

2017 National Defense Authorization Act and USFSPA

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Pro bono education with Attorneys and Clients

Biggest Asset of Divorce Proceedings

- This presentation is only about **asset division** of military retirement, which comes from a Federally mandated formula:

$$monthly\ retirement\ check = 2.5\% * base\ pay * years\ of\ service$$



BASIC PAY—EFFECTIVE JANUARY 1, 2009																
Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18	Over 20	Over 22	Over 24	Over 26	Over 28
O-10 ²												14,688.60	14,760.30	15,067.20	15,602.10	15,602.10
O-9												12,846.90	13,032.00	13,299.30	13,765.80	13,765.80
O-8	9,090.00	9,387.60	9,585.30	9,640.50	9,867.10	10,299.00	10,395.00	10,786.20	10,896.10	11,235.30	11,722.50	12,172.20	12,472.50	12,472.50	12,472.50	12,472.50
O-7	7,553.10	7,904.10	8,066.40	8,195.40	8,429.10	8,660.10	8,926.80	9,192.90	9,460.20	10,299.00	11,007.30	11,007.30	11,007.30	11,007.30	11,063.10	11,063.10
O-6	5,598.30	6,150.30	6,553.80	6,553.80	6,578.70	6,860.70	6,897.90	6,897.90	7,290.00	7,983.30	8,390.10	8,796.60	9,027.90	9,262.20	9,716.70	9,716.70
O-5	4,666.80	5,257.20	5,621.40	5,689.80	5,916.60	6,052.80	6,351.60	6,570.60	6,853.80	7,287.30	7,493.40	7,697.40	7,928.70	7,928.70	7,928.70	7,928.70
O-4	4,026.90	4,661.40	4,972.20	5,041.80	5,330.40	5,640.00	6,025.20	6,325.50	6,534.30	6,654.00	6,723.30	6,723.30	6,723.30	6,723.30	6,723.30	6,723.30

- For a Reserve military retirement, “years of service” is points/360
- Big money! For a 20-yr LtCol, 420 months of 2.5% * \$8617 * 20 = **\$1,809,570.00**

Chronology of Military Retirement Division

The 2017 NDAA makes the biggest change to military divorce law since 1982. You want to understand it.

Up to 1981 – military retirement was reduced pay for reduced services, belonging only to the military member. The US Supreme Court confirmed it was not divisible in *McCarty v. McCarty*, 453 U.S. 210.

1982 – USFSPA 10 U.S.C. 1408 law says States may divide military retirement, but are not required to. Military member must not be left with less than half from the asset division. DFAS implements the law by requiring one of TWO methods: either fixed dollar division or %-age based division.

2001 – DOD Congressional report to Armed Services Committees recommends benefit to ex-spouse should be proportional to time and promotion status during marriage overlapping the military career.

2017 – NDAA requires division (if done) to be done proportional to pay grade and years of service at time of divorce. Calculated correctly, **nothing either spouse does after divorce should make the marital asset go up or down in constant year dollars** (COLA is given). A time-only coverture fraction fails this litmus test.

Transition to Today

- 2017 NDAA culmination of... (2001 DOD report, 2005 FL, 2009 MI, 2012 OK, 2013 PA)
- QDRO and “experts” claim that implementation is chaotic – this misleads many
- Lack of special knowledge yields bad results. Both sides throw chaff and confusion.
- To spread clarity, I started publishing technical specialized web pages, spreadsheet tools, white papers, case analysis.
- Research yielded a universal, plug-n-play method, enabled by a critical insight.
- Critical insight is now implementable with Federal NDAA 2017 mandate; it's no longer theoretical or narrow jurisdiction.

