

## **A PROPOSAL FOR COMPREHENSIVE SURVIVOR BENEFIT REFORM**

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*With malice toward none, with charity for all,  
with firmness in the right as God gives us to see the right,  
let us strive on to finish the work we are in,  
to bind up the nation's wounds,  
to care for him who shall have borne the battle  
and for his widow, and his orphan,  
to do all which may achieve and cherish  
a just and lasting peace among ourselves and with all nations.<sup>1</sup>*

## I. Introduction

Survivors of a deceased servicemember are eligible for many benefits and entitlements.<sup>2</sup> Though the original goals of these benefits are many, they stem from a common intent to provide for the dependents of those who have given their health or lives in the military service of their country. However, given the history and genesis of various military survivor benefit programs and their legislative intent, in at least some cases, the original goals are no longer met due to shifting societal and economic norms, as well as the complexity with which these benefits interact. Current survivor benefit programs are an unwieldy hodgepodge of multiple legislative packages managed by different federal agencies, including the United States Department of Veterans Affairs (DVA), the Department of Defense (DOD), and the Social Security Administration (SSA). Many states also have their

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<sup>1</sup> President Abraham Lincoln, the Gettysburg Address (Nov. 19, 1863). The phrase “to care for him who shall have borne the battle and for his widow, and his orphan” is the motto of the Department of Veterans Affairs (DVA). See *the Origin of the VA Motto*, <http://www1.va.gov/opa/feature/celebrate/vamotto.asp> (last visited Nov. 23, 2008).

<sup>2</sup> U.S. DEP’T OF DEFENSE, A SURVIVOR’S GUIDE TO BENEFITS: TAKING CARE OF OUR OWN (Jul. 2008) [hereinafter DOD SURVIVOR BENEFIT GUIDE] at 9.

own survivor benefit programs.<sup>3</sup> Recent efforts to examine and reform survivor benefits have focused only on specific programs.<sup>4</sup> Today's survivors would benefit from a comprehensive and critical review of all survivor benefits and how they interact. Ultimately, a single piece of legislation covering all survivor benefits, and alignment of these benefits under a single office within the DVA, will best serve the needs of survivors. Consolidation of survivor benefit programs and centralized administration under the DVA would also streamline the survivor benefit process under the agency best suited to deal with survivor matters, and would allow the DOD to more fully focus on its mission.

This thesis begins with an overview of existing survivor benefits, including an examination of the historical development of survivor benefits and the legislative intent behind the programs. While this thesis focuses on the major DVA and DOD survivor benefits, SSA and state programs are briefly addressed as well. The thesis then examines the current features of survivor benefit programs. Next, the thesis critically analyzes DVA and DOD survivor benefit programs in light of their legislative intent and more recent policy objectives to determine their current and continuing viability. Finally, the thesis concludes

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<sup>3</sup> For a comprehensive discussion of state survivor benefit plans, see U.S. GOV'T ACCOUNTABILITY OFFICE REPORT, *MILITARY PERSONNEL: SURVIVOR BENEFITS FOR SERVICEMEMBERS AND FEDERAL, STATE, AND CITY GOVERNMENT EMPLOYEES*, GAO 04-814 (2004) [hereinafter *GAO STATE SURVIVOR BENEFIT REPORT*] and Major Dana J. Chase & Major Daniel J. Sennott, *State Survivor Benefits: An Overview*, ARMY LAW., Dec. 2008, at 25.

<sup>4</sup> See, e.g., U.S. GEN. ACCOUNTABILITY OFFICE REPORT, *VETERANS' BENEFITS: BASING SURVIVORS' COMPENSATION ON VETERANS' DISABILITY IS A VIABLE OPTION*, GAO 95-30 (1995) [hereinafter *GAO DIC REPORT*] (providing "information on the income and benefits received by surviving spouses of servicemembers who died on active duty and the surviving spouses of certain disabled veterans" and "assess[ing] alternative ways of determining these spouses' benefits under the Department of Veterans Affairs' Dependency and Indemnity Compensation Program" in response to a Congressional request in the Veterans' Benefits Act of 1992."), and U.S. GOV'T ACCOUNTABILITY OFFICE REPORT, *ACTUARIAL SOUNDNESS OF THE DOD SURVIVOR BENEFIT PLAN*, GAO 06-837-R (2006) [hereinafter *GAO SBP ACTUARIAL REPORT*] (responding "to a legislative mandate to report on the effects of certain program changes on the actuarial soundness of the Survivor Benefit Plan (SBP) program, which is part of the Department of Defense's Military Retirement Fund.").

with a proposal for comprehensive reform and realignment. The ultimate goal of the proposed reform is the consolidation of various survivor benefit programs with oversight by only one agency – a subdivision of the DVA focused solely on administration of survivor benefits.<sup>5</sup>

## II. Overview of Survivor Benefit Programs

### A. Legislative History of Survivor Benefits

The U.S. government “has a long history of compensating veterans who, in the service of their country, were injured, incapacitated,”<sup>6</sup> killed, “or otherwise rendered incapable or less capable of providing for themselves.”<sup>7</sup> Veterans’ benefits date to the U.S. Colonial period,<sup>8</sup> and compensation for surviving family members appeared shortly following the

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<sup>5</sup> Interestingly, Section 222 the Veterans’ Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145, 4156, provides for the creation of an Office of Survivors Assistance, “to serve as a resource regarding all benefits and services furnished by the Department—(1) to survivors and dependents of deceased veterans; and (2) to survivors and dependents of deceased members of the Armed Forces.” *Id.* This office would likely be the perfect clearinghouse for oversight of survivor benefit matters.

<sup>6</sup> U.S. VETERANS ADMIN. OFFICE OF POLICY, PLANNING, AND PREPAREDNESS, VA DISABILITY COMPENSATION PROGRAMS: LEGISLATIVE HISTORY (2004) at 11 (hereinafter VA DISABILITY LEGISLATIVE HISTORY).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

The United States has the most comprehensive system of assistance for veterans of any nation in the world. This benefits system traces its roots back to 1636, when the Pilgrims of Plymouth Colony were at war with the Pequot Indians. The Pilgrims passed a law which stated that disabled soldiers would be supported by the colony.

*Id.*

Revolutionary War.<sup>9</sup> Although benefits were also provided to surviving family members during and after the Civil War, a robust system of survivor benefits did not appear until World War I. Keeping in mind that the DVA’s disability and survivor benefit compensation programs include “more than 200 laws; 400 House, Senate, and Conference Reports; and over 10,000 pages of the Congressional Record spanning more than 90 years,”<sup>10</sup> this section will discuss some of the more important legislation in the history of survivor benefits, leading us into a discussion of present-day DVA, DOD, and SSA programs that make up the current survivor benefit package.

1. *The War Risk Insurance Acts*

Despite a long history of survivor benefit initiatives, prior to World War I, few formal legislative programs existed to compensate and support the dependent survivors of those killed in the service of their country. One of the first formal programs was a death gratuity in the amount of six months’ pay,<sup>11</sup> the purpose of which was “to help fill the financial gap

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<sup>9</sup> U.S. DEP’T OF DEFENSE, MILITARY COMPENSATION BACKGROUND PAPERS VOL I (6th ed. 2005), ch. III.D.4 (hereinafter MILITARY COMPENSATION BACKGROUND PAPERS).

Compensation for the dependent survivors of United States military personnel was first provided by a 1780 resolution of the Continental Congress that granted the widow and children of any officer who died as a result of Revolutionary War service half the officer’s pay for seven years. No provision was made, however, for the survivors of enlisted personnel or for anyone else who died as a result of military service other than during the Revolutionary War.

*Id.*

<sup>10</sup> VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 11.

<sup>11</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3 (citing Act of May 11, 1908, Pub. L. No. 60-112, 60th Congress, 35 Stat. 106 (1908)).



resulting from [a] lack of life insurance protection.”<sup>12</sup> That lack of life insurance protection for servicemembers, however, was short-lived.

The War Risk Insurance Act of 1914<sup>13</sup> marked Congress’ first formal attempt to provide insurance for businesses involved in war-related commerce.<sup>14</sup> The Act, however, did not provide insurance against the risks of war for servicemembers themselves.<sup>15</sup> That benefit arrived three years later with the War Risk Insurance Act of 1917.<sup>16</sup> This legislation created United States Government Life Insurance (USGLI)<sup>17</sup> and provided, for the first time, “low-cost voluntary insurance against death or disability” for servicemembers.<sup>18</sup> Further, the Act “eliminated grade and degree of disability as factors determinative of survivor compensation,”<sup>19</sup> providing instead a flat rate of compensation for widows and their children.<sup>20</sup> Most importantly,

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<sup>12</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3.

<sup>13</sup> War Risk Insurance Act of 1914, Pub. L. No. 63-193, 38 Stat. 711.

<sup>14</sup> VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 33.

<sup>15</sup> *Id.*

<sup>16</sup> War Risk Insurance Act of 1917, Pub. L. No. 65-90, 40 Stat. 398.

<sup>17</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>18</sup> VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 33. “The act also permitted military members to buy up to \$10,000 of low-cost government life insurance to supplement the death compensation otherwise due their survivors under law.” MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>19</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>20</sup> *Id.* ch. III.D.4; *see also* VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 33.

In passage of this law, the language of the legislation also makes clear Congressional intent of replacing support and income. From Public Law 65-90:

*Article III, Section 301: If the deceased leaves a widow or a child, or if he leaves a widowed mother dependent upon him for support, the monthly compensation shall be in the following amounts:*

The act's separate death compensation and life insurance programs amounted to the first legislative recognition that the government had an obligation to aid the survivors of persons killed in service with both "dependency" compensation, intended partially to replace the loss of income resulting from the member's death, and a damages-like "indemnity" payment, intended to serve in some sense as reparation for the death, to the extent that a price could be set on human life.<sup>21</sup>

Thus, with this legislation, Congress began an important precedent of providing a specific monetary amount of income maintenance for survivors,<sup>22</sup> as well as providing both "indemnity" and "compensation" payments.<sup>23</sup> Additionally, the passage of the War Risk Insurance Act resulted in the repeal of existing death gratuity laws.<sup>24</sup>

## 2. *World War I Era Legislation*

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- (a) *For a widow alone, \$25.*
  - (b) *For a widow and one child, \$35.*
  - (c) *For a widow and two children, \$47.50, with \$5 for each additional child up to two.*
  - (d) *If there be no widow, then for one child, \$20.*
  - (e) *For two children, \$30.*
  - (f) *For three children, \$40, with \$5 for each additional child up to two.*
  - (g) *For a widowed mother, \$20.*

The precision and variation in amounts makes clear Congress' intent to provide *support* that compensates dependents for the loss of their provider. This is consistent with the original intent and purpose of the War Risk Insurance Act, which was to compensate wartime losses and mitigate the risks of wartime commerce.

*Id.* at 34 (emphasis in original).

<sup>21</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>22</sup> War Risk Insurance Act of 1917, Pub. L. No. 65-90, 40 Stat. 398.

<sup>23</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.4.

<sup>24</sup> *Id.* ch. III.D.3.

The casualties of World War I reignited interest in a one-time death gratuity payment. In 1919, after “spirited debate”<sup>25</sup> over the purposes of a death gratuity and whether its necessity was precluded by life insurance, Congress reinstated a death gratuity equal to six months’ pay “for survivors of Regular Army personnel.”<sup>26</sup>

Additionally, the dual-pronged system of providing a death indemnity payment and government life insurance created by the War Risk Insurance Acts continued and was modified numerous times in the years following World War I.<sup>27</sup> One such modification was the World War Veterans’ Act of 1925,<sup>28</sup> which, among other things, “clarified the definition of dependent child to include children and grandchildren of veterans who are unmarried and under 18 years old or who are over 18 and permanently incapable of self-support by reason of mental or physical defect.”<sup>29</sup> Further, the World War Veterans’ Act of 1928<sup>30</sup> expanded survivor benefits by increasing the age of eligible non-disabled children from eighteen to twenty-one.<sup>31</sup>

The Great Depression brought with it a general philosophy of fiscal constraint within the

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*(citing Act of December 17, 1919, Pub. L. No. 66-99, 41 Stat. 367 (1919)). Notably, “the Act of June 4, 1920 (Naval Service Appropriation Act, 1921) ...reinstated the Navy and Marine Corps death gratuity programs.” *Id.*

<sup>27</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>28</sup> World War Veterans’ Act of 1925, Pub. L. No. 68-628, 43 Stat. 1302.

<sup>29</sup> VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 37.

<sup>30</sup> World War Veterans’ Act of 1928, Pub. L. No. 70-585, 45 Stat. 964.

<sup>31</sup> VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 38.

U.S. government.<sup>32</sup> As a result, Congress passed the Economy Act of 1933.<sup>33</sup> That act initially repealed all veterans' and survivor benefit legislation, instead permitting the President to extend such benefits only via Executive Order.<sup>34</sup> Although constitutional challenges ultimately resulted in an amendment to the Economy Act,<sup>35</sup> in terms of its significance for survivor benefits, the law altered pensions resulting from death or disability of servicemembers by distinguishing between "three classes of disabilities and deaths."<sup>36</sup> Thus, line of duty deaths incurred in war-time service, line of duty deaths incurred in peacetime service, and deaths not incurred in service were treated differently when calculating benefits provided to surviving family members.<sup>37</sup> Congress later sought to relax the service-connection distinctions drawn in the Economy Act<sup>38</sup> by enacting two "liberalization" laws in 1937<sup>39</sup> and 1938.<sup>40</sup> The goal of these liberalization acts was to "clarify earlier language that had been construed to remove some entitlement to disability or death compensation."<sup>41</sup>

Thus:

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<sup>32</sup> *Id.* at 43.

<sup>33</sup> Economy Act of 1933, Pub. L. No. 73-2, 48 Stat. 8.

<sup>34</sup> VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 43.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Liberalization of Laws Pertaining to Service Connected Benefits, Pub. L. No. 75-304, 50 Stat. 660 (1937).

<sup>40</sup> Liberalization with Respect to Widows, Pub. L. No. 75-514, 52 Stat. 514 (1938).

<sup>41</sup> VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 43.

[I]n no event shall the widow, child, or children otherwise entitled to compensation ... be denied such compensation if the veteran's death resulted from a disease or disability not service-connected, and at the time of the veteran's death he was receiving or entitled to receive compensation, pension, or retirement pay for [ ] disability or more presumptively or directly incurred in or aggravated by service in the World War.<sup>42</sup>

The final major piece of benefit legislation from this era was the National Service Life Insurance Act of 1940,<sup>43</sup> which replaced USGLI with National Service Life Insurance (NSLI). Servicemembers who entered service after October 8, 1940, were covered by NSLI; those serving both before and after the October date could elect between USGLI and NSLI.<sup>44</sup> The maximum coverage amounts under either plan remained \$10,000 and, like USGLI, "the government was the NSLI insurer and bore the excess cost resulting from the hazards of military service."<sup>45</sup> The NSLI, however, based its premium rates on "a three percent interest rather than the 3 1/2 percent rate applicable to USGLI. This resulted in slightly higher premiums and lower death benefits, when paid on an income basis, for NSLI than for USGLI."<sup>46</sup>

### 3. *Post World War II Legislation*

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<sup>42</sup> Liberalization of Laws Pertaining to Service Connected Benefits, Pub. L. No. 75-304, 50 Stat. 660 (1937).

<sup>43</sup> National Service Life Insurance Act of 1940, Pub. L. No. 76-801, 54 Stat. 974.

<sup>44</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

Immediately following World War II, the passage of the Servicemen’s Readjustment Act of 1944<sup>47</sup> (commonly known as the GI Bill) marked Congressional intent to aid “veterans’ transition to civilian life and ... prevent[ ] the economy from suffering a post-war recession or depression.”<sup>48</sup> In the arena of insurance, the first major piece of postwar legislation was the Servicemen’s Indemnity Act of 1951,<sup>49</sup> which replaced NSLI and USGLI “with a \$10,000 gratuitous indemnity payable to the survivors of a member”<sup>50</sup> who died on active duty, “in 120 monthly installments of \$92.90 each.”<sup>51</sup> The Act also established Veterans’ Special Term Life Insurance (VSLI) to “provide low-cost insurance during the transition from military to civilian life.”<sup>52</sup>

The programs created by the 1951 legislation, however, were not intended to provide income replacement for survivors.<sup>53</sup> The option of providing an annuity for survivors came with the Uniformed Services Contingency Option Act of 1953,<sup>54</sup> which “was the first law to permit military members to receive reduced retired pay during their lifetime in return for insuring that their widows and eligible children would receive an annuity after their death.”<sup>55</sup> The act created the Contingency Option plan and permitted service members to set aside a

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<sup>47</sup> Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284.

<sup>48</sup> VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 52.

<sup>49</sup> Servicemen’s Indemnity Act of 1951, Pub. L. No. 82-23, 65 Stat. 33.

<sup>50</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Uniformed Services Contingency Option Act of 1953, Pub. L. No. 83-239, 67 Stat. 501.

<sup>55</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

“portion of their retired pay for future survivors.”<sup>56</sup> Ultimately, the act was considered by many (and particularly participating service members) to be an unattractive annuity option.<sup>57</sup> Because the act required the program to be “actuarially self-supporting ... it was quite expensive in terms of the reduction in current retired pay required to effect the election.”<sup>58</sup> Subsequent legislative changes to improve the Contingency Option plan were made in 1961, 1966, 1968, 1978, and 1985, and are discussed *infra* in Part II.A.4.c.<sup>59</sup>

Nearly simultaneous legislation designed to provide more permanent income replacement came with the Servicemen’s and Veterans Survivor Benefits Act of 1956.<sup>60</sup> This legislation

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

[A] member’s contribution costs, *i.e.*, the amount of the reduction in the member’s retired or retainer pay entitlement, were determined on the basis of the member’s age and the age of the member’s eligible dependents at the time of retirement, and by whether the member was retired for disability or nondisability. Under the original Contingency Option Plan, members could elect, before the completion of their 18th year of service, to leave their survivors an annuity of either one-half, one-fourth, or one-eighth of their initial retired pay. . . . The Contingency Option Plan did not prove attractive to most of the members eligible for it because it was quite expensive in terms of the reduction in current retired pay required to effect the election. For example, the cost per dollar of coverage was 22.8 cents for a member who retired for other than disability at age 45 with a wife five years younger. In addition, contributions were subject to taxation, so that a participating retired member had to pay taxes on income he never in fact received. . . . Furthermore, since the survivor annuity was based on a member’s initial retired pay and remained frozen at that level, inflation in the general cost of living could cause a decrease in the real purchasing power of the annuity. In practice, unchecked inflation rapidly eroded the real purchasing power of the annuity, and for this reason also, the plan never became truly successful.

*Id.*

<sup>59</sup> *Id.* “Subsequent legislation chipped away at some of [the act’s] shortcomings, but neither the Contingency Option Plan, nor the Retired Serviceman’s Family Protection Plan, as it was later renamed, achieved a participation rate of more than 15 percent at any time during their 19 years of existence.” *Id.*

<sup>60</sup> Servicemen’s and Veterans’ Survivor Benefits Act, Pub. L. No. 84-881, 70 Stat. 857 (1956).

“created the Dependency and Indemnity Compensation (DIC) program<sup>61</sup> as a partial income replacement program,”<sup>62</sup> but also did away with insurance benefits under the Servicemen’s Indemnity Act and VSLI, leaving servicemen and veterans without a government life insurance program “for the first time in 40 years.”<sup>63</sup> The rationale for such a dramatic shift was that the need for government-provided life insurance would be eliminated by the new DIC program. In other words, it was thought at the time that because the DIC program provided for simplified and consolidated “indemnity” and “dependency” benefits, government life insurance became unnecessary.<sup>64</sup>

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<sup>61</sup> Dependency and Indemnity Compensation (DIC) is discussed in further detail *infra* at Part II.B.2.

<sup>62</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>63</sup> *Id.* The lack of government insurance was not rectified until 1965, with the passage of legislation creating the Servicemen’s Group Life Insurance (SGLI) program. *Id.*

<sup>64</sup> *Id.* ch. III.D.4. The rejection of the Servicemen’s Indemnity Act benefits in favor of DIC was justified as follows:

[A] constant criticism of the \$10,000 gratuitous indemnity has been that payments suddenly come to an end at a time when the needs of the recipient survivor remained unmitigated. In an effort to overcome this objection there was considerable testimony before the committee that that amount of the indemnity should be reduced, paid by a longer period certain, and in some cases continued for the life of the recipient. . . . the committee concluded that this benefit should be terminated and payments formerly made under this program integrated with the existing Veterans’ Administration compensation programs so as to reflect an indemnity increment therein. Thus these two separate and distinct survivor benefit programs administered by the Veterans’ Administration would become one. To this limited extent one of the objectives of the committee, greater simplicity, would be accomplished and the long-term interest and equity of survivors protected.

*Id.* (quoting H.R. REP. NO. 84-993, at 5-6 (1956)).

In hearings on the legislation, however, the General Counsel of the then Veteran’s Administration recognized the controversial nature of the decision to abolish government life insurance and testified that:

[R]egardless of the fact that the new form of compensation will be termed dependency and indemnity compensation, it is quite likely that it will not be widely accepted or understood as something materially different from the existing death compensation. Accordingly, it may be expected that as time moves on there will be demands for reinstatement of an in-service insurance program or an indemnity program additional to the compensation benefit. This possibility is emphasized by the fact that insurance, followed by indemnity, has been a



The 1956 Act set a monthly DIC rate of “\$112 plus 12 percent of the basic pay prescribed for the deceased members’ pay grade and length of service.”<sup>65</sup> The legislative history of the Act indicates that “[i]t was generally assumed, though never explicitly stated, that the \$112 represented the ‘indemnity’ element of the compensation and the 12 percent of basic pay the ‘dependency’ element.”<sup>66</sup> The flat DIC payment plus twelve percent of base pay continued until 1969, when Congress changed the DIC formula to a flat rate based on pay grade at time of death or disability.<sup>67</sup> Further, the elimination of government-provided life insurance in favor of the DIC “indemnity” and “dependency” payments continued until 1965, when Congress established the Servicemen’s Group Life Insurance (SGLI) program, discussed *infra* at Part II.A.4.b.<sup>68</sup>

In contrast with DIC, which had existed in some form for many years, the War Orphans’ Educational Assistance Act of 1956<sup>69</sup> marked the first time Congress made educational benefits available to survivors.<sup>70</sup> This legislation was merged into a larger veterans’ benefits

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distinct part of the system of benefits for survivors for nearly 40 years.

*Id.* (quoting *Hearings on H.R. 7089 Before the Sen. Comm. On Finance*, 84th Cong. (1956) (statement of Guy H. Birdsall, General Counsel, Veterans’ Administration)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* The base of \$112 was raised to \$120 in 1963, and “the amount of DIC produced by the 12-percent-of-basic-pay side of the formula increased each time basic pay rates were increased,” which occurred eight times over the period that the 12 percent formula was in use. *Id.*

<sup>67</sup> *Id.* “This change was not related to the split ‘dependency’ and ‘indemnity’ concept; it stemmed from dissatisfaction with the linkage between basic pay and DIC. Junior personnel had benefited less from the eight basic pay raises [and] ... their survivors had thus gained lesser DIC increases than other survivors.” *Id.*

<sup>68</sup> Act of Sept. 29, 1965, Pub. L. No. 89-214, 79 Stat. 880 (1965).

<sup>69</sup> War Orphans’ Educational Assistance Act of 1956, Pub. L. No. 84-634, 70 Stat. 441.

<sup>70</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. V.B.2.

package with the addition of Title 38, Veterans' Benefits, to the U.S. Code in 1958, and became known as the War Orphans' Educational Assistance Program.<sup>71</sup> The program "extended monthly education benefits (\$110 for full-time students) for a maximum of 36 months to the children 18 to 23 years of age of the veterans of World War I, World War II, and the Korean Conflict who died as a result of service connected activity."<sup>72</sup> The program eventually became known as the Dependents' Educational Assistance (DEA) Program in 1976, and is further discussed *infra* at Part II.B.4.

In recognition of the expanding role of reserve and National Guard members during World War II, Congress also passed legislation extending the death gratuity payment to "survivors of reserve and National Guard members who died during a period of active duty or inactive-duty training."<sup>73</sup> Following the Korean War, Congress again examined the death gratuity in its passage of the Servicemen's and Veterans' Survivor Benefits Act,<sup>74</sup> and clarified the intent of the death gratuity as an

"[E]mergency fund" intended to tide survivors over the period immediately following the death of a service member while payment of dependency and

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<sup>71</sup> Veterans' Benefits, Title 38, Pub. L. No. 85-857, 72 Stat. 1105 (1958). "On September 2, 1958, Public Law 85-857 consolidated all of the laws administered by the Veterans' Administration into one act. The consolidation of Title 38 of the U.S.C., 'Veterans' Benefits', established Chapter 35, the 'War Orphans' Educational Assistance Program.'" MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. V.B.2.

