THE 1990 U.S.F.S.P.A. AMENDMENT: NO BAR TO RECOGNITION OF TENANCY IN COMMON INTERESTS CREATED BY PRE-McCARTY DIVORCES THAT FAIL TO DIVIDE MILITARY RETIREMENT BENEFITS

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I. INTRODUCTION

In 1981 the United States Supreme Court held in McCarty v. McCarty1 that due to federal pre-emption, state divorce courts in commu-

nity property states could not classify as community property retirement pay to be received in the future, if it was earned during a spouse’s participation in the United States armed services. Such future benefits had to be treated in the division of property as separate property of the member or former member of the military. To overturn most effects of the McCarty decision, Congress in 1982 passed the Uniform Services Former Spouses Protection Act (USFSPA). The Act provided it was retroactive to June 25, 1981, the day prior to the McCarty decision.


There is, likewise, unanimity that McCarty has no effect on a pre-McCarty decree that granted a portion of future military retired pay to the member’s ex-spouse. Those states that view USFSPA as fully retroactive despite its effective date clause cite that act as a basis for their decisions, while other states rely on general principles of finality of judgments. See Wilson v. Wilson, 667 F.2d 497 (5th Cir. 1982) (Texas divorce decree); Erspan v. Badgett, 659 F.2d 26 (5th Cir. 1981) (Texas divorce decree); Rodriguez v. Rodriguez, 649 P.2d 290 (Ariz. 1982), aff’d 649 P.2d 291 (Ariz. Ct. App. 1982); Marriage of Sheldon, 177 Cal. Rptr. 380 (Cal. Ct. App. 1981); Marriage of Jacanin, 177 Cal. Rptr. 86 (Cal. App. 1981); Marriage of Mahone, 176 Cal. Rptr. 274 (Cal. App. 1981); Rose v. Rose, 483
Most of the community property states\textsuperscript{8} which have considered the question have concluded that, where USFSPA's jurisdictional prerequisites were met,\textsuperscript{6} the Act authorized their courts to resolve disputes of military retired pay between parties divorced before \textit{McCarty} as if that decision had never been rendered.\textsuperscript{7} Under state law, if neither the divorce decree nor a property settlement agreement inci-


The rule that even an error of constitutional magnitude does not open up a domestic relations final decree to collateral attack has been applied in many settings. \textit{See} Toupal v. Toupal, 790 P.2d 1055 (N.M. Ct. App. 1990) (\textit{Mansell} decision established 1977 divorce decree dividing military disability pay was unconstitutional but no collateral attack allowed). \textit{See also} Godoy v. Gullotta, 406 F. Supp. 692 (S.D.N.Y. 1975). There a New York court had awarded the wife $1000 in attorneys' fees under a statute providing only females could receive an attorney's fees award at divorce. On appeal to the Appellate Division the husband purported to reserve all federal constitutional issues. His later Civil Rights Act suit attacking the New York statute for obvious unconstitutional sex discrimination (\textit{see} Reed v. Reed, 404 U.S. 71 (1971)) was dismissed on issue preclusion grounds because the constitutional attack could have been made in the divorce action. \textit{Cf.} Marshall v. Board of Educ., 575 F.2d 417 (3d Cir. 1978) (no collateral attack on decree ordering overtime wages for municipal employees based on overruling of \textit{National League of Cities} after judgment final).

5. Wisconsin did not become a community property jurisdiction until 1986. Its pre-
\textit{McCarty} decisions involving Wisconsin domiciliaries do not involve community property jurisprudence. All future references to "community property states" in this article are to the eight that at the time of \textit{McCarty} had legal community regimes.

6. Under USFSPA a state court has jurisdiction to treat military retirement pay as community property if the defendant spouse consents to the jurisdiction of the court, is a domiciliary of the forum state, or is a resident there for reasons other than military assignment. 10 U.S.C. § 1408(c)(4) (Supp. III 1992). \textit{See, e.g.}, Southern v. Glenn, 677 S.W.2d 576 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

dent to divorce dealt with an asset that was community property, including the community interest in future retirement pay, the ex-spouses became owners of it as tenants in common. If at any time after such a divorce the military member was to inquire of an attorney about ownership of the military pension, he would have been advised of the co-equal interest of the ex-spouse. The unadjudicated property interest would be, depending upon the community property state, divisible in a future action under the same principles applicable at divorce or subject to a 50-50 division in a partition suit like any other

8. See Henn v. Henn, 605 P.2d 10 (Cal. 1980) (the leading case); Chirmside v. Board of Admin., 191 Cal. Rptr. 605, 609 (Ct. App. 1983) (rule applicable if no property adjudication at divorce or if some but not all assets dealt with); Marriage of Elkins, 105 Cal. Rptr. 59 (Ct. App. 1972); Godey v. Godey, 39 Cal. 157 (1870); Anderson, 520 So. 2d at 1239; Moreau, 457 So. 2d at 1288 (military retirement pay, notwithstanding provision in settlement contract stating each spouse discharged other from all community property claims); Williams v. Waldman, 836 P.2d 614 (Nev. 1992); Amie v. Amie, 786 P.2d 233 (Nev. 1990); Harris v. Harris, 493 P.2d 407 (N.M. 1972); Jones v. Tate, 360 P.2d 920 (N.M. 1961); Estate of Miller, 100 P.2d 908 (N.M. 1940); Bankston, 612 S.W.2d at 217, overruled on other grounds by Berry v. Berry, 647 S.W.2d 945 (Tex. 1983); Matthews, 576 S.W.2d at 883 (military retirement pay); Yeats, 580 P.2d at 619; de Carteret v. de Carteret, 615 P.2d 513 (Wash. Ct. App. 1980) (unadjudicated teacher's retirement pay).

In Louisiana at the time of McCarty and USFSPA such nonmarital co-ownership was called ownership in indistinction, but now, due to enactment in 1990 of article 2369.1 of the Louisiana Civil Code it is simply called "co-ownership." Frazier v. Harper, 600 So. 2d 59, 61 (La. 1992).

9. Ariz. Rev. Stat. Ann. § 25-318(A) (1991) (Arizona court that in prior action lacked jurisdiction to divide property, e.g., because of no in personam jurisdiction over a spouse, on obtaining such jurisdiction shall divide property held in common equitably as at divorce); Id. § 25-318(B) (same where court did have jurisdiction but failed to divide a community asset so that it was converted into tenancy in common); Cal. Fam. Code § 2556 (operative Jan. 1, 1994) (current code in effect is Cal. Civ. Code § 4353 (West Supp. 1993) (enacted 1989)) (divorce action may be reopened to divide "community property" not previously adjudicated in the action; division shall be equal as at divorce "unless the court finds upon good cause shown that the interests of justice require an unequal division . . ."); Tex. Fam. Code Ann. § 3.91 (Vernon 1993) (enacted 1987) (if divorce court of Texas or other state failed to exercise jurisdiction to divide community or quasi-community property, Texas court may divide equitably (as at divorce) or if divorce was out of state apply that state's division law); Id. § 3.92 (same where original divorce court lacked jurisdiction to divide asset but Texas court later acquired such jurisdiction); Wash. Rev. Code Ann. § 26.09.080 (West Supp. 1993) (enacted in 1973 and amended in 1989) (where divorce court lacked jurisdiction in personam and in rem to divide asset, division may be equitable when jurisdiction is later obtained).

The Arizona and Washington statutes appear to be subject to the rule expressly stated in the Texas statute that the power to divide exists even though the divorce decree leaving an asset undivided was rendered out of state. The California statute addresses only the reopening of a California divorce decree. Most likely if the tenancy in common was created by failure to adjudicate in a divorce in another community property state, the sole remedy in California is a 50-50 division at a partition suit.
asset held by tenants in common. 10 Under these two theories, many retired members of the United States armed services who were divorced pre-McCarty by decrees silent concerning ownership of future military retired pay were ordered to recognize the co-ownership rights of their ex-spouses by paying them a share of benefits received. 11 In most community property states—certainly in California, Louisiana, New Mexico, Texas, and Washington—there is no apparent state law bar to continuing to entertain suits to deal with pension benefits unadjudicated in divorces granted before June 25, 1981. 12

Arizona was the only community property state where a court held, by a reported decision before the 1990 USFSPA Amendment,

10. Such was the law of Texas and California at the time of McCarty and the enactment of the USFSPA. E.g., Henn, 605 P.2d at 13; Matthews, 576 S.W.2d at 883.

11. See cases cited supra note 7.

12. Idaho Code § 32-713A (Supp. 1992) provided that all relief in "gap" cases (see cases and discussion supra note 4) had to be sought in actions filed before July 1, 1988. Perhaps the Idaho legislature thought that USFSPA itself barred relief where the divorce was pre-McCarty. The Idaho courts could possibly construe the section as applying to pre-McCarty divorces as well if the interpretation of USFSPA urged in this article is adopted so that USFSPA itself does not bar relief in such cases. Or the statute can be literally applied so as not to bar the type of suit discussed in this article.

Subsection four of § 32-713A provided: "This section shall remain in effect until July 1, 1988, and on that date it is repealed and null and void." Taken literally, this means there is no longer a cutoff date in Idaho for bringing even "gap" case partition actions. Mosier v. Mosier, 830 P.2d 1175 (Idaho 1992), held that, at least while § 32-713A was in effect, relief in "gap" cases was limited to the actions specified in the statute. That the statute is now to be treated, however, as if it never existed (i.e., "null and void") and requires the Idaho courts to decide on the basis of common law if suits may now be brought to partition tenancy-in-common rights existing under pre-McCarty divorce decrees. There is dictum in Leatherman v. Leatherman, 833 P.2d 105, 107 (Idaho 1992), a "gap" case, that a statute such as § 32-713A is essential to avoid a res judicata bar to relief when the court actually treated the military retired pay solely as the separate property of the member due to McCarty.

