

Creating a Bad Law

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The following is an excerpt from a statement made by (now deceased) SGT MAJ C.A. MCKINNEY, USMC Retired before the Committee On Veterans Affairs, U.S. House of Representatives on the UNIFORMED SERVICES FORMER SPOUSE PROTECTION ACT (USFSPA) on 5 August, 1998.

"To understand the mechanics that moved Congress to enact the USFSPA, one must be knowledgeable of the events leading to its finale. The following statement was prepared by this witness who played a major role in trying to delay the momentum driving the force toward the enactment of what the military and veterans' groups believed to be a one-sided proposal. Much of this statement is supported by documents retained on file by this witness.

MILITARY RETIRED PAY

For almost a century, prior to the enactment of USFSPA, U.S. Courts agreed that military retired pay is neither an annuity, a pension, nor a payment for fully retiring from the Armed Forces of the United States. As far back as 1881, the U.S. Supreme Court held in *U.S. v. Tyler* (105 U.S. 244) that officers retired from active service were still "in the military service of the government." The Court took note that those on the retired list "were in all respects still performing 'service'."

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in military service."

Other Courts upheld the earlier decision. In *Lemly v. United States* (109 Ct.Cl. 760,763 (1948)) the Court stated: "Retirement pay ... is a continuation of active duty." Nearly 20 years later on March 16, 1976, the U.S. District Court, Northern District of California, supported the judgment that military retired pay is "reduced pay for reduced but continuing service." In October 1978 the U.S. Court of Appeals for the Ninth Circuit arrived at the same result as in the Lemly case: "Retirement pay ... is a continuation of active duty."

Additionally, the Internal Revenue Service (IRS), through the Federal Government's issue of W-2P Forms, identified military retired pay as separate from 'pensions and annuities.' And the Subchapter on Forfeiture of Annuities

and Retired Pay, USC 5, 8311, defined military retired pay separately from federal employees' annuities. Even the Encyclopedia Britannica of the time noted that military retired pay was different from 'public employee pensions,' "... they (military retired pay measures) continued a certain portion of pay."

THE BEGINNING

For some years prior to 1977, a few States, then numbering no more than 8, had developed community property laws. Some treated military retired pay as divisible upon granting divorces involving military personnel. In 1977, two noncommunity property States, Michigan and New Jersey, adopted the concept. Colorado, however, had ruled in 1975 that military retired pay was not subject to a division because it was not the result of a 'contributory plan.'

The Montana Supreme Court also took the position that military retired pay, like a private pension, could be considered vested property and was divisible under State law. Oregon's Court of Appeals ruled that the retired pay of a Foreign Service Officer could be assigned to his former spouse while he was still employed. Payments would begin after retirement.

California went further. In *Luciana v. Luciana* its Court of Appeals decided that the former spouse did not have to wait until the service member retired to begin receipt of the latter's military retired pay. However, the court noted that if she began payments at that time it would "constitute an irrevocable election to give up possibly higher future payments that might accrue because of longevity increases, more years of service and military pay raises." (Randall Shoemaker, *The Retired Scene*, Navy Times, Oct. 20, 1980.)

In another California case, Tom Philpott, reporting for the Navy Times, March 16, 1981, discovered that a state court had awarded a former spouse damages because her former military spouse refused to retire so she could get a portion of his retired pay.

In an article by Bruce Covill, Army, Navy, Air Force Times, April 14, 1977, he noted that one of the community property states, Texas, had recorded a state court judge's ruling in 1960 that military retired pay constituted property and could be divided between husband and wife in a divorce action.

Texas, in the minds of its congressional delegation had one insurmountable problem, it wasn't able to enforce payment due to a quirk in its constitutional

law. The State had no alimony or garnishment statute. Although Texas may have wished for the Federal government to collect and pay its court orders involving the division of military retired pay as community property, the Comptroller General of the United States, in decision B-190985, gave service secretaries legal basis for refusing to follow Texas community property attachments to military retired pay.

Texas' predicament led former U. S. Representative Kent Hance (TX) to introduce H.R. 3677 in early 1980 authorizing the Service Secretaries to pay 'another person' part of a service member's retired pay as a result of a court decree, etc., or 'any court-approved property settlement.' Hance reintroduced his proposal in 1981 as H.R. 1711. Eleven (11) of his co-sponsors were Texans. (More on the Texas situation, pp 10-11.)