<sup>72</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. V.B.2. Subsequent legislation "later extended education benefits of the program to children of living veterans rated permanently and totally disabled who sustained their disability as a result of service-connected activity." *Id.*

<sup>73</sup> *Id.* ch. III.D.3 (citing Act of June 20, 1949, Pub. L. No. 81-108, 63 Stat. 201, 201 – 02 (1949)) ("This provision was part of a larger package entitling members of reserve components of the Armed Forces to the same benefits in general as members of regular components." ).

<sup>74</sup> Servicemen's and Veterans' Survivor Benefits Act, Pub. L. No. 84-881, 70 Stat. 857 (1956).

indemnity compensation, Social Security survivor benefits, and life insurance proceeds, as applicable, was pending. To this end, the act specified that the gratuity be paid “immediately,” and implementing regulations require payment, if possible, within 24 hours of death where eligible beneficiaries can be properly determined.<sup>75</sup>

Additionally, Congress determined that because the amount of the death gratuity was rank-based (i.e., calculated as six months’ pay), it was too small in some cases. Thus, Congress took further action in the 1956 legislation to stabilize the amount of the gratuity by imposing “an \$800 floor and a \$3,000 ceiling on payments,” which had the effect of “blurr[ing] the pay-related distinctions resident in the gratuity program”<sup>76</sup> Interestingly, Congress did not revisit the death gratuity issue until nearly 30 years later.<sup>77</sup>

#### 4. *Vietnam and Post-Vietnam Era Survivor Benefit Legislation*

##### a. *Dependency and Indemnity Compensation*

In 1969, Congress dispensed of the DIC formula (discussed *supra* in Part II.A.3) and instituted a flat rate of compensation based on pay grade.<sup>78</sup> The change

[W]as not related to the split “dependency” and “indemnity” concept; it stemmed from dissatisfaction with the linkage between basic pay and DIC.

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<sup>75</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* See *infra* Part II.A.4, discussing post-Vietnam era survivor benefit legislation.

<sup>78</sup> Act of October 27, 1969, Pub. L. No. 91-96, 83 Stat. 144 (1969).

Junior personnel had benefited less from the eight basic pay raises than other personnel. Because of the partial tie-in between basic pay and DIC rates, their survivors had thus gained lesser DIC increases than other survivors.<sup>79</sup>

The use of pay grade to calculate DIC continued until the Gulf War era; no further changes to the DIC program were made until 1992.<sup>80</sup>

*b. Servicemen's Group Life Insurance*

The 1965 Act establishing SGLI was the first major piece of survivor benefit legislation of the Vietnam Era.<sup>81</sup> As predicted in the legislative history of the Servicemen's and Veterans' Survivor Benefits Act of 1956,<sup>82</sup> the elimination of government-provided life insurance in favor of a single DIC payment remained controversial, and the 1965 legislation stemmed not only from this ongoing controversy, but from a recognition that low-cost life insurance was important in the context of a new war, "to meet the insurance needs of Vietnam Era service members."<sup>83</sup> To that end, the SGLI established "low-cost term insurance protection to servicemembers through a group policy issued by a commercial life

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<sup>79</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.4.

<sup>80</sup> *Id.* See *infra* Part II.A.5 for a discussion of Gulf-War Era survivor benefit legislation.

<sup>81</sup> Act of September 29, 1965, Pub. L. No. 89-214, 79 Stat. 880 (1965). The act placed the provisions of SGLI in a new subchapter III of Chapter 19, Title 38, U.S. Code. MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>82</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.4. "In hearings on the legislation, however, the General Counsel of the then Veteran's Administration recognized the controversial nature of the decision to abolish government life insurance . . ." *Id.*

<sup>83</sup> DEP'T OF VETERANS AFFAIRS, VA LIFE INSURANCE PROGRAMS FOR VETERANS AND SERVICEMEMBERS 11 (Apr. 2008) (hereinafter VA LIFE INSURANCE).

insurance company.”<sup>84</sup> The original SGLI provided an automatic \$10,000 in insurance coverage to all service members on active duty for 30 days or longer, “in the absence of an individual election to the contrary.”<sup>85</sup> Further,

Coverage continued for 120 days after separation, with the cost of such extended coverage being included in the premiums paid while on active duty. Up to the end of this 120-day period, the insured had the right to purchase an individual policy of permanent insurance in an amount equal to his SGLI coverage from any of the companies in the program.<sup>86</sup>

Although legislative modifications to SGLI have been made over the years, “most of its fundamentals have remained intact.”<sup>87</sup> In 1970, SGLI coverage increased to \$15,000 and was provided to certain reservists,<sup>88</sup> and in 1974, coverage increased again to \$20,000.<sup>89</sup> The 1974 legislation also further extended SGLI benefits to reservists, and added a program of

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<sup>84</sup> *Id.*

<sup>85</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.D.2.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

SGLI is term insurance: it has no cash, loan, paid-up, or extended insurance values. Neither does it provide accidental death or disability benefits. SGLI coverage is in addition to any coverage a member may have under any other government policy. A member eligible for SGLI is insured in the maximum authorized amount unless he declines in writing to be insured or elects in writing less-than-maximum coverage. This “automatic” feature is a departure from the earlier programs under which an individual was required to take affirmative action to be insured in any amount. SGLI also differs from the previous programs in that the government is not the insurer. The Prudential Insurance Company is the primary SGLI insurer under a contract with the Department of Veterans Affairs, the federal agency charged with supervisory responsibility for the program. Several hundred other private insurance companies participate in the program as reinsurers.

*Id.*

<sup>88</sup> *Id.* (citing Act of June 25, 1970, Pub. L. No. 91-291, 84 Stat. 326, 327 (1970)).

<sup>89</sup> *Id.* (citing Pub. L. No. 93-289, 88 Stat. 165, 166 (1974)).

Veterans' Group Life Insurance (VGLI).<sup>90</sup> The SGLI increased over the years; to \$35,000 in 1981,<sup>91</sup> and to \$50,000 in 1985.<sup>92</sup>

c. *The Survivor Benefit Plan*

Although Congress' passage of SGLI legislation was a major step toward reinstatement of indemnity compensation for survivors, Congress also continued to develop the Contingency Option Plan (discussed *supra* at Part II.A.3) as an additional method of income replacement during the Vietnam Era. In 1961, Congress passed legislation that changed the name of the Contingency Option Plan to the Retired Serviceman's Family Protection Plan (RSFPP) and made the election procedures more flexible.<sup>93</sup> The Act of March 8, 1966,<sup>94</sup> rendered "the amount by which retired pay was reduced because of RSFPP participation exempt from income taxation."<sup>95</sup> In an effort to increase participation in the RSFPP, Congress passed the Act of August 13, 1968,<sup>96</sup> which "liberalized various provisions" of the RSFPP.<sup>97</sup> Despite

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (citing Veterans' Disability Compensation, Housing, and Memorial Benefits Amendments Act of 1981, Pub. L. No. 97-66, 95 Stat. 1026 (1981)).

<sup>92</sup> *Id.* (citing Veterans' Administration Health-Care Amendments of 1985, Pub. L. No. 99-166, 99 Stat. 941, 956 (1985)). No further significant changes to SGLI were made until the Gulf War era and post-September 11, 2001; these changes are discussed *infra* at Part II.A.5 and II.A.6.

<sup>93</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2 (citing Act of October 4, 1961, Pub. L. No. 87-381, 75 Stat. 810 (1961)).

<sup>94</sup> *Id.* (citing Act of March 8, 1966, Pub. L. No. 89-365, 80 Stat. 32 (1966)).

<sup>95</sup> *Id.*

<sup>96</sup> Act of August 13, 1968, Pub. L. No. 90-485, 82 Stat. 751 (1968).

<sup>97</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2. The act:

Congress' efforts to make favorable legislative changes to the RSFPP,<sup>98</sup> because of high costs to service members, the RSFPP was not viewed favorably and widespread participation in the program was lacking.<sup>99</sup>

As a result of continued lack of participation in the RSFPP and other perceived problems with the program, the Act of September 21, 1972<sup>100</sup> terminated RSFPP benefits, replacing them with the Survivor Benefit Plan (SBP).<sup>101</sup> Unlike the RSFPP, which was designed to actuarially support itself<sup>102</sup> (thus rendering it expensive for service members), the SBP "was not intended to be a self-supporting program: its costs were to be shared by the government and retired members. For this reason, it was much less expensive to the member in most

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[P]ermitted elections to become effective immediately if made before the start of the 19th rather than the 18th year of service. . . . allowed members to change or revoke their election between their 19th year of service and the date of retirement, without regard to the two-years-of-subsequent active duty rule, if such a change or revocation resulted from "significantly changed family circumstances." It enabled retired members to withdraw from RSFPP or to reduce the amount of their respective annuities on their own applications, effective six months after the date of application. . . . changed the annuity base from a member's reduced retired pay to full retired pay. Finally, instead of an election being limited to an annuity of either one-half, one-quarter, or one-eighth of a member's retired pay, the act authorized the election of an annuity in any amount specified by the member, provided the amount was not more than 50 percent nor less than 12.5 percent of the member's retired pay. . . . however, this liberalization further increased the costs to participating members.

*Id.*

<sup>98</sup> See, e.g., MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2 (citing the Uniformed Services Survivors' Benefits Amendments of 1978, Pub. L. No. 95-397, 92 Stat. 843) as making "several changes to RSFPP designed to improve the benefits available to persons already receiving annuities thereunder," including adding a cost-of-living adjustment to the annuity and permitting annuitants over the age of 60 to remarry without a loss of benefits. *Id.*; see also *id.* (citing 1985 Department of Defense Authorization Act, Pub. L. No. 98-525, 98 Stat. 2492, 2545-2546 (1984)) (extending RSFPP benefits to family members of those service members missing and presumed dead).

<sup>99</sup> See *supra* notes 58 and 59 for further discussion of some of the problems with RSFPP.

<sup>100</sup> Act of September 21, 1972, Pub. L. No. 92-425, 86 Stat. 706 (1972).

<sup>101</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

<sup>102</sup> *Id.*

cases than RSFPP had been.”<sup>103</sup> A review of the legislative history of the SBP demonstrates Congressional recognition of the significant shortcomings of the RSFPP that rendered participation in the program nearly nonexistent.<sup>104</sup> Thus, at least one goal of the SBP was to meet the “moral obligation” of permitting servicemembers to provide some measure of “income protection for ... survivors.”<sup>105</sup> The major goal of the SBP, however, was to “insure that survivors of military retirees be provided ‘reasonable and continuous income replacement’—a goal that Social Security could not meet because, for the vast majority of survivors, Social Security entitlement does not begin until the survivor reaches age 62”<sup>106</sup> For further discussion of the current features of the SBP system, including the fact that the SBP annuity is offset by any receipt of DIC benefits, see *infra* Part II.C.2.c.

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<sup>103</sup> *Id.* A review of the legislative history of the SBP sheds light on Congress’ recognition of the significant shortcomings of the RSFPP, rendering participation in the program nearly nonexistent. Thus, at least one goal of the SBP was to permit servicemembers to enroll in an affordable annuity plan for their survivors.

<sup>104</sup> *Id.* (citing H.R. REP. NO. 91-68).

The lack of basic survivor protection, which is a standard feature of most employee fringe benefit programs . . . is a glaring weakness in the singularly outstanding benefits program of the Armed Forces. The lack of a survivor benefits program based solely on the man’s retired pay . . . calls into question the retiree’s inherent legal interest in his retired pay. The subcommittee believes the concept of retired pay as an earned right in which the retiree has a legal interest should be beyond challenge.

The subcommittee believes the Government, in recognition of these rights, has a moral obligation to join in providing income protection for his survivors . . .

RSFPP has proved a failure insofar as it was designed to provide general survivor protection to the retired military population. The law has been amended seven times over the past 17 years in an attempt to liberalize its provisions and make it more attractive to military personnel. The efforts have not been successful because of fundamental shortcomings in the plan, and only 15 percent of eligible military retirees have participated since 1953. This means that the survivors of 85 percent of deceased eligible retirees have no claim to any part of the member’s military retired pay.

*Id.*

<sup>105</sup> *Id.* (citing H.R. REP. NO. 91-68).

<sup>106</sup> *Id.*



In contrast with the RSFPP, the attractiveness of the SBP was immediately apparent. Of those eligible to enroll when the legislation took effect, “approximately 50 percent of the personnel on the retired rolls on September 20, 1972 elected to participate in the SBP program.”<sup>107</sup> In addition, the legislation afforded those already enrolled in the RSFPP several participation options.<sup>108</sup> In 1981, Congress took action to institute an “open season,” whereby eligible but unenrolled servicemembers could take advantage of the SBP, increase their existing level of participation, or make beneficiary changes.<sup>109</sup>

The post-Vietnam era brought further changes and improvements to the SBP. In 1984, Congress amended the SBP so as to comply with the provisions of the Uniformed Services Former Spouses’ Protection Act (USFSPA),<sup>110</sup> permitting servicemembers to “designate a former spouse as a beneficiary of an SBP annuity.”<sup>111</sup> More importantly, the 1985 Defense Authorization Act<sup>112</sup> contained a number of provisions meant to improve and refine the SBP.

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

Those who were in the RSFPP program . . . were permitted to either (1) drop their RSFPP if they elected SBP coverage in an equal or greater amount; (2) continue their RSFPP and also enter the SBP program, provided the total of the two annuities did not exceed 100 percent of their retired pay; or (3) continue their RSFPP alone.

*Id.*

<sup>109</sup> *Id.* (citing Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981)).

<sup>110</sup> Uniformed Services Former Spouses’ Protection Act (USFSPA), Pub. L. No. 97-252, 96 Stat. 718 (1982). “The thrust of the USFSPA was to return to the states the authority to treat military retired pay in accordance with individual state laws in divorce settlements and to provide a direct payment mechanism to ensure that valid state court orders were honored by military finance centers.” MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

<sup>111</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

<sup>112</sup> Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, 98 Stat. 2492 (1984).

First, the act eliminated the Social Security offset “against SBP annuities in the case of a survivor who is receiving Social Security benefits based on his or her own earnings, rather than a widow’s or widower’s benefits based on the earnings of a deceased member-spouse.”<sup>113</sup> Second, the act initiated SBP payments for survivors of those deemed missing in action.<sup>114</sup> Third, the act “clarified”<sup>115</sup> Congressional intent with respect to the USFSPA and permitted SBP administrators to accept a court order “that incorporated, ratified, or approved a voluntary written agreement by the retiree to designate the spouse as an SBP beneficiary.”<sup>116</sup>

In 1985,<sup>117</sup> Congress enacted the Survivor Benefit Plan Amendments of 1985 as part of the 1986 Defense Authorization Act, in response to a perception that the SBP had become too complex.<sup>118</sup> The goal of the SBP amendments was to “simplify the plan, make it more attractive, and eliminate certain problems.”<sup>119</sup> To this end, “the Survivor Benefit Plan amendments of 1985 made both substantive and technical changes.”<sup>120</sup> First, the SBP

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<sup>113</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, 99 Stat. 583 (1985).

<sup>119</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2 (citing H.R. REP. NO. 99-81, at 250 (1985), S. REP. NO. 99-118, at 442 (1985) (Conf. Rep.), and H.R. REP. NO. 99-235, at 442 (1985) (Conf. Rep.)) (“The Survivor Benefit Plan Amendments of 1985 were characterized as having been intended to ‘improve and simplify the Survivor Benefit Plan as well as correct certain inequities associated with the program.’”).

<sup>120</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

amendments made further changes to the Social Security Offset system.<sup>121</sup> Second, the SBP amendments “changed the way in which the cost of SBP coverage was calculated for participants.”<sup>122</sup> Third, the amendments addressed a number of spouse and former spouse issues raised by the passage of the USFSPA, to include requiring spouse concurrence when a servicemember declined participation in the SBP or elected less than maximum coverage.<sup>123</sup>

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<sup>121</sup> *Id.*

Under the amendments to the SBP program effected by the Survivor Benefit Plan Amendments of 1985 . . . Congress, in an “effort to simplify and make the plan [as it relates to the Social Security offset] more understandable,” eliminated the Social Security offset and established in its stead a “two-tier system under which the survivor would receive 55 percent of retired pay before age 62 and 35 percent thereafter in recognition of the entitlement to Social Security based on military service.” As enacted, these provisions were applicable to all SBP beneficiaries. In a savings provision, however, the 1985 SBP amendments provided [for an election between the systems,] whichever provided a greater benefit for an SBP-eligible survivor. . . . eligible survivors of future retirees . . . not presently retirement-eligible, would be subject to the new 55/35, two-tier, income-replacement annuity.

*Id.* (quoting S. REP. NO. 99-118, at 442 (1985) (Conf. Rep.) and H.R. REP. NO. 99-235, at 442 (1985) (Conf. Rep.)).

<sup>122</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

Under the contribution formula applied to participants, the member is permitted to select SBP coverage ranging from a minimum of \$300 to a maximum of full retired pay. To participate, the member paid 2.5 percent of the first \$300 for the “base amount” selected and 10 percent of the “base amount” above \$300. With increases in basic pay over the years, members’ retired pay entitlements increased, with the result that the 10 percent factor applied to a larger percentage of a participant’s “base amount” of coverage. This situation, in turn, had the effect of eroding the intended cost-sharing ratio of 60-40. As explained by the House Armed Services Committee, the cost-sharing ratio had changed from the intended 60-40 split to a 72-28 split—and this was at least in part due to the application of the 10 percent factor to an ever increasing portion of a participant’s elected amount of coverage. To bring the cost split back closer to the intended 60-40 ratio, the 1985 SBP amendments indexed the \$300 amount to which the 2.5 percent charge was to be applied to future increases in basic pay. Thus, while a participant can still elect \$300 as “base amount” coverage, the lower 2.5 percent charge would be applied to an ever increasing amount.

*Id.*

<sup>123</sup> *Id.* The spouse concurrence provisions did not, however, apply to “new” spouses resulting from the remarriage of an eligible participant. For these new spouses, the 1986 Defense Authorization Act provided only for notification, not concurrence, “[i]f a participant opted not to participate in the plan with respect to the new spouse, or to provide an annuity for the spouse at less than the maximum level, or to provide an annuity for a dependent child but not the new spouse.” *Id.*

Throughout the 1980s, Congress continued to make changes aimed at improving the SBP and increasing participation. The Military Retirement Reform Act of 1986<sup>124</sup> changed the calculation of retirement entitlements for servicemembers, but contained provisions ensuring that SBP annuity payments would not be adversely affected by new retirement pay multipliers.<sup>125</sup> In the 1987 National Defense Authorization Act,<sup>126</sup> Congress made additional adjustments to SBP, “permit[ting] state courts to order military servicemembers to participate in the Survivor Benefit Plan and to designate a former spouse as a beneficiary incident to a divorce agreement or decree;”<sup>127</sup> amending the age at which SBP recipients could remarry without losing annuity payments from 60 to 55;<sup>128</sup> authorizing “payment of survivor benefits to the surviving dependent children of an active-duty, retirement-eligible member who died without a surviving spouse or if the surviving spouse also subsequently died;”<sup>129</sup> and

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<sup>124</sup> Military Retirement Reform Act of 1986, Pub. L. No. 99-348, 100 Stat. 682.

<sup>125</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

In brief, the “multipliers” to be applied to a member’s “monthly retired or retainer pay base” in determining retired or retainer pay entitlements of affected personnel would be reduced from current levels until the member reaches age 62, at which time they would be restored to the same level as if the member had been eligible for retirement under the high-three formula.

Under the amended retirement system, the “multipliers” used in determining retired or retainer pay entitlements of affected personnel were generally reduced, by one percentage point from current percentage multipliers for each year by which a member’s term of service was less than 30 years.

*Id.*

<sup>126</sup> Department of Defense Authorization Act of 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986).

<sup>127</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2. Congress made this change to bring the SBP in line with civil service survivor benefits. *Id.* (citing H.R. REP. NO. 99-718, at 211 (1986)).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* “The amendment in question was made because of Congress’s ‘concerns about the orphan children of retirement-eligible active duty personnel’ and its belief that, ‘in the absence of a spouse beneficiary, all orphan

eliminating the Social Security offset for incapacitated dependent children eligible for SBP payments.<sup>130</sup> Finally, the Defense Authorization Act for 1988 and 1989<sup>131</sup> added a provision allowing SBP participants to “withdraw from the plan with the consent of their spouses.”<sup>132</sup>

In one final piece of 1980s legislation, Congress made three major changes to the SBP. First, the Military Survivor Benefits Improvement Act of 1989<sup>133</sup> changed the method of calculating participation costs in an effort to reduce SBP costs and increase participation.<sup>134</sup> Second, the act increased the SBP annuity amount for officers with previous enlisted time who died on active duty while retirement eligible but without ten years of service as an officer.<sup>135</sup> Finally, the act added the Supplemental Survivor Benefit Program (SSBP), which permitted participants to purchase additional annuity coverage for dependents to avoid the

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children of deceased retirement-eligible active duty personnel should be treated alike.” *Id.* (quoting H.R. REP. NO. 99-718, at 210 (1986)).

<sup>130</sup> *Id.*

<sup>131</sup> Department of Defense Authorization Act of 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019 (1987).

<sup>132</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2. These procedures remained in effect until 1998, when Congress added a “more comprehensive withdrawal procedure.” *Id.*

<sup>133</sup> Military Survivor Benefits Improvement Act of 1989, Pub. L. No. 101-189, 103 Stat. 1352.

<sup>134</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

First, the basis for determining the cost—in terms of the reduction in a retiree’s retired or retainer pay entitlement—to a member or former member of a uniformed service for participating in the Survivor Benefit Plan was changed from the old 2.5 percent of the first \$300 of the base amount of a member’s prospective annuity plus 10 percent of the remainder of the base amount to a flat 6.5 percent of the base amount for all persons who first became members of a uniformed service on or after March 1, 1990. The method for determining the amount of the reduction in retired or retainer pay for SBP participation for pre-March 1, 1990, is either the new, flat 6.5 percent of the base amount or the old 2.5 percent/10 percent formula, whichever is more advantageous to the retiree.

*Id.*

<sup>135</sup> *Id.*

Social Security offset when an eligible dependent reached the age of 62.<sup>136</sup> The SSBP program did not actually take effect, however, until 1992,<sup>137</sup> and its provisions for “soften[ing] the effect of reducing SBP benefits when the recipient began receiving Social Security at age 62”<sup>138</sup> were further amended by 2001 legislation intended to finally eliminate the Social Security offset and thus the need for SSBP.<sup>139</sup> This legislation is discussed in more detail *infra* at Part II.A.6.c.

*d. Dependents’ Educational Benefits*

In the arena of Vietnam-era educational benefits, Congress first passed the Veterans’ Readjustment Act of 1966,<sup>140</sup> also known as the “Cold War GI Bill.”<sup>141</sup> The main feature of this legislation was its “effective[ ] exten[sion] of coverage to all who served after April 21,

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<sup>136</sup> *Id.*

Under the Supplemental Survivor Benefit Plan, participants in the normal Survivor Benefits Plan are entitled to provide a “supplemental annuity” for a spouse or former spouse “beginning when the participant dies or when the spouse or former spouse becomes 62 years of age, whichever is later, in order to offset the effects of the two-tier annuity computation under the Survivor Benefit Plan” ... The supplemental annuity allows a participant in the SBP program to provide a level, 55 percent annuity to his or her surviving spouse, thus effectively overcoming the reduction of the normal SBP 55 percent annuity to 35 percent when the participant’s surviving spouse becomes eligible for Social Security benefits.

*Id.*

<sup>137</sup> *Id.* The delay in implementation was necessary “in order to give the Department of Defense more time to prepare ‘an actuarially neutral’ plan for the implementation of the Supplemental Survivor Benefit Plan.” *Id.* (citing H.R. REP. NO. 101-665, at 282 – 289 (1990)).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Veterans’ Readjustment Act of 1966, Pub. L. No. 89-358, 80 Stat. 12.

<sup>141</sup> VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 64.

1898.”<sup>142</sup> In terms of educational benefits for survivors, the War Orphans Educational Assistance Program (discussed *supra* at Part II.A.3) was changed to the Survivors’ and Dependents’ Educational Assistance Program (DEA) in 1976.<sup>143</sup> The DEA legislation “increased the maximum [educational] entitlement from 36 to 45 months” and “also extended the period of eligibility for children from five to eight years.”<sup>144</sup>

*e. Death Gratuity*

In 1986, Congress revisited the death gratuity for the first time in nearly 30 years, with a proposal to increase the amount of the gratuity to include “three months of basic pay, basic allowance for subsistence, and basic allowance for quarters, with a minimum payment of \$3,000 and a maximum payment of \$9,000.”<sup>145</sup> Ultimately, the measure failed to pass, in part because of increases in the amount of SGLI coverage and a failure to examine the adequacy of the death gratuity in meeting its original Congressional intent as an “emergency

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<sup>142</sup> *Id.*

<sup>143</sup> Survivors’ and Dependents’ Educational Assistance Program, Pub. L. No. 94-502, 90 Stat. 2405 (1976).

<sup>144</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. V.B.2.