Nevada Revised Statutes § 125.161 was enacted in 1987 to specifically allow post-divorce relief for decrees not dealing with military retired pay. The statute provided all such actions had to be brought by March 20, 1989. That statute was repealed in 1989, and the Nevada Supreme Court has said of that legislative action: "[I]t is apparent that the legislature intended to prevent all Nevada courts, including this court, from giving the benefit of the statutory partition of retirement proceeds to the nonmember spouses in any case that was still pending before the courts when the governor signed the act." Taylor v. Taylor, 775 P.2d 703, 704 (Nev. 1989). The Nevada Supreme Court neglected to consider language of the repealed statute, which stated that it did not impair any rights arising from a prior final judgment. Tenancy-in-common rights created by a pre-McCarty divorce silent on its face as to military retired pay would seem to be protected under the Nevada statute's savings clause. Perhaps Taylor will be overruled in a case that makes this contention. The general rule in Nevada is that a community property asset not dealt with at divorce becomes tenancy-in-common property subject to partition in an independent post-divorce action in equity. Amie v. Amie, 796 P.2d 233 (Nev. 1990).
that the USFSPA could not be applied to grant relief after a pre-
McCarty divorce had failed to deal with a community property interest in future military retirement benefits. The pertinent Arizona decision did not consider the constitutional problems that result from taking the non-member spouse’s property.13

Effective November 5, 1990, Congress amended USFSPA to provide as follows:

A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member’s spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member’s spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member’s spouse or former spouse.14

Intermediate appellate courts in California and Louisiana have held that this 1990 Amendment bars granting relief when a pre-McCarty divorce decree as a matter of law rather than by specific language converted the community interest from community property to tenancy-in-common property or its equivalent.15 Neither the Louisiana nor California court considered the argument, made by this article, that such a decree does “treat” the community interest even though it does not specifically refer to it. In my view “treat” should be given a broad

13. Kelly v. Kelly, 774 P.2d 226 (Ariz. Ct. App. 1989), conceded that under state law a 1977 divorce, silent as to the status of the community property interest in future military retirement benefits, created a tenancy in common in such property rights between the military member and his ex-spouse. The court held the ex-spouse’s property rights were “terminated” by the McCarty decision. Id. at 228. Although this obviously involved a taking of the spouse’s property rights by operation of law, the Fourteenth Amendment due process issue was not alluded to. As explained in part III of this article, such a taking is likely unconstitutional.

Compare Bryant v. Sullivan, 715 P.2d 282 (Ariz. Ct. App. 1985), where the pre-McCarty divorce entered by a California court was silent as to the rights in future military retired pay. After first applying McCarty to deny relief, the court granted a rehearing and accorded relief to the ex-spouse, declaring that California law governed the rights and obligations of the parties.


meaning—which would not require that the decree (or settlement agreement) mention the community interest in military retirement benefits—for two reasons: (1) the more persuasive part of the legislative history of the 1990 Amendment reveals that Congress was concerned with a reopening of pre-McCarty divorces that would work a taking in fact of the retired member's property rights in future retired pay rather than procedurally implementing ownership rights previously vested in the member's spouse; and (2) the narrow meaning requiring mention of the community interest creates serious constitutional problems of taking the property rights of the member's ex-spouse as well as a denial of equal protection. It is a settled maxim of statutory construction that, when one of two constructions raises substantial problems of unconstitutionality, the other construction is adopted.16

II. THE SCOPE OF THE 1990 AMENDMENT: DOES IT APPLY ONLY IN COMMUNITY PROPERTY STATES?

On one reading, the 1990 Amendment literally bars a court from granting relief to the ex-spouse of a member divorced pre-McCarty only if her theory is that she already is a co-owner of the military retirement benefits. The amendment can be read as barring post-divorce relief only if the remedy prayed for requires a finding by the court that an interest in retirement benefits is "the property of the member and the member's . . . former spouse."17 That is the situation in community property states where the pre-McCarty divorce converts the community interest into tenancy-in-common property. Such a narrow interpretation of the amendment would not bar a court in a common-law state with authority to re-open a decree from recognizing the member alone as owner of all the benefits while viewing his ex-spouse as equitably entitled to be awarded a share. It would not bar a Washington court that, in granting a divorce, was not apprised of the separate property interest of the member spouse (i.e., an interest earned before marriage) in military retirement benefits from reopening and granting the ex-spouse a share under the Washington rule that makes separate property as divisible at divorce as is community property.18 Nor would the narrow interpretation preclude a court in Texas under present


Texas law from opening a divorce action to divide a quasi-community property interest not dealt with in the pre-McCarty divorce.\textsuperscript{19}

Appellate courts in Alaska\textsuperscript{20} and Missouri\textsuperscript{21} have assumed that the 1990 Amendment applies in common-law jurisdictions and not just in community property states in situations where the theory for granting relief is that the moving party already has a co-ownership interest. The reported decisions do not reveal whether the literalist argument was presented, but each court reads the language as embracing "marital" property—that which is divisible at divorce although solely owned by one spouse. Under this theory, the 1990 Amendment applies when the member and ex-spouse become co-owners as a result of the treatment by the court granting post-divorce relief, rather than being co-owners prior to the granting of post divorce relief.

The interpretation of the Missouri and Alaska courts must be correct, because Congress would have no reason to grant protection only to divorced members in community property states. The narrow interpretation must also be rejected as raising serious equal protection problems. What could the rational basis be for cutting off the claim of the member's ex-spouse when the theory was that he or she already had become the owner of an interest, but allowing it to proceed when the theory was that the ex-spouse presently lacked an ownership interest but was equitably entitled to be granted an interest? I cannot imagine any.

I assume, then, the Alaska-Missouri interpretation is correct. If, instead, the narrower interpretation is, the thesis of this article collapses, since it asserts the exact opposite result: that Congress intended to bar a divesting of any share of the member's solely-owned interest under common law theory but not to bar the ex-spouse in an action seeking to recognize her already vested community property interest. Under my view that a pre-McCarty divorce "treats" a community interest in military retirement benefits by converting it into tenancy-in-common property, the 1990 Amendment could be inoperable unless it applied to the situation where the interest of the ex-spouse of the military member was first created in the action for post-divorce relief. Since in 1990 no community property state appeared to hold that an

\textsuperscript{19} Tex. Fam. Code Ann. §§ 3.91 & 3.92 (Vernon 1993); see cases supra note 10 and accompanying text.


unadjudicated asset retained its community status despite the divorce.\textsuperscript{22} Congress almost certainly did not have that situation in mind.

III. THE CHANGE FROM COMMUNITY TO TENANCY-IN-COMMON OWNERSHIP IS NO MERE TECHNICALITY

Suppose a case where the pre-\textit{McCarty} decree stated on its face that there was a community interest in future military retired pay and, rather than awarding the spouses fractions in this interest other than 50-50 or awarding the entire interest to the member or to his divorcing spouse, the court was declaring the parties to be owners as tenants-in-common. Surely there could be no doubt that the decree did “treat . . . retired pay of the member as property of the member and the member’s spouse.”\textsuperscript{23} Under state law, the change from community to tenancy in common alters management powers of the co-owners and changes creditors’ rights. Outside Texas, management switches from equal over the entire asset to sole management over a half. In Texas the shift is from the retiree’s sole management to exclusive management of one-half by each ex-spouse.\textsuperscript{24} The impact of management law is felt most importantly when benefit monies are received—a tenant-in-common co-owner can lawfully deal with only a half interest. Absent the community to tenancy-in-common conversion, the payee-retiree could lawfully invest 100%.

Under \textit{state law}, so long as the interest is community, the operator of the military retirement plan would be required to accept directives concerning payment options from the spouse of the retiree. It may be that a court would hold this aspect of state law pre-empted by the

\textsuperscript{22} In California, the statute authorizing a reopening to divide unadjudicated assets says the court has jurisdiction “to award community property.” \textsc{Cal. Fam. Code} § 2556 (operative Jan. 1, 1994) (current code in effect is \textsc{Cal. Civ. Code} § 4353 (West Supp. 1993)). The similar Arizona statute lists community property as well as tenancy-in-common property as among the divisible assets in such a situation. \textsc{Ariz. Rev. Stat. Ann.} §§ 25-318A & 25-381B (1991). Courts in neither state have been asked to rule on whether the use of the term “community property” in such statutes is intended to overrule the case law that an entry of divorce converts community property into tenancy in common. Since equal management by both ex-spouses over the whole asset (rather than sole management by each over his or her half interest, in the case of tenancy in common) is an unreasonable management system for persons whose relationship is so soured that they divorced, a court should not infer from the mere use of the term community property a drastic change in the law. In each such statute the term “community property” should be construed to mean former community property.

\textsuperscript{23} 10 \textsc{U.S.C.} § 1408(c)(1) (Supp. III 1992).

\textsuperscript{24} On the basic difference between the managerial system in Texas and that of other community property states, see generally \textsc{William A. Reppy, Jr. \& Cynthia A. Samuel, Community Property in the United States} chs. 14 & 15 (3d ed. 1991).
statutes creating the scheme of military retired pay at issue, but this does not mean state law is a mere technicality. Congress could "un-preempt" in the area of management just as USFSPA "unpreempted" in the area of right to shared ownership by reversing McCarty.

The same analysis applies to creditors rights. In states that follow the managerial system of creditors' rights and have equal management, the change from community property to tenancy-in-common ownership affects creditors, as a matter of law, in the following way: the creditor of each spouse formerly could seize the entire community interest; now the creditor can reach only the debtor's one-half interest. In Texas, the result is the same for tort creditors; however an ex-spouse's non-tort (necessaries) creditors' rights change from the inability to reach any interest to reaching a one-half interest in the asset. In Washington, Arizona, and New Mexico, where the creditors' rights system is more complex because different rules apply depending on whether there is a community or separate debt, the change also has substantial effects on creditors.25

Statutory spendthrift clauses applicable to federal retirement benefits may under federal pre-emption—if timely invoked by a debtor spouse—preclude application of these state law rules concerning creditors' rights in tenancy-in-common property.26 However, it is unlikely the spendthrift clauses apply once benefits are paid out.

