1951

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Recommended Citation
Harvey L. Davis, The Case of the Missing Community Property, 5 Sw L.J. 1 (1951)
https://scholar.smu.edu/smulr/vol5/iss1/1

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THE CASE OF THE MISSING COMMUNITY PROPERTY

Harvey L. Davis*

As a result of the four-to-three decision of the Supreme Court of the United States in the case of *Wissner v. Wissner* a tremendous amount of wealth in the form of the wife's interest in community property suddenly disappeared. The widow in that case lost only her one-half interest in a matured $10,000 National Service Life Insurance policy. But millions of wives and widows domiciled in the original community property states apparently lost their interest in such insurance under the decision. At the very least their interest has been made subject to such complete and unrestricted control of the insured serviceman-husband that no semblance of a property right remains to the wife. The majority opinion, written by Mr. Justice Tom Clark, from the community property state of Texas, does not say what happened to the widow's community property interest in the earnings of her husband that were used as premium payments to keep the insurance in force. But the opinion does imply in a footnote that possibly the wife never had any community property interest in such earnings.

The decision struck a blow that is as momentous in its effect on a wife's community property interest as the Tidelands Decision is upon state ownership of submerged lands. Millions of dollars worth of property in the form of National Service Life Insurance (NSLI) and United States Government Life Insurance (USGLI) that was believed to be vested equally in husbands and wives

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1 338 U. S. 655 (1950).

2 Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington.

3 338 U. S. at 657, n. 2.
domiciled in the community property states has been snatched from the wives and placed at the unrestricted disposal of the husbands. The majority opinion completely disregarded traditional and fundamental community property principles in carrying out the present philosophy of making alleged federal interests paramount to all other interests. This philosophy is, of course, most apparent in the Tidelands Decision which completely ignores traditional state property concepts as well as solemn compacts between sovereign entities.

1. History of the Case

Margaret V. Wissner and Leonard O. Wissner were married in California in 1930 and were continuously domiciled there. At that time Leonard was taking medical training, and Margaret continued her work as a trained nurse, earning money to permit Leonard to complete his education. Her earnings were put into a joint account with her husband, this account being continued until November, 1944, at which time Leonard withdrew all the balance.

Leonard entered the United States Army in November, 1942. After six months he caused allotment payments to his wife to be discontinued and opened up a joint account with his mother and father and directed his allotments to be deposited in that account. This was a part of his effort to force Margaret to a settlement and divorce. Leonard had been sending money to his bank with instructions to buy bonds in his and one Naomi Beiler's names. He instructed his parents to use the funds in the new joint account for the same purpose. Leonard also succeeded in putting his parents into possession of, and giving them title to, an automobile that had been purchased with community funds. All these things were done without Margaret's knowledge or consent.

Leonard had taken out a National Service Life Insurance policy in the sum of $10,000 and paid the premiums thereon from his army salary. The trial court concluded, therefore, that the prem-
iums were paid with community funds. He named his mother principal beneficiary and his father contingent beneficiary. Margaret did not know anyone other than herself was the named beneficiary and did not consent to the application of community funds for payment of premiums for such a policy.

Leonard died testate in November, 1945, while a major in the United States Army. Margaret thereafter brought action against Leonard's parents on the grounds that during the marriage her husband made transfers of community property to them, consisting of moneys, stocks, bonds and an automobile, without her knowledge or consent and without consideration and that as a result she was defrauded of her community interest in such transferred assets. The trial court found the facts as alleged by Margaret to be true, and the district court of appeals affirmed such finding stating: "Furthermore, we think it is apparent that the transfers made to defendants were not made with an intent to repay them for moneys expended for his medical education, but were made in order to prevent his wife from receiving them, and to force her into a divorce and settlement to further plans which decedent was making for his future from which she was to be excluded."

In a second count Margaret alleged the facts recited above concerning the NSLI policy and further alleged that the defendants had received from the proceeds of said policy installments amounting to $882.05. She asked for a judgment for one-half of the payments which the defendants had already received and that the defendants be ordered to pay her amounts equal to one-half of any proceeds received by them in the future when such amounts were received. Such a judgment was entered by the trial court, and it was affirmed by the district court of appeals. The California appellate court framed the question to be: "... [D]id Congress intend, by section 454a... [of the World War Veterans Relief Act] to provide that the proceeds of a National Service Life Insur-

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ance policy, after payment of the same to a named beneficiary, are not subject to the laws of a state governing title to property within that state, and if it did so intend, had it the power under the Constitution to so provide, and thus divest a wife in California of property rights which under the laws of this state are community property in which such wife has a vested interest."