<sup>145</sup> *Id.* ch. III.D.3. The Senate Armed Services Committee supported the measure, noting that:

The death gratuity, originally instituted in 1908, is designed to provide immediate funds to the family of deceased military members to meet immediate expenses. The rates of the death gratuity have not changed since 1956. Under present law, this payment is equal to six month’s basic pay (plus any special and incentive pays) with a minimum of \$800 and a maximum of \$3,000. Because of increases in pay rates since 1956, the death gratuity for all personnel is \$3,000 ... The President’s *Fifth Quadrennial Review of Military Compensation* recommended that the death gratuity be updated to better meet the needs of survivors of military personnel. The committee agrees that this benefit should be updated...

*Id.* (citing S. REP. NO. 99-331, at 234 (1986)).

payment.”<sup>146</sup> The 1991 Defense Authorization Act<sup>147</sup> raised the rate of basic pay for servicemembers and generated the following effect:

[T]he lowest rate of basic pay for any member of the Armed Forces ... was \$697.20 per month, so that the death gratuity for all members was \$3,000, and no distinction was made on the basis of the “pay” received by a deceased member immediately before the member’s death. The prescribed \$800 minimum was then, and had long been, totally without effect. . . . no survivor received a death gratuity as great as six months’ basic pay of the deceased member.<sup>148</sup>

Despite recognition that basing the death gratuity on six months’ pay was now essentially meaningless because of statutory pay raises, Congress did not revisit the issue until the first Gulf War.<sup>149</sup>

The bulk of remaining Vietnam-era legislation affecting survivor benefits focused primarily on veterans’ benefits, disability determinations, and presumption of service-

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<sup>146</sup> *Id.* In conference, the House determined that:

Currently, the death gratuity is equal to six months of basic pay with a minimum payment of \$800 and a maximum payment of \$3,000. The Senate bill contained a provision ... that would change the death gratuity computation to three months of basic pay, basic allowance for subsistence, and basic allowance for quarters with a minimum payment of \$3,000 and a maximum payment of \$9,000.

The conferees note that, although the death gratuity was established in 1908, the military estate program has been expanded to include social security benefits, dependency and indemnity compensation, and Serviceman’s [*sic*] Group Life Insurance (SGLI). The maximum SGLI payment was recently increased to \$50,000.

*Id.* (citing H.R. REP. NO. 99-1001, at 484 (1986) (Conf. Rep.)).

<sup>147</sup> Department of Defense Authorization Act of 1991, Pub. L. No. 101-510, 104 Stat. 1485 (1990).

<sup>148</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3.

<sup>149</sup> *Id.*



connection for a variety service-related health and medical conditions.<sup>150</sup> It is clear, however, that the main thrust of legislative efforts in the Vietnam era and the years leading up to the first Gulf War was to provide more robust sources of income replacement, in the form of both life insurance and annuity programs, for the survivors of deceased servicemembers. At the close of the Vietnam Era, the paradigm of modern survivor benefits, consisting of SGLI, SBP, DIC, DEA and a larger death gratuity, had been established.

5. *Gulf War Era Survivor Benefit Legislation (1991 – 2001)*

a. *Dependency and Indemnity Compensation*

In the first major change to DIC in nearly 23 years, Congress enacted the Dependency and Indemnity Compensation Reform Act of 1992,<sup>151</sup> which changed the basis for determining the amount of DIC benefits from military rank of the deceased to a flat rate for all surviving spouses.<sup>152</sup> The act mandated that DIC be paid in the amount of \$750 per month,

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<sup>150</sup> VA DISABILITY LEGISLATIVE HISTORY, *supra* note 6, at 52 -70.

<sup>151</sup> Dependency and Indemnity Compensation Reform Act of 1992, enacted as Title I of the Veterans' Benefits Act of 1992, Pub. L. No. 102-568, 106 Stat. 4320.

<sup>152</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.4.

Under the new program, the amount of DIC to be paid to a survivor is not dependent on the pay grade of the deceased member. Rather, the 1992 law prescribed that DIC be paid to all surviving spouses at the rate of \$750 per month, independently of the pay grade of the member.

*Id.* It is important to note, however, that for those dependents whose spouses died before the effective date of the 1992 act (i.e., January 1, 1993), the rate of DIC is based either on pay grade at time of death or on the flat rate amount, whichever is higher. *Id.*

periodically adjusted to reflect increases in the cost-of-living.<sup>153</sup> Cost-of-living adjustments continue to the present-day. The act also authorized additional amounts of DIC where minor children are among the servicemembers' survivors,<sup>154</sup> and where the servicemember had a total service-connected disability at the time of death.<sup>155</sup>

The changes in the 1992 legislation stemmed from “basic dissatisfaction with reliance on the member’s or former member’s military rank while on active duty as the primary determinant of the amount of DIC payable to survivors.”<sup>156</sup> Congress believed that a rank-based DIC system was unfair; “[d]uring hearings, the point of view was frequently expressed that a new and ‘more equitable’ payment system should be established ‘to better provide for ... survivors of individuals in the lower ranks who die while in service or as a result of a service-connected disability.’”<sup>157</sup> The DVA also agreed with this characterization, and pressed for DIC reform:

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<sup>153</sup> *Id.* ch. III.D.4, n.6.

<sup>154</sup> *Id.* ch. III.D.4, n.7. “As enacted, a surviving spouse with minor children was entitled to an additional \$100 per month per child during fiscal year 1993, \$150 per child during fiscal year 1994, and \$200 per child during fiscal year 1995.” *Id.*

<sup>155</sup> *Id.* ch. III.D.4.

An additional \$165 per month was authorized for the surviving spouse of a veteran who, at the time of death, had been eligible to receive compensation for a service-connected disability that had been rated totally disabling for at least eight continuous years before the veteran's death, provided the surviving spouse had been married to the veteran at least eight years immediately before the veteran's death.

*Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (quoting H.R. REP. NO. 102-753, at 10 (1992)).

The large majority of DIC recipients are awarded the benefit following post-service deaths, many occurring several decades after separation from service. In those cases, the military rank attained by the deceased is not related to his or her income prior to death. . . . We find the inequity of payments made to spouses under the current program troublesome. DIC payments to a few spouses are in some cases three times those paid to other surviving spouses. Quite frankly, we are just not prepared to conclude that one family's loss from a service-connected death is somehow greater than another's, merely because their loved one attained a higher service rank.<sup>158</sup>

Aside from cost-of-living increases in the DIC schedule, no further major legislative changes were made to DIC until after September 11, 2001, discussed *infra* at Part II.A.6.a.

*b. Servicemen's Group Life Insurance*

Legislative changes to the SGLI during the Gulf War era typically increased the maximum amount of coverage for servicemembers. In 1991, Congress increased SGLI coverage to \$100,000,<sup>159</sup> and again in 1992 to \$200,000.<sup>160</sup> In 1996, Congress rendered this level of coverage automatic unless a servicemember opted out of a portion or all SGLI coverage in writing.<sup>161</sup> Finally, in 2001,<sup>162</sup> Congress again raised the maximum coverage to

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<sup>158</sup> *Id.* (quoting H.R. REP. NO. 102-75, at 28 – 29 (1992)).

<sup>159</sup> *Id.* ch. III.D.3 (citing Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, 105 Stat. 75).

<sup>160</sup> *Id.* (citing Veterans' Benefits Act of 1992, Pub. L. No. 102-568, 106 Stat. 4320 (1992)).

<sup>161</sup> *Id.* (citing National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996)). Under the 1996 NDAA, persons eligible for SGLI coverage included "all members of the uniformed services on active duty, active duty for training, or inactive-duty training, as well as members of the Retired Reserve of any service and persons who, upon application, would be eligible for assignment to the Retired Reserve." *Id.*

<sup>162</sup> Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419, 114 Stat. 1822.

\$250,000, and “granted SGLI eligibility to members of the Individual Ready Reserve who [were] subject to involuntary callup.”<sup>163</sup> Legislation from this era also improved coverage for veterans and their families under the VGLI program.<sup>164</sup>

In other Gulf War era SGLI legislation, the Veterans Benefits Enhancement Act of 1998<sup>165</sup> “established an accelerated benefit option for terminally ill holders of SGLI policies, providing a lump-sum payment at the face value of the insurance.”<sup>166</sup> Additionally, SGLI coverage for family members was created by the Veterans Survivor Benefits Improvement Act of 2001,<sup>167</sup> which “established maximum SGLI coverage of \$100,000 for spouses (not to exceed the coverage amount of the member) and automatic coverage of \$10,000 for each dependent child,”<sup>168</sup> also known as Family Servicemembers’ Group Life Insurance (FSGLI).

c. *Survivor Benefit Plan*

The Gulf War era saw administrative changes made to the SBP via annual DOD

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<sup>163</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3.

<sup>164</sup> *Id.* (citing Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, 105 Stat. 75; Veterans’ Benefits Act of 1992, Pub. L. No. 102-568, 106 Stat. 4320; Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315; and the Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419, 114 Stat. 1822) (“Like SGLI, VGLI is available in \$10,000 increments up to a maximum of \$250,000.”).

<sup>165</sup> Veterans Benefits Enhancement Act of 1998, Pub. L. No. 105-368, 112 Stat. 3315.

<sup>166</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3.

<sup>167</sup> Veterans Survivor Benefits Improvement Act of 2001, Pub. L. No. 107-14, 115 Stat. 25

<sup>168</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3. For more information on FSGLI, see DEP’T OF VETERANS’ AFFAIRS, FAMILY SERVICEMEMBERS’ GROUP LIFE INSURANCE (FSGLI), <http://www.insurance.va.gov/Sglisite/FSGLI/sglifam.htm> (last visited Jan. 15, 2008) and *infra* at Part III.B.3.c.

authorization acts. For example, in 1992,<sup>169</sup> Congress “eliminated the two-year survival period for servicemembers making an open enrollment election if married to widows who were entitled, before Nov. 1, 1990, to receive DIC based on a previous marriage.”<sup>170</sup>

In 1997,<sup>171</sup> Congress created an option to terminate SBP participation for the first time.<sup>172</sup> This option was available to servicemembers who had been retired for more than two years (or, in the case of servicemembers retired for less than two years, on the second anniversary of their retirement), and the legislation provided participants with a one-year window to terminate SBP.<sup>173</sup> Spouse or former spouse concurrence was required before termination could be effected.<sup>174</sup>

In 1998,<sup>175</sup> Congress created a “paid up” provision for SBP participants.<sup>176</sup> This provision, which became effective in October 2008, provided that SBP participants who were age 70 and whose retired pay had been reduced by SBP premiums for at least 360 months were exempt from SBP premiums.<sup>177</sup> In 1999,<sup>178</sup> Congress extended this provision to

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<sup>169</sup> Department of Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2571.

<sup>170</sup> MILITARY OFFICERS ASSOCIATION OF AMERICA, SURVIVOR BENEFIT PLAN, SECURITY FOR YOUR SURVIVORS 45 (2005), *available at* [http://www.moaa.org/pubs/pubs\\_infoex/pubs\\_infoex\\_sbpsys/index.htm](http://www.moaa.org/pubs/pubs_infoex/pubs_infoex_sbpsys/index.htm) (hereinafter MOAA SBP GUIDE).

<sup>171</sup> Department of Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629.

<sup>172</sup> MOAA SBP GUIDE, *supra* note 170, at 45.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* This is because SBP benefits are divisible under the USFSPA. MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

<sup>175</sup> Department of Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 1920.

<sup>176</sup> MOAA SBP GUIDE, *supra* note 170, at 46.

<sup>177</sup> DEFENSE FINANCE AND ACCOUNTING SERVICE, PAID-UP SBP FAQs (2008), *available at* <http://www.dfas.mil/retiredpay/frequentlyaskedquestions/paid-upsbpfaqs.html>.

RSFPP participants.<sup>179</sup> The 1999 legislation also treated servicemembers who enrolled or maximized participation in SBP during the open enrollment period “as if they elected coverage at their first opportunity ([so that this] time will be used in computing 360 payments for the paid-up provision).”<sup>180</sup>

*d. Dependents’ Educational Benefits*

Despite the numerous changes to DIC, SGLI, and SBP, no significant legislative changes to the DEA program occurred during the Gulf War era, other than increases in the amount of DEA benefits to account for inflation. Surviving children continued to receive educational benefits for up to 45 months, and remained eligible to use these benefits for eight years.<sup>181</sup>

*e. Death Gratuity*

In contrast to the DEA program, the post-Gulf War era saw an increase in the death gratuity. In 1992, in response to an increase in combat-related deaths,<sup>182</sup> Congress

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<sup>178</sup> Department of Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512.

<sup>179</sup> MOAA SBP GUIDE, *supra* note 170, at 46.

<sup>180</sup> MOAA SBP GUIDE, *supra* note 170, at 46.

<sup>181</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. V.B.2.

<sup>182</sup> Though not expressly mentioned in the legislation, it can be assumed that Congressional examination of the adequacy of the death gratuity stemmed from combat deaths during the Persian Gulf conflict, as previous wars had similarly driven Congress to examine death benefits. *See, e.g.*, Ammin K. Spencer, Analysis of the Death Gratuity Program: History, Current Issues, and Future Implications, 8 (Dec. 2005) (unpublished MBA Professional Report, Naval Postgraduate School), *available at* <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA442861&Location=U2&doc=GetTRDoc.pdf>, noting that “[s]imilar to the

temporarily increased the amount of the death gratuity to “\$6,000 for a death resulting from any injury or illness incurred during the Persian Gulf conflict or during the 180-day period beginning at the end of the Persian Gulf Conflict.”<sup>183</sup> This increase was later made permanent,<sup>184</sup> and no further adjustments to the death gratuity were made until post-September 11, 2001.<sup>185</sup>

6. *The Global War on Terrorism and Current Survivor Benefit Legislation*

a. *Dependency and Indemnity Compensation*

Recent DIC legislation has focused on ensuring that DIC rates reflect the actual cost-of-living. Thus, beginning in 1992, Congress enacted yearly legislation to increase DIC by the same percentage as that “automatically received by Social Security recipients.”<sup>186</sup>

Additionally, the Veterans’ Benefit Act of 2003 “[p]rovide[d] that the remarriage of a surviving spouse of a veteran after age 57 shall not bar the furnishing of dependency and

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circumstances that led to the legislation of 1917, Congress was again prompted by war to address the death gratuity program in 1991.”

<sup>183</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3 (citing Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, 105 Stat. 75). Congress defined the “Persian Gulf conflict” as “the period beginning on August 2, 1990, and ending thereafter on the date prescribed by Presidential proclamation or by law.” *Id.* ch. III.D.3, n.11.

<sup>184</sup> *Id.* ch. III.D.3 (citing National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1290 (1991)).

<sup>185</sup> *Id.* Further changes to the death gratuity are discussed *infra* at Part II.A.6.d.

<sup>186</sup> VA DISABILITY LEGISLATIVE HISTORY *supra* note 6, at 90-92 (citing Veterans’ Compensation Rate Amendments of 2001, Pub. L. No. 107-94, 115 Stat. 900 and Veterans’ Compensation Cost-of-Living Adjustment Act of 2003, Pub. L. No. 108-147, 117 Stat. 1885).

indemnity compensation (DIC), home loan, and educational benefits eligibility.”<sup>187</sup> Spouses who had previously remarried after age 57 were provided one year to re-apply for their DIC benefits.<sup>188</sup>

As previously noted, the 1972 legislation creating SBP included a DIC offset provision. Although there have been several legislative efforts to eliminate the offset between DIC and SBP, to date, no such legislation has been successful.<sup>189</sup> Despite the fact that the DIC/SBP offset remains in effect, Section 644 of the 2008 NDAA<sup>190</sup> provides a taxable indemnity

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<sup>187</sup> *Id.* at 93.

<sup>188</sup> *Id.*

<sup>189</sup> *See, e.g.*, National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3144 and National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 177. Section 666 of the 2006 NDAA called for the GAO to review the actuarial soundness of the SBP in light of several proposed changes, including elimination of the DIC offset provisions. *See also* H.R. 1927, 110th Cong. (2007-2008) which, among other things,

[r]epeals certain provisions which require the offset of amounts paid in dependency and indemnity compensation from Survivor Benefit Plan (SBP) annuities for the surviving spouses of former military personnel who are entitled to military retired pay or would be entitled to such pay except for being under 60 years of age.

The Library of Congress, H.R. 1927, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01927:@@D&summ2=m&> (last visited Mar. 11, 2009) (quoting Congressional Research Service Summary).

<sup>190</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 177. Section 644 provides, in part:

- (1) [T]he Secretary concerned shall pay a monthly special survivor indemnity allowance under this subsection to the surviving spouse or former spouse of a member of the uniformed services to whom section 1448 of this title applies if—
  - (A) the surviving spouse or former spouse is entitled to dependency and indemnity compensation under section 1311(a) of title 38;
  - (B) except for subsection (c) of this section, the surviving spouse or former spouse is eligible for an annuity by reason of a participant in the Plan under section 1448(a)(1) of this title; and
  - (C) the eligibility of the surviving spouse or former spouse for an annuity as described in subparagraph (B) is affected by subsection (c) of this section.
- (2) AMOUNT OF PAYMENT.—Subject to paragraph (3), the amount of the allowance paid to an eligible survivor under paragraph (1) for a month shall be equal to—
  - (A) for months during fiscal year 2009, \$50;
  - (B) for months during fiscal year 2010, \$60;
  - (C) for months during fiscal year 2011, \$70;



allowance for those dependents affected by the DIC/SBP offset. This Special Survivor Indemnity Allowance (SSIA) takes the form of “an automatic payment to those spouses whose SBP benefits are offset by DIC.”<sup>191</sup> Although it is unclear whether the SSIA legislation is a step toward actual elimination of the DIC/SBP offset, some organizations with military interests believe that the creation of SSIA reflects positive Congressional recognition of the issue.<sup>192</sup> In addition, the GAO opined in 2006 that eliminating the offset between DIC and SBP would likely not negatively impact the actuarial soundness of the SBP.<sup>193</sup> Further, the Veterans’ Benefits Improvement Act of 2008<sup>194</sup> requires the Comptroller General to report on the adequacy of DIC as a method of income replacement when a veteran with a service-connected disability dies, signaling Congressional intent to examine whether DIC, which nearly always displaces SBP due to offset provisions, is alone sufficient to provide support to survivors. Nevertheless, to date, the offset between SBP and DIC remains, and it is as confusing and controversial for survivors as ever. For a critical analysis of the current

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(D) for months during fiscal year 2012, \$80;  
(E) for months during fiscal year 2013, \$90; and  
(F) for months after fiscal year 2013, \$100.

(3) LIMITATION.—The amount of the allowance paid to an eligible survivor under paragraph (1) for any month may not exceed the amount of the annuity for that month that is subject to offset under subsection (c). . . .

*Id.*

<sup>191</sup> DEFENSE FINANCE AND ACCOUNTING SERVICE, NDAA SECTION 644 (FY 08) FAQs (2008), *available at* <http://www.dfas.mil/retiredpay/frequentlyaskedquestions/ndaa644faqs.html>.

<sup>192</sup> *See, e.g., FY 2008 Defense Authorization Bill Would Improve Pay and Benefits*, FAM. PROGRAMS UPDATE (Ass’n of the U.S. Army), May 2007, at 2 (noting that the SSIA “does not outright eliminate the offset which reduces survivor benefit annuities by the amount received through Dependency and Indemnity Compensation from the VA but the new allowance should be taken as a good sign that Congress is addressing the issue.”).

<sup>193</sup> GAO SBP ACTUARIAL REPORT, *supra* note 4, at 5.

<sup>194</sup> Pub. L. No. 110-389, 122 Stat. 4145 (2008).

DIC/ SBP offset, see *infra* Part III.A.3.

*b. Servicemembers' Group Life Insurance*

After September 11, 2001, Congress recognized that the amount of Gulf-War era survivor benefit compensation was not meeting intended goals.<sup>195</sup> As a result, SGLI benefits saw two major changes in 2005. First, the Servicemembers' Group Life Insurance Enhancement Act of 2005<sup>196</sup> increased SGLI coverage from \$250,000 to \$400,000.<sup>197</sup> At least one rationale behind this increase was to bring “the SGLI benefit more fully in line with the current economic needs of military families who suffer the loss of one who is in most cases their primary provider.”<sup>198</sup>

In additional 2005 legislation,<sup>199</sup> Congress created for the first time a Traumatic SGLI (TSGLI) program, an insurance benefit intended to “bridge the gap in financial assistance servicemembers receive[] from the time of their [traumatic] injury to the time of their

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<sup>195</sup> See, e.g., *Death Benefits and Services Available to Survivors of Military Personnel and Legislative Proposals to Enhance these Benefits: Hearing Before the S. Comm. On Armed Services*, 109th Cong. 6 (2005) and *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. 65 (2005) (Committee hearings on adequacy of current levels of survivor benefits).

<sup>196</sup> Servicemembers' Group Life Insurance Enhancement Act of 2005, Pub. L. No. 109-80, 119 Stat. 2045.

<sup>197</sup> *Id.*

<sup>198</sup> *Pending Benefits-Related Legislation, Hearing Before the S. Comm. On Veterans' Affairs*, 109th Cong. 32 (2005) (statement of Steve Smithson, Deputy Director, Veterans Affairs and Rehabilitation, the American Legion).

<sup>199</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

rehabilitation and their recovery.”<sup>200</sup> The program provides payments ranging from \$25,000 to \$100,000 in traumatic injury insurance for servicemembers, at a cost of \$1.00 per month. Traumatic SGLI is attached as a rider to existing SGLI policies,<sup>201</sup> and covers a laundry list of traumatic injuries, detailed in the statute.<sup>202</sup> The TSGLI program is available only to servicemembers enrolled in the SGLI program.<sup>203</sup>

Even though they are fairly new programs, recent legislation has made several changes to both FSGLI and TSGLI.<sup>204</sup> First, the DVA is required to review the feasibility of including severe and acute post-traumatic stress disorder as among the compensable conditions under TSGLI.<sup>205</sup> The legislation also permits stillborn children to be considered insurable

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<sup>200</sup> See, *Hearing on Wounded Warrior Insurance: A First Look at a New Benefit for Traumatically Injured Servicemembers: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. 2 (2006) (statement of Sen. Craig, Chairman, Senate Committee on Veterans' Affairs). Other testimony at the hearing noted:

This program supplements existing DOD and VA benefits. As we discussed when we were crafting this new benefit, servicemembers and their loved ones face many financial hardships when a servicemember is hospitalized with injuries. This insurance program helps ease the financial burden during this critical time. It allows servicemembers and their families to focus on what is really important, and that is the recovery of the injured servicemember.

*Id.* at 3 (2006) (statement of Sen. Akaka, Ranking Member, Senate Committee on Veterans' Affairs). For additional legislative history on TSGLI, see *Hearing on (1) Draft Bill to Enhance SGLI; (2) PL 109-13, Traumatic Injury Protection Provisions; (3) H.R. 1618, The Wounded Warrior Servicemembers Group Disability Insurance Act of 2005: Hearing Before the H. Comm. On Veterans' Affairs*, 109th Cong. (2005).

<sup>201</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231, 257 (2005).

<sup>202</sup> See *id.*

<sup>203</sup> 38 U.S.C. § 1980A (2008).

<sup>204</sup> Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145.

<sup>205</sup> *Id.*

dependents under FSGLI.<sup>206</sup> For a description of the current features of the SGLI, FSGLI, and TSGLI programs, see *infra* Part II.B.3.c.

c. *Survivor Benefit Plan*

Following September 11, 2001, Congress also began to take action to increase eligibility for, as well as the benefits received from, the SBP. The 2002 NDAA<sup>207</sup> extended eligibility for the SBP to “spouse[s] or eligible children of all active-duty deaths classified in the line-of-duty since Sept[ember] 10, 2001.”<sup>208</sup> This legislation thus extended full SBP benefits to dependents of those who died on active duty, and the SBP annuity amount was “computed as if the servicemember [was] retired will full disability on the date of death.”<sup>209</sup>

The 2005 NDAA<sup>210</sup> “contain[ed] some of the most important changes to the SBP in years.”<sup>211</sup> Of these changes, the most significant was a gradual phase out of the so-called “widow’s tax,”<sup>212</sup> or reduction in SBP annuity benefits under the Social Security offset after

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<sup>206</sup> *Id.*

<sup>207</sup> National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012.

<sup>208</sup> MOAA SBP GUIDE, *supra* note 170, at 46.

<sup>209</sup> *Id.*

<sup>210</sup> National Defense Authorization Act of 2005, Pub. L. No. 108-375, 118 Stat. 1811.

<sup>211</sup> MOAA SBP GUIDE, *supra* note 170, at 3.