All of the above significant effects occur with equal force when the tenancy in common is created at divorce not by a specific provision of the court's decree but because the decree does not refer at all to the community interest in future retirement pay yet terminates marital status so that community ownership can no longer exist.

In some states another significant effect of the "treatment" of the community interest in pension benefits, occurring as a matter of law by

25. In these states, as in those using the "managerial system" of creditors' rights, the change at divorce from community to tenancy-in-common classification of assets not divided reduces the share that a creditor on a "community" debt can reach from all to one-half. Absent applicability of a special statute, all Arizona "separate" creditors and separate non-tort creditors in Washington benefit by the change from community to tenancy-in-common classification because they can now reach their debtor's half interest, while previously the asset was not liable at all. The change does not affect the rights of "separate" creditors in New Mexico and separate tort creditors in Washington. See generally id. at 17-1 through 17-19; McDonald v. Senn, 204 P.2d 990 (N.M. 1949) (creating the "partitionable community" system of creditors' rights); deElche v. Jacobsen, 622 P.2d 835 (Wash. 1980).

the entry of divorce, is the termination of the right of either spouse (at a later partition action) to an equitable share of more than 50%. Under Texas law at the time of all pre-McCarty divorces, the converting of the community interest to a tenancy-in-common interest left a 50-50 partition action as the sole remedy for both the ex-wife and the ex-husband.27 Although I have been unable to find cases in point, one would predict the same results from the divorce under Nevada and Idaho law. In California at the time of McCarty and the enactment of the USFSPA and in New Mexico the divorce decree eliminated the power of the court to make an item theory division of the community interest, awarding it entirely to one spouse as part of the mandatory 50-50 division.28

Only one reported decision has sought to interpret the concept of "treating" a pre-McCarty community property interest in military retirement pay under the 1990 USFSPA Amendment.29 Its discussion of the issue is shallow, and the court does not consider whether conversion by the pre-McCarty divorce judgment of the pension interest from community property to a non-community property form of co-owner-

27. See Harrell v. Harrell, 684 S.W.2d 118 (Tex. Ct. App.—Corpus Christi 1984), rev’d on other grounds, 692 S.W.2d 876 (Tex. 1985); Matthews v. Houtchens, 576 S.W.2d 880 (Tex. Ct. Civ. App.—Fort Worth 1979, no writ). In 1987 statutes were enacted in Texas granting the ex-spouse a right to reopen the divorce proceeding so that an equitable division of the pension interest not previously dealt with could be made. Tex. Fam. Code Ann. §§ 3.91 & 3.92 (Vernon 1993). I am assuming that an analysis of how much "treating" a divorce judgment did to the pension interest should focus on the law in effect when the judgment was rendered.

28. Regarding the item theory see Reppy & Samuel, supra note 24, at 19-1 through 19-7. In 1989 California passed a statute allowing the belated division of the pension interest to be made by the divorce court in a reopening of the divorce suit rather than in a new partition action. Cal. Fam. Code § 2556 (operative Jan. 1, 1994) (current code in effect is Cal. Civ. Code § 4353 (West Supp. 1993)). This statute authorizes an equitable as opposed to an equal division. I have stated in footnote 27 that the law in effect when the divorce was rendered should be considered in analyzing the degree to which the judgment "treated" the community interest in military retirement benefits. If this is in error and the focus should be on the law existing when the 1990 Amendment to USFSPA was enacted, then it is California and not Texas that provides the clearest example of a major change in potential property rights. The change is from 50-50 divisibility to a right to claim an equitable share greater than 50% (whereas under pre-1987 Texas law the change was the opposite).

29. Johnson v. Johnson, 605 So. 2d 1157 (La. Ct. App. 1992). Johnson dealt with a post-divorce partition suit after a 1976 divorce decree failed to divide or award the community interest in future military retired pay earned by the member-spouse. Marriage of Curtis, 9 Cal. Rptr. 2d 145 (Ct. App. 1992), and Dunham v. Dunham, 602 So. 2d 1139 (La. Ct. App. 1992), assumed without analysis that the interpretation employed in Johnson that denies there is a "treating" of the community interest when it is converted as a matter of law into tenancy in common was proper.
ship could be a “treating” of the interest. The Louisiana Court of Appeals in Johnson v. Johnson simply declares that:

[the intent of the Congress in amending 10 U.S.C. § 1408(c)(1) was to prevent relitigation of cases concluded prior to McCarty . . . . The [pre-McCarty] separation and divorce judgments in this case did not specifically treat or reserve jurisdiction to treat the military retirement benefits as property as required by the federal statute.]

The court also said that “clear wording” of the 1990 Amendment required a “specific treatment.”

I submit there is no such wording and that the Louisiana court cites to nothing at all to support its view that the treatment must be by specific language. Moreover, the 1990 Amendment does not, as the Louisiana court says, seek merely to bar relitigation concerning interests in military pensions but is directed at judgments that never litigated the point. In fact the amended USFSPA is clear that if the spouses did litigate, pre-McCarty, whether there was a community interest in military retirement benefits and the court held there was but reserved jurisdiction to divide it until the member retired, the spouses are free to resume litigation of the appropriate mode of division. Moreover, the post-divorce partition suit in Louisiana involves little to litigate. The former community property interest must be identified, but the division can only be 50-50. To recognize that an ownership interest in the spouse in indi vision was created by the pre-McCarty divorce is not to relitigate anything but to enforce the judgment. The Johnson court actually lets the military member or retiree relitigate by invoking the 1990 USFSPA Amendment to effectively nullify the property right his ex-spouse had under the pre-McCarty judgment.

IV. LEGISLATIVE HISTORY REVEALS CONGRESS INTENDED TO BAR A POST-DIVORCE ACTION THAT DECREASES THE PROPERTY INTEREST OF THE MEMBER OR RETIREE

The little legislative history there is for the 1990 USFSPA Amendment is less than clear as to what Congress meant by exempting from the bar to post-divorce relief in pre-McCarty cases of interests in military pensions that had previously been “treated.” The pertinent passage of the House report on the bill creates doubt because what is said

30. Johnson, 605 So. 2d at 1161 (emphasis added).
31. Id.
reveals a plain error in the understanding of state law concerning the effect of divorce on community property. The House Report states that USFSPA should have been interpreted by the states as not affecting the applicability of McCarty to divorces entered before June 1981. It then states a concern that

some state courts have been less than faithful in their adherence to the spirit of the law [i.e., only limited retroactive application of USFSPA]. The reopening of divorce cases finalized before the Supreme Court's decision in McCarty v. McCarty that did not divide retired pay continues to be a significant problem. Years after final divorce decrees have been issued, some state courts, particularly those in California, have reopened (through partition actions or otherwise) to award a share of retired pay. Although Congress has twice stated in report language that this result was not intended,[33] the practice

33. If the Congress that enacted USFSPA did intend to wipe out the tenancy-in-common rights of spouses existing under pre-McCarty decrees not specifically dealing with community property interests in future military retired pay, such intent was never expressed. Like the overwhelming majority of courts, the only law review piece I found to address the issue concluded that USFSPA was no bar to state court partition suits enforcing such tenancy-in-common interests. A well researched and written student piece opined that "with pre-McCarty final judgments, state courts remain free to apply their own law to such [post-USFSPA] partition suits without interference from McCarty or the USFSPA." John B. McKnight, Note, Closing the McCarty-USFSPA Window: A Proposal for Relief from McCarty-Era Final Judgments, 63 Tex. L. Rev. 497, 513 (1984) (citation omitted). The writer relied on the following portion of the Conference Report for the bill enacting USFSPA:

Although the conference report contains no prohibition against courts reopening decisions before that date [June 26, 1981], the conferees agreed that changes to court orders finalized before the McCarty decision should not be recognized if those changes were effected after the McCarty decision . . . to implement the holding in that decision (for example, a modification setting aside a pre-McCarty division of military retired pay).

. . . [T]he conferees intend this provision to preclude recognition of changes to court orders finalized before the McCarty decision if those changes are effected after the McCarty decision and as a direct result of the enactment of the new title X [USFSPA] . . . . In other words, the courts should not favorably consider applications based on the enactment of this title to reopen cases finalized before the McCarty decision wherein military retired pay was not divided.

H.R. CONF. REP. No. 749, 97th Cong., 2d Sess. 167-68 (1982), reprinted in 1982 U.S.C.C. A.N. 1555, 1573 (emphasis added). This says that rights in pre-McCarty judgments were not to be altered, yet a post-divorce order refusing to recognize tenancy-in-common rights created in the spouse by such a judgment most surely "changes" that judgment in a very real sense. The report also says it is post-divorce relief based on USFSPA that is barred for an ex-spouse with a pre-McCarty divorce, but a partition action seeking en-
continues unabated. Such action is inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate. 94

This report clearly assumes that under state law a divorce decree making no division of the community interest in a member's future retired pay has the effect of making the member the sole owner, so that a post-divorce action "awards" property owned by the member after the divorce to his ex-spouse, upsetting property rights vested in him by the decree. That is, the community interest of the military member is superior to that of his spouse so that at divorce it subsumes the spouse's inferior interest. 95 Even the California case of *Kelley v. Kelley*, 96 which

forcefulness of tenancy-in-common rights is not based on USFSPA but on common law holdings that *McCarty* does not retroactively disturb rights in pre-*McCarty* judgments. See discussion supra note 4. The final sentence in the above quotation is directed at common-law states (and Washington when dealing with separate property interests and quasi-community property dispositions in Arizona, California and Texas) that would "change" rights by divesting the member of property interests. Note, too, that in a practical sense the pre-*McCarty* judgments converting the community property interest in military retired pay to tenancy in common are not "finalized" but anticipate a subsequent partition or similar action for enforcement.