2017 NDAA

Senate Bill (S 2943 Sec 642)

“In calculating the total monthly retired pay to which a member is entitled for purposes of subparagraph (A), the following shall be used:

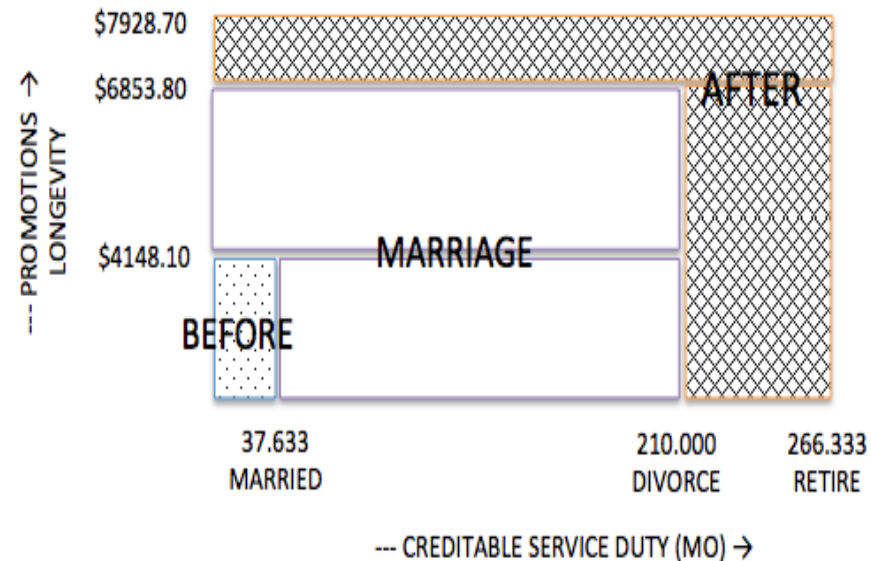
- (i) The member’s pay grade and years of service at the time of the court order.
- (ii) The amount of pay that is payable at the time of the member’s retirement to a member in the member’s pay grade and years of service as fixed pursuant to clause (i).”

- This changes the definition of “disposable retired pay” in 10 USC 1408(a)(4).
- The spousal benefit is not fixed. It is a DOD 7000.14 Vol 7b Ch 29 290601(C) percentage-based division.

2017 NDAA House Bill (HR 4909 Sec 625)

“[member entitlement] is to be determined using the member’s pay grade and years of service at the *time of the court order*, rather than the member’s pay grade and years of service at the *time of retirement*, unless the same”

- This changes the definition of “disposable retired pay”.
- The spousal benefit is not fixed. It is a DOD 7000.14 Vol 7b Ch 29 290601(C) percentage-based division.



2017 NDAA Reconciled Version

SEC. 641. USE OF MEMBER'S CURRENT PAY GRADE AND YEARS OF SERVICE AND RETIRED PAY COST-OF-LIVING ADJUSTMENTS, RATHER THAN FINAL RETIREMENT PAY GRADE AND YEARS OF SERVICE, IN A DIVISION OF PROPERTY INVOLVING DISPOSABLE RETIRED PAY.

(a) *IN GENERAL.*—Section 1408(a)(4) of title 10, United States Code, is amended—

(1) by redesignating subparagraphs (A), (B), (C), (D) as clauses (i), (ii), (iii), (iv), respectively;

(2) by inserting “(A)” after “(4)”;

(3) in subparagraph (A), as designated by paragraph (2), by inserting “(as determined pursuant to subparagraph (B))” after “member is entitled”; and

