale Dalton, Office of Sen. Bill Nelson, S. 339, SBP-DIC Offset Repeal Fact Sheet, 115th Cong. (2017) (on file with author) (noting that since September 2001, "the Senate has generally supported repealing the SBP-DIC offset [but] [t]he repeal has yet to make it into public law despite being included in many years' Senate passed NDAA," to include FYs 2001, 2006, 2007, 2008, 2009, 2010, 2012, and 2013); CONG. RESEARCH SERV., RL31664, *THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS* 14 (2011) (describing how the Senate versions of the NDAA for FYs 2006, 2008, 2008, and 2010 all included language to eliminate the offset that was later dropped by the conferees); Atkins, *supra* note 5 (emphasizing that "Congress knows this inequity needs to be fixed").

¹⁹¹ Philpott, *supra* note 21; see also Ostrom, *supra* note 21. Kelly Hruska, a survivor issues representative for the National Military Family Association and The Military Coalition, referred to the offset as criminal: "This is a benefit that service members paid for, either through monthly premiums or . . . with their lives. If any company were doing this, they would tie [its executives] up in the square and members of Congress would be the first ones lining up to throw stones." *Id.*

¹⁹² Harkins, *supra* note 63.

spouses and their supporters, however, lawmakers continue to pay lip service to the repeal¹⁹³ without taking meaningful action.¹⁹⁴ Thus, ironically, despite increased efforts to repeal the widow's tax over the last few decades, "no efforts have been successful."¹⁹⁵

Not surprisingly, the impediment has always been—and continues to be—cost,¹⁹⁶ or, more specifically, "the last minute consensus on how to pay for the offset elimination."¹⁹⁷ To call the problem last-minute is, at this point, however, disingenuous; lawmakers have been aware of the offset for decades but continue to delay their commitment to finding a permanent solution.¹⁹⁸ As advocates aptly note, the only apparent purpose

¹⁹³ H.R. REP. NO. 111-89, at 72 (2009) (Conf. Rep.) ("Repeal of the offset would allow the widows and orphans whom our servicemembers and veterans leave behind to receive the full SBP amount due to them."); ROBERT TOMKIN, FACT SHEET NO. 112-6, DEFENSE AUTHORIZATION FOR FY 2012 50 (2011), LEXISNEXIS.

¹⁹⁴ Boldrin, *supra* note 84 ("No one has solved the problem beyond slapping band-aids on it.").

¹⁹⁵ McCarl, *supra* note 6, at 419.

¹⁹⁶ Estimates regarding the total cost of repealing the offset range considerably, including, but not limited to: \$12.9 billion, U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-837R, ACTUARIAL SOUNDNESS OF THE DoD SURVIVOR BENEFIT PLAN PROGRAM 11 (2006); \$8 billion over ten years, Philpott, *supra* note 21 (referencing the latest Congressional Budget Office's calculations); \$7 billion from 2010 to 2019, CONG. RESEARCH SERV., RL31664, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS 14 (2011); and as low as \$4.5 billion, Hammersly, *supra* note 21, at 10A. Note, however, that according to the GAO, adjustments to DoD and Treasury payments to offset increased costs associated with expanded benefits, "should not negatively affect the actuarial soundness of the [DoD Military Retirement] Fund." U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-837R, ACTUARIAL SOUNDNESS OF THE DoD SURVIVOR BENEFIT PLAN PROGRAM 5 (2006). See also U.S. GOV'T ACCOUNTABILITY OFF., GAO-HEHS-95-30, VETERANS' BENEFITS—BASING SURVIVORS' COMPENSATION ON VETERANS' DISABILITY IS A VIABLE OPTION 18 (1995) ("If the SBP offset were eliminated, federal savings would be reduced because of increased DOD SBP payments. Additionally, including in the program the surviving spouses of all disabled veterans would increase the number of surviving spouses who become eligible for the program each year.").

¹⁹⁷ Ostrom, *supra* note 21 ("[T]he barricade to ending the offset is finding budget dollars to cover the cost . . . The cost of full repeal is estimated by the Congressional Budget Office at \$8 billion over 10 years."). Due to mandatory allocations of funds for the national defense, Congress has little flexibility to generate these funds independently, hence the need to work with House Budget Committee members to increase direct spending to resolve the issue. *Id.* See also Berquist, *supra* note 11 (explaining that "the sense in Congress is that the offset should be eliminated but the costs are high"); Philpott, *supra* note 21. Cf. MACKIN ET AL., *supra* note 75, at 42 (estimating a total cost of \$35 million for "each year's new cohort of surviving spouses").