35. Although it has long been settled that the interests of a husband and wife in community property are truly equal, e.g., CAL. FAM. CODE § 751 (operative Jan. 1, 1994) (current code in effect is CAL. CIV. CODE § 5105 (1983)), the erroneous assumption that the husband's interest is "more equal" than the wife's in community assets arising from his labors occasionally is asserted by attorneys even in community property states. See Phillips v. Parrish, 814 S.W.2d 501, 503 (Tex. Ct. App.—Houston [1st Dist.] 1991, writ den'd), where the "residuary clause" of a property settlement agreement at divorce stated that each spouse "assigns to the other an undivided one-half interest in any community property owned by the granting party" not otherwise divided. The husband's contention this awarded him all the community property interest in his longshoreman's retirement plan—apparently because he somehow "owned" those community benefits but the wife did not—was rejected.

A very few reported decisions have bought the "more equal" argument. See Babb v. Schmidt, 496 F.2d 957 (9th Cir. 1974) (erroneously treating husband as owner of 100% of community property because he had power to apply it to pay his debts).

36. 141 Cal. Rptr. 33 (Ct. App. 1977). The divorce decree stated that all community property of the assets had been divided by written agreement, but the property settlement was silent with respect to a community interest in retirement pay. The court said the wife knew about this asset and chose not to assert a claim to it, thus making the judgment referring to the settlement agreement res judicata that she had no interest in the ex-husband's retirement pay to assert at a post-divorce proceeding. Henn v. Henn, 605 P.2d 10 (Cal. 1980), overruled *Kelley*, holding that the facts there would not support a holding of waiver.

It would seem that a contractual stipulation that "all community property" had been divided is at least ambiguous on the issue whether the wife intended thereby to
was overruled several years before the 1990 USFSPA amendment, did not view the decree as acting in such manner but rather found that the conduct of the wife, aware she could claim a community interest in the pension but did not do so, was a waiver of her proprietary interest. Few reports of post-divorce reopenings have indicated a basis for finding such a waiver.\footnote{37}

If the basis for a post-divorce order making payments to the ex-spouse was that—in Texas and Arizona and apparently California—the stipulate that future retirement pay was separate property. If the extrinsic evidence were stronger that the wife intended a waiver, the \textit{Kelley} res judicata theory makes sense.

\textit{Kelley} may explain \textit{Smith} v. \textit{Lewis}, 530 P.2d 589 (Cal. 1975), \textit{overruled on other grounds by} Marriage of \textit{Brown}, 544 P.2d 561 (Cal. 1976). The wife's attorney in the 1967 divorce failed to assert her community interest in the husband's future military retirement pay. Her motion to amend the decree in 1968 to divide this asset was denied, and rather than appealing she sued trial counsel for malpractice. In its footnote 9, the \textit{Smith} court says whether counsel's inaction at trial resulted in harm to the client was a question of fact. The opinion refers to no facts from which the trier of fact could have equated the inaction at trial into a deliberate waiver. It is possible trial counsel negligently initiated a series of events leading to the wife's loss, the final error being failure to appeal the 1968 motion to reopen (or to style that action as one to partition a tenancy-in-common interest). \textit{Henn} v. \textit{Henn}, 605 P.2d 10 (Cal. 1980), holds that laches can bar the post-divorce assertion of tenancy-in-common rights, but the one-year delay in \textit{Smith} seems too short to support a theory that the ex-wife lost her rights by laches.

The post-\textit{Henn} opinion of \textit{Aloy} v. \textit{Mash}, 696 P.2d 656 (Cal. 1985), reiterates the point of \textit{Smith}'s footnote 9 that whether failure to assert the community interest in future retirement pay at divorce causes loss to the spouse is a question of fact. \textit{Worton} v. \textit{Worton}, 286 Cal. Rptr. 410 (Ct. App. 1991), holds that the mere delay suffered by a spouse forced to bring a post-divorce action to reopen and divide or to partition unadjudicated community assets is harm entitling her to damages if negligence of her attorney caused the failure to divide at divorce. This theory could explain both \textit{Smith} and \textit{Aloy}. Also overruled by \textit{Henn} was \textit{Brown} v. \textit{Brown}, 147 P. 1168 (Cal. 1915), holding that if the pleadings in the divorce action alleged there was no community property, entry of the decree established this to be true. \textit{Brown} made no sense after 1927, when legislation in California established the wife as equal owner with the husband of community property. \textit{See} William Repp, Jr., \textit{Retroactivity of the 1975 California Community Property Reforms}, 48 S. Cal. L. Rev. 977, 1085-89 (1975). Under pre-1927 law, the husband was sole owner and the wife had a mere expectancy in so-called community property. As to post-1927 property, the divorce decree could give no guidance as to whether the result of the truth of the allegation meant the unadjudicated asset was property of the wife, property of the husband, or property that was at the time of divorce already owned in tenancy in common or in joint tenancy.

\footnote{37} One exception is the Missouri case of \textit{Mings} v. \textit{Mings}, 841 S.W.2d 267 (Mo. Ct. App. 1992), see \textit{supra} note 21 and accompanying text, where the record showed, as in \textit{Kelley}, that the wife was aware of the existence of the husband's military pension, which was then viewed under Missouri law as marital property subject to equitable division. No waiver was found, however. \textit{But see} Chrisman v. Chrisman, 487 So. 2d 140 (La. Ct. App. 1986) (during divorce proceedings ex-wife had twice characterized rights to military pension as husband's separate property and was estopped to deny that).
interest was quasi-community property rather than community or in Washington that the pension should be divided as separate property, the kind of unfairness the House report objects to would be present. However, post-divorce action that does no more than create a method of payout for the tenancy-in-common 50% interest created previously at divorce does not "award a share" of the pension to the ex-spouse. It is a purely procedural decree that leaves the property interests as they were at the time of divorce. One can only assume that if the writer of the House report understood that a pre-McCarty divorce had not had the effect of making the member the sole owner of the community interest in the pension, he or she would have found no basis for labeling the post-divorce enforcement action unfair.

The 1990 USFSPA Amendment originated in the House as part of a larger Act, the Senate version of which would not have amended USFSPA to address state court enforcement of pre-McCarty decrees. During proceedings of the conference committee, the Senate agreed to the basic provision that had passed the House. The Conference Report

38. A similar situation exists when the pre-McCarty divorce was rendered in the common law state where the couple had resided when the member earned by his labor during marriage military retirement benefits, but the suit for post-divorce relief is brought later in a community property state after one or both ex-spouses changed domicile. E.g., Tomlinson v. Tomlinson, 729 P.2d 1363 (Nev. 1986) (pre-McCarty Michigan decree).

Idaho, Nevada, Louisiana, and New Mexico, have at various times employed the law of a former common-law domicile of a divorcing couple to deal with military retired pay. E.g., Allen v. Allen, 484 So. 2d 269 (La. Ct. App. 1986) (applying Maryland law). A decree in a community property state that used the law of a former common-law domicile to deal with some property but left the military retired pay unadjudicated would be of the same nature as the Michigan decree before the Nevada court in Tomlinson. The member's ex-spouse would have no rights to be enforced at reopened or partition; there would have been no "treatment" of the military retired pay to make inapplicable the bar to relief of the 1990 USFSPA amendment.

39. It is possible the mistake made by the writer of the House report was not in assuming state divorce law of res judicata or waiver stripped the spouse of her community interest when she did not have the divorce decree recognize it specifically. Perhaps the error was unawareness of how the rule of Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), see infra note 58 and accompanying text, caused McCarty not to be read into judgments rendered before June 1981 but rather the constitutionally erroneous rule existing at the time the judgment was entered that a military pension could be subject to a community property regime. If the writer of the report had understood the effect of Chicot County, the writer could not—just as in the case where the error underlying the report relates to state res judicata law—find unfairness to the military member in the situation where the post-divorce action does no more than enforce rights that the Chicot County doctrine preserved despite the McCarty decision. It was also fully settled by the time Congress was amending USFSPA that McCarty was not retroactive at all. See supra note 4.
shows the Senate had the same understanding expressed in the House report above: that it was some new action upon reopening the pre-1981 decree that was to be prohibited, not enforcement of rights created sub silentio by the original judgment:

The House bill would provide that if a final decree of divorce, . . . was issued before the McCarty decision and did not treat military retired pay as the property of both the retired member and the former spouse, then the court, subsequent to McCarty, may not divide retired pay between the retired member and the former spouse.40

Since an order reopening or a partition that merely enforces tenancy-in-common rights created by the pre-McCarty decree does not “divide” property in the sense of changing property rights, the word “treat” in the above context should include the creation of the tenancy in common in the original decree, even if not by express words.

The only other pertinent legislative history41 is found in comments made by Representative Dornan in the House prior to the filing of the 1990 USFSPA Amendment:

State courts consistently have ruled that if a former spouse reopens a divorce case under the [US]FSPA, they are

41. A recent article in the Army Times says that 1990 USFSPA Amendment applies where the pre-McCarty “decrees made no mention of dividing the service member’s retired pay.” Grant Willis, Retired Pay Split to Ending for Some, ARMY TIMES, Mar. 26, 1992, at 8. This is correct in the majority of situations, i.e., where the governing marital property law was the equitable distribution rule of a common-law state. In any event, the article is not a pre-enactment statement that could have influenced members of Congress that voted for the 1990 USFSPA Amendment. It is not legislative history.