ESTABLISHING A PRECEDENT

Despite protests to the contrary, the civilian community, including Members of Congress, referred to military retired pay (also 'retainer pay' payable to Navy and Marine Corps personnel with more than 20 years of active service but less than 30) as a 'pension.' The late U.S. Representative Les Aspin used the term 'pension' during his attacks on the military retirement system. Even such military-oriented publications as the Army, Air Force, and Navy Times used the word. It wasn't too long before some uninformed service members began to refer to their military retired pay as a pension.

It is of little wonder that the media adopted the misnomer and used it in such articles to describe military retired pay. Newspapers had a field day with former U. S. Representative Patricia Schroeder's quotes on the plights of ex-spouses not in receipt of any part of their ex-husbands' retired civil service or military 'pensions.'. William Raspberry of The Washington Post was one of the first to pick up the Schroeder banner after she introduced legislation in early 1977 to authorize splitting retired 'pensions' between federal employees and their former spouses.

THE PROPOSALS

In introducing her first bill, seeking the division of civil service retirees' annuities, Schroeder hailed the fact that at least former spouses of military personnel would be eligible to receive social security benefits from their military sponsors' contributions to that program. However, this did nothing later to dissuade her from going after the retired pay of military members. She provided 'heart-rending' stories for publication in the Congressional Record of former spouses left without financial or other support.

Schroeder's initial proposal to divide military retired

pay specified that:

- a. Marriage must last for 10 years while the military member is serving the 20 years to be entitled to retired pay.

- b. Division to be prorated on years of service not to exceed 50 percent of the retired pay. For example, being married for 20 years while the member was 'earning' the entitlement gave the former spouse a 50 percent share.

- c. Member must provide survivor benefits for ex-spouse unless the latter declines.

- d. Payment to ex-spouse terminates upon remarriage prior to age 60. (Applicable also in her Federal retirees proposals.)

- e. Applies to military personnel retiring after enactment.

- f. If divorce occurs while member is on active duty, the ex-spouse could later claim a portion of retired pay for time married.

Schroeder

went on to introduce successive proposals in the 96th and 97th Congresses. All were similar in content and all terminated payments to ex-spouses on remarriage before age 60. In all three bills she used the term 'pension' in describing military retired pay. Two (2) examples are quoted below.

"This bill recognizes that both spouses contribute to the service member's ability to earn a wage and receive a pension."

"The major policy question before us is whether pension plans should continue to emphasize benefits for retired workers solely?"

Schroeder's

quest to have Congress amend Federal statutes so that military retired pay would no longer belong exclusively to the service member set off a number of related proposals.

In addition to the Hance bill, H.R. 3677, former Senators DeConcini and McGovern and U.S. Representative Joseph Fisher (VA) sponsored legislation that would provide either financial or administrative support to ex-spouses of service members. Fisher's bill required the Department of Defense (DOD) to notify the military retiree that his or her retired pay would be divided by a court order, etc., but the retiree would have no recourse to halt the payments. On the other hand, civil service personnel were granted an additional 30 days to initiate legal action to challenge the validity of the order.

Meanwhile, earlier actions by the Executive Branch, the Civil Service Commission and the General Accounting Office (GAO), opposed the Schroeder legislative proposals awaiting consideration by Congress.

THE 1980-81 HEARINGS

On May 28, 1980, the late U. S. Representative Bill Nichols, Chairman, House Armed Services Committee's Subcommittee on Military Compensation, conducted a hearing to consider Schroeder's bill, H.R. 2817, and the Hance and Fisher proposals.

In his introductory remarks, the chairman stated:

"The (military retirement) benefit system is designed to attract and retain the quantity and quality of military personnel needed. To this end, it must provide equitable compensation in conjunction with a benefit package that provided the incentive to choose the military as a career. Providing benefits to dependents can be justified, in part, on the basis of comparability with the private sector. However, extending certain benefits to former spouses neither directly enhances career attractiveness nor addresses a problem with regard to comparability. ... Whether the Federal government provides assistance to former spouses of military personnel through a military benefit program or whether that assistance is provided through standard social programs, that assistance is a payment from the public at large to a specific group. It is not for services rendered or an entitlement earned; it is a transfer payment."