<sup>212</sup> *Id.*

a dependent reaches the age of 62.<sup>213</sup> This offset necessitated the creation of SSBP in 1989.<sup>214</sup> The rationale for the 2005 NDAA SBP changes is described as follows:

Many military retirees signed up for SBP, assuming that benefits would stay fixed at 55% of retirement pay. But benefits for many widows were cut drastically when they reached age 63 under a provision called the Social Security Offset. [The 2005] NDAA eliminates this offset over the next three years, raising the benefit level from the current 35% of retired pay to 55% (the maximum under SBP) by April 1, 2008 ... Retirees with Supplemental Survivor Benefit Plan (SSBP). . . will retain their coverage levels but will no longer have to pay the extra premium.<sup>215</sup>

The 2005 NDAA also created an open season for enrollment, permitting retirees who previously had not participated in the SBP to enroll, provided they paid back premiums with interest.<sup>216</sup>

The 2008 NDAA,<sup>217</sup> as previously discussed, implemented the SSIA program to provide additional compensation for those dependents affected by the DIC offset. For further discussion of this legislation, see *supra* at Part II.A.6.a. The features of the current SBP are discussed *infra* at Part II.C.2.c.

*d. Dependents' Educational Assistance*

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<sup>213</sup> *Id.*

<sup>214</sup> For further discussion of SSBP, see *supra* Part II.A.4.c.

<sup>215</sup> MOAA SBP GUIDE, *supra* note 170, at 3 (providing that “[t]he schedule for increases is as follows: 40% of the base annuity amount as of Oct. 1, 2005; 45% of the base annuity amount on April 1, 2006; 50% of the base annuity amount on April 1, 2007; 55% of the base annuity amount on April 1, 2008.”).

<sup>216</sup> *Id.*

<sup>217</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3.

Other than adjustments to monthly amounts available to dependents entitled to DEA educational benefits, no major legislation has affected these benefits since the Vietnam era. A recent legislative initiative to improve and modernize educational benefits for survivors failed.<sup>218</sup> However, the Veterans' Benefits Improvement Act of 2008<sup>219</sup> amended the DEA program to "allow spouses of veterans who are permanently and totally disabled to use educational assistance over a 20-year period."<sup>220</sup> For a description of the current DEA program, see *infra* Part II.B.4.c.

*e. Death Gratuity*

In 2003,<sup>221</sup> Congress increased the amount of the death gratuity from \$6000 to \$12,000, retroactive to all active duty "deaths occurring on or after September 11, 2001."<sup>222</sup> This legislation also made the death gratuity exempt from federal taxation.<sup>223</sup> In 2005, Congress

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<sup>218</sup> See, Veterans' Survivors Education Enhancement Act of 2007, S. 698, 110th Cong. (2007), which would have terminated the 45-month limitation on use of educational benefits. The legislation also would have increased the aggregate amount of educational assistance available to \$80,000, and made tutorial assistance available. GovTrack.us, Veterans' Survivors Education Enhancement Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=s110-698&tab=summary> (last visited Jan. 16, 2009).

<sup>219</sup> Pub. L. No. 110-389, 122 Stat. 4145 (2008).

<sup>220</sup> Congressional Budget Office Cost Estimate, S. 3023, Veteran's Benefits Improvement Act of 2008, Jul. 23, 2008.

<sup>221</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3 (citing Military Family Tax Relief Act, Pub. L.No. 108-121, 117 Stat. 1337 (2003)).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

dramatically increased the death gratuity to \$100,000 for eligible beneficiaries.<sup>224</sup> The impetus for this increase stemmed, in part, from Congressional recognition that \$12,000 was a “paltry, miserly, and ... insulting amount” for a loss of life in service to the United States,<sup>225</sup> particularly in light of the fact that the goal of the death gratuity is to provide an immediate sum of money to meet the needs of survivors.<sup>226</sup> Further, Congress noted that deaths in other professions, such as law enforcement, generally resulted in a higher death gratuity.<sup>227</sup> However, the legislation initially limited the increased death gratuity to the

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<sup>224</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

<sup>225</sup> See *Death Benefits and Services Available to Survivors of Military Personnel and Legislative Proposals to Enhance these Benefits: Hearing Before the S. Comm. on Armed Services*, 109th Cong. 6 (2005) (statement of Sen. Allen, Senator from the State of Va.). Interestingly, there was also some discussion regarding whether an increase in the death gratuity would result in lower participation in the SGLI, particularly from the young Soldier’s standpoint. 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. 65 (2005) (responses to written questions for the Hon. Daniel Cooper, Senate Veterans’ Affairs Committee) (stating:

It is difficult to predict whether the proposed increase in the death gratuity would have a significant adverse impact on participation in the SGLI program. If such an increase were coupled with government-paid premiums for \$150,000 of SGLI in designated zones as some have proposed, members would in essence have \$250,000 of “free” survivor benefits and it is conceivable that many would believe they do not need the additional \$250,000 of SGLI coverage that would be available. If participation among younger servicemembers were to decline substantially, it is possible that premium revenue would not be sufficient to cover program costs. This could result in an increase in the SGLI premium rate, or having to charge age-based premium rates in place of the current single rate for all members.)

Ultimately, Congress went ahead with the death gratuity increase, and also increased SGLI benefits to \$400,000, discussed *infra* at Part II.A.6.b.

<sup>226</sup> 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. 65 (2005) (responses to written questions for Thomas M. Tower, Senate Veterans’ Affairs Committee) (“The purpose of the death gratuity is to provide immediate cash to meet the needs of survivors. The death gratuity is geared toward helping survivors meet immediate expenses incurred, such as burial costs and/or transportation of family members to funeral locations.”).

<sup>227</sup> See *Death Benefits and Services Available to Survivors of Military Personnel and Legislative Proposals to Enhance these Benefits: Hearing Before the S. Comm. On Armed Services*, 109th Cong. 6 (2005) (statement of Sen. Allen, Senator from the State of Va.):

survivors of those who died in combat or from combat-related injuries; the death gratuity remained at \$12,000 for all other survivors.<sup>228</sup> This limitation on the death gratuity proved extremely controversial.<sup>229</sup> As a result, Congress extended the increase to survivors of any servicemember who dies on active duty, retroactive to all deaths occurring on or after October 7, 2001.<sup>230</sup>

The increased death gratuity operated as it always had, providing a lump sum payment to a servicemembers' statutorily limited next-of-kin, usually the spouse. In light of the exponential increase in the death gratuity, the 2008 NDAA<sup>231</sup> authorized servicemembers to designate one or more recipients of the death gratuity.<sup>232</sup> Under this legislation, default

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How does one determine what is an appropriate amount? It is always hard to value life, but I looked at what our law enforcement and fire fighters receive across this country if they die, and it is generally between \$50,000 and \$100,000. In Virginia, Mr. Chairman, the average is \$75,000. \$100,000 will not replace that loved one, but I think a grateful Nation, it is my sincere sense, wants to provide for those families who have also made the ultimate sacrifice.

*Id.*

<sup>228</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005). *See also* Spencer, *supra* note 182, at 10-11.

<sup>229</sup> *See* Spencer, *supra* note 182, at 20, noting concerns that the death gratuity increase created “two classes of servicemembers—those in combat zones and those not,” and Congressional concern that “the plan was discriminatory because it created different death benefits based primarily on where the deaths occur.” *Id.*

<sup>230</sup> *See*, National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136. October 7, 2001 is the day the United States and Great Britain began offensive operations against Afghanistan and the Taliban regime. Whitehouse.gov, Presidential Address to the Nation, Oct. 7, 2001, <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html> (last visited Jan. 16, 2009).

<sup>231</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3.

<sup>232</sup> *Id.* The relevant text of the legislation provides:

SEC. 645. MODIFICATION OF AUTHORITY OF MEMBERS OF THE ARMED FORCES TO DESIGNATE RECIPIENTS FOR PAYMENT OF DEATH GRATUITY.

(a) Authority to Designate Recipients.--Section 1477 of title 10, United States Code, is amended ... by ... inserting the following new subsections:

Designation of Recipients.—(1) On and after July 1, 2008, . . . a person . . . may designate one



statutory rules remain in place if a servicemember fails to make an affirmative designation.<sup>233</sup>

Further, if a married servicemember elects to designate a beneficiary other than a spouse, the spouse must be notified.<sup>234</sup> For a description of the current death benefit program, see *infra* Part II.C.1.c.

## B. Department of Veterans Affairs Survivor Benefit Programs

### 1. Introduction

The mission of the DVA is “to care for him who shall have borne the battle and for his widow and his orphan.”<sup>235</sup> The DVA is currently the second largest agency in the federal government, and was elevated to a cabinet-level department in 1989.<sup>236</sup> The DVA is administered by three major sub-organizations: the Veterans Health Administration (VHA), the Veterans Benefits Administration (VBA), and the National Cemetery Administration (NCA).<sup>237</sup> Of these, the VBA is “responsible for administering the Department’s programs

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or more persons to receive all or a portion of the amount payable under section 1478 of this title. The designation of a person to receive a portion of the amount shall indicate the percentage of the amount, to be specified only in 10 percent increments, that the designated person may receive.

*Id.*

<sup>233</sup> *See id.*

<sup>234</sup> *See id.*

<sup>235</sup> President Abraham Lincoln, the Gettysburg Address (Nov. 19, 1863).

<sup>236</sup> VA.gov, History of VA, [http://www.va.gov/JOBS/VA\\_In\\_Depth/history.asp](http://www.va.gov/JOBS/VA_In_Depth/history.asp) (last visited Jan. 16, 2009).

<sup>237</sup> U.S. DEP’T. OF VETERANS’ AFFAIRS, 2008 ORGANIZATIONAL BRIEFING BOOK 1 (2008).

that provide financial and other forms of assistance to veterans, their dependents, and survivors.”<sup>238</sup> In addition, 2008 legislation authorized the creation of an Office of Survivors Assistance, which is intended to serve as a clearinghouse for DVA survivor benefit matters.<sup>239</sup> This part will provide an overview of current DVA-administered survivor benefit programs.

## 2. *Dependency and Indemnity Compensation (DIC)*

### a. *History*

Congress established the DIC program in 1957<sup>240</sup> as an income replacement program for survivors of deceased military personnel and service-disabled veterans. In 1957, the rate of DIC was equal to twelve percent of basic pay.<sup>241</sup> In 1969,<sup>242</sup> Congress amended the DIC program so that benefits were based on a veterans’ pay grade at time of death.<sup>243</sup> No further changes were made to the DIC program until 1992, when Congress enacted the Veterans’ Benefits Act of 1992<sup>244</sup> and “changed the basis of the benefits from that of the

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<sup>238</sup> *Id.* at 11.

<sup>239</sup> Veterans’ Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145.

<sup>240</sup> Servicemen’s and Veterans’ Survivor Benefits Act, Pub. L. No. 84-881, 70 Stat. 857 (1956).

<sup>241</sup> GAO DIC REPORT, *supra* note 4, at 10.

<sup>242</sup> Act of October 27, 1969, Pub. L. No. 91-96, 83 Stat. 144 (1969).

<sup>243</sup> GAO DIC REPORT, *supra* note 4, at 10.

<sup>244</sup> Dependency and Indemnity Compensation Reform Act of 1992, enacted as Title I of the Veterans’ Benefits Act of 1992, Pub. L. No. 102-568, 106 Stat. 4320.

servicemember's or veteran's rank to that of a flat monthly payment.”<sup>245</sup> Other than yearly rate changes meant to keep DIC payments in line with actual cost-of-living adjustments, the only significant legislative change to the DIC program is the 2008 addition of the SSIA payment, a nominal monthly sum intended, in part, to reduce the effect of the DIC/SBP offset.<sup>246</sup>

*b. Purpose*

The overarching purpose of DIC is income replacement. To that end, DIC provides a monthly 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 the death.”<sup>247</sup> Indeed, DIC

[w]as designed to provide indemnification to certain survivors of veterans who died during military service as well as to survivors of veterans who died after military service as a result of service-connected disabilities. It was also designed to provide partial compensation to survivors for economic losses attributable to veterans' deaths.<sup>248</sup>

*c. Overview*

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<sup>245</sup> GAO DIC REPORT, *supra* note 4, at 11 (1995). Prior to the 1992 legislation, the amount of annual DIC payments ranged widely from \$7392 to \$18,960. *Id.*

<sup>246</sup> *See*, National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 177.

<sup>247</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.4.

<sup>248</sup> *Id.*

The DIC program<sup>249</sup> consists of a nontaxable monthly stipend<sup>250</sup> paid to survivors of three categories of servicemembers: those who die on active duty due to service-connected injury or disease and not due to their own willful misconduct; those who die after active duty service from service-connected causes not due to their own misconduct; and those having a total service-connected disability rating who die after active duty not due to their own misconduct.<sup>251</sup> The flowchart at Appendix A depicts eligibility conditions for DIC. For DIC payments to survivors of members of the reserve component, the term “active duty” includes active duty (AD), active duty for training (ADT), and inactive duty for training (IDT) personnel.<sup>252</sup>

The current monthly rate of DIC for spouses for deaths occurring after January 1, 1993<sup>253</sup> is \$1091.<sup>254</sup> This amount may be increased by \$233 per month if the veteran had a total service-connected disability for at least eight years before the time of death.<sup>255</sup> Additional

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<sup>249</sup> 38 U.S.C. §§ 1301-1322 (2006).

<sup>250</sup> 38 U.S.C.S. § 1311 (2008).

<sup>251</sup> *Id.* § 1310. “Willful misconduct” is defined as “deliberate or intentional wrongdoing with knowledge of or wanton disregard of consequence.” 38 C.F.R. § 3.1(n). In order for DIC payments to be prohibited, the willful misconduct must proximately cause the injury, disease, or death in question. *Id.* The DVA makes the final determination on service-connection and whether willful misconduct exists. *Id.* at § 3.400.

<sup>252</sup> 38 C.F.R. § 3.6 (2009). If death of a reserve component member occurs on IDT, DIC is paid only for IDT deaths due to injury, not illness.

<sup>253</sup> This is the effective date of the Dependency and Indemnity Compensation Reform Act of 1992, enacted as Title I of the Veterans’ Benefits Act of 1992, Pub. L. No. 102-568, 106 Stat. 4320.

<sup>254</sup> 38 U.S.C.S. § 1311(a)(1).

<sup>255</sup> *Id.* § 1311(a)(2).

amounts of DIC are authorized if there are surviving dependent children.<sup>256</sup> For deaths occurring before January 1, 1993, the monthly DIC rate may still be tied to the servicemembers' pay grade at death, if that amount is greater than the flat rate payment.<sup>257</sup>

Where there is no surviving spouse, DIC may be authorized for eligible surviving children.<sup>258</sup> The amount is calculated based on the total number of eligible children.<sup>259</sup> In addition, the dependent parents of a deceased servicemember may also be eligible for DIC:<sup>260</sup>

While a parent's basic entitlement depends on the service-connected death of the parent's veteran son or daughter, the DIC payable to a surviving parent depends on the parent's income and marital status. No DIC entitlement exists if a parent's income exceeds a statutorily prescribed limit. A parent who is in need of the regular aid and attendance of another person may be entitled to a special allowance in addition to whatever DIC payment has been awarded.<sup>261</sup>

Thus, surviving parents are eligible for DIC only if they were dependent on the deceased and do not exceed applicable income ceilings.<sup>262</sup>

Regarding the operation of DIC benefits, receipt is not automatic, and eligible survivors

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<sup>256</sup> The basic monthly rate is an additional \$271 per child under the age of 18. *Id.* § 1311(b). The \$271 is still available for a child aged 18-23 if in school full-time, unless the child is receiving DEA. *Id.* § 1314(c). The basic monthly rate for a disabled child is \$462. *Id.* § 1314(b).

<sup>257</sup> *Id.* § 1311(a)(3).

<sup>258</sup> *Id.* § 1313. Generally speaking, “[a] child under age 18 may receive DIC benefits in his or her own right only if there is no surviving spouse who is entitled to DIC benefits.” MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.4.

<sup>259</sup> 38 U.S.C.S. § 1313. The monthly payment ranges from \$462 for one child; \$663 for two children; \$865 for three children; and \$865 plus \$165 for each child when there are more than three surviving children. *Id.*

<sup>260</sup> *Id.* § 1315.

<sup>261</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.4.

<sup>262</sup> 38 U.S.C.S. § 1315.

must apply for them.<sup>263</sup> Further, the receipt of SBP annuity payments is currently offset by DIC payments.<sup>264</sup> This is a controversial and confusing offset that this thesis addresses *infra* at Part III. DIC is payable for the life of a spouse, provided the spouse does not remarry before the age of 57.<sup>265</sup> Even if the spouse remarries, subsequent termination of that remarriage may reinstate eligibility for DIC.<sup>266</sup>

### 3. *Servicemembers' Group Life Insurance (SGLI)*

#### a. *History*

The SGLI in its most current state was created by Congress in 1965.<sup>267</sup> The original

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<sup>263</sup> In general, applicants must complete VA Form 21-534, Application for Dependency and Indemnity Compensation. Parents must complete VA Form 21-535, Application for Dependency and Indemnity Compensation for Parents. Electronic forms and detailed instructions are available at VA.gov, Survivor Benefits: What VA Offers, <http://www.vba.va.gov/survivors/vabenefits.htm> (last visited Jan. 21, 2008).

<sup>264</sup> 38 U.S.C.S. § 1317. Note, however, that it is possible to avoid the offset in at least some cases where survivors include both a spouse and dependent children.

In the case of members killed on active duty on or after October 7, 2001, a surviving spouse who has children can temporarily avoid the dollar-for-dollar offset only by assigning SBP to the children. But that forces the spouse to give up any SBP claim after the children attain their majority, leaving the spouse with just a \$1,067 monthly annuity from the VA. And that provision offers no relief at all to survivors of members who died before 10/7/01 or who have no children.

*Legislative Agenda of Veterans' Organizations: Hearing on H.R. 1538, H.R. 1102, H.R. 867, and H.R. 1589 Before the S. Committee on Veterans' Affairs*, 110th Cong. (2007) (statement of Ana R. Smythe, Deputy Director, Government Relations, Military Officers Association of America).

<sup>265</sup> DOD SURVIVOR BENEFIT GUIDE, *supra* note 2, at 11.

<sup>266</sup> *Id.* The rules regarding remarriage are rather complex, but generally speaking, before Oct. 1, 1998, a spouse's remarriage terminated DIC outright. Effective Oct. 1, 1998, 38 U.S.C. § 1311 was amended so that termination of a subsequent remarriage could trigger reinstatement of DIC, retroactive only to Oct. 1998. In addition, 38 U.S.C. § 103(d) provides that surviving spouses who remarry at or after age 57 retain their right to receive DIC benefits, though spouses had to affirmatively apply for reinstatement before Dec. 15, 2004.

amount of SGLI coverage under this legislation was \$10,000,<sup>268</sup> but over the years that amount has steadily increased. The current amount of SGLI coverage available to servicemembers is \$400,000.<sup>269</sup> Additional coverage for family members under the FSGLI program was added in 2001,<sup>270</sup> and is available in the amount of \$100,000 for spouses, and \$10,000 per eligible child.<sup>271</sup> Traumatic injury protection for servicemembers was created by the TSGLI program in 2005;<sup>272</sup> coverage ranges from \$25,000 to \$100,000, depending on the nature of the traumatic injury.<sup>273</sup> Of all the survivor benefit programs, the changes to SGLI over the years have arguably been the most dramatic and advantageous to servicemembers and their families.

*b. Purpose*

The basic purpose of SGLI is “to make insurance protection available to members of the uniformed services at a reasonable cost.”<sup>274</sup> Additionally, the DVA describes its insurance program mission as one that will:

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<sup>267</sup> Act of September 29, 1965, Pub. L. No. 89-214, 79 Stat. 880 (1965).

<sup>268</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>269</sup> VA LIFE INSURANCE, *supra* note 83, at 30. This increase was created by the Servicemembers’ Group Life Insurance Enhancement Act of 2005, Pub. L. No. 109-80, 119 Stat. 2045.

<sup>270</sup> Veterans Survivor Benefits Improvement Act of 2001, Pub. L. No. 107-14, 115 Stat. 25.

<sup>271</sup> VA LIFE INSURANCE, *supra* note 83, at 34.

<sup>272</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

<sup>273</sup> VA LIFE INSURANCE, *supra* note 83, at 38.

<sup>274</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

[P]rovide universally available life insurance benefits to service members and their families; provide traumatic injury protection insurance for service members; provide a conversion privilege to either a permanent plan or a renewable term insurance policy after a service member's separation from service; provide life insurance benefits to veterans that not may be available from the commercial insurance industry due to lost or impaired insurability resulting from military service; provide all benefits and services in an accurate, timely, and courteous manner and at the lowest achievable administrative cost; provide insurance coverage in a reasonable amount at competitive premium rates; and ensure that a competitive, secure rate of return will be earned on investments held on behalf of insureds.<sup>275</sup>

The DVA also strives to provide these services at a lower cost than commercial insurers.<sup>276</sup>

c. *Overview*

The SGLI program<sup>277</sup> is group term life insurance for members of the armed forces.<sup>278</sup> It is purchased by the government by private insurers; the Prudential Insurance Company is the primary insurer, and “[s]everal hundred other private insurance companies participate in the program as reinsurers.”<sup>279</sup> In order to keep premiums as low as possible, SGLI is partially subsidized by the government.<sup>280</sup> The SGLI is considered group life insurance because it

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<sup>275</sup> VA LIFE INSURANCE, *supra* note 83, at 4.

<sup>276</sup> *Id.*

<sup>277</sup> 38 U.S.C. §§ 1965-1976 (2006).

<sup>278</sup> Captain Wojciech Z. Kornacki, *What Every Soldier and Legal Assistance Attorney Should Know about Servicemembers Group Life Insurance*, ARMY LAW., Nov. 2006, at 42.

<sup>279</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.2.

<sup>280</sup> *Id.* (noting that “[a]ny extra hazard costs of SGLI attributable to military service are determined by the Department of Veterans Affairs on an actuarial basis and paid to that agency by each of the services from appropriated funds.”).



provides full-time coverage for a “group” of servicemembers.<sup>281</sup> As term insurance, SGLI provides a flat amount of coverage if the servicemember dies during the time of coverage. There is no equity or cash surrender value in a term life insurance policy such as the SGLI.<sup>282</sup>

Unlike many other employer-provided insurance plans, coverage under SGLI is automatic for active-duty servicemembers, and may also be available for reserve component members.<sup>283</sup> Insurance coverage is available in \$50,000 increments up to \$400,000, and

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<sup>281</sup> Group life insurance is “[l]ife insurance available through an employer or association that covers participating employees and members under one master insurance policy.” Nolo.com, Life Insurance, <http://www.nolo.com/definition.cfm/term/1fd7a413-0c6c-4ba7-bf9bdd24716d1472/alpha/1/#term%20life%20insurance> (last visited Jan. 21, 2009).

<sup>282</sup> Kornacki, *supra* note 278, at 43. *See also*, Nolo.com, Life Insurance, <http://www.nolo.com/definition.cfm/term/1fd7a413-0c6c-4ba7-bf9bdd24716d1472/alpha/1/#term%20life%20insurance> (last visited Jan. 21, 2009) (defining “term life insurance” as:

No-frills life insurance, with neither cash surrender value nor loan value (an amount that can be used as collateral for a loan). Term life insurance provides a pre-set amount of coverage if the policyholder dies during the period of time specified in the policy. Policyholders usually have the option to renew at the end of the term for the period of years specified in the policy. Unlike whole life insurance, premiums generally increase as the insured person gets older and the risk of death increases.)

*Id.*

<sup>283</sup> DEPARTMENT OF VETERANS AFFAIRS, SERVICEMEMBERS’ AND VETERANS’ GROUP LIFE INSURANCE HANDBOOK, sec. 1.03 (2008), <http://www.insurance.va.gov/Sglsite/handbook/handbook.htm> (hereinafter SGLI HANDBOOK), provides:

- a. Full-time coverage is provided for the following members of the uniformed services while performing full-time active duty or active duty for training, under calls or orders that do not specify periods of less than 31 days:
- (1) Commissioned, warrant and enlisted members of the Army, Navy, Air Force, Marine Corps and Coast Guard and commissioned members of the NOAA and PHS;
  - (2) Members of the Ready Reserve/Guard of a uniformed service who are assigned to a unit or position in which they may be required to perform active duty or active duty for training and each year will be scheduled to perform at least 12 periods of inactive duty training that is creditable for retirement purposes under title 10, United States Code.
  - (3) Members of the Individual Ready Reserve (IRR) who volunteer for assignment to a "mobilization" category under section 12304 (i)(1) of title 10, United States Code.
  - (4) Cadets or midshipmen of the United States Military Academy, United States Naval Academy, United States Air Force Academy and the United States Coast Guard Academy; and
  - (5) Members, cadets or midshipmen of the ROTC while attending field training or practice

active duty servicemembers are automatically insured for the full coverage amount unless they affirmatively opt out in writing.<sup>284</sup> Coverage under SGLI extends from the first day on active duty (or any period of eligibility for full-time coverage) and terminates 120 days after a servicemember's separation from service.<sup>285</sup> While cause of death is irrelevant to SGLI coverage, servicemembers may lose entitlement to SGLI benefits

[w]hen an insured member is guilty of mutiny, treason, spying, or desertion, or refuses, because of conscientious objections, to perform service in the Armed Forces of the United States, or refuses to wear the uniform of such force. No insurance shall be payable for death inflicted as a lawful punishment for crime or for military or naval offense except when inflicted by an enemy of the United States.<sup>286</sup>

The cost of SGLI premiums is determined by regulation.