¹⁹⁸ Shane III, *supra* note 93 (noting that "lawmakers on the committee have repeatedly said they cannot find [enough funding] in ever tightening military budgets").

of the offset is to save the government money.¹⁹⁹ Year after year, Congress' go-to justifications for failing to effectuate full repeal are rooted in "defense spending caps and House budgeting rules."²⁰⁰ Until recently, opponents of the offset argued that Congress should, at the very least, extend and increase SSIA.²⁰¹ Now that SSIA is a permanent benefit, however, repeal is the logical next step that lawmakers continue to claim remains far out of reach.²⁰²

Undaunted by these obstacles, members of MOAA—one of several active advocacy groups—continue to urge surviving spouses to call their Congressional representatives to express support for the latest in a series of bills to eliminate the offset.²⁰³ MOAA advocates acknowledge that budget uncertainty will make funding total repeal "difficult,"²⁰⁴ but they remain committed to prioritizing the issue.²⁰⁵ Due to political turnover, however, the reeducation and advocacy process begins anew every election cycle, forcing offset opponents to return to the drawing board in seeking out additional cosponsors. For example, in the 2018 midterm election, Senator Bill Nelson, the proponent of the Military Widow's Tax

¹⁹⁹ Philpott, *supra* note 169. Joe Davis, the public affairs director for Veterans of Foreign Wars calls this penny-pinching justification the "ultimate insult our government can inflict on' surviving spouses." *Id.*

²⁰⁰ Shane III, *supra* note 93.

²⁰¹ *Eliminating the Widows' Tax*, *supra* note 10; *see also* Berquist, *supra* note 11 (noting that those impacted would lose \$3720 a year in survivor benefits if SSIA was not extended or made a permanent benefit); *Survivor Advocacy Issues*, *supra* note 17; *The Widow's Tax*, *supra* note 5 (pointing out that SSIA "will terminate in May 2018 if Congress does not extend the allowance").

²⁰² Hammersly, *supra* note 21, at 10A (noting that DoD views the "cost in billions as "another issue" and estimates that the total cost of repeal will require \$7 billion to \$10 billion over ten years, despite widows and others believing the number is closer to \$4.5 billion to \$5 billion).

²⁰³ Berquist, *supra* note 11 (arguing that without enough cosponsors, the issue will go unfunded).

²⁰⁴ *Eliminating the Widows' Tax*, *supra* note 10 (estimating the total cost of repeal at approximately \$6.5 billion).

²⁰⁵ *See Legislative Action Center*, *supra* note 187.

Elimination Act of 2017²⁰⁶ and a long-time advocate of repeal²⁰⁷ was defeated by his opponent.²⁰⁸ To make matters worse, the total number of

²⁰⁶ S. 339, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/339/text?format=txt>; *see also* H.R. 846, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/846/text?q=%7B%22search%22%3A%5B%22h846%22%5D%7D&r=1>. With the recent political turnover in the Congress, including the defeat of former Sen. Bill Nelson, a new bill has now replaced the previously pending offset repeal legislation. *See* H.R. 553, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/553/text?q=%7B%22search%22%3A%5B%22Hr+553%22%5D%7D&r=1&s=1>; *see also* Press Release, Tammy Duckworth U.S. Senator for Illinois, Duckworth Helps Reintroduce Bipartisan Legislation to Eliminate the Military “Widow’s Tax,” (Mar. 8, 2019), <https://www.duckworth.senate.gov/news/press-releases/duckworth-helps-reintroduce-bipartisan-legislation-to-eliminate-the-military-widows-tax> (noting that, in addition to Sen. Duckworth, thirty-two other Senators from both parties have cosponsored the newest bill); Brittany De Lea, *Military ‘Widow’s Tax’ Under Fire on Capitol Hill*, FOX BUSINESS (May 24, 2019), <https://www.foxbusiness.com/economy/military-widows-tax-capitol-hill>; Misty Inglet, *‘I Feel Betrayed’: Boise Veteran Fighting Terminal Cancer Aims to End ‘Military Widow’s Tax,’* KTVB.COM (Apr. 23, 2019, 11:02 PM), <https://www.ktvb.com/article/news/local/i-feel-betrayed-boise-veteran-fighting-terminal-cancer-aims-to-end-military-widows-tax/277-8357cfe2-2c74-4b45-82a5-64e5dda415f6>; Kevin Lilley, *Bipartisan House Bill Would End ‘Widows Tax,’* MIL. OFFICERS OF AM. (Jan. 16, 2019), <https://www.moaa.org/Content/Publications-and-Media/News-Articles/2019-News-Articles/Bipartisan-House-Bill-Would-End--Widows-Tax->; Ed O’Keefe, *Military Spouses Seek to Repeal “Widow’s Tax,”* CBS NEWS (May 27, 2019), <https://www.cbsnews.com/video/military-spouses-fight-to-repeal-archaic-rule-known-as-widows-tax/>; Leo Shane, *Will the Military ‘Widows Tax’ Disappear This Year?,* MIL. TIMES (May 21, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/05/21/will-the-military-widows-tax-disappear-this-year/>; Annie Yu & Stephanie Wilson, *‘We’ve Seen Historic Numbers’: Surviving Military Spouses Fight for Benefits Reaches Milestone,* WUSA90 (May 21, 2019, 11:17 PM), <https://www.wusa9.com/article/news/national/military-news/weve-seen-historic-numbers-surviving-military-spouses-fight-for-benefits-reaches-milestone/65-6e7be06d-cc4d-49df-961f-406cc1afbba6>. Notably, a tax code update (often referred to as the “kiddie tax”) that adversely impacted the children of Gold Star families during the 2018 tax season has also refocused Congressional attention on the repeal of the SBP-DIC offset. *See generally* James Clark, *Trump’s Tax Cut was a Disaster for Some Gold Star Families, but it’s a Symptom of a Larger Problem,* TASK & PURPOSE (Apr. 23, 2019, 11:26 AM), <https://www.cnn.com/2019/05/24/politics/gold-star-families-tax-fix/index.html?ofs=fbia>; Sean Higgins, *Provision of GOP Overhaul is Creating Big Tax Hikes for Gold Star Families,* WASH. EXAMINER (Apr. 29, 2019, 7:20 PM), <https://www.washingtonexaminer.com/policy/economy/provision-of-gop-overhaul-is-creating-big-tax-hikes-for-gold-star-families>; Laura Saunders, *The Surprising Tax Bill for Sons and Daughters of Gold-Star Families,* THE WALL STREET J. (May 10, 2019, 5:30 AM), <https://www.wsj.com/articles/the-surprising-tax-bill-for-sons-and-daughters-of-gold-star-families-11557480602>. *See also* Haley Byrd, *Congress Fails to Reach Pre-Memorial Day Tax Fix for Gold Star Families,* CNN POLITICS (May 24, 2019, 4:05 PM), <https://www.cnn.com/2019/05/24/politics/gold-star-families-tax-fix/index.html?ofs=fbia>.