Unfortunately, the court did not clearly answer the first part of the question. It did not directly and in unequivocal terms hold, as the writer believes it should have held, that Congress never intended by Section 454a or by any other section of the Act to deprive a wife or widow of her community interest in the proceeds of a NSLI policy after such proceeds have been paid to the named beneficiary. Instead, the court devoted its attention to the latter part of the question and held that if Congress had such intent to divest a wife of her community property, it had no power to do so under the Fifth Amendment to the Constitution of the United States.

The court denied an application for rehearing, and the appellants (defendants) made application for hearing in the Supreme Court of California. The office of the Attorney General of the United States then entered the case by instructing its office in Sacramento, California, to file an amicus curiae brief before the Supreme Court of California in support of appellants. It is interesting and surprising to note that the Attorney General of the United States at this time was Mr. Tom Clark who later as a Justice of the Supreme Court wrote the majority opinion in this case. The Supreme Court of California denied hearing without opinion.

The appellants appealed to the Supreme Court of the United States on the issue of the proceeds of the NSLI policy, conceding all other issues to have been settled by the decision of the court below. The Solicitor General of the United States filed an amicus curiae brief before the Supreme Court of the United States in

6 201 P. 2d at 841, 842.
7 Appellant's Brief in the Supreme Court of the United States, p. 3.
support of the appellants. The grounds on which the jurisdiction of the Supreme Court was invoked was that "the state courts had refused to apply the provisions of an act of Congress...but instead applied conflicting state rules and held the applicable provisions of the Congressional act void under the Fifth and Tenth Amendments to the Constitution of the United States."

As indicated above, it is doubtful that the California court did hold any act of Congress to be void, but nevertheless Mr. Justice Clark writing for the majority stated, "Reading the opinion below as a decision that the federal statute was unconstitutional we noted probable jurisdiction." The issues in the case were framed by the following language contained in the opening paragraph of the majority opinion: "We are to determine whether the California community property law, as applied in this case, conflicts with certain provisions of the National Service Life Insurance Act of 1940; and if so, whether the federal law is consistent with the Fifth Amendment to the Constitution of the United States."

After framing the issues in this fashion, the Court held that a properly designated beneficiary of a NSLI policy who was not the spouse of the insured is nevertheless entitled to all the proceeds of the policy upon the death of the insured against any claim thereto by the surviving spouse, despite the fact that the marriage was in existence at the time the policy was acquired, that both spouses were domiciled in the community property state of California at all times and that the premiums were paid from the army pay of the insured.

After the opinion of the Supreme Court was published, its effect upon the community property interest of wives and widows was noted with such alarm that the Attorneys General of the States of Arizona, Texas and California, joined by Idaho and Nevada, filed amicus curiae briefs in support of a petition for rehearing.

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8 Appellant's Brief in the Supreme Court of the United States, p. 2.
9 338 U. S. at 656.
10 Ibid.
However, the petition was denied without opinion. The writer appeared "Of Counsel" on the brief of the State of Texas.

2. NATIONAL SERVICE LIFE INSURANCE IS NOT BASICALLY DIFFERENT FROM COMMERCIAL INSURANCE

The majority opinion turns upon the interpretation of Sections 802(g) and 802(i) of the National Service Life Insurance Act of 1940 and Section 454a of the World War Veterans' Relief Act, 1924. Section 454a has been made a part of the National Service Life Insurance Act (hereinafter called the "Act"). The Court's interpretation of these sections of the Act is such as to indicate that NSLI is so radically different from commercial insurance that radically different rules of law must be applied. But this conclusion appears to be unwarranted either by the wording of the sections or by the history behind the Act.