Among the witnesses at the May 28, 1980 hearing was the Deputy Assistant Secretary of Defense for Military Personnel Policy. He advised the subcommittee that DOD was opposed to the Schroeder bill, H.R. 2817. His opposition was supported by four major military organizations. Of the two (2) women's panels, Ex-Partners of Servicemen for Equality (EXPOSE) and Action for Former Military Wives, only EXPOSE (with all of its 300 members nationwide) chose to endorse the Schroeder bill.

The following major points helped to convince the subcommittee to take no further action on H.R. 2817. Although cited to oppose a future Senate bill (see below), they apparently were ignored by that body's oversight panel.

- Military retirees are subject to the applicable provisions of the Uniform Code of Military Justice (UCMJ). (Spouses are not.)
- Military retirees may be recalled to active duty. (Spouses cannot.)
- Military retirees do not have 'property rights' to their retired pay. It is earned on a day-by-day availability to serve if recalled. The day the retiree dies is the day his or her retired pay terminates. Additionally, military retirees are subject to a variety of rules and regulations that can reduce military retired pay. (Spouses are not.)
- Enlisted service members, including combat veterans, can be honorably but involuntarily discharged and commissioned officers may resign with as many as 19 years, 11 months, and 29 days without any compensation or benefits forthcoming. They have served longer than 10 years (as in the former spouses' proposals) yet are entitled to nothing from the Armed Forces for their sacrifices and hardships endured while serving their Nation. (Why, then, should spouses with less than 20 years be considered above the service rendered by these men and women, many of them combat veterans?)
- Public Law 95-617 (1975) authorized garnishment of active and retired military pay to satisfy state-court ordered alimony and child support payments. (Later amended so that alimony would not include transfer of property as a result of divisions of property between spouses or former spouses.) (It is worthy to note that the major military organizations, numbering more than 600,000 members, did not object to the garnishment of military retired pay for court-ordered alimony or child support payments.)

Chairman Nichols conducted a second hearing in November 1981 to hear from Reps. Schroeder (H.R. 3039), Whitehorse, Vic Fazio and

Hance. Supporting them were three (3) women's groups with two (2) military associations providing the opposition. Nichols noted that the issue is 'complex and emotional'... thought must be given to the role to be played by the Federal versus the state government in divorce cases and "the rights and well-being of the military member as well as the former spouse."

McCARTY v. McCARTY

In the Fall of 1980 the Supreme Court agreed to hear the appeal of a retired military officer who had been ordered by a California Court to split nearly half of his retired pay with a former spouse. He argued, among other points, that he was not subject to the jurisdiction of the California Court and was exempt from that State's community property law. Further, he claimed that the State was violating the Federal supremacy clause by interfering with Congress' authority to provide a retirement system for the Armed Forces.

McCarty also mentioned the split between the States on treatment of military retired pay in divorce cases. And the fact that it encouraged forum shopping for a divorce by military spouses.

Meanwhile, the passage of the Foreign Service Act of 1980 brought a feeling of anxiety to the military community, in particular the major military organizations representing more than a million service members; officers and enlisted, active duty, reserve and guard, and retired. Seven (7) of the organizations joined in an amicus curiae brief on behalf of the appellant McCarty. The Fleet Reserve Association (FRA), The Retired Officers Association (TROA), Reserve Officers Association (ROA), Marine Corps League (MCL), Non Commissioned Officers Association (NCOA), Air Force Sergeants Association (AFSA) and National Association for Uniformed Services (NAUS) requested that the U. S. Supreme Court rule in favor of protecting military retired pay from State community property laws.

Filing a brief in support of Mrs. McCarty were; Action for Former Military Wives, Ex-Partners of Servicemen for Equality, National Military Wives Association, Association of American Foreign Service Women, National Organization for Women Legal Defense and Education Fund, some California women's groups (estimated to be less than 10,000 members), and eight (8) members of Congress. The eight were: U. S. Representatives Pat Schroeder, John Burton, Millicent Fenwick, Margaret Heckler, Barbara Mikulski, John Seiberling, Olympia Snowe, and Howard Wolpe.