Another post-enactment statement by a Congressional source concerning the meaning of “treat” in USFSPA is too vague to be helpful even if it had been part of pre-enactment material the Congress might have relied on. A study for the Congressional Research Service said of the 1990 USFSPA Amendment:

[Despite congressional language to the contrary, some states ha[d] continued the practice of reopening pre-McCarty divorces in order to allow for a division of retired pay. Public Law 101-510 [the 1990 USFSPA Amendment] places explicit limits on the ability of state courts to consider retired pay as property in the reopening of a pre-McCarty divorce which did not provide for such a division.

David F. Burrelli, Military Benefits for Former Spouses: Legislation and Policy Issues (Cong. Research Service, Library of Congress), at 10, July 13, 1992, (emphasis added) (citation omitted). It is likely the writer uses the word “consider” to mean an act leading to the shifting of property rights, which is absent if the court merely enforces tenancy-in-common rights existing under the pre-McCarty decree.
mandated to rule in favor of the former spouse, regardless of circumstances. As one Texas judge wrote when he had to rule in favor of a former spouse, "This court had no choice . . . [sic] If equity were permitted, this court would have to come to a conclusion exactly opposite . . . [sic] The mandated result of the [US]FSPA is grossly unfair and inequitable under the facts and circumstances of this case."[42]

Was it congressional intent that all former spouses have a right to military retirement by virtue of marriage in all cases? Was the [US]FSPA to be retroactive to divorces settled before the law was in force? I believe not.43

Representative Dornan seems aware that the effect of silence of the divorce decree is to convert a community interest into tenancy in common, which in some community property states (including Texas before 1987) a later court had to equally partition when asked to do so. If this awareness—which the writer of the House report above lacked—were to be imputed to each member of Congress, my interpretation in this article of the word "treat" in the 1990 USFSPA Amendment is incorrect. Representative Dornan does want the Amendment to apply in a situation (which he wrongly thought could then exist in Texas) where the pre-McCarty divorce had "treated" the pension interest by changing it from community property to tenancy in common. He probably had in mind a case where the judge at divorce thought (erroneously under pre-McCarty law) that military retired pay was the member's separate property, and in light of the security this would give the member in his elder years, made an unequal division of what the judge thought was all the community property in favor of the spouse of the member, only to have her later demand half the military retired pay in a post-divorce partition suit.44 Why Representative

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42. Rep. Dornan was apparently unaware that Texas in 1987 had by statute abrogated the rule that compelled the court in the post-divorce action to divide the pension interest 50-50 on the theory tenancy-in-common rights had already been irrevocably attached at divorce. Enacted in 1987, §§ 3.91 and 3.92 of the Texas Family Code specifically authorizes a court to consider the same equities a divorce court judge would take into account. California had made a similar change in its law the year before Rep. Dornan made his comments. CAL. FAM. CODE § 2556 (operative Jan. 1, 1994) (current code in effect is CAL. CIV. CODE § 4353 (West Supp. 1993)). Of the eight community property states subject to the 1990 USFSPA Amendment, Louisiana and New Mexico were the only ones where the law was clear that the judge in the post-divorce action had no choice but to recognize the spouse as 50% owner. Such was probably the case with Nevada and Idaho law as well. See discussion infra note 44.


44. It is interesting that the scenario that bothered Rep. Dornan—a "treating" by force of entry of the pre-McCarty decree that eliminated the opportunity to make a
Dornan would support a rule that as a matter of law in every post-divorce action for relief strips the member's ex-spouse—without any consideration of the equities—of all of her tenancy-in-common interest cannot be explained. An amendment to the USFSPA pre-empting any state law that barred consideration of the equities favoring the military member would have satisfied his objections to state court practice.\textsuperscript{45}

In any event, on the critical issue of the meaning of "treat" in the 1990 USFSPA Amendment, the legislative history is at best inconsistent. The House Committee on Military Affairs, consisting of fifty-three members, sees the Amendment as addressed at re-openings that disturb a final divorce decree which left the military member as sole owner of the pension. Under the theory of that report, no change in law was needed where the post-divorce suit did not substantively deal with property interests but merely worked out payout rights for the tenancy-in-common interest created by the divorce decree. The Committee cited California as a state which had been granting post-divorce relief of this type it hoped to halt, but it was common-law states that instead presented the opportunity for the kind of post-divorce proceeding considered improper. Indeed, shortly before the 1990 USFSPA Amendment was considered by Congress, a reported case from Mis-

division (including perhaps an award of 100\% of the pension to the member) based on the equities—perhaps could not have occurred when he spoke in 1990. In Louisiana and New Mexico the pension—like the rest of the community estate—never was subject to an equitable division (although as part of the mandated 50-50 division of the net community more than half and even all of the community interest in the pension could have been awarded to one divorcing spouse). See \textit{supra} note 32 and accompanying text; Michelson v. Michelson, 520 P.2d 263 (N.M. 1974). In Texas, Washington, and Arizona the judge in the post-divorce action applies the same equitable principles employed when the interest is considered at the original divorce suit. See sources cited \textit{supra} notes 9, 10 and 22 and accompanying text. In California, a delay in dealing with the asset shifts the division from a mandatory 50-50 to equitable. \textit{Cal. Fam. Code} § 2556 (operative Jan. 1, 1994) (current code in effect is \textit{Cal. Civ. Code} § 4353 (West Supp. 1993)). In Idaho the division of the community is presumptively 50-50 but in unusual cases may be unequal. \textit{Idaho Code} § 32-712 (1983). In Nevada it is equitable. McNabney v. McNabney, 782 P.2d 1291 (Nev. 1989). When Rep. Dornan made his remarks in March of 1990, neither state had decided (and neither has yet to decide) whether the sole post-divorce remedy was an action to partition equally the tenancy-in-common interest or whether the member had as an alternative remedy reopening of the divorce action, thereby making applicable the law allowing an equitable division.

\textsuperscript{45} Rep. Dornan appears to err (see the final passage of his remark quoted in text above) in assuming that if the USFSPA had never been enacted \textit{McCarty} would have applied in the interpretation of \textit{pre-McCarty} judgments. This error seems to rest on his overlooking the principle of \textit{Chicot County Drainage Dist. v. Baxter State Bank}, 308 U.S. 371 (1940), under which the unconstitutional state law becomes a part of the judgment even though it is never mentioned. See discussion \textit{supra} note 39 and \textit{infra} notes 58-59 and accompanying text.
souri had reopened a 1980 divorce decree to divide previously unadjudicated military retirement benefits even though the existence of such benefits had been referred to during the pre-McCarty divorce proceedings.\textsuperscript{46} The judgment in that case had taken property of the husband and transferred it to the wife.\textsuperscript{47}

There is little to suggest that the writer of the Committee Report intended to deprive the military member's ex-spouse of an affirmative remedy\textsuperscript{48} that would merely implement property rights previously

\begin{quote}
46. Murphy v. Murphy, 763 S.W.2d 237 (Mo. Ct. App. 1988). The court said: "There is no preclusion in the statute [USFSPA] for distribution of military pension as marital property in divorce decrees entered prior to June 26, 1981." Id. at 239. This is precisely the kind of reading of the USFSPA that the legislative history of the 1990 Amendment decries as erroneous and which the Amendment sought to abrogate.

Pending at the time the 1990 Amendment was introduced and voted on was an Oklahoma action seeking to reopen a pre-McCarty divorce to divide unadjudicated military retirement benefits. After Congress had voted the Oklahoma Supreme Court held such relief was unavailable, but the pending claim was the type of court action the Amendment backers sought to preclude. Messenger v. Messenger, 827 P.2d 865 (Okla. 1992).

The Alaska Supreme Court in applying the 1990 USFSPA Amendment to deny relief after a pre-McCarty divorce failed to deal with military retired pay indicated there can be circumstances in that state where, without the USFSPA bar, the spouse can establish cause under state law to overcome the res judicata defense arising from the final decree. Johnson v. Johnson, 824 P.2d 1381 (Alaska 1992). The right to relief is not, however, automatic under state law as it was in Missouri before the 1990 USFSPA Amendment. A ground for reopening under Alaska's version of Rule 60(b) of the Federal Rules of Civil Procedure must be established. Id. at 1382 n.2. See also Spankowski v. Spankowski, 493 N.W.2d 737, 740-41 (Wis. Ct. App. 1992) (dictum) ("a change in the law may justify relief from a divorce judgment's property division"), cert. denied, 497 N.W.2d 131 (Wis. 1992), and cert. granted, No. 91-2810, 1993 Wis. Lexis 215 (Feb. 16, 1993).

47. This can occur in the community property state of Texas when the court in a post-divorce action under Texas Family Code §§ 3.91 or 3.92 divides Texas quasi-community property or applies the division rule of a common law state where the pre-McCarty divorce was granted. It can also occur in Washington when a court there reopens to divide a separate property interest in military retired pay unadjudicated at the pre-McCarty divorce. See sources and discussion supra note 9.

48. The 1990 Amendment is not so worded as to bar the ex-spouse from asserting tenancy-in-common rights under the pre-McCarty divorce defensively to create an offset. For example, suppose the ex-spouse is ordered to pay alimony or child support to the member or to pay off a promissory note that the ex-spouse had signed to equalize (or make equitable) a division of divisible property at divorce. The ex-spouse defaults on any such obligation and is sued by the military member. That action would not be a "proceeding to divide or partition any amount of retired pay." A defense of offset could be raised by the ex-spouse under which the court views sums the ex-spouse could have collected, but for the 1990 USFSPA Amendment, from the member because of the ex-spouse's ownership rights as a tenant in common under the pre-McCarty divorce decree as having discharged the alimony, child support, or note payment obligation. A counterclaim by the ex-spouse in the member's suit for payment of arrears of alimony, child
\end{quote}
vested in her by the divorce decree.\textsuperscript{49}

On the basis of this legislative history, the narrow construction of "treat" employed by the Louisiana court in Johnson v. Johnson\textsuperscript{60} must be rejected as taking from the ex-spouse tenancy-in-common rights previously vested, which the House report writer did not have in mind when proposing a cutback in remedies. A Texas court has given the word "treat" in the pre-amendment USFSPA its literal, broad meaning: "to deal with a matter or subject."\textsuperscript{51} By converting a community interest in military retirement benefits into tenancy in common, a court certainly "deals with" the military property. There is no less "treating" or "dealing with" because the judge is not aware of the community assets not brought to the court's attention that are converted into tenancy-in-common properties.\textsuperscript{52} Employing the definition of the Texas court rather than that of Louisiana in Dunham more closely achieves the end desired by Congress.

support, etc., seeking affirmative relief as a tenant-in-common owner of an interest in military retired pay would be such a "proceeding," however, if my interpretation of "treat" is rejected.