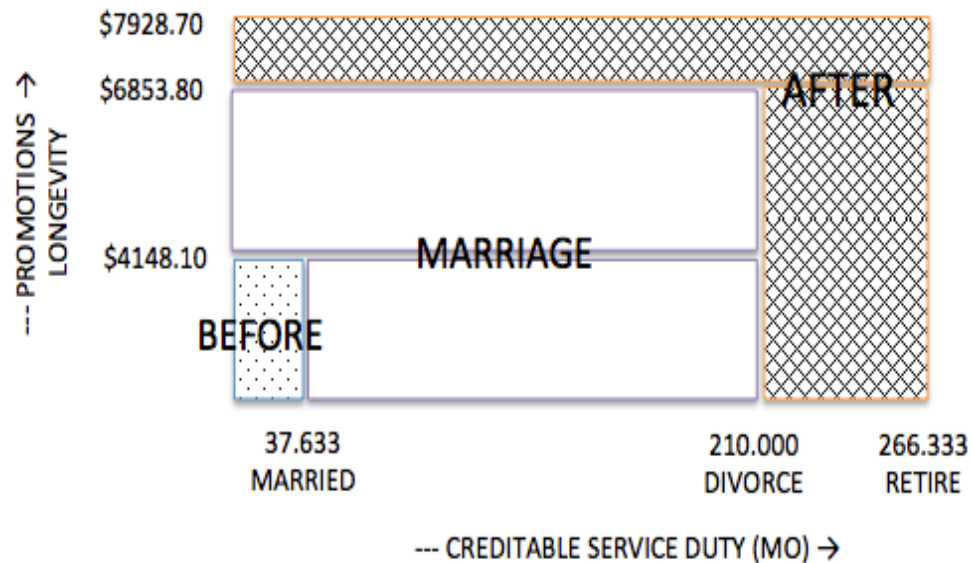
(4) by adding at the end the following new subparagraph:

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

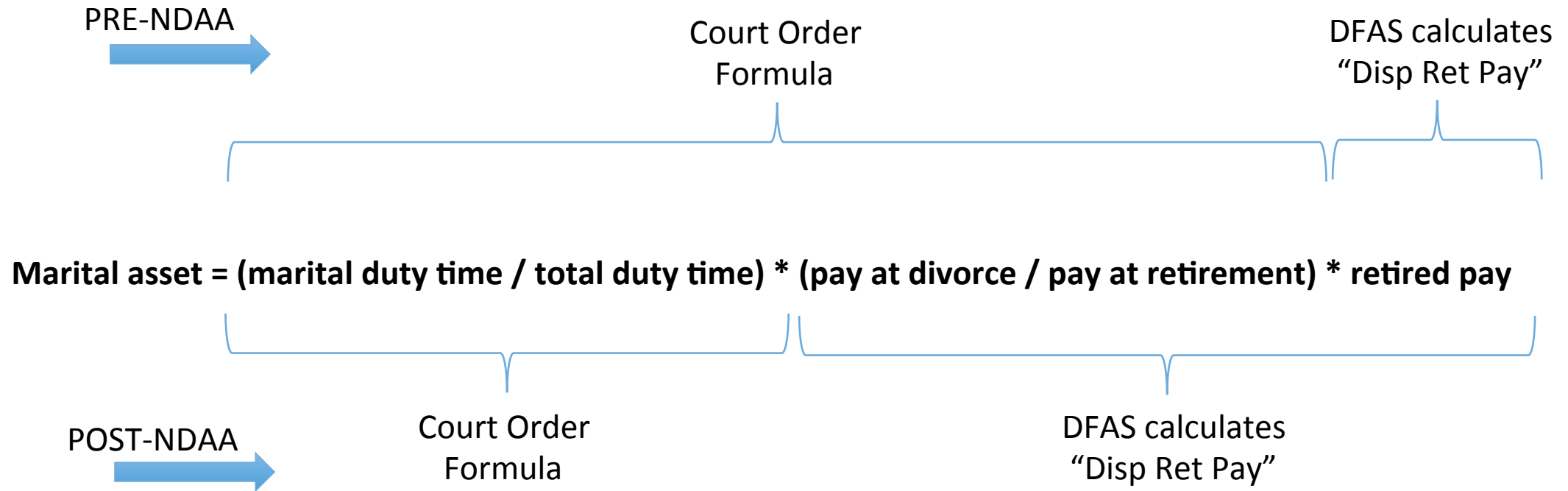
“(i) the amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order, as increased by

“(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.”.

(b) *APPLICATION OF AMENDMENTS.*—The amendments made by subsection (a) shall apply with respect to any division of property as part of a final decree of divorce, dissolution, annulment, or legal separation involving a member of the Armed Forces to which section 1408 of title 10, United States Code, applies that becomes final after the date of the enactment of this Act.



2017 NDAA amendment to USFSPA



In order to ensure equity, congress mandates the second fraction be included in the definition of "Disposable Retired Pay". Pay numbers come from the *same year* pay chart.

