COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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Dear Mr. Secretary:

This refers to letter dated November 14, 1972, of the General Counsel of the Department of Defense presenting his views on a question pending in this Office as to whether, under the Survivor Benefit Plan established by the act of September 21, 1972, Public Law 92-425, 86 Stat. 706, 10 U.S.C. 1447-1455, a military member with a spouse and a dependent child or children is authorized to elect to provide an annuity for the child or children only.

By your memorandum dated September 25, 1972, you issued an interim Department of Defense Directive implementing the Survivor Benefit Plan which you stated "will clearly permit a member who has a spouse and dependent children the options of providing coverage for a spouse only, the spouse and children, or the children only." Since there is no express language in the act permitting a member the option of providing an annuity for the children only where there is an eligible spouse and the legislative history discloses no congressional intention in that regard, the General Counsel's letter is in the form of a brief in which he presents comments and arguments which in his opinion support the election of children only without regard to the spouse.

Your General Counsel states that those in the Department of Defense who were intimately involved in justifying the proposal to the Congress have no doubt that the intent was to permit a member the option of providing coverage for a child or children only, even if he had a wife. It is further stated that the congressional committee staffs who also were intimately involved with the proposal have indicated that they are in complete accord on this point with the views of Department of Defense representatives.

The Survivor Benefit Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. Also, although not germane to the question, a person who is not married and does not have a dependent child when he becomes entitled to retired or retainer pay may elect to provide an annuity to a natural person with an insurable interest in that person. 10 U.S.C. 1448(b).

Section 1450, title 10, U.S. Code, provides in pertinent part as follows:

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"(a) Effective as of the first day after the death of a person to whom section 1448 of this title applies, a monthly annuity under section 1451 of this title shall be paid to—

"(1) the eligible widow or widower;

"(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section; or * * *"

10 USC

Subsection 1451(a) provides that the monthly annuity payable to the widow, widower or dependent children shall be equal to 55 percent of the base amount. It is provided in subsection 1452(a) that the reduction in retired or retainer pay to provide an annuity to a spouse shall be an amount equal to 2 1/2 percent of the first $300 of the base amount, plus 10 percent of the remainder of the base amount. It is further provided that as long as there is an eligible spouse and a dependent child, that amount shall be increased by an amount prescribed under regulations of the Secretary of Defense. Subsection 1452(b) provides that the retired or retainer pay of a person who has a dependent child but does not have an eligible spouse shall, as long as he has an eligible dependent child, be reduced by an amount prescribed under regulations of the Secretary of Defense.

10 USC

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The letter of your General Counsel points out that the intent of Congress in establishing a new system of survivor benefits was to provide career members of the Armed Forces an opportunity to leave a portion of their retired pay to their survivors at a reasonable cost; that the predecessor plan—the Retired Serviceman's Family Protection Plan (RSFPP), 10 U.S.C. 1431-1446— had proved too expensive and complex, and that the most attractive feature of RSFPP was the broad flexibility in the selection of beneficiaries. Under that Plan a member with a spouse and children could by the clear terms of the statute (10 U.S.C. 1434) elect to provide an annuity for the spouse only, the spouse and children, or the children only. Hence, it is argued that to now contend that the new Plan eliminated the most attractive feature of the prior plan by not permitting a member to tailor his survivorship benefits to fit the needs of his estate program would be absolutely contrary to the intent of Congress as well as that of the Department of Defense.

While the act of September 21, 1972, did not abolish the RSFPP, the new Plan supersedes the RSFPP as to persons who initially become entitled to retired or retainer pay after the effective date of the

act and provides that retirees presently covered under RSFPP have the options to continue RSFPP and not join the new program, to drop RSFPP and join the new program, or to continue RSFPP and join the new program up to a total survivor annuity of 100 percent of the member's retired pay at the time of election into the new program. The Survivor Benefit Plan is an entirely new approach to the problem of providing protection to surviving dependents of present and future military retirees and active duty members who are retirement eligible. Hence, except as to specific provisions relating to those members already covered under the RSFPP, the Survivors Benefit Plan does not incorporate by reference or otherwise any of the features of the RSFPP as to those members who elect coverage under the Survivor Benefit Plan.

The letter of November 14, 1972, goes on to say that one of the stated objectives of revising the RSFPP was to provide a plan for military retirees comparable to the plan provided for civil service annuitants and that under the civil service retirement system even though an employee elects not to accept a reduced annuity with survivor benefit to his spouse if at his death he has dependent children, an annuity is paid to the children despite the fact that no deduction was made from the annuitant's retired pay to cover the children. In this connection, however, an annuity for dependent children of civil service retirees is specifically provided by law (5 U.S.C. 8341(a)). There is no option, however, under the civil service retirement system for the employee to elect a reduced annuity with a 55 percent survivor annuity to his children in lieu of a reduced annuity with a 55 percent survivor annuity to his widow. Furthermore, except for certain general concepts the Survivor Benefit Plan is not comparable to the civil service retirement system. The plans are not financed in the same manner, the average ages of military and civilian retirees are not comparable and the additional benefits of retired military retirees and their dependents are not available to civil service annuitants.