49. Taken literally, the House Report's statement, see supra note 34 and accompanying text, that the type of post-divorce suit it wished to bar included a "partition" action would support an argument that the writer of the Report did intend to leave an ex-spouse with tenancy-in-common interests without a remedy, but to read the word "partition" in that way creates a conflicting message in the Report, since a mere partition of rights previously vested in no way disturbs the final judgment contrary to principles of finality. I suspect the writer had heard that some of the California actions he or she mistakenly thought were upsetting final divorce decrees were labeled partition suits, and for that reason included the word "partition" in the House Report. That is, the use of the term "partition" is as much a mistake as the Report's notion that California would entertain a post-divorce action when the divorce decree had left the military member sole owner of the pension.

50. 605 So. 2d 1157 (La. Ct. App. 1992); see supra text accompanying notes 29-31.

51. Southern v. Glenn, 677 S.W.2d 576, 582 (Tex. Ct. App.—San Antonio 1984, writ ref'd n.r.e.) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2434 (1981)).

52. Compare Robinson v. Robinson, 23 A. 362 (N.H. 1891). A statute provided an aggrieved spouse was entitled to a divorce "when either party has so treated the other as seriously to injure health . . . [or] endanger reason." Id. at 365 (emphasis added). The wife became a Christian Scientist and apparently sought to convert the husband to her religion. His testimony that her conduct caused him moroseness, insomnia, and loss of appetite was accepted as true. The New Hampshire Supreme Court held that a "treating" under the statute had occurred even though the wife had not intended to cause ill health to the husband, could not reasonably anticipate such results from the conduct, and apparently was unaware she was causing the husband's problems. "Treating" equated to cause in fact and no more, the court held. Under this view of the meaning of "treat" it is irrelevant that the judge in a pre-McCarty divorce case where the pension interests were not revealed to the court was unaware that his or her judgment was converting community property into tenancy in common.
My research reveals that most post-divorce actions to divide or partition are resolved by orders effectively splitting the tenancy-in-common interest 50-50.\textsuperscript{53} To the extent such actions in the courts of Washington and Arizona may award the ex-spouse more than 50% of the interest, no unexpected taking occurs. The law in effect when the pre-\textit{McCarty} divorce converted the community interest to tenancy in common did not advise the military member that the ordinary rule of equitable division ceased to apply in the event there was a reopening to deal with the unadjudicated community retirement benefits.

The writer of the House Report would object to Texas and California courts, acting under the 1987 and 1989 laws in those states expanding the available remedies to the spouse beyond partition, awarding the non-member spouse more than 50\% of the tenancy-in-common interest. Perhaps courts in those states will decline to do so because of Congressional intent, even though there is no language of the 1990 Amendment capable of being construed with such fine tuning as to allow a 50-50 division of the tenancy-in-common interest but not, for example, a 52-48.\textsuperscript{54}

In any event my interpretation of “treat” rather than that of the Louisiana court must be adopted, because under it less mischief will occur. The latter approach results, in each of the eight affected community property states, in divesting of the ex-spouse for all practical purposes of her tenancy-in-common rights, thus overturning the effects of a final decree contrary to the principles espoused in the House Report. My interpretation leaves two states—Texas and California—empowered in unusual circumstances to equitably divest the member of a part of his tenancy-in-common interest (although only in California did such a remedy not exist when the divorce decree was entered). The unfairness this will create is small in comparison to the unintended unfairness to spouses holding vested interests caused by the narrow interpretation of “treat.”

My interpretation confines the 1990 USFSPA Amendment to the kind of case the writer of the House report obviously had in mind—one where the divorce left the military member the sole owner of the pension. My interpretation bars Arizona, California, and Texas from re-

\textsuperscript{53} See, e.g., the “gap” cases \textit{supra} note 4.

\textsuperscript{54} There is not yet a reported case in either Texas or California of a judge using the new remedial laws to divest the member of some of his 50\% tenancy-in-common interest in the pension at a post-divorce enforcement proceeding brought by the ex-spouse. In the only case I found where the court on reopening or partition divided the tenancy-in-common interest in military retired pay other than 50-50, the member got all of it. \textit{Haynes v. McIntosh, 776 S.W.2d 784 (Tex. Ct. App.—Corpus Christi, 1989, writ denied).}
opening to deal with an unadjudicated quasi-community property interest, Washington from acting post-divorce to divide an unadjudicated separate property interest, and common-law states such as Missouri from doing likewise where the unadjudicated separate interest was "marital" under the equitable division law in effect at the time of divorce.

Representative Dornan apparently sought a law that would deal with community interests that had been "treated" at divorce and thereby converted into tenancy-in-common interests and that would make it mandatory in a post-divorce action to consider adjustments the divorce court had made on the assumption the member spouse alone would benefit in the future from the military pension and certainly accord ex-spouses no more than their existing 50% interest. This is not the controlling legislative history. Moreover, Representative Dornan was not addressing the bill that was enacted, with its exemption from the scope of the statute for interests that had been "treated" under pre-McCarty divorces. Rather he was announcing hearings on future legislation, and his concluding remark was: "Congress needs to revisit the issue of military retirement and draft legislation that will amend the [US]FSPA so it provides equal and fair treatment to both the service member and the former spouse."55 The bill that became the

55. 136 Cong. Rec. E739-40 (daily ed. Mar. 20 1990). He had stated that the topic of the hearings had been addressed in three bills that had died in the prior session of Congress (1989). None of these bills dealt with the concept of what constitutes "treat[ment]" of retired pay by a divorce court. The first, H.R. 572, 101st Cong., 1st Sess. (1989), would have terminated upon the remarriage of the member's former spouse provisions of a court order that had included "treatment" of retired pay as property of both the member and his spouse. Nothing in this bill shed light on what "treatment" meant to Rep. Dornan. The second bill, H.R. 2277, 101st Cong., 1st Sess. (1989), would have barred divorce court orders that required the member to pay out benefits to his ex-spouse before he had retired from the military. The third, H.R. 2300, 101st Cong., 1st Sess. (1989), would have reduced the amount of total retired pay the state divorce court could treat as community property. The latter two bills did not use the words "treat" or "treatment."

On the other hand, a bill Rep. Dornan introduced the year after the 1990 USFSPA Amendment does shed some light on what Rep. Dornan means when he speaks of a court "treating" military retired pay. H.R. 2200, 102d Cong., 1st Sess. (1991) (§ 5). It would have amended USFSPA to provide:

[1] If the court, in the final decree, does not treat or reserve jurisdiction to treat the disposable retired pay of the member . . . , then in any subsequent judicial proceeding to treat the disposable retired pay of the member . . . , the jurisdiction of the court must be separately established at the time the subsequent judicial proceeding is initiated . . . .

Id. In other words, a court asked to reopen the divorce case cannot rely on the member having been domiciled in or consented to action by the initial forum at the time it rendered its decree as the jurisdictional basis for reopening. According to Burrelli, supra
1990 USFSPA Amendment was not filed until seven weeks after Dornan spoke.66

V. SERIOUS CONSTITUTIONAL QUESTIONS ARISE IF THE 1990 AMENDMENT IS CONSTRUED AS TERMINATING THE SPOUSE'S TENANCY-IN-COMMON INTEREST

In prior cases the United States Supreme Court has finessed the question whether a taking of property occurs when state marital property law is pre-empted in order to force states to treat as separate property (federally defined) what would be community under state law by holding the federal law had "forestall[ed]" the existence of community property rights of the member's spouse in benefits the member earns by labor for the federal government.67 That is, the instant the rights passed out of the federal government to remunerate the member for his services, the federal law attached; state law never applied to the benefits. Thus there never was a right in the spouse to be viewed as taken.

That theory does not work with respect to claims of the ex-spouse under pre-McCarty divorces. Before June 1981, the law in each community property state was that all benefits earned by a military spouse during marriage (and before separation in California and Washington) were community. That this law was created by cases unconstitutionally failing to apply the Supremacy Clause of the federal constitution does not mean that state law was a nullity. It is especially not a nullity before the invalidating decision, McCarty.

note 41, at 33, "Proponents argue that this language [quoted above] would make it more difficult for those dissatisfied with a settlement that did not treat retired pay as property, or failed to receive a division consistent with this legislation [USFSPA], from searching out a more sympathetic court . . . ." More sympathy is not involved when the second court merely provides for a payout of tenancy-in-common rights created sub silentio by the first forum. Apparently, then, the mere enforcement of rights already vested is not a "treating," which means the creating of the tenancy in common should be, since the wife cannot enjoy her interest in military retired pay under USFSPA without some "treating."

I admit that if an ex-spouse with a New Mexico, Louisiana, or Nevada decree took it to California, Texas, or Washington to ask for an award of more than 50%, the requested relief would involve a "treating" as Rep. Dornan uses the term in H.R. 2200, § 5. But there is no reported case where this was ever attempted let alone turned out to be a successful ploy. I doubt Rep. Dornan had this situation in mind but rather a claim like that in Nevada's Tomlinson case. See supra note 38.