2017 NDAA amendment to USFSPA

- A new definition of Disposable Retired Pay (DRP) will be used by DFAS for orders 23 Dec 2016 ff.
- Disposable Retired Pay mandatory for all percentage-based methods. DOD 7000.14-R Vol 7B Ch 29, 290601(D)
- The new definition has the second coverture fraction (longevity and rank) “built into” the definition of DRP.

BASIC PAY—EFFECTIVE JANUARY 1, 2009

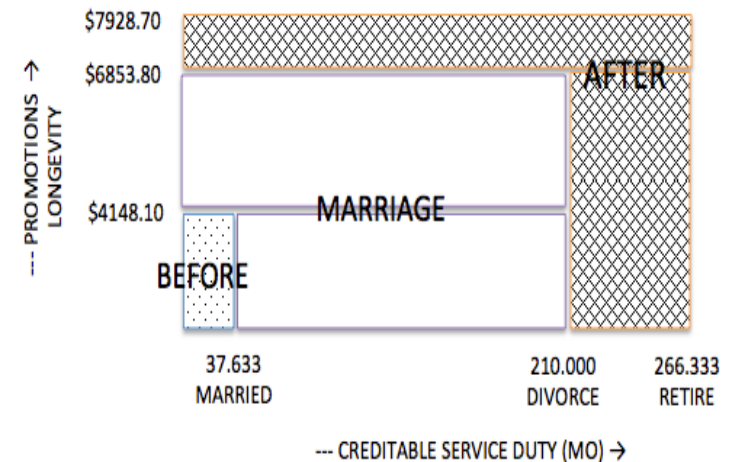
Pay Grade	O-1	O-2	O-3	O-4	O-5	O-6	O-7	O-8	O-9	O-10	O-11	O-12	O-13	O-14	O-15
O-1															
O-2															
O-3															
O-4															
O-5															
O-6															
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O-15															

- For the second fraction: Pay is taken off the **SAME year pay chart**
- The same second fraction can be obtained with a Hypothetical Method, but that is more complicated and confusing and gives unequal COLA.

Misguided Push Back

Some argue against the intent of Congress, claiming post-divorce promotions are “based on” prior marriage years, so the promotion enhancement after divorce (hashed part above the white part in the diagram) should also be divided. Rebuttals follow...

- “based on” is legally undefined and connotative. For accuracy, use “accrued during”, “earned during”, “calculated from”
- Historically, vague “based on” has been unilaterally against military members, therefore intrinsic unequal treatment.
- Example Case#1 - Write a book based on prior military career? Royalties are not divisible.
- Example Case#2 - Get a civilian pilot job based on military pilot training? Civilian retirement is not divisible.
- *Passive* earnings after divorce are divisible (delayed distribution from a bank), but *active* earnings are not
- Visual diagram: Inconsistent to claim hashed part is “based on” white part, but white isn’t “based on” the dotted part.
- FUD (Fear of the Unknown and Deception) arguments inappropriate.
- Everything today is “based on” yesterday. Moot point.



Correcting Bad Counsel on the Street

- The marital asset **is not a fixed benefit division** and does not fit the definition of a DFAS fixed-based method. The method is a DFAS **percentage based** method. BIG implications.
- **COLA is automatically awarded equally to both parties**, using the increases in military pay charts each year. Dual Coverture method gives the same result as the DFAS Hypothetical Method. Messy HM assigns military pay chart COLA to the military member and requires commercial COLA be accumulated and backed into the calculation for the ex-spouse.
- The ABA takes a position that the Federal government has no business invading into State divorce law ...while simultaneously supporting the 1982 USFSPA law, which is the most invasive divorce law on the books. **Support Federal standardization or not, but not both.**

Common Method since 1982

Single coverture fraction is okay when no promotion:

$$\textit{marital asset} = \textit{disposable retired pay} * (\textit{marital duty time} / \textit{total duty time})$$

Example: If the retirement check was \$3298 in 2016 dollars, and 4700 duty points (156.667 mo) were accrued during the marriage and 5500 duty points (183.333 mo) were accrued during the entire military career,

Marital asset would be $\$3298 * (4700/5500) = \text{\$2818.29}$ in 2016 dollars. Spouse gets nominally 50% (\$1409.15) each month in 2016 dollars (+COLA each year).