These sections are but part of the Congressional plan of setting up an insurance program for servicemen that is not basically different from commercial insurance. Section 454a provides an exemption of payments of benefits from claims of creditors. Similar statutes are in effect in all, or almost all, the states in the Union. Section 802(g) restricts the permitted class of beneficiaries and reserves to the insured the power of free designation of beneficiaries (within the permitted class) and the power to change beneficiaries. Such reservation of powers is, of course, permitted insureds under the laws of all the states and is common to almost all commercial policies. Section 802(i) makes provision for payment of benefits where no beneficiary was designated or where the designated beneficiary has died. This section

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15 The insurance proceeds exemption statutes of 42 states and the District of Columbia are discussed in 2 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929) § 330.
16 This restriction was removed as to those policies maturing on or after August 1, 1946. 60 Stat. 781 (1946), 38 U. S. C. 1946 ed. § 802(g).
along with 802(j) prevents payment of installments of insurance where the insured and all of the beneficiaries within the permitted class have died. Neither of these two sections applies to insurance maturing on or after August 1, 1946. A more detailed analysis of these sections will be made at a later point when the majority opinion's application of them is considered.

When the question of insurance for servicemen was first considered, hearings were held and investigation made to determine a feasible program. Some consideration was given to a plan of permitting servicemen to insure with commercial insurance companies, with the government bearing the expense of the extra premiums since the government was responsible for placing the men in hazardous circumstances. This plan was rejected. Three theories of government insurance were available: gratuitous, compulsory or contract. Contract insurance was selected as the plan. Therefore, the service man is not receiving a gift when he purchases a USGLI or NSLI policy. True, the amounts of the premiums are low; but reasons for this are apparent when it is considered that no fees or commissions are paid to insurance agents, no fees are paid to medical examiners, there are no special investment expenses since the funds received go into government securities, and there are no taxes to be paid. The actual administration of the insurance business is charged as a general government expense.

There is no question that when a USGLI or NSLI policy is taken out, a property right is acquired in exchange for a consideration. This is, of course, true when a commercial insurance policy is purchased. It should follow that when community funds are used to pay the premiums of USGLI or NSLI policies, such

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18 Hearings before Committee on Interstate and Foreign Commerce on H. R. 5723, 65th Cong., 1st Sess., August 17, 1917.
20 Id. at 8.
21 Id. at 6.
policies become community assets. But what has happened to these
community assets under the *Wissner* decision? They have been
turned over to the husband, and he has been given title to property
that rightfully belongs to the wife.

*Both USGLI and NSLI can be converted into permanent insur-
ance for which standard forms, duplicated by practically all com-
mercial life insurance companies, are used.*23 These standard
forms are the basis of the contract between the government and
the serviceman, and since they are duplicates of the forms used
by commercial life insurance companies, it must follow that
government insurance is basically the same as commercial insur-
ance.

Contrary to the implication in the majority opinion that NSLI
is a windfall produced by a paternal government is the fact that
husbands and wives in the community property states have been
paying premiums on such policies out of community property
earnings for over 30 years. At the time of enactment of the Select-
ive Training and Service Act of 1940 there were in force over
600,000 USGLI policies issued during and after World War I.
These were both converted and yearly renewable term policies
representing more than $2,500,000,000 of insurance.24 Five mil-
lion veterans of World War II are maintaining in force NSLI
policies with face value of $31,200,000,000,25 and the number of

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23 "All insurance issued during World War I was on the one-year renewable term
basis, whereas all NSLI was originally issued as five-year term policies, convertible
into ordinary life, twenty-payment life, or thirty-payment life policies. Now, however,
NSLI is obtainable in the following permanent forms: ordinary life, twenty-payment
life, thirty-payment life, twenty-year endowment, endowment at age 60, and endowment
at age 65. United States Government Life Insurance offers the same life policies, in
addition to a five-year convertible and renewable term policy, and the following endow-
dment forms: twenty-year endowment, thirty-year endowment, and endowment at age 62.
These are standard forms and, with the exception of the endowment at age 62, are
duplicated by practically all commercial life insurance companies. Commercial com-
panies go further, however, and offer additional plans designed to meet in a more
efficacious manner the needs of the policyholders and to improve the competitive
position of the company. Typical of the latter are family income policies and retirement
income plans. Government life insurance does not purport to furnish such specialized
protection but confines itself to basic forms of universal application." McGill, op. cit.
supra note 19, at 264.

24 *Administration of Veterans Affairs, Annual Report* (1941) 22.

married couples in community property states who are paying premiums on these policies from privately earned community funds must number in the hundreds of thousands.