bill cosponsors does not necessarily translate into repeal legislation success; previous bills garnered more support than S. 339 and H.R. 846, but they still failed to progress beyond the Senate and House subcommittees.²⁰⁹ Thus, despite bipartisan “support” for repeal, until lawmakers do more than say they want to allocate the funding, 67,000 surviving spouses will continue to face disappointment at the government’s unwillingness to honor its commitment to those who sacrificed everything.²¹⁰

2. Option 2: Reform the Current Law to Base Payments on Income

As surviving spouses often note, the sudden financial strain associated with the offset is, in a word, “scary.”²¹¹ Full repeal would undoubtedly

²⁰⁷ Breaux, *supra* note 5 (noting that now-former Sen. Nelson “introduced legislation to repeal this dollar-for-dollar offset in every Congress since 2001 . . . [and] most recently introduced S. 339”).

²⁰⁸ Patricia Mazzei et al., *Rick Scott Wins Florida Recount as Bill Nelson Concedes*, N.Y. TIMES (Nov. 18, 2018), <https://www.nytimes.com/2018/11/18/us/florida-recount-senate-rick-scott-bill-nelson.html?pgtype=Homepage>.

²⁰⁹ See Hammersly, *supra* note 21, at 10A. As Sen. John Boozman pointed out, “[t]here’s a lot of sympathy. Congress is on record saying they want to fix it. The disagreement is where you cut costs to pay for that.” *Id.* Notably, neither the former House Speaker, Paul Ryan, nor Senate Majority Leader Mitch McConnell co-sponsored repeal bills. *Id.*

²¹⁰ See Hammersly, *supra* note 21, at 11A (Elly Gibbon, surviving spouse of Chief Master Sergeant John Lee Gibbons, USAF Retired, emphasized that “[o]ur husbands honored their commitment to their country [and] [n]ow it is high time for the government to honor its commitment.”). Realistically, however, the ongoing border wall debate and recent partial government shutdown crisis make the likelihood of Congress allocating the necessary funds to repeal the offset even less likely than before. See, e.g., Andrew Taylor, *The Pentagon May Tap Military Pay and Pension Funds to Build Trump’s US-Mexico Border Wall*, BUS. INSIDER (Mar. 8, 2019, 9:46 AM), <https://www.businessinsider.com/pentagon-may-tap-military-pay-pensions-for-border-wall-2019-3>. See also Jill Colvin, *Trump Suggests Paying for Border Wall with Pentagon Funds*, WASH. TIMES (Mar. 28, 2018), <https://www.washingtontimes.com/news/2018/mar/28/trump-suggests-paying-for-us-border-wall-with-pent/>; Kate Davidson, *CBO: Shutdown Will Cost Government \$3 Billion of Projected 2019 GDP*, WALL ST. J. (Jan. 28, 2019, 5:16 PM), <https://www.wsj.com/articles/cbo-shutdown-will-cost-government-3-billion-of-projected-2019-gdp-11548688574>; Patricia Kime, *CBO Suggests Raising Tricare Fees, Cutting Veteran Benefits to Slash Deficit*, MILITARY.COM (Jan. 14, 2019), <https://www.military.com/daily-news/2019/01/14/cbo-suggests-raising-tricare-fees-cutting-veteran-benefits-slash-deficit.html?fbclid=IwAR3uy-jxawiPdEURsw6c0s-bBAND2iMIYw3XeSYq6kLJnXTumA3aCwIKC0>.