REMEMBER for comparison later

Litmus test? Yes. **Any military duty done after the divorce precisely does not change the marital asset up or down in constant year dollars.** Increase retirement check exactly offsets increased denominator. Active Duty use months; Reservists use retirement points/30.

Common Method Fails

Litmus test – “Division is calculated so that nothing either spouse does after the divorce makes the marital asset go up or down in constant year dollars.”

Common method single coverture fraction fails when [promotions after divorce are involved](#):

Example Fail: If the retirement check was \$3298 at divorce rank/longevity and \$5000 at retirement due to promotions (both numbers from 2016 pay chart), and 4700 duty points (156.667 mo) were accrued during the marriage and 5500 duty points (183.333 mo) were accrued during the entire military career,

Marital asset calculated from a single coverture fraction would be $\$5000 * (4700/5500) = \4272.72 in 2016 dollars. This is a **51.6% inequitable windfall** (compared to **\$2818.29**) to the ex-spouse. “Windfall” is accurate because ex-spouse did not contribute to earning a promotion after the divorce. → **Fails litmus test.**

Note the promotion enhancement doesn’t fully manifest until 3 years after the promotion.

New NDAA Method – works

Example: If the retirement check was \$3298 at divorce rank/longevity and \$5000 at retirement due to promotions (both numbers from 2016 pay chart), and 4700 duty points (156.667 mo) were accrued during the marriage and 5500 duty points (183.333 mo) were accrued during the entire military career,

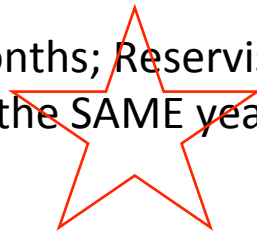
Marital asset would be $\$5000 * (4700/5500) * (3298/5000) = \2818.29 in 2016 dollars.
Spouse gets nominally 50% (\$1409.15) each month in 2016 dollars (+COLA each year).
Exact match to prior method. → **Passes litmus test.**

New 2017 NDAA Method for old orders

Dual Coverture fractions are still required when [promotions outside of marriage are involved](#) for pre-NDAA divorces. Same math, just name the second fraction in the divorce order.

Coverture = ½ * (marital duty time / total duty time) * (pay at divorce / pay at retirement)

- For the first fraction: Active Duty use months; Reservists use retirement points.
- For the second fraction: Pay is taken off the SAME year's [pay chart](#)



BASIC PAY—EFFECTIVE JANUARY 1, 2009														
Pay Grade	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11	Year 12	Year 13	Year 14
O-1														
O-2														
O-3														
O-4	\$3,905.00	\$4,387.00	\$4,869.00	\$5,351.00	\$5,833.00	\$6,315.00	\$6,797.00	\$7,279.00	\$7,761.00	\$8,243.00	\$8,725.00	\$9,207.00	\$9,689.00	\$10,171.00
O-5	\$4,753.00	\$5,235.00	\$5,717.00	\$6,199.00	\$6,681.00	\$7,163.00	\$7,645.00	\$8,127.00	\$8,609.00	\$9,091.00	\$9,573.00	\$10,055.00	\$10,537.00	\$11,019.00
O-6	\$5,601.00	\$6,083.00	\$6,565.00	\$7,047.00	\$7,529.00	\$8,011.00	\$8,493.00	\$8,975.00	\$9,457.00	\$9,939.00	\$10,421.00	\$10,903.00	\$11,385.00	\$11,867.00
O-7	\$6,449.00	\$6,931.00	\$7,413.00	\$7,895.00	\$8,377.00	\$8,859.00	\$9,341.00	\$9,823.00	\$10,305.00	\$10,787.00	\$11,269.00	\$11,751.00	\$12,233.00	\$12,715.00
O-8	\$7,297.00	\$7,779.00	\$8,261.00	\$8,743.00	\$9,225.00	\$9,707.00	\$10,189.00	\$10,671.00	\$11,153.00	\$11,635.00	\$12,117.00	\$12,599.00	\$13,081.00	\$13,563.00
O-9	\$8,145.00	\$8,627.00	\$9,109.00	\$9,591.00	\$10,073.00	\$10,555.00	\$11,037.00	\$11,519.00	\$12,001.00	\$12,483.00	\$12,965.00	\$13,447.00	\$13,929.00	\$14,411.00
O-10	\$9,000.00	\$9,482.00	\$9,964.00	\$10,446.00	\$10,928.00	\$11,410.00	\$11,892.00	\$12,374.00	\$12,856.00	\$13,338.00	\$13,820.00	\$14,302.00	\$14,784.00	\$15,266.00