With regard to beneficiary designations under SGLI, a servicemember has wide latitude and may choose "any person, firm, corporation or legal entity (including the insured's estate), individually or as a trustee,"<sup>287</sup> though servicemembers with spouses must notify them if a

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cruises.

*Id.*

<sup>284</sup> 38 U.S.C.S. § 1967 (2008). Similar to many other federal survivor benefits, servicemembers with spouses or designated next-of-kin who elect to carry less than the maximum amount of coverage must notify their spouse or next-of-kin of that election. *Id.* § 1967(f).

<sup>285</sup> *Id.* § 1968. After the 120 day post-separation coverage period, servicemembers may elect to convert SGLI coverage to VGLI.

<sup>286</sup> SGLI HANDBOOK, *supra* note 283, at sec. 1.10.

<sup>287</sup> *Id.* sec. 6.01.

beneficiary change is made. If a servicemember makes no beneficiary designation, then any SGLI proceeds are paid to by-law beneficiaries according to the statute.<sup>288</sup>

As previously discussed, the relatively new FSGLI<sup>289</sup> and TSGLI<sup>290</sup> programs provide insurance coverage for family members and traumatic injury, respectively. Generally speaking, TSGLI is not considered a survivor benefit because it involves a payment of between \$25,000 and \$100,000 to servicemembers who have suffered a qualifying traumatic injury under the statute.<sup>291</sup> As a result, the features of TSGLI will not be discussed here. Similarly, FSGLI is generally not a concern for survivors because the insurance benefit inures to the servicemember, not covered family members. However, FSGLI proceeds may be considered a survivor benefit in the case of dual military couples, who are automatically covered under FSGLI unless they affirmatively elect no coverage. Under FSGLI, spouse

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<sup>288</sup> If a member does not designate a beneficiary, the insurance will automatically be paid in the following order of precedence:

- a. The surviving spouse of the member; if none,
- b. The child or children of the member, in equal shares, with the share of any deceased children to be distributed among the descendants of that child; if none,
- c. The parents in equal shares or all to the surviving parent; if none,
- d. A duly appointed executor or administrator of the insured's estate; if none,
- e. Other next of kin. NOTE: An insured's biological parents are not always who the individual intended to receive the proceeds, and in cases such as abandonment, they are not recognized as legal parents. Claim disputes involving the recognition of "rightful" parents can be avoided by discouraging the use of "By Law" designations and listing the parents by name.

SGLI HANDBOOK, *supra* note 283, at sec. 6.06.

<sup>289</sup> 38 U.S.C.S §§ 1965-1970; the FSGLI program was created by the Veterans Opportunity Act of 2001.

<sup>290</sup> *Id.* § 1980A; the TSGLI program was created by Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231, 257 (2005).

<sup>291</sup> 38 U.S.C.S. § 1980A.

coverage is available in \$10,000 increments up to a maximum of \$100,000.<sup>292</sup>

4. *Survivors and Dependents' Educational Assistance (DEA)*

a. *History*

Educational benefits for survivors first appeared in 1956, when Congress passed the War Orphans' Educational Assistance Act.<sup>293</sup> The program title was changed to DEA, and the length of benefits increased from 36 to 45 months, in 1976.<sup>294</sup>

b. *Purpose*

The purpose of DEA is most accurately described in the statute itself:

The Congress hereby declares that the educational program established by this chapter is for the purpose of providing opportunities for education to children whose education would otherwise be impeded or interrupted by reason of the disability or death of a parent from a disease or injury incurred or aggravated in the Armed Forces after the beginning of the Spanish-American War, and for the purpose of aiding such children in attaining the educational status which they might normally have aspired to and obtained but for the disability or death of such parent. The Congress further declares that the educational program extended to the surviving spouse of veterans who died of service-connected disabilities and to spouses if veterans with a service-connected disability permanent in nature is for the purpose of assisting them in preparing to support themselves and their families at a standard of living level which the

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<sup>292</sup> SGLI HANDBOOK, *supra* note 283, at sec. 10.01.

<sup>293</sup> War Orphans' Educational Assistance Act of 1956, Pub. L. No. 84-634, 70 Stat. 411.

<sup>294</sup> Survivors' and Dependents' Educational Assistance Program, Pub. L. No. 94-502, 90 Stat. 2391 (1976).

veteran, but for the veteran's death or service disability, could have expected to provide for the veteran's family.<sup>295</sup>

Thus, the DEA program is meant to provide "education and training" opportunities to eligible dependents and survivors.<sup>296</sup>

*c. Overview*

Generally speaking, eligibility of survivors and dependents for DEA is under the same circumstances described for DIC benefits, with the additional provision that DEA benefits may be available to the spouses and dependents of service-disabled veterans as well, not just to survivors of deceased veterans.<sup>297</sup> Educational benefits under DEA are available for 45 months.<sup>298</sup>

In terms of eligible recipients, DEA is available to both surviving spouses and children.<sup>299</sup> Surviving spouses of a person who does not die on active duty are eligible for DEA for ten years from the date of the veteran's death, though an extension is possible.<sup>300</sup> That benefit is

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<sup>295</sup> 38 U.S.C.S. § 3500 (2008).

<sup>296</sup> DEP'T OF VETERANS' AFFAIRS, PAM 22-73-3, DEPENDENTS' EDUCATIONAL ASSISTANCE PROGRAM (DEA) 1 (Jan. 2005) (hereinafter DVA PAM 22-73-3).

<sup>297</sup> See 38 U.S.C.S. § 3501(a)(1) (defining "eligible person."). For a good overview of eligibility for DEA in layman's terms, see DVA PAM 22-73-3, *supra* note 296.

<sup>298</sup> DVA PAM 22-73-3, *supra* note 296, at 8. This entitlement may be extended to 48 months for survivors also eligible for benefits under another VA educational program, such as the G.I. Bill. *Id.*

<sup>299</sup> 38 U.S.C.S. § 3501(a)(1).

<sup>300</sup> *Id.* § 3512(b)(1)(A).

extended to twenty years if the servicemember died on active duty.<sup>301</sup> If a surviving spouse remarries, DEA is generally extinguished.<sup>302</sup>

For surviving children, eligibility generally extends from age 18 to 26,<sup>303</sup> though this period may be extended for military service or other contingencies.<sup>304</sup> The marriage of a surviving child does not affect eligibility for DEA.<sup>305</sup> The receipt of DEA, however, does

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<sup>301</sup> *Id.* § 3512(b)(1)(C) (2008).

<sup>302</sup> DVA PAM 22-73-3, *supra* note 296, at 7 – 8. The DEA rules applicable to remarriage are somewhat complex:

*Before age 57*

If you remarry before age 57, your eligibility ends on the date of remarriage.

*Can benefits be reinstated?* If you remarried after November 30, 1999, and your remarriage ends, we may reinstate your eligibility to DEA.

The remarriage must be ended by death, divorce, or because you stopped living with your spouse and stopped holding yourself out to the public as the person's spouse.

If you remarried after October 31, 1990, but before November 30, 1999, we can't reinstate your eligibility, even if your remarriage ends.

*After age 57*

If you remarry on or after January 1, 2004, and you're 57 or older, you can still be eligible for DEA benefits.

If you remarried after age 57 and before December 16, 2003, you must have applied in writing before December 16, 2004, for eligibility to be reinstated.

Note: Remarrying after age 57 doesn't extend the 10-year period of eligibility that you established before you remarried.

Example: A surviving spouse established eligibility for a 10-year period ending on November 15, 2005, which is 10 years from the date of the veteran's death. She remarried in April 2004 at age 58. She will keep her eligibility for DEA through November 15, 2005.

*Id.*

<sup>303</sup> 38 U.S.C.S. § 3512(a).

<sup>304</sup> DVA PAM 22-73-3, *supra* note 296, at 3. The eligibility period for DEA may be tolled for up to eight years if the child serves on active duty between the ages of 18 and 26, as long as discharge from the military is not under dishonorable conditions and the extension does not go beyond age 31. There is an exception to this exception for reserve and National Guard members involuntarily called to active duty after September 11, 2001 – in that case, receipt of DEA benefits may extend beyond age 31. In addition, DEA entitlement may be extended for circumstances beyond the dependent's control, including "service in an official missionary capacity; immediate family or financial obligations that require you to stop training, for example, to take employment; unavoidable conditions of your employment that require you to stop training; your illness, or death or illness in your immediate family." *Id.*

<sup>305</sup> *Id.* at 4.

affect eligibility for DIC; concurrent receipt of benefits is prohibited.<sup>306</sup> However, because DIC ends at age 23 and DEA ends at age 26 (or possibly later), it may be to a child's advantage to defer DEA benefits if their course of instruction is anticipated to last longer than 45 months.<sup>307</sup>

The amount of monthly DEA benefits depends on the type of educational training and whether the school is full time, half time, or less.<sup>308</sup> Generally speaking, DEA is available only for approved courses of instruction, which the DVA or a State Approving Agency (SAA) determines.<sup>309</sup> The current monthly full-time DEA benefit is \$881;<sup>310</sup> lesser amounts

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<sup>306</sup> *Id.* at 11. "If you're also eligible for DEA, you must elect which benefit to receive. If you elect DEA, the death benefits will stop when you begin receiving DEA benefits." *Id.*

<sup>307</sup> *Id.* Thus, the child would continue to receive DIC while in school until age 23, and then receive DEA until age 26, possibly longer.

<sup>308</sup> 38 U.S.C.S. § 3532.

<sup>309</sup> DVA PAM 22-73-3, *supra* note 296, at 11. Benefits are available for various types of training, as long as approved by the DVA or SAA, including:

Degree programs, undergraduate and graduate, at colleges or universities, including cooperative training programs and accredited independent study programs that may be offered through distance education; Certificate programs, at colleges, universities, and other degree-granting institutions, including accredited independent study courses that may be offered through distance education; Certificate programs at business, technical, or vocational schools; Apprenticeships or on-the-job (OJT) training programs offered by companies or unions. Apprenticeships or OJT programs may offer an alternative to college or vocational school to help you gain experience in the field you choose; Correspondence courses, if you're a spouse or surviving spouse; Farm cooperative courses; Programs overseas that lead to college degrees; Preparatory courses for college or graduate school entrance examinations; High school programs, if you aren't a high school graduate.

*Id.* at 11 – 13. In addition, DEA benefits may also be available for restorative training, specialized vocational training, tests for licenses and certifications, graduate admissions tests, remedial training, and tutorial assistance, under certain circumstances. *Id.* at 13 – 14.

<sup>310</sup> *Id.* at 20.

are available for less than full-time schooling or for nontraditional or non-institutional courses of instruction such as farm cooperative or on-the-job training.<sup>311</sup>

##### 5. *Miscellaneous DVA Survivor Benefit Programs*

In addition to the programs discussed at length here, there are various other DVA benefits available to survivors that do not warrant comprehensive discussion in this thesis. These benefits include a home loan guaranty program, under which the “surviving spouse of a veteran who died in service or as the result of a service-connected disability may be eligible for a guaranteed loan from a private lender.”<sup>312</sup> The DVA also provides, upon application, burial benefits to include headstones and grave markers, as well as Presidential memorial certificates.<sup>313</sup> A relatively new DVA program provides bereavement counseling to eligible survivors, including parents, spouses, and children of deceased servicemembers.<sup>314</sup> Finally, the DVA provides refunds of payments into the Montgomery GI Bill and Veterans Educational Assistance Program, less any benefits previously paid to the servicemember.<sup>315</sup>

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<sup>311</sup> DAVID P. SMOLE & SHANNON S. LOANE, CONG. RESEARCH SERV. REPORT, A BRIEF HISTORY OF VETERANS’ EDUCATION BENEFITS AND THEIR VALUE, RL34549, at CRS-8 (2008).

<sup>312</sup> Dep’t of Veterans Affairs, Survivor Benefits: What VA Offers, <http://www.vba.va.gov/survivors/vabenefits.htm> (last visited Mar. 12, 2009).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*; see also Dep’t of Veterans Affairs, Bereavement Counseling Program: Keeping the Promise, available at [http://www.vba.va.gov/survivors/Trifold\\_Bereavement\\_Brochure.ppt](http://www.vba.va.gov/survivors/Trifold_Bereavement_Brochure.ppt) (last visited Mar. 13, 2009) (trifold brochure).

<sup>315</sup> Dep’t of Veterans Affairs, Survivor Benefits: What VA Offers, <http://www.vba.va.gov/survivors/vabenefits.htm> (last visited Mar. 12, 2009).



C. Department of Defense Survivor Benefit Programs

1. *Death Gratuity*

a. *History*

As previously detailed, a death gratuity was first authorized for survivors of deceased servicemembers in 1908.<sup>316</sup> This legislation was repealed in 1917, when the War Risk Insurance Acts were passed.<sup>317</sup> The death gratuity was reinstated in 1919<sup>318</sup> and was extended to reserve component and National Guard members in 1949.<sup>319</sup> The death gratuity concept was refined in 1956,<sup>320</sup> and subsequent years saw steady increases in the amount. The 2006 NDAA dramatically raised the amount of the death gratuity to \$100,000, retroactive to deaths occurring on or after October 7, 2001.<sup>321</sup>

b. *Purpose*

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<sup>316</sup> Act of May 11, 1908, Pub. L. No. 60-112, 60th Congress, 35 Stat. 106, 108 (1908).

<sup>317</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3.

<sup>318</sup> Act of December 17, 1919, Pub. L. No. 66-99, 41 Stat. 367 (1919).

<sup>319</sup> Act of June 20, 1949, Pub. L. No. 81-108, 63 Stat. 201 (1949).

<sup>320</sup> Servicemen's and Veterans' Survivor Benefits Act, Pub. L. No. 84-881, 70 Stat. 857 (1956).

<sup>321</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136.

The basic purpose of the death gratuity is an immediate emergency fund intended to defray unexpected expenses until other survivor benefits become available.<sup>322</sup>

*c. Overview*

The death gratuity<sup>323</sup> is automatically paid to survivors of servicemembers who die on active duty,<sup>324</sup> or who die within 120 days of release from active duty, if the death resulted from a disease or injury incurred on active duty.<sup>325</sup> The current lump sum payment of \$100,000 is tax free for qualifying deaths occurring after September 10, 2001.<sup>326</sup>

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<sup>322</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3. The concept is one of “immediate funds to meet ... immediate expenses.” *Id.* (quoting S. REP. NO. 99-331, at 234 (1986)).

<sup>323</sup> 10 U.S.C.S. §§ 1475-1480 (2008).

<sup>324</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3. For purposes of a death gratuity payment, “active duty” includes:

[A]ctive duty, while performing authorized travel to or from active duty, while on inactive-duty training, or while performing authorized travel directly to or from active duty for training or inactive-duty training, as well as to members of reserve officers’ training programs who die while performing annual training duty under orders for a period of more than 13 days or while performing authorized travel to or from that duty, to applicants for membership in a reserve officers’ training corps who die while attending field training or a practice cruise or while performing authorized travel to or from the place where such training or cruise is conducted, and to persons who die while traveling to or from, or while at, a place of acceptance for entry upon active duty who have been ordered or directed to go to that place and have been provisionally accepted for that duty or selected for service under the Military Selective Service Act.

*Id.* (citing 10 U.S.C. § 1475(a)(1)-(5) (2006)).

<sup>325</sup> *Id.* (noting that death 120 days later will trigger the death gratuity, but

[o]nly if the Veterans’ Administration determined that the death resulted from disease or injury incurred or aggravated during such duty. As administered, this provision is inconsistent with the death-gratuity-as-an-immediate-emergency-fund theory of the rest of the program. Before a gratuity can be paid in this situation, the Department of Veterans Affairs, after being notified, must obtain information concerning the circumstances of the death and details from the individual’s service medical history, compare and evaluate those data, make its service-connection determination, and advise the military service in which the member was serving of

Consistent with the notion that the death gratuity is an immediate emergency payment, it is typically paid within seventy-two hours of the servicemember's death, either via electronic bank transfer or check.<sup>327</sup> As of July 2008,<sup>328</sup> a servicemember may designate one or more beneficiaries of the death gratuity, divisible in ten percent increments.<sup>329</sup> Default designation rules remain in place if a servicemember fails to make an affirmative designation.<sup>330</sup> Further, if a married servicemember elects to designate a beneficiary other than a spouse, the spouse must be notified.<sup>331</sup>

## 2. *Survivor Benefit Plan*

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the result. A lapse of several months is normal to this procedure).

<sup>326</sup> Internal Revenue Code (IRC) § 134(b)(3)(C) (2008).

<sup>327</sup> DOD SURVIVOR BENEFIT GUIDE, *supra* note 2, at 9.

<sup>328</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3.

<sup>329</sup> DOD SURVIVOR BENEFIT GUIDE, *supra* note 2, at 9.

<sup>330</sup> *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3:

(b) Distribution of Remainder; Distribution in Absence of Designated Recipient.--If a person covered by section 1475 or 1476 of this title does not make a designation under subsection (a) or designates only a portion of the amount payable under section 1478 of this title, the amount of the death gratuity not covered by a designation shall be paid as follows:

- (1) To the surviving spouse of the person, if any.
- (2) If there is no surviving spouse, to any surviving children (as prescribed by subsection (d)) of the person and the descendants of any deceased children by representation.
- (3) If there is none of the above, to the surviving parents (as prescribed by subsection (c)) of the person or the survivor of them.
- (4) If there is none of the above, to the duly-appointed executor or administrator of the estate of the person.
- (5) If there is none of the above, to other next of kin of the person entitled under the laws of domicile of the person at the time of the person's death.

*Id.*

<sup>331</sup> *Id.*

a. *History*

Though several precursors predate it, including the Contingency Option plan<sup>332</sup> and RSFPP,<sup>333</sup> the SBP annuity as we know it today was created in 1972.<sup>334</sup> Originally designed to be a cost-sharing program between the government and individual participants,<sup>335</sup> the SBP was considered a far superior alternative to the RSFPP because of its reduced participation costs.<sup>336</sup> Whereas the RSFPP cost the average participant roughly 23% of retired pay, the SBP was designed to dramatically reduce these costs and increase annuity participation.<sup>337</sup>

Numerous legislative changes have been made to SBP since its inception, but its status as a means of income replacement for retired servicemembers has always remained its primary goal. Major historic legislation affecting SBP is discussed in further detail in Part II.A,<sup>338</sup> and includes disposition of SBP benefits under the USFSPA,<sup>339</sup> the creation of SSBP to

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<sup>332</sup> Created by the Uniformed Services Contingency Option Act of 1953, Pub. L. No. 89-239, 67 Stat. 501, the Contingency Option plan is discussed *supra* at Part II.A.3.

<sup>333</sup> Created by the Act of October 4, 1961, Pub. L. No. 87-381, 75 Stat. 810, the RSFPP is discussed *supra* at Part II.A.4.c.

<sup>334</sup> Act of September 21, 1972, Pub. L. No. 92-425, 86 Stat. 706 (1972).

<sup>335</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2. The RSFPP, in contrast, “was intended to be actuarially neutral in terms of costs – in other words, the cost of this program was to be fully paid for by its participants.” DAVID F. BURELLI, CONG. RESEARCH SERV. REPORT, THE MILITARY SURVIVOR BENEFIT PLAN: A DESCRIPTION OF ITS PROVISIONS, RL31664, at CRS-2 (2006)

<sup>336</sup> BURELLI, *supra* note 335, at CRS-2.

<sup>337</sup> *Id.*

<sup>338</sup> A comprehensive legislative history of SBP, current to January 2009, is available at <http://www.armyg1.army.mil/rso/docs/sbp/SBPHistory.doc> (last visited Mar. 12, 2009).

<sup>339</sup> The affect of the USFSPA on SBP is discussed *supra* at Part II.A.4.c.

counteract the Social Security offset on SBP payments to eligible recipients in 1989,<sup>340</sup> and the phase-out of the Social Security offset beginning in 2005.<sup>341</sup>

*b. Purpose*

The SBP is an income replacement program for military retirees, meant 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.”<sup>342</sup> Further, it is “the only means by which a retired member can insure that his or her immediate family will be provided with continued government income under any and all circumstances at a level dictated by the member, within established bounds, after the member's death.”<sup>343</sup>

*c. Overview*

The SBP allows eligible participants<sup>344</sup> to withhold a portion of their monthly retirement pay so that when the retiree dies, a monthly benefit is paid to a surviving spouse or other

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<sup>340</sup> SSBP was created by the Military Survivor Benefits Improvement Act of 1989, Pub. L. No. 101-189, 103 Stat. 1352, and is discussed *supra* at Part II.A.4.c.

<sup>341</sup> The Social Security offset or “widow’s tax” was eliminated by National Defense Authorization Act of 2005, Pub. L. No. 108-375, 118 Stat. 1811, and is discussed *supra* at Part II.A.6.c.

<sup>342</sup> BURELLI, *supra* note 335, at CRS-1.

<sup>343</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

<sup>344</sup> 10 U.S.C.S. § 1448(d) (2008). Eligible participants include active duty servicemembers who die on active duty; those regularly retired from active duty; those retired with 30% or greater disability; and reservists eligible to retire.

eligible recipient.<sup>345</sup> Eligible recipients include spouses, former spouses, children, and persons with an insurable interest,<sup>346</sup> resulting in six possible types of coverage elections under the SBP: spouse only, spouse and children, children only,<sup>347</sup> persons with insurable interests, former spouse, and former spouse and children.<sup>348</sup> Eligibility requirements vary based on the type of beneficiary,<sup>349</sup> and coverage elections determine the cost of SBP participation.

To determine the cost of SBP coverage, a retired servicemember must first determine the desired base amount of retired pay, which can range from a minimum of \$300 to full retired pay.<sup>350</sup> Then, the servicemember must determine the type of coverage desired; this, in turn, generates a formula for determining the cost of coverage. For example, spouse-only coverage (the most common type) involves two basic formulas; the first formula, which was phased out in April 2008, is 2.5% of the first \$616, plus 10% of any selected base amount over \$616.<sup>351</sup> The current formula is a flat 6.5% of the base amount.<sup>352</sup> For spouse and

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<sup>345</sup> BURELLI, *supra* note 335, at CRS-1.

<sup>346</sup> 10 U.S.C.S. § 1448. Persons with an insurable interest may only be elected as SPB beneficiaries when there is no spouse or dependent child. *Id.*

<sup>347</sup> *Id.* Children are generally eligible for coverage until age 18 (if unmarried), or age 23 if unmarried and a full-time student. Incapacitated children are eligible for life. *Id.*

<sup>348</sup> BURELLI, *supra* note 335, at CRS-2.

<sup>349</sup> Eligible beneficiaries are defined in 10 U.S.C. § 1447. A widow or surviving spouse, for example, “means the surviving wife of a person who, if not married to the person at the time he became eligible for retired pay— (A) was married to him for at least one year immediately before his death; or (B) is the mother of issue by that marriage.” *Id.* § 1447(7).

<sup>350</sup> MOAA SBP GUIDE, *supra* note 170, at 14.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

children coverage, the basic spouse formula is adjusted on an actuarial basis, “taking into account the age of the retiree, the spouse, and the youngest child.”<sup>353</sup> Cost of child only coverage is determined solely on the basis of actuarial tables and is subject to modification.<sup>354</sup> Former spouse and insurable interest coverage generally makes use of the same formula: “10% of the base amount of retired pay, plus 5% of the total base amount of retired pay for each *full* five years that the named beneficiary is younger than the retiree.”<sup>355</sup>

Enrollment in the SBP is generally automatic, and, like many other survivor benefits, a servicemember who elects reduced participation must generally notify a spouse.<sup>356</sup> Determining the actual amount of the SBP annuity is slightly easier than determining participation costs, due to the reduction in the number of formulas used to calculate annuity amount. Prior to October 1, 2005, annuity payments equaled 55% of the base amount for recipients under the age of 62, and 35% of the base amount after the recipient reached age 62, unless the retiree also elected to participate in SSBP.<sup>357</sup> This two-tiered payment system was the result of the Social Security offset, which was eliminated in 2005.<sup>358</sup> Thus, a current

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<sup>353</sup> BURELLI, *supra* note 335, at CRS-7.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* CRS-8 (emphasis in original).

<sup>356</sup> *Id.* CRS-3. Thus:

[A] retiree is automatically enrolled in the SBP upon retirement at the maximum level of coverage to his or her respective surviving spouse and surviving dependent children, unless the retiree elects not to participate, to participate at a lesser level of coverage, elects other than spouse coverage, or is ordered by a court to provide such benefits to a former spouse.

*Id.*

<sup>357</sup> *Id.* CRS-17.