In spite of the anxiety, the military organizations believed that the Supreme Court and Congress would prevail in favor of military retirees for the following reasons:

- Foreign Service and Civil Service retirement systems, unlike that of the military, were contributory. Each had a vested program, the military did not.
- Neither of the two Federal systems had mandatory recall-to-active employment as did the military retiree.
- Neither of the two Federal systems had a program of contributing to social security and, therefore, had no former spouses' benefit to offer. The military, however, did have such a program.
- Neither of the two Federal systems required their retired members to suffer a loss of retired pay, as is the case for military retirees, for violating one of their regulations without judicial process, or for being employed by a person furnishing naval supplies or war materials to the United States, or engaging in selling, contracting or negotiating to sell certain supplies to Federal entities listed in 37 USC, 801.
- Neither of the two Federal systems required their retired members to follow a lifetime of regulations as is the case of military retirees.

Some of the above reasons were reiterated in the amici curiae filed in the McCarty case by the seven (7) military organizations noted above.

"The fundamental purpose of retired pay of military personnel is to provide for the national defense. It is this fundamental purpose which requires the finding that there is a federal interest to protect in the case before the Court, that the federal interests dictates a finding that retired pay is not a vested property right. The findings by scattered state courts that retired pay is a vested property right, based upon certain characteristics of the payment, pose significant threats to the special nature of this 'entitlement' and its function in national defense."

Once again, in the amici curiae, the associations voiced their support for court ordered alimony and child support payments. "They are in agreement that the power of a state to require support from any of its citizens is a parochial matter subject only to the due process test of a rational basis for any law."

In its opinion the Supreme Court on June 26, 1981 held that "Federal law precludes a state court from dividing military retired pay pursuant to state community property laws."

"(a) There is a conflict between the terms of the federal military retirement statutes and the community property right asserted by appellee. The military retirement system confers no entitlement to retired pay upon the retired member's spouse, and does not embody even a limited 'community property concept.' Rather, the language, structure, and history of the statutes make it clear that retired pay continues to be the personal entitlement of the retiree."

Further, the Court explained that "the application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests." Moreover, "... such a division (of military retired pay) has the potential to interfere with the congressional goals of having the military retirement system serve as an inducement for enlistment and re-enlistment and as an encouragement to orderly promotion and a youthful military."

The Court did recognize the plight of ex-spouses. It stated that an ex-spouse's situation may be mitigated by the right to claim social security benefits and garnishee military retired pay for support, but that Congress may wish for a need to provide more protection. Congress now had carte blanche to change the system.

SENATE ACTION

While the Supreme Court was weighing the McCarty case, the Senate Armed Services Committee's Manpower and Personnel Subcommittee was working on the introduction and consideration of a proposal to divide military members' retired pay with their former spouses. In early 1981 the panel, chaired by former Iowa Senator Roger Jepsen, offered a proposal for review, later introduced as S.1814.

Meanwhile, others, including Representatives Schroeder and Hance, sponsored their own bills dealing with the ex-spouse issue. Schroeder's bill, H.R. 3039; Hance's H.R. 1711; former Senator Hatfield's S. 888; and former Senator DeConcini's S. 1453, became subjects of a September 22, 1981 hearing before the Jepsen panel.

At the hearing the list of witnesses was restricted to one (1) military organization opposed to the bills while two (2) small women's organizations representing affirmative action were allowed to provide testimony. From that date forward, until the proposal was adopted by the Senate Armed Services Committee, none of the hearings scheduled by the Jepsen panel included as a witness a representative of an opposing military organization. Only witnesses favoring the ex-spouses' proposals were invited to testify.

Accordingly, things would not go well for the military organizations desiring to maintain military retired pay as an exclusive right of the service member. Comments by the chairman and ranking member were weighted heavily in favor of changing the retirement system so that former spouses would be able to obtain a percentage of the military member's retired pay. DOD's statement had changed from a negative position on the Schroeder's proposal to a neutral one awaiting instructions from the President's office. Responding to a Jepsen question, the DOD spokesman said that "most of us" (in DOD) agree to splitting the (retiree's) check. From this hearing until the enactment of the USFSPA DOD's position remained ambiguous.

Representative Schroeder also appeared before the Jepsen panel. She endorsed Hance's H.R. 1711 or DeConcini's S. 1453 "if the Subcommittee finds that stronger language is necessary to override the Supreme Court's McCarty decision." She then spoke of her proposal, once again voicing support for terminating retired pay division if the former spouse remarried before age 60.