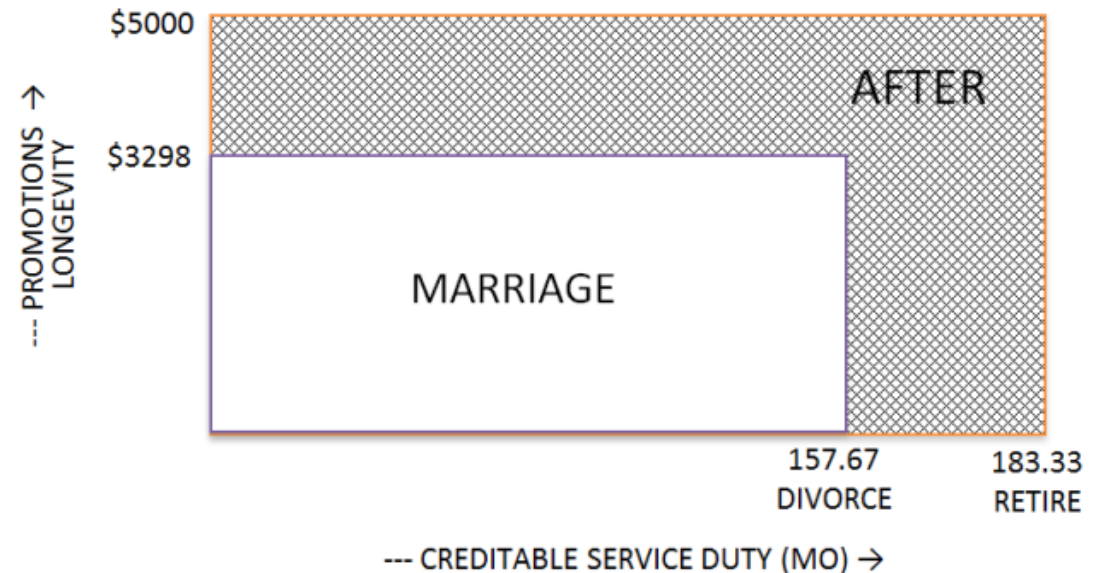
- [Dual Coverture Spreadsheet Calculator](#) is available to automate your calculations.

Legal Language 1 – to mimic NDAA

[Sample language for court order](#) (to duplicate NDAA behavior for older divorces) :

"The former spouse is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying **50%** times two fractions, the first numerator of which is **157.7** mo, and the first denominator of which is the total number of months of retirement creditable service, and the second numerator is the base pay of a **14 year O-4 rank**, and the second denominator is the base pay of the member years and rank upon retirement. Both base pay amounts are to be taken from the SAME year military chart. If a Reserve retirement is obtained, duty months = points/30."

Note the diagram shows retirement numbers which cannot be quantified in the division order, because they are unknown at time of divorce.