<sup>358</sup> The Social Security offset or “widow’s tax” was eliminated by National Defense Authorization Act of 2005, Pub. L. No. 108-375, 118 Stat. 1811, and is discussed *supra* in Part II.A.6.c.

annuitant may expect to receive a flat 55% of the base amount elected, offset by any DIC entitlement.<sup>359</sup> The flat 55% also applies to servicemembers who die on active duty; the base amount is assumed to be the maximum amount of coverage available had the servicemember retired on the day of their death.<sup>360</sup>

SBP benefits are taxable to the recipient. Further, the receipt of SBP annuity payments is currently offset, dollar-for-dollar, by any DIC received by survivors.<sup>361</sup> The result of this offset is that the typical SBP annuity is eliminated by the DIC offset for the vast majority of surviving spouses.<sup>362</sup> The offset provisions are extremely controversial and a topic of perennial interest both to Congress and various military lobbying groups, who consider the offset to be unfair and a violation of the spirit and intent of the SBP.<sup>363</sup> This thesis addresses

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<sup>359</sup> MOAA SBP GUIDE, *supra* note 170, at 147(2005).

<sup>360</sup> BURELLI, *supra* note 335, at CRS-12.

<sup>361</sup> 38 U.S.C.S. § 1317 (2008). *See also* note 264, *supra* (explaining how the offset may be temporarily avoided for post-2001 active duty deaths where survivors include a spouse and dependent children).

<sup>362</sup> *Hearing on H.R. 1927 Before the H. Comm. On Armed Serv.*, 110th Cong. (1998) (statement of Rose Elizabeth Lee, Chairman, Government Relations Committee, Gold Star Wives of America, Inc.). Ms. Lee's testimony notes, however, that "some surviving spouses of military personnel with higher rank and more time in service [still] receive a small portion of the SBP annuity." *Id.*

<sup>363</sup> *See, e.g., Helping Parents and Families of Veterans: Hearing Before the Subcomm. On Disability Assistance and Memorial Affairs of the H. Comm. On Veterans Affairs*, 110th Cong. (2007) (statement of Patricia Montes Barron, Deputy Director, National Military Families Association) ("NMFA still believes the benefit change that will provide the most significant long-term advantage to the financial security of all surviving families would be to end the Dependency and Indemnity Compensation (DIC) offset to the Survivor Benefit Plan (SBP). Ending this offset would correct a long-standing inequity.") and *Legislative Presentations of Veterans' Affairs Organizations: Hearing on H.R. 808 and H.R. 1462 Before the H. Comm. On Veterans' Affairs*, 108th Cong. (2005) (statement of Penny Splinter, Member, Gold Star Wives) (arguing that:

This patently unfair offset currently affects approximately 52,000 survivors who are dually eligible for both SBP and DIC. While DIC is non-taxable income and SBP is taxable, survivors of these disabled retirees see little or no SBP funds despite having paid monthly premiums equal to 6.5 per cent of their retired pay; adding up to thousands of dollars over the years. The previously paid premiums are returned as lump sum to the survivor without interest. This lump sum refund is a taxable event for the survivor. The premium refund therefore becomes an unjust survivor's tax burden. There is a great deal of resentment by



this perceived unfairness, as well as the sheer complexity of the SBP system, at Part III.

### 3. *Miscellaneous DOD Survivor Benefits*

In addition to the programs discussed at length here, there are various other DOD benefits that may be available to survivors, but do not warrant comprehensive discussion in this thesis. Burial benefits, including preparation and transportation of remains and burial in a national cemetery, are available to survivors.<sup>364</sup> Transportation of eligible family members to the funeral is also authorized.<sup>365</sup> Further, survivors are entitled to the servicemember's final pay and allowances, including any accrued and unused leave.<sup>366</sup> The disbursement of unpaid pay and allowances may be subject to federal and state income taxation.<sup>367</sup> Survivors may also be entitled to continued housing benefits for up to 365 days after a servicemember's death.<sup>368</sup> Finally, eligible survivors may also be entitled to the services of a Casualty

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some survivors who see that the federal government is collecting taxes on SBP payments that were not honored because the military retiree died of the wrong causes. The net effect of their monthly premium payments is that the retired disabled veteran's survivor pays taxes for having given the federal government a loan).

<sup>364</sup> DOD SURVIVOR BENEFIT GUIDE, *supra* note 2, at 10.

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 9.

<sup>367</sup> *Id.*

<sup>368</sup> *See, e.g.*, MyArmyBenefits.us.army.mil, Continued Housing Benefits (For Survivors), <https://myarmybenefits.us.army.mil/EN/Benefits/FactSheets/Continued.Housing.Benefits.For.Survivors> (last visited Mar. 15, 2009) (providing links to fact sheets).

Assistance Officer (CAO), as well as to advice from a military legal assistance office regarding survivor benefits and settlement of the servicemember's affairs.<sup>369</sup>

#### D. Social Security Administration Survivor Benefits

Social Security (SS) may provide a lump sum death benefit of \$255,<sup>370</sup> as well as monthly survivor benefit payments to children under age 18; widow(er)s with children under 16; and widow(er)s age 60 and over.<sup>371</sup> The amount of the monthly benefit depends on the work history of the insured – generally, the more FICA taxes paid, the greater the benefit.<sup>372</sup> If the surviving spouse has income or a pension, the amount of the SS benefit may decrease.<sup>373</sup> Hence, survivors who work, or receive SBP and/or DIC, may expect a reduction in their monthly SS payments.

#### E. State Survivor Benefit Programs

The presence of multiple state programs further complicates the array of survivor benefits.<sup>374</sup> The majority of these programs appeared after September 11, 2001,<sup>375</sup> and their

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<sup>369</sup> DOD SURVIVOR BENEFIT GUIDE, *supra* note 2, at 3, 8.

<sup>370</sup> SOCIAL SECURITY ADMIN., SOCIAL SECURITY SURVIVOR BENEFITS 7, Pub. 05-10084 (May 2008), <http://www.ssa.gov/pubs/10084.pdf>.

<sup>371</sup> *Id.* at 5 – 6.

<sup>372</sup> *Id.* at 5.

<sup>373</sup> *Id.* at 8 – 9.

<sup>374</sup> For the purposes of this thesis, “state survivor benefits” refers only to those benefits available to the survivors of deceased servicemembers. Nearly every state, of course, has some form of survivor benefits for

interaction with federally-available survivor benefits is a relatively recent phenomenon. Currently, nearly every state has some form of survivor benefits; these benefits can be “grouped into four main categories: education, tax benefits, burial benefits, and death gratuity/annuity.”<sup>376</sup>

With regard to educational benefits, thirty-five states provide some form of tuition waiver, scholarship, stipend, or other educational incentive to the survivors of deceased servicemembers who attend state-supported institutions.<sup>377</sup> In some cases, state educational benefits are offset by any DEA received by spouses or children of the deceased.<sup>378</sup>

In addition to educational benefits, many states also provide some sort of tax benefit to surviving family members.<sup>379</sup> Such benefits typically take the form of a property tax exemption for property owned in the state by the deceased servicemember and their family.<sup>380</sup> At least one state also waives income tax liability, including “back taxes, interest, and penalties due” during the year of death when a servicemember suffers a combat death or

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state employees engaged in hazardous professions, such as police officers and firefighters. For an interesting comparison of these types of state survivor benefits and military survivor benefits, see GAO STATE SB REPORT, *supra* note 3. In this survey, the GAO found that “servicemembers almost always obtain higher lump sums than do the survivors of deceased employees from the 61 civilian government entities [studied],” and that “the military also provides more types of noncash survivor benefits than do civilian government entities. . . .” *Id.*

<sup>375</sup> Chase & Sennott, *supra* note 3, at 27.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* For a comprehensive list of current state educational benefits available to survivors, see *id.* at Appendix.

<sup>379</sup> *Id.* at 27.

<sup>380</sup> *Id.*

combat-related death.<sup>381</sup>

Some states also provide some form of death gratuity, many in addition to the \$100,000 lump sum available to surviving family members under the federal program.<sup>382</sup> These death gratuities typically take the form of a lump sum or financial assistance such as loans or grants.<sup>383</sup> As the sums involved can be significant, it is important for survivors to make themselves aware of state programs that may be available to them.<sup>384</sup>

Finally, just as federal and DVA burial benefits may be available, many states provide burial benefits to survivors of deceased servicemembers.<sup>385</sup> These benefits range from burial in a veterans' cemetery, to full or partial cost reimbursement, to provision of grave liners or headstones.<sup>386</sup>

### III. Critical Analysis of Survivor Benefit Programs

As this thesis has demonstrated thus far, the history and current state of survivor benefits is a complex one involving various social and political objectives. The overarching goal of the survivor benefit system is to help survivors of deceased servicemembers by providing

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<sup>381</sup> *Id.* at 28 (noting that the State of Georgia is currently the only state that provides such “generous” tax exemptions to survivors).

<sup>382</sup> *Id.* (noting that Connecticut offsets its death gratuity “by the amount of any death benefit that is paid to such person for the death of such member under any federal law.”) (citing CONN. GEN. STAT. § 27-69a (2008)).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* (noting that in Illinois, the death gratuity currently equals \$313,887.96, a significant sum).

<sup>385</sup> *Id.* at 29.

<sup>386</sup> *Id.*

various means of financial support, compensation for their loss, and income replacement. However, due to its complexity and bureaucracy, it is unclear whether the operation of the survivor benefit system effectively meets its goals. Is there a better way for the system to help survivors? This part explores that question by examining key criticisms of the survivor benefit system, and proposes a different way to accomplish the same goals.

#### A. The Survivor Benefit System is Overly Complex

A recurring criticism of the survivor benefit system is its complexity. The interaction between various survivor benefit programs is confusing, even to those trained in casualty affairs.<sup>387</sup> Paperwork and documentation requirements may be daunting and overwhelming for surviving family members.<sup>388</sup> The fact that multiple independent federal agencies – the DOD, DVA, and SSA<sup>389</sup> – as well as state agencies, are involved in the administration of these benefits and often communicate ineffectively with each other further complicates the

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<sup>387</sup> U.S. GOV'T ACCOUNTABILITY OFF. REPORT, DOD NEEDS AN OVERSIGHT FRAMEWORK AND STANDARDS TO IMPROVE MANAGEMENT OF ITS CASUALTY ASSISTANCE PROGRAMS, GAO 06-1010, at 20 (2006) (hereinafter GAO CASUALTY ASSISTANCE REPORT).

<sup>388</sup> *Id.*

<sup>389</sup> In addition, the Defense Finance and Accounting Service (DFAS) is involved in the process from the benefits payment perspective, and the DOD consistently experiences communication difficulties with DFAS. See GAO CASUALTY ASSISTANCE REPORT, *supra* note 387, at 18 (noting that

[t]he limited coordination between officials at DFAS and DOD's and the services' casualty assistance offices on these pay matters has resulted in confusion and uncertainty about whether survivors received all of the money to which they were entitled since they have not routinely been supplied with an itemized statement separately listing each pay, allowance, and debt owed to the service (e.g., from a government charge card). Underpayment of the money owed to the deceased servicemembers would deprive survivors of money to which they were rightfully entitled, and overpayment could result in efforts to subsequently recover the excess compensation. ).

process.<sup>390</sup> In addition, the lack of oversight and quality control regarding casualty assistance is a continuing concern.<sup>391</sup> In light of these criticisms, this part will begin with a description of the experiences of an actual survivor, and will then outline some of the perceived complexities of the system.

### 1. *A Real-Life Experience with Survivor Benefits*

In September 2006, an Army officer's husband was killed during a training exercise. Over the next several weeks, the officer completed a mountain of paperwork, including applications for DIC<sup>392</sup> and SBP.<sup>393</sup> After four months, she discovered she was receiving neither DIC nor SBP, and contacted her local Casualty Assistance Office (CAO) in February

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<sup>390</sup> Further, there is no comprehensive statement or summary of benefits available to survivors. See GAO CASUALTY ASSISTANCE REPORT, *supra* note 387, at 19 (“DOD, VA, and SSA administer an array of monetary survivor benefits in the form of lump sum cash payments or annuities and other entitlements, such as health insurance. Service officials told us that an integrated statement is needed to improve survivors’ understanding of these benefits.”). The GAO report further notes that “[c]urrently, each service’s emergency aid or relief society offers to purchase from a for-profit company a comprehensive, integrated statement of benefits for all surviving spouses of servicemembers who die while on active duty” because such a statement is not available from the DOD, DVA, or any other agency. This commercially purchased statement costs between \$200 and \$595 per spouse. *Id.*

<sup>391</sup> See, e.g., *id.* at 4 (finding that:

DOD does not have a comprehensive oversight framework and key standards necessary to monitor the casualty assistance it provides to survivors of servicemembers who die while on active duty. Thus, DOD does not have the information it needs to fulfill its responsibility of overseeing the services’ casualty assistance programs and evaluate the effectiveness and efficiency of its programs).

<sup>392</sup> U.S. Dep’t of Veterans Affairs, VA Form 21-534, Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (Jun. 1998).

<sup>393</sup> U.S. Dep’t of Defense, DD Form 2656-7, Verification for Survivor Annuity (Apr. 2006). Because this form was relatively new at the time her husband’s death, she actually filled out a prior (though outdated) version of the SBP claim form, U.S. Dep’t of Defense, DD Form 1884, Application for Annuity Under the Retired Serviceman's Family Protection Plan (RSFPP) and/or Survivor Benefit Plan (SBP) (cancelled).

2007.<sup>394</sup> At that time, she was informed that she had completed the “wrong paperwork,”<sup>395</sup> and was instructed to recomplete some of it.<sup>396</sup> She began receiving SBP payments in March 2007, and continued to do so until August 2007.

In August 2007, the Defense Finance and Accounting Service (DFAS) informed the officer that her receipt of SBP benefits was in error, due to statutory offset provisions, and that she owed DFAS the SBP annuity she had been receiving.<sup>397</sup> She promptly reimbursed DFAS, but this created a personal benefit deficit because she had not received DIC benefits from DVA for the same time period.<sup>398</sup> Once she discovered this, the officer contacted DVA on a regular basis to inquire as to the status of her back DIC payments. She did not receive those payments until five months later in February 2008, nearly 16 months after her husband’s death.<sup>399</sup> She explains:

My experience was not a good one – from the casualty notification to receiving the benefits. The information flow between DFAS/VA is terrible. . . . When I called the VA to get my reimbursement, I dialed the 1-800 number, which routes you to the closest VA office to the number from which you called. But since [my husband] died overseas, the Philadelphia office had his file. Every time I called, I had to go through the same drill: sponsor’s SSN, date of death, my name . . . I got off the phone each time, frustrated and usually in tears. I had to ask for an audit for them to transfer

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<sup>394</sup> E-mail from Army officer to MAJ Jocelyn Urgese (Feb. 12, 2009) (on file with author) (hereinafter Survivor Benefit E-mail).

<sup>395</sup> *Id.*

<sup>396</sup> *See* note 393, *supra*.

<sup>397</sup> Survivor Benefit E-mail, *supra* note 394. In other words, because of the offset, the officer should have been receiving DIC instead of SBP benefits.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

the file [DVA claim files still exist only in paper, not electronic, form] from Phil[adelphia]. I called the Roanoke office and asked to speak to a supervisor and was told he would return my call. I didn't get a call back. I called back again. Again, they said I could leave my name and number but could not be connected internally. It was their policy. . . . I think that one agency should be responsible for making payments to survivors. Not sure who that should be. How do you choose between DFAS and the VA?<sup>400</sup>

The experience of this officer is illustrative of the complexity of the system – and her situation involved only two competing benefits and paying agencies, not the full panoply available to survivors.<sup>401</sup> Having to contact DFAS and the DVA on numerous occasions to straighten out an entitlement was an unnecessary stressor on this officer, who was dealing with the loss of her husband. Indeed, only when she threatened to contact her Congressperson did the DVA finally take action on her claim.<sup>402</sup> And her experience is, unfortunately, not isolated. In its 2006 report on DOD casualty operations, the Government Accountability Office (GAO) noted that other surviving spouses experienced significant delays in receiving survivor benefit entitlements.<sup>403</sup>

## 2. *The Interaction of DOD, DVA, and SSA Survivor Benefits is Confusing*

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<sup>400</sup> *Id.*

<sup>401</sup> In addition, as an Army officer, she arguably had more experience and familiarity with the survivor benefit system than the average spouse – and she still found the system bewildering and frustrating. How would a 20-year-old spouse with little to no knowledge of the DOD or DVA be able to resolve similar issues?

<sup>402</sup> Survivor Benefit E-mail, *supra* note 394.

<sup>403</sup> See GAO CASUALTY ASSISTANCE REPORT, *supra* note 387, at 2 (describing how:

[O]ne surviving spouse related her experiences since her husband died 3 years ago. Among other things, she stated that the casualty assistance officer tried to be helpful but was not educated on the benefits available to her or her children nor could he find the right people to answer her questions. Another survivor described situations where widows experienced delays in the payment or reimbursement for their husbands' funerals.).



Particularly for those who are grieving, the operation of available survivor benefits and how they interact with one another is confusing.<sup>404</sup> Even those trained in casualty assistance struggle to understand how survivor benefits operate.<sup>405</sup> In addition, because different agencies currently manage different survivor benefit programs, even those responsible for administering them may not fully understand the complexity of their interaction. Further, federal and state survivor benefits may be offset or reduced by one another, and may even be taxed differently.<sup>406</sup> Of available survivor benefits, this section will examine those that tend to interact with the most complexity – DIC and DEA, and DIC and SBP.

As previously discussed, surviving school-aged dependents may not concurrently receive DEA and DIC benefits, and must elect between them.<sup>407</sup> Further, DIC benefits for dependents enrolled in school end at age 23,<sup>408</sup> whereas DEA benefits generally end at age 26, with some extensions possible.<sup>409</sup> Educational benefits under DEA are available for 45 months.<sup>410</sup> In some cases, it may be to a dependent child’s advantage to defer DEA benefits

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<sup>404</sup> *Id.* at 20; *see also Statement Before the Veterans’ Disability Benefits Comm’n* at 3 (2005) (statement of Deborah Kline Fryar, Deputy Director, Government Relations, National Military Family Association), *available at* [http://www.nmfa.org/site/DocServer/20050510\\_Survivor\\_Benefits.pdf?docID=2261](http://www.nmfa.org/site/DocServer/20050510_Survivor_Benefits.pdf?docID=2261) (“The spouse encounters a confusing array of decisions that must be made, the consequences of those decisions influences her life and the lives of her children for years to come.”).

<sup>405</sup> GAO CASUALTY ASSISTANCE REPORT, *supra* note 387, at 3.

<sup>406</sup> For example, the death gratuity, SGLI benefits, and DIC are not subject to federal income taxation. The SBP annuity, on the other hand, is taxed, likely because SBP premiums are paid from a servicemember’s pre-tax retirement income.

<sup>407</sup> DVA PAM 22-73-3, *supra* note 296, at 11. “If you’re also eligible for DEA, you must elect which benefit to receive. If you elect DEA, the death benefits will stop when you begin receiving DEA benefits.” *Id.*

<sup>408</sup> 38 U.S.C.S. § 1314(c) (2008). Unless the dependent is severely and permanently disabled, in which case use of DEA benefits is likely moot.

<sup>409</sup> *See* note 304, *supra*, for a discussion of possible DEA benefit extensions related to military service.

<sup>410</sup> DVA PAM 22-73-3, *supra* note 296, at 8.

if their education is anticipated to last longer than 45 months.<sup>411</sup> The decision whether to defer DEA to extend DIC benefits is a complex one with real economic consequences, because monthly DEA benefits tend to be much greater than DIC.<sup>412</sup> If a child elects to defer DEA, intending to complete a course of education exceeding 45 months, and does not do so before reaching age 26, then a significant monetary benefit may be lost.

While the interaction between DIC and DEA is somewhat complex, the interaction between the two is a relatively longstanding one and arguably more well-understood, in part because the DVA administers both programs and effectively explains in its literature how DIC and DEA work together.<sup>413</sup> In contrast, DIC and SBP benefits are managed by separate agencies (the DVA and DOD, respectively), and their interaction can be extremely confusing for survivors.<sup>414</sup> The DIC/SBP offset is also, in the eyes of many Veterans' and Military Family organizations, patently unfair.

Concurrent receipt of DIC and SBP is prohibited.<sup>415</sup> Thus, SBP annuity payments are currently offset, dollar-for-dollar, by DIC.<sup>416</sup> The result of this offset is that the SBP annuity

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<sup>411</sup> *Id.*

<sup>412</sup> The basic monthly rate of DIC for a child aged 18 – 23 and enrolled in school is currently \$271. 38 U.S.C.S. § 1311(b). In contrast, the monthly DEA rate can reach \$881, a significant difference.

<sup>413</sup> DVA PAM 22-73-3, *supra* note 296, does an excellent job of explaining how DEA and DIC interact in layman's terms.

<sup>414</sup> See *Statement Before the Veterans' Disability Benefits Comm'n* at 3 (2005) (statement of Deborah Kline Fryar, Deputy Director, Government Relations, National Military Family Association), *available at* [http://www.nmfa.org/site/DocServer/20050510\\_Survivor\\_Benefits.pdf?docID=2261](http://www.nmfa.org/site/DocServer/20050510_Survivor_Benefits.pdf?docID=2261).

<sup>415</sup> 38 U.S.C.S. § 1317.

<sup>416</sup> Interestingly, SBP annuity payments may also be offset by any debts to the United States that the servicemember owed at time of death. Personal debts, other than unpaid SBP premiums, may not offset the annuity amount. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, DOD FINANCIAL MGMT. REG., para. 460103.A. (Jun. 2008) [hereinafter DODFMR].

is typically eliminated by DIC for the vast majority of surviving spouses.<sup>417</sup> When the SBP annuity is subsumed by DIC payments, the servicemember's SBP annuity premiums are refunded to the surviving beneficiary in a lump sum without interest; the refunded amount generally does not represent the actual amount of premiums paid by the servicemember.<sup>418</sup> Further, the surviving spouse must affirmatively claim this benefit in order to receive the refund.<sup>419</sup> Because SBP premiums are generally paid from a servicemember's pre-tax retirement earnings, the refunded lump sum is taxable income to the recipient.<sup>420</sup>

In those cases where the SBP annuity is not entirely offset by DIC, survivors are left with two payments – the full amount of available DIC and any remaining SBP. Tax treatment of these benefits differs in that DIC is not subject to federal income taxation and SBP is, which may be confusing for spouses. In addition, because the flat-rate DIC is adjusted for cost-of-living purposes,<sup>421</sup> it may at some point exceed any residual SBP, at which point the SBP annuity would be cut off.<sup>422</sup> Where SBP is only partially offset by DIC, a portion of SBP premiums are refunded, but the calculation becomes more complex:

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<sup>417</sup> *Hearing on H.R. 1927 Before the H. Comm. On Armed Serv.*, 110th Cong. (1998) (statement of Rose Elizabeth Lee, Chairman, Government Relations Committee, Gold Star Wives of America, Inc.).

<sup>418</sup> Air Force Retiree Services, Fact Sheet: Effect on SBP if DIC is Awarded by the VA, <http://www.retirees.af.mil/factsheets/factsheet.asp?id=11696> (last visited Mar. 15, 2009). In addition, when a surviving spouse applies for DIC benefits more than a year after the servicemember's death, the effective date of DIC eligibility is the date of application, and the spouse may be entitled to receive SBP benefits in the meantime. "In this case, the surviving spouse receives the full SBP annuity until the effective date of the DIC award, so no SBP premiums will be refunded." *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> DODFMR, *supra* note 416, at para. 530101 ("The SBP annuity payments are taxable for federal income tax purposes."). There are some exceptions, however, for survivors who reside in certain foreign countries or are foreign citizens. *Id.* Table 53-1.

<sup>421</sup> *Id.* para. 460202.

<sup>422</sup> *Id.* para. 460202.B.

A refund of SBP premiums is made based on the difference between the costs actually incurred and the costs that would have been incurred in order to provide the annuity payable after the DIC reduction. For purposes of the cost refund, the open season premium addition (the additional penalty added during the 1992 and 1993 open enrollment period), the lump sum buy-in (from both the 1999 and 2000, and 2005 and 2006 open enrollment periods), any child costs, and any interest charges due to delinquent premiums are not refunded.<sup>423</sup>

In addition, when a surviving spouse applies for DIC benefits more than a year after the servicemember's death, the effective date of DIC eligibility is the date of application, and the spouse may be entitled to receive SBP benefits in the meantime. "In this case, the surviving spouse receives the full SBP annuity until the effective date of the DIC award, so no SBP premiums will be refunded."<sup>424</sup> Finally, the SBP annuity is only offset by DIC where the survivor's entitlement stems from the death of the same servicemember. It is conceivable, then, that a survivor of two separate deceased servicemembers could receive SBP from one and DIC from the other.<sup>425</sup>

Because post-September 11th legislation extended SBP benefits to the survivors of those who die on active duty on or after October 7, 2001<sup>426</sup> while in the line-of-duty (and thus not technically retirement eligible),<sup>427</sup> an additional legislative nuance to the DIC/SBP offset has been created. Under this nuance, a surviving spouse with children can avoid the DIC/SBP

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<sup>423</sup> *Id.*

<sup>424</sup> *Id.* para. 460202.E.