The military organizations continued to seek support for their position. They hoped for a chance to present their case before the Subcommittee; however, that hope faded as stronger support materialized favoring the Jepsen proposal. Even the military hierarchy appeared to be abandoning its opposition to the former spouses proposal. In one example, the four uniformed manpower chiefs failed to give a clear indicator as to their Service's position.

The organizations then visited a number of offices of House and Senate members of the Texas delegation urging Texas to change its laws to permit garnishment for alimony and child support payments in lieu of using Federal statutes to provide compensation to former spouses. The attempt was futile. Except for a small minority, the delegation proved to be four square in favor of changing Federal law to circumvent their state's failure to provide protective measures for former spouses.

The Texas interest in the Hance-Schroeder-Jepsen initiative became more

apparent following the Supreme Court decision of June 26, 1981. In a July 13, 1981 Air Force Times edition, Tom Philpott reported that a source told him that "... most of the hue and cry (over Mccarty) is coming from Texas, where there is no alimony and a wife who doesn't receive a property distribution doesn't receive anything."

As a result, the Texas congressional delegation was playing a major role in having changes made to the military retirement system. Conversations with Rep. Hance verified the delegation's commitment to revising Federal law 'because it is easier than trying to amend the Texas constitution.'

MARK UP AND INTRODUCTION OF AMENDMENTS

The Jepsen panel approved its version of the former spouses protection act, S. 1814, and quickly scheduled it for a mark up by the full SASC. The opposing military associations reacted by contacting Senator John Warner seeking his intervention. At the mark up he moved to have the proposal recommitted to the Jepsen panel for further consideration. He reasoned that since only one military organization had the opportunity to voice its objections, it was only fair to allow the others to have the same opportunity as did the many groups favoring the bill.

Jepsen and Exon objected and Tower sided with them. However, before announcing his decision to rule against the Warner motion, Tower went so far as to state that he was a member of one of the opposing enlisted military organizations and had heard their testimony. This came as a surprise to that organization's representative who was present for the mark up. He (as well as the other military organization representatives present) was astounded when Jepsen boasted that the Subcommittee had four hearings and they (the military organizations) had a chance to testify. Exon, the Subcommittee's ranking minority, echoed Jepsen. He, too, claimed that everyone had a chance to be heard.

On July 14, 1982, the Senate Armed Services Committee referred the bill, S. 1814, to the full Senate for consideration. The very next day, Thursday, July 15, 1982, Rep. Schroeder, without comment, and among other amendments, introduced the Senate version as an amendment to the FY 1983 Defense Authorization Bill. Twelve (12) days later, July 27, 1982, just prior to adjourning for the day, and without a hearing on the new proposal, the amendment came to the House floor for consideration. However, debate was suspended until the following morning.

After Schroeder introduced her amendment on July 15, concerned military organization representatives met the following week with Rep. Nichols, then chairing the HASC subcommittee having oversight on the issue. The purpose was to determine a method to sidetrack the proposal. However, Nichols advised

the group it is an election year and momentum was such that there is no chance to slow it down. Instead, he placed an offer on the table to consider amendments to the Schroeder proposal. A number of suggestions were made, but only a few were accepted. Without the organizations' knowledge he incorporated these into an umbrella amendment to the Schroeder amendment. Nichols introduced his amendment on July 27, 1982.

THE FLOOR DEBATE

The debate on the now Schroeder-Hance-Whitehurst amendment began the following day, July 28, 1982. The three, all attorneys-at-law, had a supporting cast of some nine (9) member attorneys to speak in favor of the amendment. It was not surprising then to learn that the only supporting document introduced during the debate by Schroeder, et al, was a letter from the American Bar Association (ABA).

The number of attorneys was so overwhelming that Rep. Nichols, leading one of the two opposing sides, admitted that he was "in a rather uncomfortable situation ... beset on both sides from people who are learned in the law." And the learned appeared to take full advantage of the task at hand. They embellished many of their remarks in swaying the jury of peers to vote for the cause. For example:

"(The McCarty decision) has materially and adversely affected the practice of family law.'

"State courts are holding up action on divorce cases until Congress resolves the conflict."

Further embellishment came through the use of the word 'pension.' Referenced any number of times to describe or allude to military retired pay, it left those who were not knowledgeable a vision of a payment for past services rather than what it really is, reduced pay for reduced services.