3. A Basic Principle of the Community Property System Is Limitation of Right of Husband To Manage, Control or Dispose of Wife’s Interest in Community

A basic principle of the community property system is the imposition of some limitations on the right and power of the husband to manage, control or dispose of the wife’s interest in the community. This principle is inherent in the system because the wife is a co-owner of the community property. It is the simple proposition that the husband cannot treat his wife’s property as his own because it is not his own.

A difficult problem in life insurance cases is the determination of the limitations on the husband’s donative power when he seeks to give away community property by means of life insurance. All of the original community property states impose some limitations. These limitations range from permitting the husband to give away community property unless he intends to defraud or injure the wife, to denial of power to give away the community without the wife’s consent. In California, where the Wissner case arose, the husband cannot give away his wife’s interest in the community without her consent in writing.

26 The husband has the authority to manage, control and dispose of the community. Vernier, American Family Laws (1935) 218.
Emphasis should be made of the vast difference between the civil law concept of marriage as a partnership and the common law concept of marriage as vesting in the husband all common property as well as making him the sole legal entity. Under the partnership concept all property possessed by the husband and wife is presumed to be common property, owned equally by each, with the husband as the managing partner. This system, inextricably woven into the whole fabric of the community property states' life and law, has had no need of fundamental changes to adapt it to the present day requirements of husbands and wives. By contrast, it has been only by statutory enactments that married women in most common law jurisdictions have been permitted rights in their own property.

The sharp difference in the two basic concepts of ownership of property acquired after marriage is exemplified by Willcox v. Penn Mutual Life Ins. Co., wherein the Supreme Court of Pennsylvania declared that State's Community Property Law of 1947 to be unconstitutional under both the Constitution of Pennsylvania and the Federal Constitution. The court there considered a statute purporting to superimpose a community property system upon a state property structure where common law rules and principles with respect to property held by and between husband and wife had been traditionally followed. The court received the benefit of profound research by many of the more prominent attorneys of Pennsylvania on the basic differences between the two marital concepts. As a result it found that the newly enacted Community Property Law of 1947 made income and profits derived from property owned by a spouse prior to the effective date of the law the common property of both spouses and that therefore its effect was to deprive the spouse of property without due process of law. The court was careful to note that the principles laid down by the Spanish law, and followed in the constitutions, statutes and judicial systems of some of the traditional community property

states from the very beginning of their governmental existence, made such income and profits community property belonging to both spouses by halves.

The Pennsylvania Supreme Court also found that the Community Property Law of 1947 failed to have any limitation on the management, control, and disposition of such community property by the husband and that therefore the wife was not really an owner of the property since she had none of the incidents of ownership. The court noted by contrast the limitations imposed by the traditional community property states upon the management, control and disposition of the community property by the husband.

This decision further emphasizes that the husband's administration of the community must be directed to the preservation and use of it for the common benefit of himself and his wife and may not be exercised to the latter's prejudice.

The decision in the Wissner case permits the husband to administer community funds, in which the wife has a vested interest, to her prejudice by using such funds to pay premiums on NSLI policies wherein some third party beneficiary may acquire complete rights in the proceeds. It forecloses relief where heretofore the courts have always granted such relief in favor of the wife for any violation of the husband's duties in regard to administration, control and disposition of the communal property.33

4. THE UNITED STATES SUPREME COURT HAS HERETOFORE RECOGNIZED LIMITATION OF RIGHT OF HUSBAND TO MANAGE, CONTROL OR DISPOSE OF WIFE'S INTEREST IN COMMUNITY

Heretofore the Supreme Court has clearly recognized the nature and the extent of the wife's vested rights in the community property. In Poe v. Seaborn34 and companion cases (Goodell

34 282 U. S. 101 (1930).
v. Koch,35 Hopkins v. Bacon,36 Bender v. Pfaff,37 and United States v. Malcolm38) decided at the same time, it was held that according to the laws of the community property states, with which those cases were respectively concerned, the wife had a vested interest in the community property and not merely an expectancy. In the case of Hopkins v. Bacon, supra, which dealt with the Texas community property laws, in considering the statutes containing provisions as to what should be included in community property, the Court stated:

"...They provide, as is usual in states having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it were his own. In spite of this, however, it is settled that in Texas the wife has a present vested interest in such property. Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799. Her interest is said to be equal to the husband's. Wright v. Hays, 10 Tex. 130, 60 Am. Dec. 200. It is held that the spouses' rights of property in the effects of the community are perfectly equivalent to each other. Arnold v. Leonard, supra. These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts. Stramler v. Coe, 15 Tex. 211; Martin v. Moran, 11 Tex. Civ. App. 509, 32 S. W. 904; Watson v. Harris, 61 Tex. Civ. App. 263, 130 S. W. 237; Davis v. Davis (Tex. Civ. App.) 186 S. W. 775."39

The rationale of these cases, decided after profound research and submission of briefs and arguments by a large number of prominent attorneys from many parts of this nation, is that the wife has a vested interest in the community property because: "While the husband has the management and control of community personal property and like power of disposition thereof as of his separate personal property, this power is subject to restric-

35 282 U. S. 118 (1930).
36 282 U. S. 122 (1930).
37 282 U. S. 127 (1930).
38 282 U. S. 792 (1930).
39 282 U. S. at 126.
tions which are inconsistent with denial of the wife's interest as co-owner."

5. **The Wissner Decision Does Violence to the Community Property System in That It Permits a Husband Unlimited Power in the Management, Control and Disposition of the Wife's Interest in the Community Estate**

As has been noted, all of the community property states impose some limitations upon the power of the husband to deal with the wife's interest in the community. With the exception of Louisiana, the limitations imposed by Texas are the least stringent. The Texas law permits the husband to give away personal community property as long as he has no intent to defraud the wife. The meaning of "intent to defraud" has not been clearly enunciated either in Texas or in those states that require a showing of fraud. The comments that follow concerning the Texas law are also applicable in general to the other community property states.

While the facts in the *Wissner* case may be sufficient to show legal fraud in Texas, there is no reason to believe that the United States Supreme Court would not reach the same conclusion in a case where "intent to defraud" was clearly shown.

Where the husband uses community funds for the payment of premiums on a policy on his life with the fraudulent intent of depriving the wife of her share in the community, the cases clearly recognize the wife's property rights in the fund used for payment of premiums, the wrong done to her rights by the husband's

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41 See notes 28, 29 and 30 supra and accompanying text.
42 Cases cited supra note 29.
44 *Id.* at 126, n. 22a.
fraudulent act, and allow recovery measured by a part or all of the proceeds of the policy.\textsuperscript{46}

It is clear that the wife, having a vested interest in the community funds used for payment of premiums, acquires by mutations\textsuperscript{47} a vested interest in the policy and that a fraudulent intent to deprive the wife of her vested interest in the policy gives her the right to recover an amount at least equal to one-half the proceeds. Under the Texas view the wife does not and cannot acquire a vested interest in the proceeds (death benefits) as such of even a non-governmental policy matured by death of the insured where a third person is properly named beneficiary.\textsuperscript{48} The insured has the contractual right and power to designate the person of his choice as beneficiary, and the insurer can safely rely upon such designation.\textsuperscript{49} The insured has such right and power under the National Service Life Insurance Act, and the Veterans Administrator can just as safely rely upon such designation. But the decision of the \textit{Wissner} case wipes out the wife's property rights in the funds (earnings) used for the payment of premiums and the consequent property rights in the policy and the right to recover one-half of the proceeds where the husband acts in fraud of the wife.

All of these traditional and firmly settled rights are wiped out on the basis that the implied intent of Congress was to prevent interference with the insurance fund and the free designation of the beneficiary by the service man. Yet these traditional communal property rights may be fully respected without such interference. This is demonstrated by the fact that non-governmental

\textsuperscript{46} Cases cited \textit{supra} note 29.
\textsuperscript{47} Furche v. Sailer, 8 S. W. 2d 334 (Tex. Civ. App. 1928). Speer, \textit{Law of Marital Rights in Texas} (3rd ed. 1929) 462, presents the point thus:

"It is not necessary to cite authorities upon a proposition so fundamental. It was never contemplated that the community should be denied the right freely to sell or exchange its possessions, upon pain of changing the status of the property if such sales or exchanges were made. To what estate could it be transferred by such a process?"

