



Eliminating the SBP-DIC Offset for Surviving Spouses of Military Servicemembers: Current Proposals and Related Issues

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Updated July 5, 2019

Update: Following publication of this Sidebar, additional developments arose regarding two matters discussed herein. On June 25, 2019, the Congressional Budget Office revised its [estimate](#) of the cost of eliminating the SBP-DIC offset to approximately \$5.7 billion over the next ten years, a reduction of \$1.3 billion from the 2009 estimate referenced in the Sidebar. And on June 27, 2019, the Senate [passed](#) the FY2020 National Defense Authorization Act without including [an amendment](#) to eliminate the offset.

The original post from June 24, 2019 is below.

Efforts to eliminate a “benefits offset” that affects surviving spouses—widows and widowers of deceased military servicemembers—have gained steam in the 116th Congress. Bills to accomplish this have been introduced for several years, but recent proposals have gained bipartisan significant support. More than three-fourths of the Members of Congress have signed on as co-sponsors of H.R. 553, the Surviving Spouses Equity Act (which has [352 House co-sponsors](#) at the time of this Sidebar’s publication), or S. 622, the Military Widow’s Tax Elimination Act of 2019 (which has [75 Senate co-sponsors](#)). The text of S. 622 has also been offered as a proposed amendment ([S.Amdt. 269](#)) to the [FY2020 National Defense Authorization Act](#).

This Sidebar first explains the legal background of the current benefits offset, which involves two military benefits: the [Survivor Benefit Plan](#) (SBP), a taxable annuity paid by the Department of Defense to survivors of active duty or retired servicemembers, and [Dependent Indemnity Compensation](#) (DIC), a non-taxable benefit paid by the Department of Veterans Affairs (VA) to survivors of servicemembers who died in the line of duty or had a service-connected injury or disease. This Sidebar then describes how a change in federal tax law drew further attention to this issue and closes with a summary of proposed legislation, including H.R. 553 and S. 622.

Congressional Research Service

7-5700

www.crs.gov

LSB10316

The Survivor Benefit Plan

Generally, military [retired pay ends](#) with the death of the retiree. In 1972, Congress [passed the SBP](#) as a successor to [previous programs](#) giving a servicemember the means to provide continuing financial support for his or her dependents after the servicemember's death. With the SBP, servicemembers receive [reduced](#) retirement benefits in exchange for a guarantee that their spouses (or surviving dependent children) continue to receive—in the form of an [annuity](#)—[a portion of those retirement benefits](#) after the servicemembers' deaths.

Participation in the SBP is generally automatic; servicemembers who are married or have a child when they become eligible for retirement pay also become SBP participants [unless they opt out](#). The [standard](#) (and maximum) monthly SBP benefit is “equal to 55 percent of the base amount” of the servicemember's monthly retirement pay. A surviving spouse's SBP eligibility [terminates](#) upon his or her death or remarriage, unless the surviving spouse is age 55 or older at the time of remarriage. A surviving child's eligibility [generally](#) terminates when he or she turns 18, or 22 if a full-time student.

At the end of 2001, Congress [extended SBP eligibility](#) to surviving spouses of active-duty servicemembers who died in the [line of duty](#), even if the servicemembers were not yet eligible for retirement pay (the bill was retroactively effective to [September 10, 2001](#), the day prior to the terrorist attacks targeting the Pentagon and other locations).

The SBP offers benefits similar in many ways to those offered to survivors of employees participating in non-military retirement plans. For example, the Federal Employee Retirement System (FERS) [provides](#) a monthly [annuity](#) to surviving spouses of federal employees based on the deceased employees' creditable service. Similarly, the Employee Retirement Income Security Act (ERISA) [requires](#) private companies to provide annuity benefits to the survivors of participants in certain types of retirement plans.

More detailed information about the SBP—including facts about program size, participation rates, and costs—can be found in this [CRS Report](#).

Dependent Indemnity Compensation

Under the [Feres doctrine](#), servicemembers and survivors generally may not sue United States for civil remedies related to injuries or death from military service. But some form of financial compensation has been paid to survivors of servicemembers who died on active duty, during training, or from service-connected disabilities [since](#) the Revolutionary War.

Rather than being calculated as a percentage of the deceased servicemember's pay entitlement (as with SBP), since 1993 the DIC has been a [flat basic rate](#), with certain additional allowances based on, for example, number of dependent children. As of December 2018, that [basic rate](#) was [\\$1,319.04](#) per month. DIC claims are processed and paid [by the VA](#).

[Until 2004](#), a surviving spouse's remarriage (at any age) ended DIC eligibility. With the Veterans Benefits Act of 2003, Congress made an [exception](#) for surviving spouses who remarry after reaching the age of 57.

In 2010, Congress [extended](#) DIC benefits to survivors of certain servicemembers who were 100% disabled due to service-connected disabilities, even if their deaths were not caused by those disabilities.