The Texas delegation, as anticipated, continued its role in the proceedings. In addition to Rep. Hance, Texas Congressmen Sam Hall, Jr., Martin Frost, Abraham Kazen and Jake Pickle offered their supportive views on the Schroeder-Hance-Whitehorse amendment. Ignoring the Federal law authorizing garnishment of military pay and retired pay, Frost and Kazen pled their case. Frost: "The amendment is definitely needed for the courts in the State of Texas. ... The State courts in Texas already consider such pay in divorce settlements;

however, there is no garnishment or enforcement provision to insure the due award to a former spouse on the basis of a qualified court order." Kazen: "... the great State of Texas does not have a garnishment law. We cannot go after anybody's salary or anybody's pension or anything else."

Early in the debate, Schroeder advised her audience that the amendment "simply returns to the State courts the authority to treat military retired pay as it does other public and private pensions." The opposition should have caught this and countered with, 'the States never had the authority to divide military retired pay from the beginning.'

Subtleties also were employed by the Schroeder-Hance-Whitehorse team and its supporters. Some are quoted below (Underlines supplied):

- "I am very saddened that we cannot -- give military spouses at least equal rights with Foreign Service and the CIA- but to not do anything would be a tragedy and really put (military spouses) in the worst of all possible positions."

- "I think we should give military wives at least equal rights with Foreign Service spouses and CIA spouses."

- "I am very saddened that we cannot give military spouses at least equal rights with the Foreign Service and the CIA."

The key words in each of the above statements were, 'at least equal rights with Foreign Service and CIA spouses,' but apparently equity never played a part in the Schroeder-Hance-Whitehorse amendment. Despite assurance that her amendment was, "absolutely (the) bare minimum," was not "breaking new ground," nor does it "put former military spouses in a more advantaged position ...," the statements made throughout the debate by Schroeder and company veiled the real

intent of the amendment to authorize enhanced benefits for military spouses. At least Rep. William Ford was honest enough to acknowledge this when he boasted, "I think (the Schroeder amendment) is far superior, for example, to what we ended up doing with the Foreign Service officers."

Nichols warned the assembly that there were "uncertainties, ambiguities and potential problems" in the Schroeder amendment and that he had "some very significant reservations" concerning its implications. Rep. Don Mitchell cautioned: "Equity, I feel, is the theme ... not just equity for divorced spouses. Even though the scales have been balanced unfairly ... I do not feel we should unbalance them on the other side in an attempt to remedy the situation. ... (W)e must also provide equity for the members of the service."

During the proceedings, the following major problems or advantages emerged:

- The military spouse will have the opportunity to forum shop. Toward the beginning of the debate, Rep. Hance remarked that in order for former spouses to get any type of the retired military pay- "they have to go to court and go from jurisdiction to jurisdiction." Later, during floor speeches by Reps. Nichols and Duncan Hunter, both called this fact to the attention of the assembly. Nichols: "The gentlewoman's amendment would subject a military member to the jurisdiction of a court solely because the member was residing in the State as a result of military orders." Duncan: "I think we do have a problem with forum shopping under the proposal by the gentlewoman from Colorado."

- No remarriage provision. Schroeder reneged on her previous position of denying payments to former spouses who remarried before age 60. Previously she had introduced four (4) bills in successive Congresses that included the denial. Her latest, H.R. 3039, was introduced in the very same Congress now hosting the debate. Referring to the Nichols' amendment, Schroeder expressed fault with its remarriage provision. "This really concerns me because the fact that (the military spouse) remarries or not should not have anything to do with the rights that she had vested in her time that she was working and living with her husband who was in the military." Nichols reminded Schroeder of her earlier statements pleading for equal rights, that the Foreign Service and CIA both had remarriage terminal provisions and, "A similar restriction is only fair for the military member as well, who, to a large extent, is similarly situated."

- Courts can order payments to former spouses with less than 10 years of marriage to the service member. Both Schroeder and Hance argued to retain this provision. Schroeder suggested that although she, as a general rule, believed pensions should not be divided after short marriages, there were always "exceptional cases." She reported further that the Foreign Service Act specified that nothing therein prevented State courts from dividing pensions in cases where the former spouse was married less than 10 years. Hance, using a different tactic, pleaded that the rights under a pension bill or retirement bill "should vest from the first day." Schroeder was reminded by Nichols that recent changes in the Foreign

Service system and those proposed for the CIA "restricted payments of portions of retired pay to situations in which the marriage lasted 10 years." Former Rep. Don Mitchell also reminded the assembly that both Schroeder and Whitehurst had the 10 year restriction in their original bills. Mitchell, who at the time was the ranking minority member on the House Armed Services compensation subcommittee, apprized his colleagues that the service member had no vesting rights. "We should take into account, he said, "that there is no vesting in the military ... If you are there 20 years, you get it. If you are there 19 years, you do not."