<sup>425</sup> *Id.*

<sup>426</sup> National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012, 1151.

<sup>427</sup> This includes servicemembers who die on active duty for training (ADT), provided they are in the line-of-duty. DODFMR, *supra* note 416, at para. 5202.

offset by assigning SBP to the children until they reach the age of majority, and receive DIC benefits as an eligible spouse.<sup>428</sup> Once the children reach the age of majority, unless permanently disabled, any SBP will disappear, leaving the spouse with only DIC payments.<sup>429</sup> Some view this nuance as inequitable, as it permits only surviving spouses of those who die on or after October 7, 2001 with dependent children to essentially skirt concurrent receipt prohibitions.<sup>430</sup>

To further complicate matters, many servicemembers purchased SSBP coverage in an effort to avoid the effects of the Social Security offset to SBP.<sup>431</sup> However, no refund of SSBP premiums paid by the servicemember is currently authorized.<sup>432</sup> Remarriage of a surviving spouse after the age of 55 may also result in a unique and complex DIC/SBP offset situation. In some cases, a spouse who remarries after age 55 will lose DIC benefits, and thus become eligible for SBP annuity payments:

If the spouse or former spouse whose SBP annuity entitlement was adjusted . . . subsequently loses entitlement to DIC because of remarriage, and the beneficiary is 55 years of age (60 years of age if remarried before November 14, 1986) or more at the time of remarriage, then annuity is reinstated . . . on the effective date of the loss of DIC entitlement. The annuity is adjusted to reflect all authorized cost-of-living adjustments. If the spouse or former spouse again should become eligible for DIC, then a second refund is not authorized if the spouse or former spouse received any annuity

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<sup>428</sup> *Legislative Agenda of Veterans' Organizations: Hearing on H.R. 1538, H.R. 1102, H.R. 867, and H.R. 1589 Before the S. Committee on Veterans' Affairs, 110th Cong. (2007)* (statement of Ana R. Smythe, Deputy Director, Government Relations, Military Officers Association of America).

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> National Defense Authorization Act of 2005, Pub. L. No. 108-375, 118 Stat. 1811.

<sup>432</sup> DODFMR, *supra* note 416, at para. 460202.A.2.

payments.<sup>433</sup>

A final wrinkle is the SSIA program, which took effect in 2008 and provides an indemnity allowance to those dependents affected by the DIC/SBP offset.<sup>434</sup> The allowance increases by \$10 per year from 2008 until 2013, remains at a static level (\$100 per month) from 2013 to 2016, and is discontinued altogether after 2016.<sup>435</sup> Unlike DIC, which is paid by the DVA, SSIA payments are drawn from the DOD Military Retirement Fund, the same fund used for SBP payments.<sup>436</sup> Like SBP annuity payments, SSIA payments are taxable income to the recipient.<sup>437</sup>

The foregoing are just a few of the more common examples of the complexity with which the DIC/SBP offset operates; there are others, particularly when one considers the changes to the SBP over the years. Understanding these complexities requires a thorough examination and understanding of statutes and departmental policies and regulations – references the average survivor may not be familiar with or able to understand. As a result, many perceive the DIC/SBP offset to be particularly burdensome and unfair. Some frequent criticisms of the offset are discussed in the next part.

### 3. *The Offset Between DVA and DOD Benefits is Unfair*

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<sup>433</sup> *Id.* para. 460202.D.

<sup>434</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 177.

<sup>435</sup> *Id.* sec. 644(2).

<sup>436</sup> *Id.* sec. 644(5).

<sup>437</sup> DEFENSE FINANCE AND ACCOUNTING SERVICE, NDAA SECTION 644 (FY 08) FAQs (2008), available at <http://www.dfas.mil/retiredpay/frequentlyaskedquestions/ndaa644faqs.html>.

Veterans' and Military Family organizations have several common complaints regarding the SBP/DIC offset. First, because of its complexity, the offset forces survivors to make extremely difficult financial decisions shortly after the servicemember's death.<sup>438</sup> This is particularly true in cases where survivors of a deceased active-duty servicemember must decide whether to elect the child-only SBP option, discussed *supra* in Part III.A.2. In any event, because survivor benefit elections are generally made shortly after the servicemembers' death in order to initiate benefits as soon as possible, many believe that the complexity of the system causes survivors to make hasty and ill-informed decisions. Too often, these decisions are made by survivors with little or no assistance, since many casualty assistance personnel are also confused by the system.<sup>439</sup>

Second, many consider the offset to be an unfair violation of the SBP contract with servicemembers. Proponents of this argument believe that because the purpose of SBP is to provide income protection or replacement to the families of servicemembers, it is therefore effectively a "purchased retirement plan,"<sup>440</sup> the offset of which effectively eliminates the

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<sup>438</sup> See, e.g., *Statement Before the Veterans' Disability Benefits Comm'n* at 3 (2005) (statement of Deborah Kline Fryar, Deputy Director, Government Relations, National Military Family Association), available at [http://www.nmfa.org/site/DocServer/20050510\\_Survivor\\_Benefits.pdf?docID=2261](http://www.nmfa.org/site/DocServer/20050510_Survivor_Benefits.pdf?docID=2261):

As you can see, the interaction between SPB and DIC is a complex procedure to understand. Consider trying to make decisions about this payment distribution a month after losing your spouse, while still in a state of shock and denial. . . . **NMFA recommends that the DIC offset to SPB be eliminated. Doing so would recognize the length of commitment and service of the career servicemember and spouse and relieve the spouse of making hasty financial decisions at a time when he or she is emotionally vulnerable.**

*Id.* (emphasis in original).

<sup>439</sup> GAO CASUALTY ASSISTANCE REPORT, *supra* note 387, at 2.

<sup>440</sup> *Legislative Agenda of Veterans' Organizations, Hearing Before the H. Comm. on Veterans' Affairs*, 111th Cong. (2008) (statement of Patrick Corbett, National President, The Retired Enlisted Association).

servicemember's retirement planning.<sup>441</sup> Additionally, the offset is unwarranted because of the differing legislative intent behind the programs – i.e., indemnity or compensation for death in the case of DIC versus compensation for service in the case of SBP.<sup>442</sup>

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<sup>441</sup> See, e.g., *Legislative Presentation of Veterans' Organizations: Hearing Before the S. Comm. On Veterans' Affairs*, 109th Cong. (2006) (statement of Mrs. Rose Elizabeth Lee, Chair, Gold Star Wives of America, Inc.):

The SBP was meant to provide income protection for survivors. This income is not protected when the DIC benefit offsets the SBP income to which a survivor is entitled, sometimes eliminating the entire SBP. To illustrate the bad publicity that this issue is getting, the NY TIMES Op Ed published an article by Attorney Dan Shea on February 13, 2006 in which he wrote: "My brother LTC Kevin Shea was killed by a rocket attack in Falluja on Sept. 14, 2004. He knew the risks when he joined the Marine Corps in 1989. But he also thought that if anything ever happened to him, the United States government would take care of his wife Amy and his two children. Sadly, that's not the case. . . ." Dan Shea went on to describe the problem which prevents his brother's wife to receive both SBP and DIC without offset.

*Id.* (citing Dan Shea, *Left Behind*, N.Y. TIMES, Feb. 13, 2006, available at <http://www.nytimes.com/2006/02/13/opinion/13shea.html> (last visited Mar. 15, 2009)).

<sup>442</sup> See, e.g., *Disability Benefits Report: Hearing Before the H. Comm. On Veterans' Affairs*, 110th Cong. (2007) (statement of James Terry Scott, Chairman, Veterans' Disability Benefits Commission):

Currently, military retirees with service-connected disabilities rated 50 percent or higher are authorized to receive both benefits, which are being phased in over the next few years. Survivors are not authorized to receive both benefits. The Commission is persuaded that these programs have unique intents and purposes: military retirement benefits and SBP are intended to compensate for years of service, while VA disability compensation and DIC are intended to compensate for disability or death attributable to military service. It should be permissible to receive both sets of benefits concurrently.

*Id.*; see also, *Helping Parents and Families of Veterans: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. (2007) (statement of Patricia Montes Barron, Deputy Director, National Military Families Association):

Each payment serves a different purpose. The DIC is a special indemnity (compensation or insurance) payment from the VA to the survivor when the service member's service causes his or her death. It is a flat rate payment, currently \$1,067 for the surviving spouse and \$265 for each surviving child. The SPB annuity, paid by DoD, reflects the longevity of the service of the military member. It is ordinarily calculated at 55 percent of retired pay.

*Id.*, and *Legislative Presentations of Veterans' Organizations: Hearing Before the S. Comm. on Veterans' Affairs*, 109th Cong. (2006) (statement of Robert F. Norton, Deputy Director, Military Officers Association of America):

MOAA believes SBP and DIC payments are paid for different reasons. SBP is purchased by the retiree and is intended to provide a portion of retired pay to the survivor. DIC is a special indemnity compensation paid to the survivor when a member's service causes premature death. In such cases, the VA indemnity compensation should be added to the SBP the retiree



Third, the extension of SBP benefits to survivors of servicemembers who die on active duty arguably unfairly creates an additional, non-offset SBP benefit unavailable to other survivors.<sup>443</sup> This benefit is the result of the ability of survivors of active-duty servicemembers to select the child-only SBP option while retaining DIC spouse benefits, assigning SBP to dependent children until they reach the age of majority, and retaining DIC as an eligible spouse. The loophole, discussed *supra* in Part III.A.2, is viewed by many as inequitable, since it permits only surviving spouses of those who die on or after October 7, 2001 to avoid concurrent receipt prohibitions.<sup>444</sup>

The fourth argument advanced against the offset is that it unfairly penalizes survivors of military retirees. Proponents of this argument note that survivors of other federal employees and certain disabled retirees are permitted concurrent receipt of their benefits.<sup>445</sup> And finally,

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paid for, not substituted for it. It's also noteworthy as a matter of equity that surviving spouses of federal civilian retirees who are disabled veterans and die of military-service- connected causes can receive DIC without losing any of their purchased federal civilian SBP benefits.

*Id.*

<sup>443</sup> *Legislative Agenda of Veterans' Organizations: Hearing on H.R. 1538, H.R. 1102, H.R. 867, and H.R. 1589 Before the S. Committee on Veterans' Affairs*, 110th Cong. (2007) (statement of Ana R. Smythe, Deputy Director, Government Relations, Military Officers Association of America):

In the case of members killed on active duty on or after October 7, 2001, a surviving spouse who has children can temporarily avoid the dollar-for-dollar offset only by assigning SBP to the children. But that forces the spouse to give up any SBP claim after the children attain their majority, leaving the spouse with just a \$1,067 monthly annuity from the VA. And that provision offers no relief at all to survivors of members who died before 10/7/01 or who have no children.

*Id.*

<sup>444</sup> *Id.*

<sup>445</sup> See, *Helping Those Left Behind: Are We Doing Enough for the Parents, Spouses, and Children of Veterans?: Hearing Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans' Affairs*, 110th Cong. 53 (2007) (Statement of Rose Elizabeth Lee, Chair, Gold Star Wives of America, Inc.) (“Disabled military retirees, Federal retired annuitants and their survivors receive their benefit without offset of VA benefits. The military survivor benefit should be similar.”).

these groups believe that the amount of income provided to survivors after the offset, typically limited only to DIC payments, is a completely unrealistic and paltry sum given current economic realities and the fact that military spouses often sacrifice their own careers and earning potential for their spouses.<sup>446</sup> This argument highlights the fact that the tens of thousands of spouses affected by the offset receive around \$13,000 per year because of offset provisions, a sum that is considered “not even subsistence.”<sup>447</sup>

#### 4. *Different Agencies Are Responsible for Administering Survivor Benefits*

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<sup>446</sup> See, e.g., *Legislative Agenda of Veterans’ Organizations, Hearing Before the H. Comm. on Veterans’ Affairs*, 111th Cong. (2008) (statement of Patrick Corbett, National President, The Retired Enlisted Association) (“The . . . (DIC) payment is simply too low. Even with the yearly COLA adjustment it provides approximately \$13,000 a year for a widow without minor children to live on. This is not even subsistence for those who sacrificed so much for the safety and survival of our country.”); see also, *Legislative Presentations of Veterans’ Service Organizations: Hearing on H.R. 775 and H.R. 809 Before the S. and H. Comms. On Veterans’ Affairs*, 111th Cong. (2009) (statement of Kathryn A. Witt, Co-Chair, Gold Star Wives of America, Inc.):

We feel the basic amount of DIC needs to be increased to 55 percent of the VA Compensation received by veterans rated with a 100 percent service-connected disability.

DIC is currently 43 percent of the VA Compensation received by veterans rated with a 100 percent service-connected disability. Most other Federal survivor programs provide 55 percent of the retirement pay of the service member or Federal employee to the surviving spouse. Calculating DIC at 55 percent of the VA Compensation received by veterans who are rated with a 100 percent service connected disability would increase DIC by approximately \$300 per month

The current dollar amount for DIC was set in 1992, and it has been increased only by cost of living allowances (COLA) since that time. An increase in DIC is long overdue. . . .

[m]y Co-Chair, and I have received letters, emails and phone calls from our widows about problems paying their utility bills and purchasing food. The ones who are in financial distress are the elderly widows whose only income is DIC or DIC and minimal Social Security. With the current economic crisis and high prices of food and utilities, many of them are unable to pay for the essentials of life.

*Id.*

<sup>447</sup> *Legislative Agenda of Veterans’ Organizations, Hearing Before the H. Comm. on Veterans’ Affairs*, 111th Cong. (2008) (statement of Patrick Corbett, National President, The Retired Enlisted Association)

The DVA and DOD are separate and distinct agencies, with different missions and different funding streams. The mission of the DVA is “to care for him who shall have borne the battle and for his widow and his orphan.”<sup>448</sup> In other words, the DVA is solely focused on veterans’ issues. In contrast, the mission of the DOD is “to provide the military forces needed to deter war and to protect the security of our country.”<sup>449</sup> Thus, the DOD’s primary focus is the nation’s warfighting capability.<sup>450</sup> It is no wonder, then, that the implementation of each organization’s survivor benefit programs is accomplished so differently. Granted, though the complexity with which various survivor benefit programs interact (particularly the DIC/SBP offset) are creatures of statute that could arguably be remedied by Congressional action, the complicated interaction of survivor benefits also results from the fact that vastly different agencies are responsible for administering them.

The GAO’s 2006 report on DOD casualty assistance operations<sup>451</sup> supports this assertion. The report found, among other things, that although DOD coordinated with the DVA and SSA in order to expedite survivor benefit payments, neither DOD nor DVA had real visibility over the consolidated administration of survivor benefits.<sup>452</sup> It is this disconnect, in part, that led the GAO to strongly recommend that the DOD provide a “a comprehensive, integrated statement for survivors to aid in their understanding of the amount and array of

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<sup>448</sup> President Abraham Lincoln, the Gettysburg Address (Nov. 19, 1863).

<sup>449</sup> DOD 101: An Introductory Overview of the Department of Defense, <http://www.dod.mil/pubs/dod101/dod101.html#bottomline> (last visited Mar. 15, 2009).

<sup>450</sup> *Id.* “Everything we do supports that primary mission.” *Id.*

<sup>451</sup> GAO CASUALTY ASSISTANCE REPORT, *supra* note 387.

<sup>452</sup> *Id.* at 6-7.

benefits that are available to survivors and how those benefits change over their lifetime .”<sup>453</sup>

Although not a magic bullet, such an integrated statement would go a long way in helping survivors understand their benefits and how those benefits interact.

In the case of the DIC and SBP offset in particular, the fact that DVA administers one program and DOD administers another can render the process very frustrating for survivors. As the anecdote at the beginning of this part makes clear, DOD personnel may not fully understand DIC, and DVA personnel may not fully understand SBP. The result, at least in the case cited,<sup>454</sup> may be significant bureaucracy and delay in payment of benefits when interface between agencies is required. Therefore, the consolidation of as many survivor benefit programs as possible under a single agency will, in the long run, provide the best solution and the best service for surviving family members.

#### B. Are Survivor Benefits Meeting Their Legislative Intent?

Given the complexity with which survivor benefits operate, one must stop and ask whether the DOD and DVA can be doing more to meet the needs of survivors. Are the original legislative goals, to provide various means of assistance to those survivors who have

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<sup>453</sup> *Id.* at 3. The Army, at least, appears to be accomplishing this goal with its website, <http://www.MyArmyBenefits.us.army.mil>. Among other features, the site includes a survivor benefits link, which “provides both general and individualized benefits information to the survivors of a fallen Soldier.” *See* <https://myarmybenefits.us.army.mil/EN/Personal/login.aspx?targetUrl=%2fEN%2fPersonal%2fdefault.aspx&WebFormID=cb459434d2a34b2a9d3875808cf25eaf> (last visited Mar. 15, 2009) (requiring a casualty assistance-provided username and password in order for survivors to access).

<sup>454</sup> The 2006 GAO Report on casualty assistance operations alludes to other such delays. *See* GAO CASUALTY ASSISTANCE REPORT, *supra* note 387, at 3.

lost a spouse or parent in the service of their country, being met when survivors must complete complex documentation and make difficult financial decisions while still grieving their loss? More importantly, to the extent that the intent of survivor benefits is to provide compensation (in the form of an indemnity payment), emergency financial assistance, and income replacement to survivors, do current benefits meet these goals? And are these goals still valid given today's economic realities? This section will critically examine the legislative intent of four survivor benefit programs: DEA, death gratuity, DIC, and SPB. Insurance benefits, administered through the SGLI program, will not be discussed here, as public and Congressional criticism of survivor benefit programs has tended not to focus on the current SGLI benefit package.

### *1. Survivors' and Dependents' Educational Assistance*

When Congress first enacted legislation extending educational benefits to survivors,<sup>455</sup> it did so in order to provide “opportunities for education to children whose education might otherwise be impeded or interrupted by reason of the death of parent from disease or injury incurred or aggravated in the Armed Forces”<sup>456</sup> and in order to “aid[ ] such children in obtaining an educational status which they normally would have obtained but for the death of such parent.” The goal of educational assistance, however, was not to “completely

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<sup>455</sup> Educational benefits were first made available to survivors by the War Orphans' Educational Assistance Act of 1956, Pub. L. No. 84-635, 70 Stat. 411, which was supplanted in 1976 by the Survivors' and Dependents' Educational Assistance Program, Pub. L. No. 94-502, 90 Stat. 2405 (1976).

<sup>456</sup> S. REP. NO. 84-2063 (1956), *as reprinted in* 1956 U.S.C.C.A.N. 2955, 2955.

subsidize”<sup>457</sup> educational and living costs; rather, Congress believed that surviving dependents would make better use of federally-provided educational assistance if they also had a personal financial stake in their education.<sup>458</sup> Thus, Congressional intent behind educational assistance was, from the outset, merely to provide some form of educational aid to surviving dependents, not a free education.<sup>459</sup> To the extent that the current DEA program continues to provide only educational assistance to eligible survivors, it appears to be fulfilling the legislative intent of survivors’ educational benefits over 50 years later. The fact that the current monthly DEA benefit, which may reach \$881,<sup>460</sup> does not even begin to cover tuition, fees, and living expenses for the average course of instruction at a four-year institution<sup>461</sup> indicates that the program is providing only an educational subsidy and not a free education for survivors, consistent with legislative intent.

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<sup>457</sup> *Id.* at 2958.

<sup>458</sup> In clarifying the intent of the legislation, the Committee states:

It is the objective of the legislation to provide substantial assistance to the eligible persons, as defined in the act, for the pursuit of a program of education or training; however, the committee recognized, in establishing the amount of educational assistance to be made available, that there is a considerable variation in the cost to an eligible person of his education, chiefly resulting from the personal selection of a program of education or training and an educational institution by the eligible person. The committee emphasizes that it is not the intention of this legislation to establish a program which completely subsidizes the cost of the eligible person’s education or training program as well as his living costs. This legislation is designed as an aid program and it is expected that in many cases the eligible person or his parent or guardian will be required to make a contribution to the cost of his own education and training program. *It is believed that the eligible person will maintain a greater interest in the use made of funds provided by this bill if he or his parent or guardian is required to make a small contribution from their own resources.*

S. REP. NO. 84-2063 (1956), as reprinted in 1956 U.S.C.C.A.N. 2955, 2958 (emphasis added).

<sup>459</sup> *Id.* This intent is likely reflected by the use of the term “assistance” in the name of the legislation.

<sup>460</sup> DVA PAM 22-73-3, *supra* note 296, at 20.

<sup>461</sup> See COLLEGE BOARD, 2008 TRENDS IN COLLEGE PRICING 2 (2008), <http://professionals.collegeboard.com/profdownload/trends-in-college-pricing-2008.pdf> (stating that the average

However, given the fact that “[t]hirty-five states have some sort of education benefit available to eligible dependents, with the majority of them offering complete tuition waivers and fees” to state-supported institutions,<sup>462</sup> is that legislative intent, and is the DEA program itself, still relevant? Or are educational benefits becoming an unnecessary duplication of effort?

The DEA program is still relevant for several reasons. First, while a majority may, not all states currently provide educational benefits for survivors.<sup>463</sup> Discontinuing the DEA program on this basis would unfairly penalize survivors in those states. Second, some state benefit programs tie their tuition waivers to DEA, limiting the amount of their aid provided “to that amount not covered by federal benefits.”<sup>464</sup> Finally, discontinuing DEA would also unfairly penalize survivors who choose to attend private institutions, which are generally not included in state education benefit programs.<sup>465</sup>

In sum, the DEA program appears to be meeting its legislative intent, and although it may eventually be supplanted by state educational benefit programs, it continues to provide a relevant and useful benefit to surviving dependents.

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total cost, including tuition, fees, room and board, for in-state students 2008 – 09 is \$14,333. That amount increases to \$25,200 for out-of-state students, and to \$34,132 for private four-year colleges and universities).

<sup>462</sup> Chase & Sennott, *supra* note 3, at 27.

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*

<sup>465</sup> *Id.* (noting, however, that “Delaware and West Virginia allow for some funding of attendance at private institutions.”).

## 2. *Death Gratuity*

The death gratuity in its current form is traceable to 1974 legislation<sup>466</sup> intended to provide survivors with an “emergency” payment intended to bridge the gap while applications for other survivor benefits were processed.<sup>467</sup> Since that time, the amount of the death gratuity has increased from a flat payment of \$3000 to \$100,000,<sup>468</sup> but the legislative intent behind the death gratuity as an emergency payment to meet the immediate financial needs of survivors has remained the same.<sup>469</sup> Does the current lump sum death gratuity actually meet this goal? Many Veterans’ and Military Family organizations have applauded the 2006 increase to \$100,000.<sup>470</sup> Further, putting aside compensation packages for survivors of September 11th emergency responders<sup>471</sup> and the Public Safety Officers’

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<sup>466</sup> Servicemen’s and Veterans’ Survivor Benefits Act, Pub. L. No. 84-881, 70 Stat. 857 (1956).

<sup>467</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.3.

<sup>468</sup> In 2006, Congress increased the death gratuity to \$100,000 for survivors of any servicemember who dies on active duty. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136.

<sup>469</sup> 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. 65 (2005).

<sup>470</sup> See, e.g., *Death Benefits and Services Available to Survivors of Military Personnel and Legislative Proposals to Enhance These Benefits: Hearing Before the S. Comm. on Armed Services*, 109th Cong. (2005) (providing testimony of various Veterans’ and Military Family organizations indicating support for proposed increase in death benefit to \$100,000).

<sup>471</sup> In addition to receiving benefits from the Public Safety Officers’ Benefits Program (PSOB), survivors of emergency responders who died as a result of the September 11th attacks are also eligible for benefits from the September 11th Victims’ Compensation Fund (VCF), 49 U.S.C.S. § 40101 (2008), New York City pension benefits, the New York City Mayor’s Office Benefit (equal to one year’s pay), and various charitable donations. It is projected that the average survivor of deceased emergency responders received \$4.2 million. LLOYD DIXON & RACHEL KAGANOFF STERN, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS 44 – 48 (Rand Institute for Civil Justice 2004).



Benefits (PSOB) Program,<sup>472</sup> the military death gratuity generally appears to meet or exceed similar state or municipal payments for those in dangerous professions.<sup>473</sup>

Because the scope of legislative intent with regard to the death gratuity is relatively limited – to provide a financial bridge immediately following a servicemember’s death – it appears that this survivor benefit is still meeting that intent. Further, the death gratuity appears to be in line with similar state and local death payments for dangerous professions. Thus, no significant legislative change to the death gratuity is recommended at this time.

### 3. *Dependency and Indemnity Compensation*

As its name suggests, DIC was intended from the outset to be a payment to indemnify and compensate survivors for the loss of a servicemember.<sup>474</sup> Indeed, in recognition of the indemnity element of the program, DIC actually supplanted government life insurance for a time.<sup>475</sup> Recognition of the indemnity element of DIC continues today.<sup>476</sup>

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<sup>472</sup> 42 U.S.C.S. § 3796 et seq. (2008). The PSOB, which is administered by the Department of Justice, “[a]uthorizes federal benefits for survivors of public safety officers whose deaths were the direct and proximate result of an injury sustained in the line of duty.” Bureau of Justice Assistance, *The Public Safety Officers’ Benefits Program 5* (2008) <http://www.ojp.usdoj.gov/BJA/grant/psob/AboutPSOB.pdf>.