²¹¹ Harkins, *supra* note 63 (quoting surviving spouse Susie Brodeur, who emphasized the challenges inherent in “not knowing where that next dollar [is] going to come from”).

alleviate this stress; until then, basing survivor benefits on an established income cut-off, particularly in the years immediately following a service member's death, would provide some temporary respite for those who need it most. Many surviving spouses struggle to retain their homes and pay monthly bills, barely subsisting above the poverty line in some cases.²¹² In a recent Rand Corporation study conducted at the behest of Congress, researchers found that “nearly 16 percent of widows whose main source of survivor benefits is the military are below the poverty line,” and 7.7% of this same subset of the survivor population participate in food stamps.²¹³ The study's authors are quick to note that these findings “do[] not necessarily mean that military survivor benefits are ineffective” but, rather, that “further analysis is . . . needed to better understand” the data.²¹⁴ However, references to a “lack of data” pervade the authors' analysis of surviving spouses' income,²¹⁵ thereby calling into question the extent to which SBP widows truly do “compare well [with other widows].”²¹⁶

²¹² See Hammersly, *supra* note 21, at 10A; see also Telephone Interview with Teresa Priestner, surviving spouse of Chief Warrant Officer 4 John Priestner (Oct. 28, 2018) (describing her financial difficulties in making ends meet now that her daughters have both reached the age of twenty-two and no longer qualify for receipt of SBP); Questionnaire Answers of Theresa Morehead, surviving spouse of Master Sergeant Kevin Morehead (Oct. 24, 2018) (on file with author) (“I almost lost my home and had to sell possessions just to get by.”).

²¹³ HOSEK ET AL., *supra* note 8, at 69.

²¹⁴ *Id.*

²¹⁵ See, e.g., HOSEK ET AL., *supra* note 8, at 47, 48 (noting that the average income data on which the authors relied on in reaching their conclusions excludes widows under age 40, which represent less than two percent of all widows); *id.* at 54 (explaining that the data for “the characteristics of decedent spouses . . . were not available”); *id.* at 49–50 (discussing various limitations associated with the Annual Social and Economic Supplement (ASEC) of the Current Population Survey (CPS) used to analyze income data); *id.* at 58 (attempting to explain differences in data between military survivor benefits and VA benefits); *id.* at 60 (acknowledging that “the data do not allow us to investigate whether the larger benefits are explained by higher earnings of the deceased spouse”); *id.* at 69 (referencing “data limitations”); *id.* at 72 (noting “we recognize that more-detailed analysis is needed to better understand the differences in outcomes we observe and determine whether remedies to the SBP program are warranted”).

²¹⁶ *Id.* at 47. The study's authors acknowledge that *nonmilitary* widows receiving benefits from other federal, state, or local government pension plans typically “had higher average total income, lower poverty rates, and lower participation in public assistance programs.” KRISTY N. KAMARCK & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL45325, MILITARY SURVIVOR BENEFIT PLAN: BACKGROUND AND ISSUES FOR CONGRESS 3 (2018). See also HOSEK ET AL., *supra* note 8, at xiv–v, 67–68.

For surviving spouses living with the real consequences of lost spousal income, the conclusions of the Rand study provide little comfort.²¹⁷ If these survivors had additional time to adjust to their new reality, however, the sudden financial blow might be an easier pill to swallow. In a 2007 report, the Veterans' Disability Benefits Commission (VDBC) found that regardless of the time elapsed since the veterans' death, young survivors in their twenties and thirties "with an SBP offset had lower employment than those without the offset," and, as a result, also earned less on average.²¹⁸ More to the point, however, the study found that "the average income of survivors within 5 years of the veteran's death is lower than for those whose veteran spouse died 5 or more years ago."²¹⁹ Similarly, for all age groups, available data indicated that surviving spouses of veterans who "died within the last 5 years have employment rates that are consistently below those [whose] spouse died 5 or more years ago."²²⁰