The SBP-DIC Offset for Surviving Spouses

By law, a surviving spouse's SBP benefit currently is “[offset](#)” dollar-for-dollar by the amount of any DIC he or she receives from the VA:

- (1) REQUIRED OFFSET.—If, upon the death of a person to whom section 1448 of this title applies, the surviving spouse or former spouse of that person is also entitled to dependency and indemnity

compensation under section 1311(a) of title 38, the surviving spouse or former spouse may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.

As is clear from the language, the offset applies only to surviving spouses, not to other recipients of SBP, such as surviving dependent children. As a result, this offset is [sometimes referred](#) to as the “widows’ tax,” although offsets may more accurately be described as reductions in paid benefits rather than taxes.

[Some](#) have justified this particular offset by comparing it to laws prohibiting “[double dipping](#),” or collecting federal funds from two sources for the same purpose (such as billing two federal agencies for the same work). Other observers may characterize this offset as somewhat consistent with federal practices in other non-military contexts, where benefit entitlements can have complex interactions. For example, one’s own [Social Security](#) entitlement may prevent one from collecting benefits based on status as someone else’s dependent. On the other hand, one may receive [both](#) a FERS annuity and Social Security dependent benefits, and private pension annuities are generally independent of any life insurance or other indemnity payments. In the military context, which may be more closely analogous to the situation of surviving spouses, retired veterans with a disability rating of 50 percent or more [currently](#) receive [both](#) retired pay from the DOD and disability payments from the VA, which arguably means that military retirement and disability are treated as separate entitlements, at least to some extent. The question of whether that should change when those payments are received by the surviving spouse rather than the veteran may be open to debate.

The other primary obstacle to eliminating the offset appears to be cost: in 2009, the Congressional Budget Office [estimated](#) that ending the offset would cost approximately \$7 billion over ten years, though a revised estimate is anticipated shortly. Unless waived, restrictions like the Senate’s [pay-as-you-go rules](#) could mean that equal spending cuts would need to be identified before the expense of eliminating the offset could be incurred.

Effect of Surviving Spouse Remarriage on Applicability of the Offset

As noted above, surviving spouses who remarry before age 55 lose SBP eligibility, while surviving spouses who remarry before age 57 lose DIC eligibility. However, [the law](#) that restored DIC eligibility to surviving spouses who remarry *after* age 57—38 U.S.C. § 1311(e)—contained [language](#) that appeared to [contradict](#) the SBP offset provision: “notwithstanding any other provision of law . . . no reduction in benefits under such other provision of law shall be made by reason of such individual’s eligibility for benefits under this section.” The Department of Defense, arguing that § 1311(e) [did not apply](#) to the SBP offset and that Congress [did not intend](#) otherwise, nonetheless [continued to apply](#) the offset to surviving spouses who remarried after age 57. At least one court, [describing](#) the matter as “a close question of statutory interpretation,” acknowledged the government’s argument that prohibiting the offset only for surviving spouses who remarried after age 57 seemed “arbitrarily disparate” and “arguably unreasonable.” But in *Sharp v. United States*, the Court of Appeals for the Federal Circuit determined that DOD’s interpretation was ultimately unlawful. As that court [put it](#):

Perhaps Congress intended to encourage marriage for older surviving spouses. Perhaps section 1311(e) simply represents a first step in an effort to eventually enact full repeal. After all, the servicemember paid for both benefits: SBP with premiums; DIC with his life. Whatever the reason, the government has failed to make the “extraordinary showing of [Congress’] contrary intentions” that would permit this court to construe section 1311(e) in a way that eviscerates its plain language.

As a result, surviving spouses who remarry before age 55 receive neither SBP nor DIC; surviving spouses who remarry between the ages of 55 and 57 receive SBP but not DIC; surviving spouses who never remarry receive SBP subject to the offset of whatever DIC they receive; and surviving spouses who

remarry after age 57 receive both SBP and DIC in full. The various legislation that resulted in this state of affairs remains in place today.

Prior Measures to Address the Offset

Congress [provided an option in 2003](#) for surviving spouses of active-duty servicemembers to transfer SBP benefits to surviving dependent children, if the spouses are either ineligible for SBP or “determine[] it appropriate” to make the transfer. As noted above, the benefit entitlement of children is [not the same](#) as a spouse’s lifetime-or remarriage entitlement, which may shorten the term of the SBP annuity.

Beginning in 2009, Congress [created](#) the Special Survivor Indemnity Allowance (SSIA) to partially “offset the offset”—giving an additional \$50 per month to those whose SBP was offset by DIC, and gradually increasing the monthly SSIA amount to \$100 over several years. Additional increases were [later authorized](#), bringing the monthly SSIA amount to \$310 in 2017. Congress [permanently](#) authorized that SSIA along with annual cost-of-living adjustments in the FY2018 National Defense Authorization Act; for 2019, the maximum SSIA benefit is [\\$318](#) per month, with no adjustment for number of dependents. Accordingly, for a surviving spouse whose SBP is offset by the base amount of DIC ([\\$1,319.04](#)), the 2019 SSIA will functionally restore approximately 24% of the benefits that were subtracted by the offset.