\textit{And see generally Emery, Mutations, 4 Southwestern L. J. 123 (1950).}

\textsuperscript{48} Volunteer State Life Ins. Co. v. Hardin, 145 Tex. 245, 197 S. W. 2d 105 (1946).
insurers can safely pay the designated beneficiary—freely designated by the insured.

In view of the fact that the decision in this case gives the husband an unqualified power of disposal of community funds used for the payment of premiums on governmental insurance policies, it is necessarily contrary to the Texas cases cited, necessarily irreconcilable with the fundamental principles of community property law on which they rest, and necessarily in derogation and denial of long established property rights of the wife in community funds.

Since by statute\(^5^0\) in Texas the community estate is composed of “all property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other,” any acquisition by either spouse during marriage becomes community unless it falls within the definition of separate property.\(^5^1\) Separate property is limited to property acquired by gift, devise or descent and to the increase of separate lands.\(^5^2\) Thus, all earnings during marriage,—salaries, wages and business profits \textit{and any property acquired therewith}—are community property; and this is true whether the acquisition is accomplished by the husband or by the wife. The wife’s rights of ownership in all property so acquired are in every respect equal to those of her husband. The United States Supreme Court has said that these rights are identical, that the husband and wife own the estate in common, and that though the husband is the active managing partner of the union, yet her claims to the common property are equal to his.\(^5^3\)

In the leading Texas case of \textit{Arnold v. Leonard}\(^5^4\) two statutes which had the effect of declaring that the rents and revenues of the separate property of the wife would be her separate property

\(^{51}\) Tex. Const. Art. XVI, § 15, defines the wife’s separate property.
\(^{53}\) Hopkins v. Bacon, 282 U. S. 122 (1930).
\(^{54}\) 114 Tex. 535, 273 S. W. 799 (1925).
were held to violate the provisions of the Texas Constitution\textsuperscript{56} defining the wife’s separate property in that they were an attempt to enlarge the wife’s separate property. The constitution was held to give rise to an implied prohibition against the legislative power either to add to or withdraw from the wife’s separate property. This case has been cited and followed by many succeeding Texas cases for the principle that the legislature cannot enlarge upon the provisions of the state constitution and make that separate property of the wife which otherwise would be community property.\textsuperscript{56}

There is no constitutional definition of the husband’s separate property in Texas, and, consequently, in \textit{Stephens v. Stephens},\textsuperscript{57} a statute making rents and revenues from the husband’s separate estate the separate property of the husband was held to be constitutional. However, in \textit{Commissioner v. Wilson}\textsuperscript{58} the United States Court of Appeals for the Fifth Circuit held that the said statute relating to rents and revenues from the husband’s separate estate was unconstitutional. It was urged that since the state constitution did not define the husband’s separate estate, there was nothing to render ineffective its statutory extension. However, the court indicated that the whole course of legislation in Texas indicated a purpose to treat husband and wife alike in fixing their separate estates as against the community, and as the statutes were clearly connected with and dependent upon one another, since the provision as to the wife was unconstitutional, the provision as to the husband must also be so regarded.

These cases clearly demonstrate that the community property system of Texas forms a pattern whereby constitutionally the property rights of the spouses are definitely fixed and cannot be enlarged or diminished by legislative or judicial processes. But

\textsuperscript{56}\textit{Tex. Const.} Art. XVI, § 15. A 1948 amendment provides for changes in the community estate if accomplished pursuant to the amendment.

\textsuperscript{57}Frame v. Frame, 120 Tex. 61, 36 S. W. 2d 152 (1931); Gohlman, L. & Co. v. Whittle, 114 Tex. 548, 273 S. W. 808 (1925).

\textsuperscript{58}292 S. W. 290 (Tex. Civ. App. 1927).
the Wissner case permits the husband completely to destroy the wife's community property interest in funds used to pay premiums on NSLI policies. In effect, it permits him to treat as his separate property a chose in action that was created by the use of community funds.

6. Analysis of the Majority Opinion

If USGLI and NSLI are not basically different from commercial insurance, then the community property laws do not conflict with the Act unless Congress by special provisions in the Act intended to abrogate the community property laws as applied to federal insurance. Unless such intent is clearly revealed, there was no occasion, therefore, to raise any question as to the constitutionality of the Act. As will be seen, there is nothing in the Act indicating such intent on the part of Congress. In the rather detailed analysis of the opinion that follows, no comment will be made on the latter part of the opinion holding the Act constitutional except the Court's interpretation of a sentence in Section 802(i).