Collectively, data from the Rand study and VDBC report suggests that the first five years following a veteran's death are among the most financially challenging for the surviving spouse, particularly when the spouse is young, inexperienced, and requires additional qualifications to secure employment.²²¹ The VA already offers income-based benefits to other groups of beneficiaries, such as DIC payments to surviving parents²²² and the Survivors Pension²²³ to eligible low-income surviving spouses or unmarried children. Establishing a similar income-based payment system for *all* surviving spouses would eliminate the confusion currently associated with the offset while guaranteeing a sufficient and reliable level of income. Arguably, setting a minimum income threshold for receipt of benefits might disincentivize some surviving spouses from

²¹⁷ See, e.g., Tom Philpott, *Military SBP 'Compares Well,' Irking Widows Still Hit by Offset*, MILITARY.COM (May 3, 2018), <https://www.military.com/militaryadvantage/2018/05/03/military-sbp-compares-well-irking-widows-still-hit-offset.html>.

²¹⁸ Christensen, *supra* note 10, at 105–06.

²¹⁹ *Id.* at 104.

²²⁰ *Id.* at 103.

²²¹ See also AMALIA MILLER ET AL., ANALYSIS OF FINANCIAL SUPPORT TO THE SURVIVING SPOUSES AND CHILDREN OF CASUALTIES IN THE IRAQ AND AFGHANISTAN WARS 33 (2012), https://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1281.pdf (finding "substantial household earnings losses following the deaths of active duty service members" that tend to "increase over the first four years following the deaths," due to in part to the loss of service member earnings and in part to the "decline in the earnings of the spouses of fallen service members").

²²² *Parents Dependency and Indemnity Compensation*, *supra* note 68.

²²³ *Survivors Pension*, U.S. DEP'T OF VETERANS AFFS., <https://www.benefits.va.gov/pension/spousepen.asp> (last visited June 12, 2019).

seeking employment or other sources of income; however, the importance of providing financial support to this population during an emotionally fraught time outweighs the dangers of potential abuse in the short term. If abuse were to become a problem, Congress could further revise the income-based benefits structure to taper payment percentages over time or simply add a time limit to the receipt of further payments.

3. Option 3: Switch to a Commercial Provider for the Administration and Management of Survivor Benefits

Much in the same way Servicemembers' Group Life Insurance (SGLI) is managed by Prudential,²²⁴ Congress should also consider administering survivor benefits through a commercial provider. As the Rand study noted, eliminating the DIC offset would have no negative financial impact on a private insurer "because premiums would have been paid on the SBP policy, thereby providing the funds needed to pay SBP benefits upon the death of the insured."²²⁵ Furthermore, providing SBP commercially would fundamentally alter the nature of the DoD's subsidy from SBP, making it "a government outlay and not an intergovernmental subsidy as it is today."²²⁶ As a result, the contracting accrual charge and outlays for a provider with the ability to operate SBP at a lower total cost than the DoD "would be smaller than they would have been under continued DoD

²²⁴ See *Office of Servicemembers' Group Life Insurance*, PRUDENTIAL, <https://ssologin.prudential.com/app/giosgli/Login.fcc?TYPE=33554433&REALMOID=06-000eb2bc-e833-1efc-9d9b-348e307ff004&GUID=&SMAUTHREASON=0&METHOD=GET&SMAGENTNAME=giosgli&TARGET=-SM-HTTPS%3a%2f%2fgiosgli%2eprudential%2ecom%2fosgli%2fController%2flogin%3faction%3dreturn> (last visited June 12, 2019); *Servicemembers' Group Life Insurance*, U.S. DEP'T OF VETERANS AFFS., <https://www.benefits.va.gov/insurance/sgli.asp> (last visited June 12, 2019). See also HOSEK ET AL., *supra* note 8, at 80 (emphasizing the high quality of service Prudential Insurance provides). Compare, however, the success of the privatization of SGLI with the recent military housing crisis. See, e.g., Matthew Cox, *Army Under Secretary on Housing Crisis: 'It's Embarrassing,'* MILITARY.COM (Feb. 27, 2019), <https://www.military.com/daily-news/2019/02/27/army-under-secretary-housing-crisis-its-embarrassing.html>; Claudia Grisales, *Lawmakers Ramp Up Hearings in Face of Military Housing Crisis*, STARS AND STRIPES (Mar. 5, 2019), <https://www.stripes.com/lawmakers-ramp-up-hearings-in-face-of-military-housing-crisis-1.571478>; Karen Jowers, *Black Mold, Rodents, Lead Paint in Privatized Housing: No Rent Until It's Fixed, Military Spouses Say*, MIL. TIMES (Feb. 13, 2019), <https://www.militarytimes.com/pay-benefits/2019/02/14/black-mold-rodents-lead-paint-in-privatized-housing-no-rent-until-its-fixed-military-spouses-say/>.