Legal Language 2 – to mimic NDAA

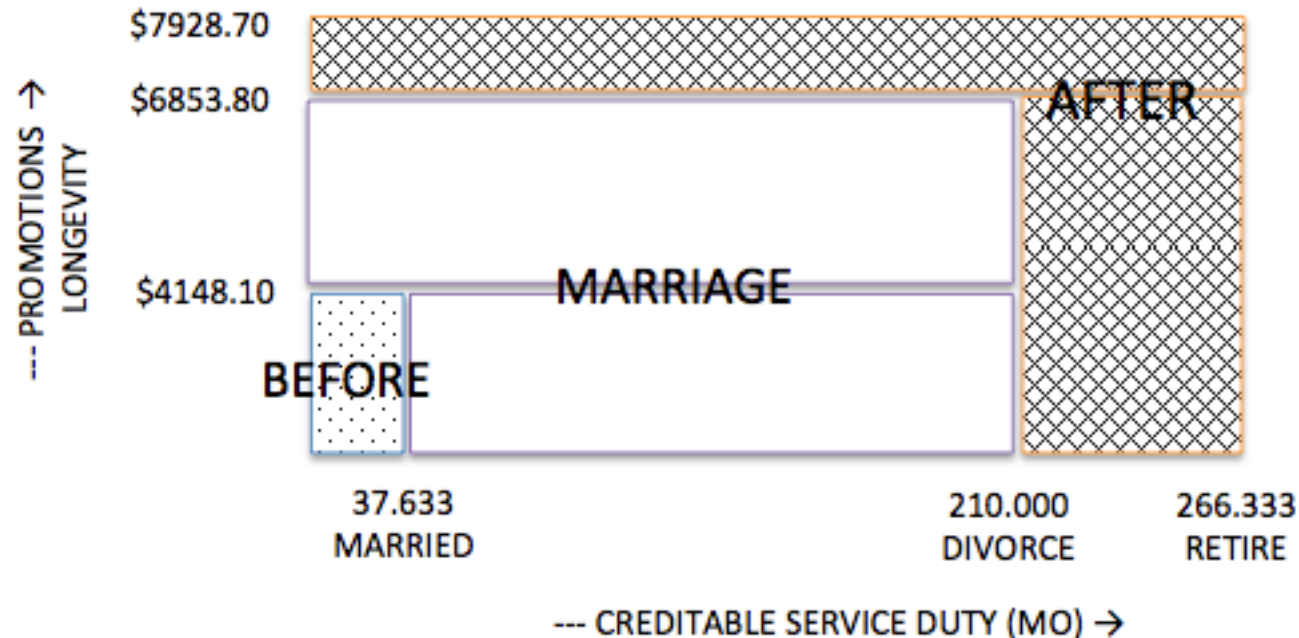
[Sample language for court order](#) (to duplicate NDAA behavior for older divorces):

“The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying **50%** times a Coverture Fraction. The Coverture Fraction numerator is **519996**. The Coverture Fraction denominator is member’s total number of retirement duty months times basepay at time of retirement. Basepay values for this formula will be looked up on the **2009** year pay chart. If a Reserve retirement is obtained, duty months = points/30.”

Combines two numerators ahead of time as shown [in AM Practicum](#). More versatile for multiple marriages or military time before marriage.

Looking Forward Next 10 Years

- The NDAA change is long overdue 16 years after it was recommended to Congress
- [Dual Coverture method](#) is a subset (simplification) of the [Area Method](#). See [Area method Practicum](#). NDAA allows either.
- [Dual Coverture Value Area Method is the “mother lode”](#) – [capable of any combination](#) of life situations, multiple spouses, Reserve or Active duty, [Early Reserve retirement](#), intermittent career, military before marriage, etc.



Summary

- 2017 NDAA can be easily implemented; don't be miffed or stymied.
- Retirement is 2 factors on the pay charts, therefore 2 coverture fractions.
- After law's implementation, 2nd coverture fraction happens automatically by DFAS. Before law's implementation or if DFAS will not calculate payment, division order must spell out 2nd coverture fraction.
- DFAS percentage method, not a DFAS fixed-benefit method.

Research Continually Updated

- <https://www.facebook.com/military.divorce.retirement.division/>
- [Reserve Military](#) specialty!
- Authored dozens of web pages and documents – publicly available
- Understanding has yielded good mediation and avoids litigation
- Pro-bono case analysis and education with attorneys or clients
- Contact information