A. Interpretation of Section 802(g)

Mr. Justice Clark, writing for the majority, stated that "the controlling section of the Act provides that the insured 'shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class] ... and shall ... at all times have the right to change the beneficiary or beneficiaries....' 38 U. S. C. Sec. 802(g), 38 U.S.C.A. Sec. 802(g)." (Emphasis supplied.)

It takes but a moment's reflection to see that this "controlling" section merely reserves to the insured the same powers afforded in millions of commercial life insurance policies: the power of free designation of the beneficiary and the power to change beneficiaries. The reservation of such powers is almost universal practice in the usual life insurance forms; but it does not enable the insured arbitrarily to divest his wife of her community interest in

52 338 U. S. at 658.
the policy or its proceeds. Yet, speaking of these common powers in the very next sentence, the Court said, "Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." (Emphasis supplied.)

It is incomprehensible how the above-quoted section of the Act directs "that the proceeds belong to the named beneficiary and no other." Neither the word "proceeds" nor any synonym thereof is used. Nothing is said about the proceeds "belonging" to anyone, much less to the "beneficiary and no other." How can Congress, in granting the usual common reservation of powers freely to designate or change beneficiaries be speaking "with force and clarity" concerning the rights or interests in the fruits of a community investment?

Nowhere in the Act has Congress stated that the proceeds of the insurance "belong to the named beneficiary and no other." In fact, there are federal decisions that have held that the proceeds belong to other than the named beneficiary.61

Next it is stated, "Pursuant to the congressional command, the Government contracted to pay the insurance to the insured's choice." This is exactly what the ordinary commercial insurance company contracts to do. Nevertheless the conclusion is then drawn "that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money."

It was the insured, not Congress, who directed that the named beneficiary, his mother, should receive the proceeds. There is no doubt as to his power to direct who shall receive the proceeds as beneficiary. The same power exists in the usual commercial policy. It is incorrect to say that the judgment of the lower court substi-

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61 If the serviceman named as beneficiary a woman whom he believes to be his wife but it is determined under the laws of the state where the marriage took place that she is not his wife, she is not entitled to the proceeds. Brown v. United States, 164 F. 2d 490 (C. C. A. 3rd, 1947); United States v. Layton, 68 F. Supp. 247 (S. D. Fla. 1946).
tuted the widow for the mother as beneficiary of one-half the proceeds. The widow made no claim to any rights as a beneficiary. She claimed only her community property interest in funds already received and to be received by the mother as beneficiary.

The next statement attributes to appellee (the widow) a "discovery of congressional purpose that widows in community property states participate in the payments under the policy, contrary to the express direction of the insured." No such discovery was attempted or necessary to preserve the widow's community property rights. If the Act does not disclose an intent by Congress to change the existing law, then no change is accomplished.6 Widows in community property states are entitled to payment measured by their community property interest in commercial policies where the premiums are paid with community funds.6 The Act is completely silent with respect to such community property, and no intent by Congress to destroy the widow's rights can logically be found.

It is next stated, "Whether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress." The soldier's choice of beneficiary was his mother. No one denies that she is the named beneficiary or that she is entitled to receive payments under the policy contract with the government as the named beneficiary. The soldier's choice was not nullified. But if it was the soldier's choice to defraud his wife by giving away her community property interest in the policy without consideration to the community and without her knowledge or consent, then his "choice" rightfully should be nullified.

62 "It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention." Thompson v. Thompson, 218 U. S. 611, 618 (1910).

63 See cases cited supra note 60.
The "deliberate purpose of Congress" as is deliberately set out in Section 802(g) was to see that the soldier could freely designate and change beneficiaries. This purpose was not frustrated. It could not be the "deliberate purpose of Congress," by that section of the Act or by any other section, to allow a soldier to take his wife's property without her consent or knowledge and use it to purchase another piece of property (insurance policy) that inures to the sole benefit of a third party.