²²⁵ HOSEK ET AL., *supra* note 8, at 76.

²²⁶ *Id.* at 78.

management of SBP.”²²⁷ Although there are currently no “readily available commercial versions of SBP,” the technological capacity to create such a product exists.²²⁸ Thus, “if the commercial price, the cost of contracting, and the subsidy DoD would deliver to the commercial provider sum to an amount less than the in-house costs of administering, managing, and subsidizing the SBP fund, then outsourcing SBP is more likely to be advisable.”²²⁹

Providing SBP through a commercial insurance company is not, however, without potential pitfalls, to include “rising premiums with age and the possibility of no policies being offered to older individuals.”²³⁰ As a result, the Rand study authors note that “commercially provided term life policies are less likely to feasibly replace the current SBP, since SBP has neither feature.”²³¹ A commercial provider would also have to determine how to fund SBP payments for active duty beneficiaries because, unlike retirees, these individuals do not pay SBP premiums; rather, retiree premiums, DoD SBP accrual charges, interest earned on the fund, and the subsidy currently cover minimal SBP payments to active duty survivors.²³² Thus, in order to overcome these hurdles, a commercial provider would have to design a product with “construction of inflation-adjusted, flat-rate, single-rate whole life policies that pay an amount sufficient to fund an inflation-adjusted whole life annuity for the life of a surviving spouse and fund the payouts for the other categories of SBP beneficiaries.”²³³

Despite frequent references to a lack of data,²³⁴ the Rand study authors ultimately concluded that a contracted commercial insurance company may be able to administer SBP at a lower cost than the DoD while

²²⁷ *Id.* at 78–79.

²²⁸ *Id.* at 79.

²²⁹ *Id.* at 80.

²³⁰ *Id.* at 75.

²³¹ *Id.*

²³² *Id.* at 76.

²³³ *Id.* at 83.

²³⁴ *See, e.g., id.* at 73 (2018) (stating that data regarding quality and cost of service under the DoD compared to potential commercial providers is lacking); *id.* at 80 (noting that the cost information to assess the feasibility of outsourcing SBP is not currently available); *id.* at 82 (emphasizing that “further data and analysis would be required to determine whether commercial providers could perform the insurance function more cheaply than the public sector does”); *id.* at 83 (“[A]dvizability depends on whether, combined, the commercial price, the cost of DoD’s SBP subsidy to the commercial provider, and DoD’s cost of contracting are less than the in-house costs of administering, managing, and subsidizing the SBP,” for which “data are lacking to assess whether this is the case . . .”).

increasing overall efficiency and providing a higher overall quality of service.²³⁵ Given these cautiously optimistic findings, Congress should, at the very least, take note of the study's multiple references to the need for more information²³⁶ and invest resources into analyzing the costs associated with the commercialization of SBP.

V. Conclusion

Then-Senator Barack Obama was one of several Congressmen who heard the testimony of surviving spouses at a special veterans' benefits hearing on 3 February 2005. He listened to their words, acknowledged their frustrations at the inequities of the SBP-DIC offset, and ultimately urged his colleagues "not to pinch pennies on this . . . We can do better. I know there is a bipartisan commitment to do better. I am looking forward to being a part of doing better."²³⁷

After over a decade and three White House administrations, however, the SBP-DIC offset persists. The plight of approximately 67,000 surviving spouses, many of whom are elderly, is hardly the kind of sensational, attention-grabbing headline that ruffles the feathers of public indignation. Perhaps it should be, but after years of attempts at legislative reform, repeal of the offset continues to take a backseat to other issues. Survivors of both retirees and active duty members have ample cause for concern: retirees forfeit a percentage of their earned retirement pay to participate in SBP, and, in theory, active duty service members should benefit from the post-9/11 expansion of the program. The difference in dollars between the receipt of SBP *plus* DIC and SBP *minus* DIC may not seem like much, but for most surviving family members, \$15,000 represents a significant loss in annual income. By the time they learn these additional benefits will never come to fruition, it is almost always too late for contingencies, such as pursuing private life insurance coverage. To make matters worse, some spouses forfeit their own professional

²³⁵ See *id.* at 82.

²³⁶ See, e.g., *id.* at 73 (noting that "[f]urther research into DoD's internal costs, at a minimum, is indicated, as well as research into contract mechanisms that could induce insurers to provide a sufficiently high-end product to service members at a reduced cost to the government").