The General Counsel comments that to conclude that coverage for the spouse is an absolute condition precedent to providing coverage for children will, in many cases, result in no coverage for children--a result not intended by the Congress or the Department of Defense. He further states that there are situations in which a member would want to provide for a child only when there is a spouse and sets forth several examples. However, such an election, no matter how valid a reason may seem in a given case, may not be permitted unless authorized by law.

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It is further stated that the use of the qualifying word "eligible" before "spouse" under the express language of the statute pertains to the criteria defining a widow and widower (section 1447(3) and (4)) and to the termination of an annuity by remarriage before reaching age 60 (section 1450). The view is expressed that the word "eligible" widow also connotes the fact that the member has elected her out of the Plan, an option which everyone concedes he has a right to do. If he elects her out of the Plan, it is stated that she obviously is not an "eligible" widow, though not expressly so stated in the law. Hence, while the General Counsel admits that neither the express language of the law nor its legislative history is entirely clear on this point, he expresses the view that such language supports the election of "children only" without regard to the spouse.

A review of the legislative history of the act of September 21, 1972, discloses that the act was the culmination of a long recognized need for the protection of military widows. At the outset the Department of Defense proposed that the Plan make no specific provision for children, it being anticipated that those parents who desired to provide benefits for children in addition to those available under social security could do so under the insurable interest provision. However, during the consideration of the matter in the House of Representatives a children's benefit was added. The Department of Defense had no objection to the addition of a children's benefit but made certain recommendations as to the costs of coverage for a spouse and dependent children and for dependent children alone, which costs would be specified in regulations issued by the Department of Defense.

Senate Report No. 92-1089 to accompany S. 3905, 92nd Congress, 2d session, which provisions were incorporated in the text of H.R. 10670 which became the act of September 21, 1972, Public Law 92-425, 86 Stat. 706, explained the inclusion of actuarial coverage for dependent children as follows:

> "Coverage is provided for dependent children under S. 3905 in the same manner as for the spouse—at the same monthly cost for the same benefit level. However, when the children reach age 18 (or 22 in school), their eligibility terminates. On the other hand, just as with the member who covers a spouse, the member who covers children under S. 3905 must contribute to the Plan for life, even though in the case of children, the eligibility for benefits is limited, at most, until they reach age 22. This provision makes the application of the plan to children prohibitively costly; members insuring only dependent children would, in many instances, be paying over 3 times the value of the benefits.

"While the committee agrees that the legislation should provide a benefit to dependent children, it also believes that it should be accomplished on the basis of a self-financing plan. Specifically, the committee recommends that the basic plan in the bill apply to the spouse. For a slight additional charge (above the charge for spouse coverage), the member could cover the spouse and dependent children. If the spouse were to become ineligible, benefits would then flow to the children. If there were no spouse, the member could cover dependent children. The cost of dependent children's coverage, in both cases, would be based on the actuarial cost of providing benefits and would terminate when the children no longer are eligible for benefits.

"The provision recommended by the committee will result in no cost to the government (except for the cost of administering the provision) and will not be prohibitive in terms of individual member cost.

"The committee also intends that the cost of the program for dependent children would be determined by the actuarially equivalent method, that is, by a self-financing method in regulations prescribed by the Secretary of Defense."

In further support of our view that Congress had no intention of permitting the member to elect to provide an annuity for the children only where there is an "eligible" spouse, there is for noting the opening remarks on the Senate floor by Senator Bennett who chaired the Special Subcommittee on Survivor Benefits, which considered S. 3905 that "Mr. President, the bill S. 3905 might be termed the 'widow's equity bill.'" See Congressional Record--Senate (page S14334) dated September 8, 1972. Also, in commenting on the several changes made by the Senate in the House bill, Mr. Pike, who chaired the Special Subcommittee on Survivor Benefits in the House of Representatives which considered H.R. 10670, stated, among other things, that "In the absence of a widow or widower, the benefits would go to the surviving dependent children in equal shares and the annuity would be paid as long as there are eligible children." See Congressional Record--House (page H8254) dated September 12, 1972.

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The above excerpts from the legislative history coupled with the provisions of section 1448(a) that "If a person who is married elects

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not to participate in the Plan to the maximum level, that person's spouse shall be notified of the decision," and the unambiguous order of precedence expressed in subsection 1450(a) indicate an intention to provide protection first to the eligible widow and if none to the surviving dependent children. Under the plain terms of the law, we find no basis to conclude that a member may elect an annuity for his children only if he has an eligible spouse. Moreover, we are unable to concur in the view that an eligible widow becomes an ineligible widow solely by the member electing her out of the Plan. Therefore, it is our view that that part of the above-mentioned regulation which would authorize such an election must be considered as being contrary to the law.

However, military retirees and active duty personnel apparently are currently being offered the election to provide an annuity for children only, even though there is an eligible spouse. Since the elections of retired and retirement eligible members to whom the Survivor Benefit Plan applies must be processed in an expeditious manner, we will delay questioning such elections until your department has an opportunity to present the matter in the early part of the 93rd Congress with a recommendation for an amendment specifically authorizing the election of an annuity for dependent children only where there is an eligible spouse.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States

The Honorable
The Secretary of Defense