- Has no history of hearings in the House. Schroeder and other team members alluded to the fact that her amendment had been considered in the House. "(T)here were lots of hearings on this in the House," she claimed. Later, she again implied that the House "has had lots of hearings on this, on the CIA, on Foreign Service, on civil service." In truth, there were a number of hearings to consider the CIA, Foreign Service and civil service proposals, but none- absolutely none in the House on her proposal now on the House floor. Nichols, whose panel had this authority, alluded to Schroeder's statements as erroneous. He said he would rather have been able to consider this "rather complex and far-reaching issue within the committee to insure that the full impact of these changes could be evaluated in detail." He rightfully charged that Schroeder's amendment "was an attempt to circumvent the system." The House Armed Services ranking member, former Rep. William Dickinson, said the House should go about it in the more normal way. "This really should be the subject of extensive hearings so that all parties interested can have their day in court ... to develop the problems that will arise from this ... and we know what we are doing." Nichols and Dickinson were joined by Mitchell who noted there wasn't sufficient testimony received. "I would hate to pass a bill ... because we acted prematurely this year." Former Rep. Richard White, one time chairman of the House Armed Services personnel subcommittee, went even further in his observation. He said he could not be silent "when the House might produce what I regard as defective legislation. ... Both (Schroeder's and Nichols' amendments) create more loopholes than they seek to cure." White also reminded his colleagues that there was no mark up on the amendments and no opportunity for the House to pass a separate type of program.

- Provides minimum protection for service members. Rep. Whitehorse assured members of the House that, "The service member is protected by several clauses in this legislation." He noted that one limited the amount of the award of retired pay to 50 percent of disposable retired or retainer pay, failing to add that the amount could go as high as 65 percent. Another would forbid the courts from ordering a service member to retire in order to effectuate payments from the member's retired pay, yet he made no mention that the amendment did not forbid the courts from ordering the service member to begin payments out of his or her active duty pay. A third clause stipulated that the former spouse could not transfer, dispose of by will or inheritance, or sell her portion of retired pay, although it is doubtful that this clause was a protective measure for service members. At other times during the debate other clauses were briefly addressed. One deterred the courts from ordering service members to enroll in a survivor benefit plan for their former spouses; however, they could voluntarily do so if they chose. Another came to light when Rep. Sam Hall, Jr., a Texan, inquired if there was a provision in the Schroeder amendment allowing the courts to reopen previously concluded final judgments? Schroeder replied in the negative but she did not inform Hall that there was no provision in the proposal to stop the courts from doing just that if so inclined.

OTHER PROBLEM AREAS

A number of questionable clauses in the Schroeder amendment, also incorporated in the Nichols' proposal, spelled trouble for service members. An attempt by military organizations to have the House and Senate conferees rescind, amend or correct a number of these was not successful. Most important, perhaps, was the lack of enforcement in protecting the service members' rights once the court order is received by the members' Service Secretary. Upon receipt, if the order appears "valid on its face," neither the Secretary nor any other Federal agency is required to validate jurisdiction.

The most depressing news came in response to a query to the Solicitor General of the United States. He said that the only enforcement of any violation of the USFSPA by a State court would have to be by an appeal to a higher court. The onus would be on the military retiree to pursue litigation.

THE END: YET
ANOTHER BEGINNING

In spite of the warnings by Nichols and others opposed to the Schroeder amendment, the election year momentum made it impossible to have it recommitted to the Committee for further consideration. Nichols, who had no choice but to introduce an amendment to Schroeder's, argued that his was the better choice of the two. However, as Rep. White advised his colleagues, both Schroeder's and Nichols' amendments "created more loopholes than they seek to cure." Consequently, the Nichols' proposal prevailed by voice vote, but the remarriage provision and a few others fell by the wayside when House and Senate conferees met to sculpt the final language of the FY 1983 National Defense Authorization Bill."

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