²³⁷ *Benefits for Survivors: Is America Fulfilling Lincoln's Charge to Care for the Families of Those Killed in the Line of Duty?: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 50 (2005) (statement of former Sen. Barack H. Obama, S. Comm. On Veterans' Affairs).

opportunities to keep their families intact while moving from assignment to assignment. Generally, survivors do not regret the decision to make these kinds of personal sacrifices. However, to say that they now feel slighted at the government's lack of urgency in response to their efforts to change the status quo would be an understatement. Default SBP enrollment for retirees, a lack of knowledge about the offset, and, perhaps most galling, what amounts to a post-9/11 publicity stunt purporting to expand SBP to active duty survivors are all factors that aggravate the impact of the current law on those subject to it. Fortunately, in these areas, judge advocates have the opportunity to provide an invaluable resource; in translating obscure statutes and legislation into digestible, clear guidance for active duty and retiree families, military lawyers can bridge the persistent knowledge gap that shrouds the SBP-DIC offset.²³⁸

Full repeal of the offset—an admittedly costly endeavor—is by no means the only avenue to providing some relief for surviving spouses. Congressional leaders should also consider other options to effectuate meaningful change for those impacted by the sudden emotional and financial strain of lost earnings. First, Congress could amend the statutory offset to establish income cut-offs for surviving spouses in dire need of both benefits. Second, Congress could dedicate additional resources to exploring the commercial privatization of SBP, thereby potentially reducing the costs of funding and managing the program. The reality, however, is that although lawmakers *could* spend money to resolve the inequities of the offset, they have not and, due to competing demands, likely will not. After almost two decades of war on more than two fronts, the offset remains an ugly, unpleasant stain on the nation's conscience. It challenges the patriotic solidarity of the “support our troops” rhetoric, and it calls into question President Lincoln's age-old pledge to provide for those hit hardest by years of war: until and unless something gives, who *will* care for him who shall have borne the battle, and for his widow, and his orphan?

²³⁸ For suggested guidance on how judge advocates might advise potential clients on estate-planning issues related to the SBP-DIC offset, see *infra* Appendix A.

Appendix A. Quick Guide to the SBP-DIC Offset for Judge Advocates

➤ Introduction

In advising service members, retirees, and surviving family members on estate planning matters, judge advocates must be equipped with knowledge of the interaction between the Survivor Benefit Plan (SBP) and Dependency Indemnity Compensation (DIC). Understanding how current law impacts the concurrent receipt of these two benefits may significantly affect the decisions service members and their family members make in preparing for the future.

➤ What is SBP?

SBP is a Department of Defense (DoD)-funded benefit that acts somewhat like a life insurance plan. Unlike private insurance policies, however, the SBP provides flat-rate, inflation adjusted monthly annuity payments that are not contingent on the policy holder's age or pre-existing medical conditions. Retirees are automatically enrolled in SBP while transitioning out of the military and must proactively opt out to avoid monthly payments. SBP monthly payments comprise up to 6.5% of the individual's monthly retirement pay. After September 11th, 2001, Congress expanded SBP eligibility to include surviving family members of active duty service members who die in the line of duty. Unlike retirees, active duty service members are not required to make monthly SBP payments.

Eligible SBP beneficiaries include the retiree or active duty member's spouse; spouse and children (with age limitations for children); children; former spouse; former spouse and children; and other persons with an insurable interest. Surviving spouse beneficiaries who remarry before the age of fifty-five lose SBP eligibility. SBP is a taxable benefit for all categories of beneficiaries. For survivors of retirees, annuity payments are calculated as fifty-five percent of the member's monthly retirement pay. For survivors of active duty service members, annuity payments are calculated as fifty-five percent of the member's theoretical monthly retirement pay if he/she had been 100% medically retired at the time of his/her death.

➤ What is DIC?

DIC is a Veterans Affairs (VA)-funded benefit payable to the family members of active duty and retired service members who die from service-connected injuries or illnesses (e.g. health issues associated with Agent Orange exposure during the Vietnam War). Unlike the SBP, DIC is a tax-free benefit awarded at a flat rate to all eligible recipients, regardless of rank or time in service. As of 1 December 2018, the basic monthly rate for DIC payments was \$1319.04. Dependency Indemnity Compensation beneficiaries include surviving spouses, children, and, in some cases, parents, depending on the parents' income and marital status. Surviving spouse beneficiaries who remarry before the age of fifty-seven lose DIC eligibility.

➤ What is the SBP-DIC offset and why does it matter?

The SBP-DIC offset is a statutory requirement that offsets the SBP payments dollar-for-dollar by DIC payments. If the DIC benefit is larger than the SBP benefit, then the survivor receives only the DIC benefit. On the other hand, if the SBP benefit is larger than the DIC benefit, the survivor receives the full DIC benefit and any SBP benefits less an amount equivalent to the DIC benefit. Put another way, the survivor retains the higher of the two payments rather than the combined amount of both benefits. The offset is, in essence, a limitation on the concurrent receipt of SBP and DIC. Unfortunately, knowledge of the SBP-DIC offset is generally quite limited, and many surviving family members are unaware of its existence until confronted with the realities of its unexpected impact on their financial circumstances.