<sup>473</sup> GAO STATE SB REPORT, *supra* note 3. Granted, this GAO report predates the \$100,000 death gratuity increase, but it appears from the report that the current death gratuity still exceeds similar state and local payments. *Cf.* Public Safety Officers’ Benefits (PSOB) Program, 42 U.S.C. § 3796, which provides \$315,746 for eligible deaths occurring on or after October 1, 2008.

<sup>474</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.4.

<sup>475</sup> *Id.* (citing H.R. REP. 84-993 at 5-6 (1956)).

<sup>476</sup> Indeed, this is one of the arguments frequently advanced for eliminating the DIC/SBP offset – that the purpose of DIC is to compensate for death due to military service, while the purpose of SBP is income replacement. *Legislative Presentations of Veterans’ Organizations: Hearing Before the S. Comm. on Veterans’ Affairs*, 109th Cong. (2006) (statement of Robert F. Norton, Deputy Director, Military Officers Association of America).

However, the DIC/SBP offset undermines this legislative intent. Because the offset typically results in either a full loss of or significant reduction in SBP benefits, one could argue that the DIC program is currently used not only to compensate survivors, but also to provide them with an annuity. This dual purpose – indemnity and income replacement – is not necessarily reflected in the DVA’s understanding of the intent of the original legislation.<sup>477</sup> Although the DVA has expressed at other times that DIC, at least in part, was meant as a form of income replacement,<sup>478</sup> at minimum, there appears to be some confusion over what the true legislative intent of DIC is.<sup>479</sup> Because the SBP was created by separate legislation to be managed by a separate agency, one could argue that the *proper* intent of DIC is as an indemnity payment, and that the income replacement element of survivor benefits is the intended goal of the SBP annuity.

#### 4. *Survivor Benefit Plan*

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<sup>477</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. III.D.4 (citing DVA DIC Program Description) (“It was designed to provide indemnification to certain survivors of veterans who died during military service as well as to survivors of veterans who died after military service as a result of service-connected disabilities. It was also designed to provide partial compensation to survivors for economic losses attributable to veterans’ deaths.”).

<sup>478</sup> *See, e.g.*, Evaluation of Pension and Parents’ DIC Programs: Parents’ DIC Programs Final Report 9 (ORC Macro Economic Systems, Inc. ed., 2004) (noting that the intent of parents’ DIC, which Public Law 84-881 also created, “was related to the loss of income support caused by the veteran’s death.”).

<sup>479</sup> *See* GAO DIC REPORT, *supra* note 4, at 2. The GAO’s understanding of DIC focuses on the indemnity element, and not the income replacement model: “The DIC program’s objectives are (1) to partially compensate survivors for income lost as a result of the deaths of servicemembers or of veterans who died because of service-connected disabilities and (2) to indemnify the survivors for a life lost as a result of service to the country.” *Id.*

In contrast, there is far less confusion regarding the legislative intent of the SBP, which has always been an income replacement program for the survivors of military retirees.<sup>480</sup> It has been described as “the only means by which a retired member can insure that his or her immediate family will be provided with continued government income under any and all circumstances at a level dictated by the member, within established bounds, after the member's death.”<sup>481</sup> Indeed, in creating the Contingency Option Plan,<sup>482</sup> a predecessor to the SBP, Congress emphasized that “[u]nder existing law career personnel of the uniformed services are unable to participate in any plan which would permit them to leave any portion of their retired pay to their surviving dependents.”<sup>483</sup> This intent was reiterated in 1972<sup>484</sup> when Congress created the SBP,<sup>485</sup> and continues to be referenced in more recent legislation.<sup>486</sup>

To the extent that the DIC/SBP offset operates to eliminate most, if not all, SBP annuity payments, the legislative intent of the SBP is clearly compromised. This position is reiterated by Veterans’ and Military Family organizations, who believe that the DIC/SBP offset unfairly undermines the stated intent of SBP.<sup>487</sup> This position is further supported by

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<sup>480</sup> BURELLI, *supra* note 335, at CRS-1. Since 2002, the SBP has also become available to survivors of active-duty servicemembers who die on active duty after September 11, 2001.

<sup>481</sup> MILITARY COMPENSATION BACKGROUND PAPERS, *supra* note 9, at ch. IV.C.2.

<sup>482</sup> Uniformed Services Contingency Option Act of 1953, Pub. L. No. 89-239, 67 Stat. 501.

<sup>483</sup> S. REP. NO. 83-672 (1953), *as reprinted in* 1953 U.S.C.C.A.N. 2257.

<sup>484</sup> Act of September 21, 1972, Pub. L. No. 92-425, 86 Stat. 706 (1972).

<sup>485</sup> S. REP. NO. 92-1089 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3288.

<sup>486</sup> H.R. REP. 208-111 (2003), *as reprinted in* 2003 U.S.C.C.A.N. 2336.

<sup>487</sup> *See* discussion of offset criticisms *supra* at Part III.A.3.

the fact that when Congress created the offset in the 1972 SBP legislation, it specifically noted that the SBP annuity was needed because, in part, DIC was payable only in “relatively few cases in which a retiree’s death is determined to be service-connected,”<sup>488</sup> indicating at least some intent for the SBP to be a separate and distinct payment. Additionally, economic conditions in 1972 were such that those survivors receiving DIC still received a portion of SBP, with the intent that DIC plus residual SBP would reach 55% of the servicemembers’ retirement pay.<sup>489</sup> As the requirements for receipt of DIC have been relaxed, the number of DIC recipients has increased dramatically, so that over 50,000 survivors are currently affected by the DIC/SBP offset.<sup>490</sup> Further, as the DIC payment has increased over time, it has, in the majority of cases, completely eliminated SBP annuity payments.<sup>491</sup> In other words, even if Congress intended to create the DIC/SBP offset in 1972, it arguably could not have anticipated the broad effect the offset would have today.

There is thus a strong argument to be made that legislative intent behind both SBP and DIC is severely compromised by the DIC/SBP offset. Veterans’ and Military Family organizations have taken this position and have focused much attention and energy on lobbying for offset reform.<sup>492</sup> In response, there has been a steady stream of legislation

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<sup>488</sup> S. REP. NO. 92-1089.

<sup>489</sup> *Id.*

<sup>490</sup> *Legislative Presentations of Veterans’ Service Organizations: Hearing on H.R. 775 and H.R. 809 Before the S. and H. Comms. On Veterans’ Affairs*, 111th Cong. (2009) (statement of Kathryn A. Witt, Co-Chair, Gold Star Wives of America, Inc.).

<sup>491</sup> *Hearing on H.R. 1927 Before the H. Comm. On Armed Serv.*, 110th Cong. (1998) (statement of Rose Elizabeth Lee, Chairman, Government Relations Committee, Gold Star Wives of America, Inc.).

<sup>492</sup> For a discussion of some of the more common criticisms of the DIC/SBP offset advanced by these organizations, see *supra* Part III.A.3.

proposing an elimination of the offset.<sup>493</sup> In the face of intense public pressure and criticism, Congress has had numerous opportunities to eliminate the offset, but has failed to do so. Because it appears that legislative elimination of the offset is unlikely to occur soon, this thesis takes the position that perhaps there is an alternate way to accomplish the goal of offset elimination, while aligning as many survivor benefits as possible under a single agency.

#### IV. Proposed Survivor Benefit Reform

As this thesis has demonstrated, the alignment of administrative responsibilities for survivor benefits under separate and distinct federal agencies – the DOD and DVA, and to a lesser extent, SSA – has increased the bureaucracy of the system and the complexity with which survivor benefits interact. Further, this thesis has shown that at least two major survivor benefit programs, DIC and SBP, are currently not meeting the legislative intent underlying the respective programs. Unfortunately, it is survivors who suffer most from systemic weaknesses. The system is too complex for the average survivor to fully understand, and being forced to deal with multiple independent agencies is frustrating, time-consuming, and confusing for survivors. Additionally, statutory offset provisions have created a situation whereby tens of thousands of survivors are receiving a monthly indemnity and compensation payment, but no annuity.

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<sup>493</sup> In fact, there are bills in the current Congress. *See, e.g.*, Military Surviving Spouses Equity Act, H.R. 775, 111th Cong. § 2a (2009) (proposing a “repeal [of] the requirement for reduction of survivor annuities under the Survivor Benefit Plan to offset the receipt of veterans dependency and indemnity compensation.”).

This part will attempt to rectify these systemic weaknesses by proposing two major Congressional reforms: alignment of the majority of survivor benefit programs under the DVA, and a merger of the SBP and DIC programs. To aid the proposal, a before-and-after depiction of survivor benefit programs is available *infra* at Appendix B. Under the proposed Congressional reforms, only administration of miscellaneous survivor benefit programs such as final pay and burial benefits will be administered by the DOD; all other programs will fall under the DVA.

A. Alignment of Survivor Benefits Under a Single Agency

The missions of the two main agencies that administer survivor benefits, the DOD and DVA, are vastly different. These divergent missions have created at least some of the bureaucracy and complexity with which survivor benefits interact. Of the two agencies, only the DVA is solely dedicated to serving veterans, their family members, and survivors. Certainly survivors would be better served by a single agency focused on their needs. This thesis thus proposes that, to the maximum extent possible, survivor benefit programs be realigned so that the DVA is responsible for administering them.

Short of creating a separate agency to handle survivor benefit matters, the DVA is in the best position to become the sole agency responsible for survivor benefits for several reasons. First, its mission and structure is more suited to handling survivor benefit matters than the DOD. Second, the DVA is already responsible for administering several rather complex programs, including DEA, DIC, and SGLI; further, it understands how these programs interact with each other and, to a certain extent, other federal programs. Third, recent

legislation has created a dedicated Office of Survivors Assistance,<sup>494</sup> which, although not geared toward handling individual benefit issues,<sup>495</sup> will likely

[a]dvice the Secretary of Veterans Affairs on all matters pertaining to policies, programs, legislation and issues affecting the survivors of veterans. . . . the office will serve as an advocate for survivors, develop outreach programs to keep them informed and serve as VA liaison with agencies inside and outside of government on survivor issues. The Office will serve as a primary advisor to the Secretary on all matters relating to the policies, programs, legislative issues and other initiatives affecting survivors. Though it will not process or handle individual claims inquiries, the new office will regularly monitor the delivery of benefits and services of the Department.<sup>496</sup>

In contrast, the DOD is likely not in the best position to assume sole responsibility for administering survivor benefits. This is because its mission, while acknowledging the obvious importance of its people, cannot be solely focused on the individual needs of servicemembers, veterans, family members, and survivors. In addition, the DVA has an extremely long history of administering its survivor benefit programs, and a shift of those programs to the DOD would likely be so disruptive as to be a disservice to survivors.

The difficulty, of course, in realigning survivor benefit programs under the DVA is how and whether the two main DOD programs, the death gratuity and SBP, may be transferred to the DVA smoothly and effectively. There are practical roadblocks to such a transfer of responsibility. First, the DOD has an equally long history of administering these programs

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<sup>494</sup> Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145.

<sup>495</sup> VeteransToday.com, Top Ten Veterans News from Around the Country, <http://www.veteranstoday.com/modules.php?name=News&file=print&sid=5229> (last visited Mar. 18, 2009).

<sup>496</sup> *Id.*

and has institutional knowledge on its side. Second, the programs are funded with DOD, and not DVA appropriations, which creates fiscal constraints. Third, because DOD programs generally involve recently retired or deceased active duty servicemembers, the DOD programs do not involve veterans' issues germane to the DVA.

One compromise may be to continue to allow the DOD to administer the death gratuity. Because it is an emergency payment that is made very quickly after a servicemembers' death and is funded with DOD appropriations, the DOD could continue to administer this payment as part of its formal casualty assistance program – along with burial benefits and other small-scale survivor benefit programs that require less manpower to administer. However, in the interest of having a single agency administer as many survivor benefit programs as possible, the preference is for the DVA to assume responsibility for processing the death gratuity, even if funding remains with DOD and actual payment is made by DFAS.

Under a consolidated survivor benefit program, responsibility for the SBP, which is a complex program, would be transferred to the DVA. The period of transition would likely be very difficult and would require significant organizational restructuring, to include determining how and whether SBP should continue to be funded by DOD appropriations.<sup>497</sup> However, having a single agency responsible for handling a program that interacts with such complexity with other DVA programs will benefit survivors, streamline the process, and reduce duplication of effort. In the case of the Army officer discussed *supra* in Part III.A.1,

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<sup>497</sup> The fiscal constraints of this proposal are very real. Perhaps the DOD could MIPR funds to the DVA for DOD programs, but permit DVA to administer them.



consolidated administration of survivor benefit programs may have saved months of frustration as she attempted to straighten out her entitlements.

## B. Consolidation of Survivor Benefits

While consolidating as many survivor benefit programs as possible under a single agency will likely reduce the complexity and bureaucracy of the survivor benefit system, one further proposed change may significantly improve the system – an actual consolidation of DIC and SBP benefits. This thesis has shown that there is widespread dissatisfaction with the DIC/SBP offset; many view it as unfair and difficult to understand.<sup>498</sup> More importantly, after taking the offset into account, many have questioned whether the monetary benefit provided to survivors is enough, given modern economic realities.<sup>499</sup> Further, although Congress has made multiple attempts to eliminate the offset and essentially double the monthly benefit available to survivors, it has to date failed to do so.

What if the two programs merged into a single, non-offset benefit solely administered by the DVA? Given that the legislative intent behind DIC may or may not include an income replacement component,<sup>500</sup> and given that the legislative intent behind SBP is not being met

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<sup>498</sup> For a discussion of the operation of the DIC/SBP offset and common criticisms of it, see *supra* Part III.A.1 – 3.

<sup>499</sup> See *Legislative Agenda of Veterans' Organizations, Hearing Before the H. Comm. on Veterans' Affairs*, 111th Cong. (2008) (statement of Patrick Corbett, National President, The Retired Enlisted Association) and *Legislative Presentations of Veterans' Service Organizations: Hearing on H.R. 775 and H.R. 809 Before the S. and H. Comms. On Veterans' Affairs*, 111th Cong. (2009) (statement of Kathryn A. Witt, Co-Chair, Gold Star Wives of America, Inc.).

<sup>500</sup> There is some confusion between agencies regarding the legislative intent of DIC. See *supra* Part III.B.3.

when the SBP annuity is so frequently offset,<sup>501</sup> is there a way to fulfill indemnity and annuity goals with a single program? This thesis proposes that Congress merges the DIC and SBP programs into a hybrid Survivor Benefit Indemnity and Compensation Plan (SBICP) administered by the DVA. The goals of the consolidated SBICP are to eliminate the DIC/SBP offset once and for all, and to streamline and simplify the system. A further goal is to generate a larger monthly payment to survivors, a payment that includes compensation for loss of life as well as an annuity component.

The major roadblock to creating SBICP is, of course, money. Is it possible to increase the amount of a monthly survivor benefit, or is the DIC/SBP offset the reason both programs are still actuarially sustainable? Additionally, SBP is paid from the DOD military retirement fund,<sup>502</sup> while DIC is funded via DVA appropriations. In order for the SBICP to work, Congress would likely have to authorize a hybrid fund from multiple sources – DOD, DVA, and servicemember/retiree contributions. This thesis assumes that hybrid funding is possible, and also adopts the stance recently taken by the GAO that eliminating the DIC/SBP offset is actuarially possible.<sup>503</sup>

Because eligibility for DIC and SBP benefits has been liberalized over the years to include the survivors of active-duty servicemembers, perhaps viewing these programs as

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<sup>501</sup> *Hearing on H.R. 1927 Before the H. Comm. On Armed Serv.*, 110th Cong. (1998) (statement of Rose Elizabeth Lee, Chairman, Government Relations Committee, Gold Star Wives of America, Inc.).

<sup>502</sup> GAO SBP ACTUARIAL REPORT, *supra* note 4, at 1.

<sup>503</sup> *Id.* at 5 (“Enactment of these legislative changes would require [an adjustment of] DOD and Treasury payments, subject to future appropriations, by amounts necessary to offset any increased costs related to expanded benefits; for this reason, enactment of these changes should not negatively affect the actuarial soundness of the Fund.”) The GAO projects that elimination of the DIC/SBP offset would increase liability of the DOD military retirement fund by \$12.9 billion. *Id.* at 11.

primarily to the benefit of retirees and their survivors is outdated. A basic feature of the SBICP is that it permits both active duty as well as retired servicemembers to elect participation in the program. Including active duty servicemembers in the SBICP has the advantage of generating additional needed income for the fund. Although it is unclear whether this program would be actuarially sustainable without more study,<sup>504</sup> permitting servicemembers to make SBICP elections while on active duty would generate funds for the program. While there are an infinite number of ways to manage such a program, this thesis proposes two courses of action.

### *1. Voluntary Participation (VP)*

Since survivors of active-duty servicemembers are now entitled to SBP and DIC benefits, this proposed version of the SBICP would permit servicemembers to voluntarily elect a small monthly payment into the SBICP, similar to the monthly SGLI premium. The VP has the advantage of generating more funds for the program. Participation would be voluntary while on active duty, and would then shift to a presumption of participation, similar to the SBP, in retirement. Those servicemembers who choose to participate in the VP while on active duty would be rewarded with a head start at an enhanced monthly retirement benefit for their survivors,<sup>505</sup> similar to “top-up” provisions provided to GI Bill participants.<sup>506</sup> The

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<sup>504</sup> However, because the GAO has concluded that elimination of the DIC/SBP offset will not negatively affect the military retirement fund, the creation of the SBICP is arguably no different, and, as proposed, may generate additional income. *See id.* at 5, 11.

<sup>505</sup> For example, an annuity that includes a monthly payment that is 5% higher than that of a non-early contributor. Thus, if the SBICP included an annuity that was, like the SBP, 55% of retirement pay, the annuity for an early contributor could be up to 60% of retirement pay.

survivors of those active duty servicemembers who choose not to participate would receive a flat indemnity and annuity payment set by statute and periodically adjusted for inflation – similar to, but hopefully much greater than – the monthly DIC amount they are currently entitled to. Further, servicemembers who choose not to participate while on active duty would be provided an opportunity to enroll in the SBICP at retirement, similar to the current operation of the SBP.

There are many advantages to the VP – the major one being its voluntariness, so active-duty servicemembers will not have to participate if they do not wish. But for those who do choose participation, the possibility of an enhanced monthly retirement annuity is another advantage. Further, because the pool of participants in the plan is not limited to retirees, participation costs may be lower and additional income may be generated for the underlying fund. Finally, the VP effectively eliminates the DIC/SBP offset.

There are also some drawbacks to this program. The first one has been alluded to previously: how to effectively merge the DIC and SBP programs when their underlying appropriations differ. Determining how to fund the SBICP could be a fiscal and actuarial nightmare. Second, both the DVA and DOD may object to this plan, which effectively hijacks existing programs, combines the funding for those programs, and assigns DVA with the responsibility of administering the program. Third, servicemembers and their families may object to the program, rejecting another monthly deduction from their income, even if voluntary. And finally, the early participation incentive may unfairly favor those who are higher-ranking with a larger monthly income, leaving the families of those who arguably

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<sup>506</sup> See Tuition Assistance Top-up, <http://www.gibill.va.gov/pamphlets/tatu.htm> (last visited March 20, 2009).

most need survivor benefits – those of lower-ranking individuals – with a lower monthly payment.

## 2. *Required Partial Participation (RPP)*

Under this plan, active duty servicemembers would be required to make a nominal monthly payment, set by statute, toward the indemnity portion of the SBICP. Servicemembers could then elect an additional monthly payment into the annuity portion of the program, the incentive for which would be an enhanced retirement benefit for their survivors.<sup>507</sup> The indemnity portion of any monthly survivor benefit payment would be the same for all servicemembers, but the annuity portion would fluctuate based on contribution amounts, years of service, and retirement salary, similar to the SBP but with an enhanced benefit stemming from early participation. Like the voluntary plan, survivors of those active duty servicemembers who choose not to participate in the annuity plan would receive a flat indemnity and annuity payment set by statute and periodically adjusted for inflation – similar to, but hopefully much greater than – the monthly DIC amount that they are currently entitled to. Again, servicemembers who elected not to participate in the annuity portion of the SBICP would be provided the opportunity to enroll at retirement.

The RPP plan also has advantages. Where a benefit of the VP is voluntariness, a feature of the RPP is fairness – every active duty servicemember would be required to at least pay a nominal amount into the program, with the possibility of contributing more in exchange for

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<sup>507</sup> See *supra* note 505 for proposed enhanced benefit.

an enhanced annuity payment in retirement. Like the VP, the RPP provides the possibility of this enhanced annuity payment, which many will view as a positive feature. Also like the VP, the RPP effectively eliminates the DIC/SBP offset, aligns the SBICP program under the DVA, and arguably creates lower participation costs while generating income for the underlying fund.

Of course, the RPP plan also has drawbacks. Similar to the VP, funding the RPP given current appropriations would be a challenge. Like the VP, there is nothing about the RPP that would prevent DOD or DVA from likely objecting to the merger of DIC and SBP programs to create SBICP. Finally, if servicemembers and families object to the VP on the basis that they do not want to make monthly payments into another government program, then they are much more likely to be unhappy with the RPP, because a monthly contribution to the indemnity portion of the fund would be required.

Because so many of the pros and cons of the VP and RPP are similar, this thesis takes the position that the RPP is the best option. In contrast with the VP, it is not totally voluntary and will thus have the effect of generating more upfront income for the underlying fund. But like the VP, it has a voluntary element that may be attractive – it is a “best of both worlds” program. Most importantly, the RPP is probably more equitable because it requires some measure of participation from everyone, and does not unfairly favor those of higher incomes who may be able to afford larger voluntary contributions under the VP.

## V. Conclusion

As this thesis has shown, the survivors of a deceased servicemember or retiree are faced with a wide array of federal (and, in some cases, state) benefits intended to accomplish multiple goals – income replacement, compensation for loss, the provision of emergency monies, and educational assistance. Though the original goals of these benefits and entitlements are many, they stem from a common intent to provide for the dependents of those who have given their health or lives in the service of their country.

However, because current survivor benefit programs are an unwieldy hodgepodge of multiple legislative packages managed by the DVA, DOD, and SSA, this thesis has shown that the sheer complexity with which these programs interact potentially undermines their legislative intent. Many servicemembers, as well as Veterans' and Military Family organizations, believe that there is much room for improvement in the system: increased benefits, better service and casualty assistance, and elimination of some of the most complex and inequitable features of the system, including the DIC/SBP offset.

To highlight the systemic problems of a system divided between agencies, this thesis presented a real-life case in which one survivor did not receive full benefits until nearly 16 months after her spouse's death. This delay was caused, in part, by the bureaucracy of a system where major benefit packages are administered by separate federal agencies. Survivors would be better served by a benefit system aligned under a single agency.

In an effort to consolidate, centralize, and simplify the survivor benefit system, this thesis has proposed two major changes. First, it seeks to align as many survivor benefit programs as possible under the DVA, whose mission is most in keeping with the goals of a fair, equitable, and well-managed survivor benefit system. While the DOD would retain oversight over minor survivor benefit programs and its casualty assistance operations, this thesis

proposes that responsibility for SBP and DIC be transferred to the DVA. Second, this thesis proposes merging the two survivor benefit programs that interact with the most complexity: DIC and SBP. Under this proposal, a new hybrid program would be created, the SBICP, which would provide a larger consolidated indemnity and annuity payment to survivors.

The goal of the survivor benefit system should be to serve the survivors of those who have given their lives in the service of their country in the best way possible. Although the proposals outlined in this thesis will likely be very difficult to implement, the outcome – a single point of contact for survivor benefit matters, and increased benefits for survivors overall – will, in the long run, best serve the needs of America’s survivors.





## Appendix B

### Responsibility for Major Survivor Benefit Programs: Current Versus Proposed

<b>PROGRAM</b>	<b>CURRENT RESPONSIBILITY</b>	<b>PROPOSED RESTRUCTURING</b>	<b>PROPOSED RESPONSIBILITY</b>
Dependency and Indemnity Compensation (DIC)	DVA	Elimination of DIC and merger with SBP to form SBICP	DVA
Servicemembers' Group Life Insurance (SGLI)	DVA	None	DVA
Survivors' and Dependents Educational Assistance (DEA)	DVA	None, though program should be monitored periodically to evaluate relevancy given abundance of state assistance programs	DVA
Death Gratuity	DOD	Transfer of oversight responsibility to DVA	DVA (though possibly funded by DOD)
Survivor Benefit Plan	DOD	Elimination of SBP and merger with DIC to form SBICP	DVA
Miscellaneous Casualty Assistance Matters (burial benefits, final pay, etc.)	DOD	None	DOD