56. Rep. Dornan's remarks in the Congressional Record were given March 20, 1990; H.R. 4739 was filed May 8, 1990.

The leading case to establish the rule that a final judgment based on an unconstitutional law creates enforceable rights is *Chicot County Drainage District v. Baxter State Bank*. In *Chicot County*, certain bondholders had been parties to a suit to readjust obligations under bonds issued by the drainage district. They did not question the constitutionality of the federal statute authorizing a federal district court to delay payment of such bonds, and a judgment of readjustment was entered and became final. After the Supreme Court held the statute unconstitutional in an action involving wholly different parties, the bondholders brought suit on the original obligations. The Supreme Court held the judgment was no less subject to principles of res judicata although it rested on an unconstitutional statute: "The actual existence of a statute, [i.e., one that is unconstitutional] . . . , is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." Likewise, the judgment was no less final because the constitutional question was not litigated; it was sufficient that the bondholders had the opportunity to litigate and chose not to do so.

Under the above analysis it is irrelevant whether the judgment operates by way of specific language describing the item at issue. That is, one judgment may declare that "right #2 no longer exists." Another may declare "right #1 no longer exists" but if as a matter of law #2 is dependent on #1, the former ceases to exist as well. A divorce judgment declares that the marital status ceases to exist and necessarily thereby terminates all unmentioned rights dependent on that status. This is familiar in common-law states where a divorce judgment en-

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59. *Chicot County*, 308 U.S. at 374. See also *Harrington v. Vandalia-Butler Bd. of Educ.*, 649 F.2d 434 (6th Cir. 1981), where a constitutional decision on the scope of a fees statute was rendered after a litigant was denied fees in a judgment that had become final. Because the litigant could have raised the constitutional issue in the first action but did not, the matter was res judicata.

60. This rule has been applied in the area of divisibility of military retired pay at divorce. In *Hicks v. Secretary of the Air Force*, 594 F. Supp. 690 (D. Md. 1984), the military member had appealed the judgment of a 1978 California court which, in granting a final separation, ordered him to pay 37.77% of future military retired pay received to his spouse. By the time his appeal was heard, *McCarty* had been decided but then limited by USFSPA, which the Court of Appeal applied retroactively to affirm. In the federal suit the member contended such application of USFSPA was unconstitutional, but the court held consideration of that claim was precluded by the final judgment of affirmance by the California appellate court, because the member had the opportunity there to raise the constitutional point.
tered, which says nothing about property rights, terminates all tenancies by the entirety, eliminating the previously nonseverable right of survivorship that is an incident to such form of ownership.61 In a few states this also applies to the survivorship right in a husband-wife joint tenancy.62 Inchoate dower is likewise eliminated by the mere entry of a divorce decree,63 as are spousal rights under joint and survivor annuity provisions in pensions.64 The fact that the military member in a pre-
McCarty divorce not dividing future military retirement pay chose not to ask the court for a declaration that such was his separate property by force of the federal constitution makes the issue closely analogous to Chicot County, where unconstitutionality of the bond adjustment act was not raised. The only difference is the Chicot County initial judgment stated on its face the bonds were (unconstitutionally) adjusted, while the creation of the tenancy in common in the pre-Mc
 McCarty divorce decrees under consideration happens automatically by virtue of language delaring the marriage dissolved and is not referred to by the court.

The fact that the United States employs the war and defense power in its attempt to take the spouse's property rights in the retirement benefits to be transferred to the member does not eliminate the obligation to make just compensation.65 The member may argue, however, that lack of reliance by his ex-spouse on being co-owner in tenancy in common of future retirement benefits unadjudicated in the pre-McCarty divorce enables Congress to constitutionally divest her of such property by enacting a law with a specific retroactivity provision.66

65. See United States v. Russell, 80 U.S. 623, 628 (1871), holding that while an unforeseen need during wartime to seize property to aid the military efforts may excuse the failure to pursue formal condemnation procedures, "the government is bound to make full compensation to the owner." Accord Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); Annotation, Compensation for Property Confiscated or Requisitioned During War, 137 A.L.R. 1290 (1942); cf. United States v. Caltex, Inc., 344 U.S. 149 (1952) (compensation not owed where property not requisitioned but destroyed to prevent seizure by enemy troops).
66. I here assume, arguendo, that by providing that the USFSPA has no application to pre-McCarty divorces (in certain circumstances of no treatment, for example) the 1990 Amendment is the functional equivalent of a law re-enacting the statutes that the McCarty court held pre-empted state community property law with a proviso that they applied only in the enforcement of divorce judgments rendered before June 1981.
Reliance by the ex-spouse is probably minimal. Her attorney acting as her agent was undoubtedly aware while representing her at the pre-McCarty divorce that failure to assert a community property claim to an asset would not forfeit the client’s interest but would delay the obtaining of relief concerning that asset to a post-divorce action. Surely, however, any attorney who thought about future retirement pay as a community asset would have presented the claim at the time of divorce. At the time of divorce, then, the ex-spouse was probably ignorant of, rather than relying on, the state community property law (the conversion to tenancy in common) that is allegedly pre-empted by the 1990 USFSPA Amendment.

Many ex-spouses learned of their rights under pre-1990 USFSPA and state law before the 1990 Amendment. Although laches can be a defense by the member in a post-divorce action for relief, the ex-spouse and her attorney probably relied minimally on state law rights continuing in existence in not immediately suing to partition or reopen.

Spouses who learn about a potential claim to a share of military retired pay after the 1990 USFSPA Amendment probably can prove no reliance at all. But reliance is but one element of concern in cases of takings by retroactive application of statutes. If the day after I learn that I have inherited $1 million from a distant relative I had been unaware of the government passing a law confiscating all the inherited wealth, surely the absence of reliance on my part concerning how I would expend my inheritance does not mean there is no compensable taking. Moreover, the ex-spouse is not in the posture of a donee but will have paid directly or indirectly for the property rights that would be taken from her under the interpretation of the 1990 USFSPA Amendment that I urge must be rejected. She has paid directly if the court in the pre-McCarty divorce awarded the member a share of some assets traceable to earnings by her, the ex-spouse. Perhaps that asset

67. E.g., Henn v. Henn, 605 P.2d 10 (Cal. 1980).
was the spouse's own pension, and the member was awarded half. She has paid indirectly by rendering services as a homemaker and perhaps mother of his children, services which will have facilitated his military career.

Lack of reliance by the spouse perhaps might be a basis for upholding as constitutional a law of the type Representative Dornan advocated in his comments on the House floor. Such a law would pre-empt what appears to be the present state of the law in Louisiana and New Mexico under which the ex-spouse in a post-divorce partition action will necessarily receive 50% of the former community (now tenancy-in-common) interest, already paid to the member, even though the pre-
McCarty divorce court had required the member to pay substantial alimony because of his ex-spouse's apparent need. Such a narrow law would compel the state court to weigh the equities in dealing with the previously unadjudicated interest. But the outright seizing of the spouse's interest—even if she had "paid" for it by the divorce court's awarding to the member half of the savings from her own remunerative employment—is too intrusive to be upheld on a no-reliance theory.

The member fares no better if he tries to defend the 1990 USFSPA Amendment as a law enacted under the war and defense power to regulate the res judicata effects of a judgment. A law making military retired pay the member's separate property perhaps would preclude finding a taking of rights created by a state court judgment if the pre-empting federal law were in effect before the judgment was rendered so that it "forestalled" creation of enforceable rights under state res judicata law. If there is no such "forestalling," a taking occurs when the spouse is stripped of all beneficial use of her interest in the retirement package.

The dubious theory that Congress has reserved the right to change, cut back, or even eliminate entirely military benefits because

69. He also may have acquired a half interest in the spouse's pension if it was not mentioned at the pre-McCarty divorce and thus became a tenancy-in-common asset, just as did his military pension. Under the constitutionally-suspect interpretation of the 1990 USFSPA Amendment, unless the ex-spouse's pension was also military, the member is free to reopen the divorce action for an accounting of his share of pension payments previously collected by his ex-spouse and for an order of direct payment to him in the future of his share, but the ex-spouse is barred from similar relief concerning her interest in his pension.


71. See supra text accompanying note 57.

72. See Kalb v. Feuerstein, 308 U.S. 433 (1940) (under federal bankruptcy power, act of Congress in effect when state court renders judgment could deprive state debt-collection judgment from having res judicata effect).
they are created by statute rather than contract also is of no benefit to the member. The 1990 USFSPA Amendment as applied by the California and Louisiana courts does not cut back on military benefits but takes them from one person and transfers them to another. For purposes of the rule allowing Congress to readjust military retired pay by amending the applicable statutes, what happens under the broad interpretation of the 1990 USFSPA Amendment is no different than if the federal government stripped Lieutenant X of his pension in order to transfer it to Lieutenant Y.

Only one court has considered the constitutional takings problem, and its analysis was, in my view, unacceptably simplistic. The key to the rejection of the due process claim in Dunham v. Dunham was as follows:

[T]he plaintiff [ex-wife] urges that she has a vested right in a share of the military retirement pay which cannot be affected by a subsequent congressional act. However, the impact of the change in the law on the right alleged by the instant plaintiff could have been avoided entirely had plaintiff preserved the right by mentioning it in her property settlement with defendant. Thus, the 1990 amendment to the USFSPA does not impact all pre-McCarty cases, but impacts only those pre-McCarty cases wherein the date of divorce and the failure of the nonmilitary spouse to reserve rights to the military retirement benefits combine to bar his or her claim to a share of the benefits.