Survivors subject to the offset are also eligible for an additional monthly payment known as the Special Survivors Indemnity Allowance (SSIA). Special Survivors Indemnity Allowance is intended to partially make up for the SBP-DIC offset. Like DIC, SSIA is awarded at a flat rate (adjusted for COLA) and, like SBP, is a form of taxable income.

➤ Bottom Line

Although judge advocates may not bear direct responsibility for managing or overseeing personnel matters, we can thoroughly research the kinds of complex survivor benefit issues that impact the lives of surviving family members. In this area of law, responding to client questions often requires parsing through multiple statutory and regulatory authorities,

many of which are obscure or difficult to understand in a vacuum. Distilling this information into simplified, easily digestible terms can make a very emotional subject far less daunting for service members and their families.

As a result, service members and retirees can make more informed decisions based on their families' needs while still in a position to do so. For all clients, this might mean pursuing an additional, privatized life insurance policy to make up for the potential effects of the SBP-DIC offset. For retiree clients, this may translate to proactively opting out of SBP rather than forfeiting years of premium payments, especially when the retiree knows that his/her spouse may be eligible for DIC based on his/her disability ratings at retirement. Ultimately, equipping clients with this invaluable information manages expectations for family members following the sudden death of a service member or retiree, which, for most survivors, is likely among the most challenging life events they will ever experience.

➤ Helpful Resources

SBP Financial Analysis Tools, OFF., OF THE ACTUARY,
<https://actuary.defense.gov/Survivor-Benefit-Plans/>.

MY ARMY BENEFITS, <https://myarmybenefits.us.army.mil/>.
Benefits and Programs, MILITARYSURVIVOR.COM,
<https://www.militarysurvivor.com/benefits>.

FORREST D. BAUMHOVER, *MILITARY IN TRANSITION'S GUIDE TO THE SURVIVOR BENEFIT PLAN: NAVIGATING THE SBP* (2016).

Understanding SBP, DIC, and SSIA, DEF. FIN. AND ACCT. SERV.,
<https://www.dfas.mil/retiredmilitary/survivors/Understanding-SBP-DIC-SSIA.html>.

Office of Survivors Assistance FAQs, U.S. DEP'T OF VETERANS AFF.,
<https://www.va.gov/SURVIVORS/FAQs.asp#FAQ8>.

HYPOTHETICAL SBP-DIC OFFSET COMPARISON		
	O-5 Retiree Death (Spouse Only)	E-6 Active Duty Death (Spouse Only)
Years in Service (YIS)	20 years	14 years
Monthly Retirement Pay (as of Jan. 1, 2019) ➤ Retirees = 2.5% x YIS x Monthly Base Pay ➤ AD = 75% x High-36 Basic Pay (i.e. medically retired at 100% disability rating)	\$4621.80 (= .025 x 20 x \$9243.60)	\$2922.75 (= .75 x \$3897)
Monthly SBP Deduction Payment ➤ Retirees = Up to 6.5% x Monthly Retirement Pay ➤ AD = Free	\$300.42 (= .065 x \$4621.80)	None
Theoretical Timing of Death (note that the numbers used here are provided for the limited purpose of this hypothetical example)	10 years <u>AFTER</u> retirement (this could be any number of months or years following retirement).	6 years <u>PRIOR TO</u> retirement eligibility (this could be any number up to and in excess of 20 years, the cut-off for traditional retirement eligibility).
Total SBP Payments at Time of Theoretical Death (not adjusted for inflation)	\$36,050.40 (= \$300.42 x 12 months/year x 10 years)	None

Monthly SBP Payment to Beneficiary (= 55% x Monthly Retirement Pay)	\$2541.99 (= .55 x \$4621.80)	\$1607.51 (= .55 x 2922.75)
Monthly DIC Payment to Beneficiary (as of Dec. 1, 2018)	\$1319.04	\$1319.04
Monthly Amount Received by Beneficiary Without SBP-DIC Offset (= SBP + DIC)	\$3861.03 (= \$2541.99 + \$1319.04)	\$2,926.55 (= \$1607.51 + \$1319.04)
Monthly Amount Received by Beneficiary After SBP-DIC Offset (= Higher of SBP/DIC Payments)	\$2541.99	\$1607.51
Monthly SSIA Payment to Beneficiary (as of Dec. 1, 2018)	\$318	\$318
Total Monthly Amount Received by Beneficiary (= Monthly Amount Received After SBP-DIC Offset + SSIA) <i>*not including Social Security Payments</i>	\$2859.99 (= \$2541.99 + \$318)	\$1925.51 (= \$1607.51 + \$318)