Effects of the 2017 Tax Revision on Child SBP Recipients

The so-called “kiddie tax,” which originated in 1986, seeks to prevent parents from taking advantage of children’s typically lower tax rates by simply transferring money into accounts in the children’s names. Explained in more detail [here](#), the kiddie tax generally applies to a child’s [unearned income](#)—that is, income from sources like interest, dividends, and SBP rather than income from wages or payments for services.

As noted above, because only surviving spouses are subject to the SBP-DIC offset, a servicemember or surviving spouse may designate a minor child as the SBP beneficiary so the family can—through the child—receive full SBP benefits for at least a limited time after the servicemember’s death. The kiddie tax is therefore relevant to many families of deceased servicemembers, and changes made by the [2017 tax revision](#) affected many child SBP recipients and their families.

Prior to 2018, a child’s unearned income was [taxed](#) at the child’s tax rate (often 10%) up to a certain threshold, then at the parents’ tax rate if that rate was higher. Under the [new rules](#) established by the 2017 tax revision (which remain in effect until 2025), children’s unearned income above the threshold is now taxed at the rates applicable to trusts and estates. Although both income taxes and trusts-and-estates taxes have the same 37% maximum rate, the highest tax rates kick in much [sooner](#) for trusts and estates taxes. For example, in 2019, a married couple filing jointly will hit the top income tax bracket of 37% once their taxable earnings exceed [\\$612,350](#), but the 37% tax bracket will apply to taxable trusts and estates income of just [\\$12,750](#). Thus, classifying SBP payments to children as unearned income taxed at trusts and estates levels led to substantially higher tax burdens for [some](#) families receiving SBP.

Proposed Legislation and Options for Congress

[H.R. 553](#), the Military Surviving Spouses Equity Act, and [S. 622](#), the Military Widow’s Tax Elimination Act of 2019, are nearly identical bills that would, if enacted, eliminate the SBP-DIC offset. Both bills effectively repeal the offset by striking the provisions in [10 U.S.C. §§ 1450\(c\) and 1451\(c\)](#) that require it.

[H.R. 553](#) would leave intact [§ 1450\(m\)](#), which establishes the SSIA (discussed above). This means the law would still provide for an SSIA payment in the event that an otherwise SBP-eligible surviving spouse’s eligibility “is affected by subsection (c) of this section”—but that subsection (c) is the offset

provision that would be stricken if H.R. 553 passes, seemingly leaving subsection (m) a [dead letter](#). S. 622 would strike § 1450(m) altogether, directly eliminating the SSIA.

Both bills contain a virtually identical set of additional revisions to eliminate other references to the offset. For example, both would strike subsection [1450\(e\)](#), which provides full or partial refunds of SBP premiums to surviving spouses whose SBP payment is reduced or eliminated by the offset, and subsection [1450\(k\)](#), which covers circumstances in which a surviving spouse subject to the offset subsequently loses DIC eligibility due to remarriage after the age of 55.

Both versions of the bill also specify that these changes would not entitle survivors to retroactive benefits; in other words, surviving spouses would not receive any compensation for the time during which the offset was applied. However, surviving spouses who previously received refunds of SBP premiums under subsection 1450(e) would not be required to return those refunds. Put differently, those surviving spouses who previously received full or partial refunds for the SBP premiums paid by deceased servicemembers could retain those refunds while also receiving future SBP payments, provided that they remain otherwise eligible for SBP—though the amount of refunded premiums may be smaller than the amount of SBP benefits that were not paid due to application of the offset.

Finally, both H.R. 553 and S. 622 would eliminate the option in [section 1448\(d\)\(2\)\(B\)](#) for an otherwise-eligible surviving spouse to designate a child beneficiary for SBP payments. The bills would then restore SBP eligibility to surviving spouses who previously designated child beneficiaries—even if the child’s entitlement has expired—as long as the surviving spouses continue to meet remaining eligibility requirements. For survivors who would have received full SBP payments but for the offset, this would ameliorate the “kiddie tax” issue going forward, because those benefits would now be paid to the parent and taxed at the parent’s rate. However, surviving spouses who were ineligible for SBP for other reasons (such as remarriage) would still face the increased tax burden on any SBP payments to their children. In other words, eliminating the offset would also eliminate the financial burden of the kiddie tax changes for surviving spouses who would begin receiving SBP instead of their children, but the burden would remain intact for children who continue to receive SBP.

Congress has also considered passing bills that address the “kiddie tax” issue separately and directly. For example, the Senate last month passed the Gold Star Family Tax Relief Act, [S. 1370](#), which defines SBP payments to a child as “earned income” for that child (to be taxed at the same rate as, for example, any wages the child earned), instead of as “unearned income” that is subject to the “kiddie tax.” If enacted, the bill would apply retroactively to taxable years beginning after December 31, 2017, meaning families who owed increased taxes due to SBP benefits received in 2018 could file amended returns to take advantage of lower tax rates. Taking a slightly different tack, the House passed the Setting Every Community Up For Retirement Enhancement (SECURE) Act of 2019, [H.R. 1994](#), which would simply repeal the 2017 tax revision’s changes to the kiddie tax.