73. See Lynch v. United States, 292 U.S. 571 (1934); Marriage of Karlin, 101 Cal. Rptr. 240 (Ct. App. 1972) (such a federal rule would not require classifying unpaid benefits as mere expectancy under state law), overruled on other grounds by Marriage of Brown, 544 P.2d 561 (Cal. 1976). See also United States R.R. Bd. v. Fritz, 449 U.S. 166 (1980), upholding elimination of certain benefits of already retired railway workers from a package of benefits previously received under the Railroad Retirement Act and Social Security Act because the programs were noncontractual and Congress reserved the right to alter them.


75. Id. at 1143. To stress Mrs. Dunham’s failure to have the pre-McCarty decree mention the community interest in her husband’s military retirement pay is essentially the same as claiming she did not rely on the rule that an unadjudicated asset becomes tenancy-in-common property (ownership in indivision under pre-McCarty Louisiana parol). I have noted above that the absence of such reliance simply cannot allow any bald taking to proceed without compensation.

Note too that the silence of the wife who does not ask that the decree mention the tenancy in common is echoed by the silence of the husband who does not make the constitutional argument that will later prevail in McCarty. Why is it less than arbitrary
Under this kind of “logic” the anti-development regulation in *Lucas v. South Carolina Coastal Council,* would have been upheld rather than invalidated as a taking because Mr. Lucas had the opportunity to invest his money not in fragile coastlands but in mountain resort areas—basically in 99.9% of the state consisting of other than the coastal strip. What was relevant to the takings analysis in *Lucas* was that pre-regulation state law had vested a property right in persons who acquired the type of property at issue. Of course it was totally irrelevant that hundreds of thousands of South Carolini ans owning different types of realty were not similarly subjected to a loss of value.

Similarly in the case of military retired pay, it is an operative fact that state law in effect prior to the 1990 USFSPA Amendment vested the same property right in spouses whose divorce decree was silent about a community interest in military retired pay as whose decree recited the existence of that interest while reserving jurisdiction to divide it in the future. Additionally, the fact there are few people in Mrs. Dunham’s position subjected to an outright taking is directly analogous to the fact there were only several hundred coastal property owners in South Carolina subjected like Mr. Lucas to near total loss of value due to regulation barring development. Indeed, the protection of the Fourteenth Amendment is all the more needed when a tiny minority is singled out for regulatory taking, because the political process may not be open to the group to prevent enactment of the law.

The first reported California court to apply the 1990 USFSPA Amendment alluded to what can be seen as an equal protection problem. The court in *Marriage of Curtis* said it was “curious” that Congress made the USFSPA retroactive so that states could overturn judgments applying *McCarty* during the months after that decision until USFSPA took effect. This showed that Congress thought *McCarty* was an erroneous decision creating unfairness. “Congress, nonetheless seems to have decided that state marital property laws should not benefit older and less-ably advised or represented non-military spouses . . . . [W]e question the rationale of Congress’s decision . . . .” The court seems to be judicially noticing the fact that on av-

for the statute to punish only the wife for not asking the divorce court to make a specific ruling?

78. Apparently the ex-spouse of the member in the case had not raised any constitutional issues, because the court did not frame the problem it found with the Amendment in terms of equal protection.
80. *Id.* at 153.
verage spouses of military members involved in post-\textit{McCarty} "gap" cases, whom USFSPA does not bar from relief, as well as spouses in post-USFSPA cases, will be younger than spouses in pre-\textit{McCarty} divorces (whom the California court viewed as barred from relief by the 1990 Amendment). With respect to "gap" case spouses, the observation of the Louisiana court in \textit{Dunham} that the spouses in pre-\textit{McCarty} divorces had the chance to ask for a division of military retired pay while those in "gap" cases did not may provide a rational basis for the distinction that disturbed the California court. With respect to spouses divorced post-USFSPA, they simply get the benefit of prospective application of a change in law.

In my view, the discrimination in the USFSPA after the 1990 Amendment (assuming my interpretation is rejected) that cannot be defended on any rational basis is between spouses with divorce decrees that declare the divorcing parties to be tenant-in-common owners of the community interest in military retired pay, subject to later court division, and decrees that achieve precisely this legal result by silence concerning such community interest. In the latter case the member has no basis in law—or even in a layman's "common sense" notions about how the law of husband-wife co-ownership might function—for thinking his ex-spouse's property interest was taken from her and transferred to him.\footnote{The case is different where the pre-\textit{McCarty} decree recites that there is no community property of the marriage. In such instance the military member could think either (1) that his spouse was foregoing a claim under community property law in his military retirement pay or (2) that the spouse had forgotten about the community interest. I cannot say the layperson's belief in (1) above is unreasonable, even though the recital of no community property technically under law cannot equate to a waiver by the spouse of her community interest. \textit{See}, \textit{e.g.}, Matthews v. Houtchens, 576 S.W.2d 880 (Tex. Ct. Civ. App.—Ft. Worth 1979, no writ). Nevertheless, my research indicates pre-\textit{McCarty} decrees with such recitals are so rare (even assuming that all the military members in those cases mistakenly believed (1) above) that it cannot be rational to add to the USFSPA a provision to deal with them in a way that broadly strips the deserving spouse of her tenancy-in-common interest under the far more common decree that says nothing at all that could be construed as a waiver.

More common than the decree reciting there is no community property of the marriage is the decree that incorporates a property settlement agreement with a residuary or omnibus clause of the "possession" type. For example: "Any item of community property not divided herein shall become the separate property of the divorcing spouse having possession of it on the date of divorce" (or date of the property settlement agreement). A layman should understand that an intangible interest such as a claim to future retired pay is not "possessed" by either divorcing party, and the courts have regularly so held. \textit{See}, \textit{e.g.}, Smith v. Smith, 733 S.W.2d 915, 916-17 (Tex. Ct. App.—Houston [1st Dist.] 1987, \textit{writ ref'd n.r.e.}); Yeo v. Yeo, 581 S.W.2d 734 (Tex. Ct. Civ. App.—San Antonio, 1979, \textit{writ ref'd n.r.e.}); Dessommes v. Dessommes, 505 S.W.2d 673 (Tex. Ct. Civ.
There is one group of pre-McCarty divorcing military members from community property states with decrees silent as to rights in future military retirement benefits that an amendment to USFSPA might reasonably have singled out for treatment similar to that which the 1990 Amendment does accord to members from common-law states who are clearly protected from a reopening that would be an occasion for divesting them of some share of their solely-owned benefit package. Those are military members who co-owned with their spouses in community an interest in future retirement pay whose pre-McCarty divorce was ex parte and who subsequently did not participate in an action for division of property where the court had in personam jurisdiction over them as well as subject matter jurisdiction to divide. In the normal divorce where the court does have jurisdiction to divide property, the military member had the opportunity to anticipate the winning argument of the McCarty case and seek a holding that future military retired pay had to be by virtue of federal pre-emption treated as his separate property. In that situation, the silence of the decree as to ownership of future retirement benefits is as much the fault of the military member who neglected to make the pre-emption argument as of his spouse who forgot to assert a community property claim. Where, however, the pre-McCarty divorce was ex parte, the member (even if the plaintiff) was unable to assert the pre-emption point. He will contend it is unfair to structure USFSPA so that he never has that opportunity. 82

Concededly, under my interpretation of the 1990 USFSPA Amendment the military members with pre-McCarty ex parte divorces

App.—Dallas, 1973, writ ref'd n.r.e.). That would be true even though as a matter of state law, see Tex. Fam. Code Ann. § 5.22(a) (Vernon 1993), or federal law pre-empting equal management statutes outside Texas, the military member had exclusive management of the community interest in the future military retired pay.

82. Such a military member can argue that the doctrine of Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), which is the basis for giving res judicata effect to a constitutionally erroneous holding, is not to be applied when the court lacked jurisdiction to consider the constitutional issue. See United States v. Estate of Donnelly, 397 U.S. 286 (1970). There the defendant bought land in Michigan at a time the law indicated a federal tax lien against the seller—in order to provide constructive notice—had to be filed in the office of the recorder in the situs county, not just in federal district court for the district. After the sale the United States Supreme Court held the pre-sale law erroneous, so that the government’s filing in district court, as had been done in the case, was sufficient. The lower courts applied Chicot County to protect the buyer, holding that the erroneous law at the time of sale somehow attached to the transaction, and found the Internal Revenue Service barred from relying on the Supreme Court holding correcting the prior erroneous law. Reversing, the Supreme Court held Chicot County is applicable only to a final judgment after a hearing at which the affected party (there the I.R.S.) has an opportunity to assert the true state of the law. Id. at 294.
never have the chance to make the pre-emption argument that prevailed in McCarty, but in that regard they are treated the same as members divorced after enactment of USFSPA and even less harshly than members divorced during the gap period who invoked McCarty only to have the benefits of final decrees based on McCarty overturned in post-USFSPA reopenings. No court has held this upsetting of vested rights to be unconstitutional. If no unconstitutional action is involved in singling out "gap" case military members for loss of benefits awarded by McCarty-based decrees, denying members with pre-McCarty ex parte divorce decrees the opportunity to make a federal pre-emption argument surely must be constitutional, whether the claim be denial of due process or of equal protection.

VI. CONCLUSION

The thesis of this article is not that the above arguments establish the unconstitutionality of the interpretation of the 1990 USFSPA Amendment applied by the Louisiana and California intermediate appellate courts. Rather it is contended that these arguments raise substantial doubts about constitutionality. No more is required to compel construing the word "treats" in the 1990 Amendment as including the converting of community property interests to tenancy in common as a matter of law.

83. Treating final "gap" divorces as if they were nonfinal is troubling although not likely to disturb reliance interests of a military member (at least if he is not required to account for funds received and spent before enactment of the USFSPA). However, such treatment of "gap" cases assures that spouses of members divorced during the gap are, effectively, given the same property claims to military retired pay as spouses in post-USFSPA divorces. Achieving equality under law bolsters the case for the reasonableness of a taking by government action, but I am aware of no authority that holds that achieving the goal of equal treatment per se excuses the obligation to pay just compensation.