The all-important fact, ignored by the majority, is that the community property law when applied to the facts of this case does not deprive the insured of the power to select his beneficiary and to insure that that beneficiary receive those proceeds of the policy which the insured has the power to dispose of. Where the policy is purchased with community funds, it is community property and each spouse has a one-half interest in the policy as an owner. The husband, though he has control and management, cannot give away more than he owns, but he can give away the one-half he does own. Surely all Congress intended in Section 802(g) was to grant to the insured the power to designate the beneficiary to receive as owner the proceeds arising from those funds, and only those funds, originally owned by him or those representing his community interest.

B. Interpretation of Section 454a

The opinion then takes up that part of the judgment of the lower court for amounts equal to one-half of the insurance installments to be paid by the Government to the mother.\(^4\) It finds that the effect is that the very payments received are to be seized and concludes that this is in "flat conflict" with Section 454a,\(^5\) the exemption provision. If the widow was a creditor of either the insured or the beneficiary, the conclusion might be valid because Section 454a is a typical exemption statute immunizing the pro-

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\(^4\) 338 U.S. at 659.

ceeds from attachment by the beneficiary's creditors. But she is not a creditor. She is a co-owner of the proceeds. Every one of the original community property states has such exemption statutes, but they do not apply to a wife's or widow's claim of community interest in insurance proceeds. The obvious reason for this is that her claim is that of co-owner rather than creditor. It has never been held that the wife in a community property state occupies the position of a creditor with respect to community assets.

The opinion does recognize a number of cases holding that Section 454a or similar exemption statutes do not apply to claims for alimony or family support. What may be an attempt in the opinion to distinguish these cases follows, although it must be admitted by the writer that he does not fully understand these sentences:

"We shall not attempt to epitomize a legal system at least as ancient as the customs of the Visigoths, but we must note that the community property principle rests upon something more than the moral obligation of supporting spouse and children: the business relationship of man and wife for their mutual monetary profit. See de Funiak, Community Property, § 11 (1943). Venerable and worthy as this community is, it is not, we think, as likely to justify an exception to the congressional language as specific judicial recognition of particular needs, in the alimony and support cases. Our view of those cases, whatever it may be, is irrelevant here." (Emphasis supplied.)

The statement that the "community property principle rests upon something more than the moral obligation of supporting spouse and children" seems to be a favorable one for the proposition that community property interests are not within the exemption provisions. The community property principle rests upon mutual ownership of acquisitions and gains during coverture. Consequently, it seems such co-ownership by the wife justifies "an


67 338 U. S. at 659, 660.
exception to the congressional language" even more so than the alimony and support cases.

The vagueness of the language used indicates the difficulty of drawing any distinction between the cases with reference to alimony and support for the wife and this case. It is apparent that upon divorce and separation the wife’s interest in the accumulated community property is used for her support and maintenance in the same manner as accumulated marital property is used in common law states whose statutes provide for alimony, support and maintenance, and division of the accumulated marital property in the event of divorce.

The alimony and support cases cited by the Court recognize that the exemption section does not go beyond claims of creditors and other similar debts and that it does not cut off family rights. They therefore support the proposition that the wife’s community property interest, not being a creditor’s claim or debt, but a marital property claim, is not cut off by the exemption provision.

The history behind this section also indicates that Congress never intended the exemption to extend beyond the claims of creditors and other similar debts. The original exemption section was construed very narrowly by the Supreme Court of the United States. The section then said in part: “The... insurance... shall not be subject to the claims of creditors of any person to whom an award is made.”

The Supreme Court in the case of Pagel v. Page held this language did not give exemption beyond the insured and the beneficiary, and, therefore, insurance funds were not exempt after they became a part of the estate of the insured. As a result of this decision the old Section 454 was repealed and 454a enacted so as to extend the exemption to claims of creditors against the funds when they became a part of the estate of the insured. This was doing nothing more than that done by many state exemption

69 291 U. S. 473 (1934).
70 See In re McCormick’s Estate, 8 N. Y. S. 2d 179, 185-188 (1938).
statutes which extend exemption to insurance proceeds after they become a part of the estate of the insured and even to property purchased with insurance proceeds.\textsuperscript{71} The Supreme Court, however, has held that Section 454a does not apply to property purchased with insurance proceeds.\textsuperscript{72}

The language used by Congress in Section 454a reflects the intent to protect the proceeds from “claims of creditors” only.\textsuperscript{73} In order to insure that all legal procedures for enforcing “claims of creditors” were foreclosed, there was added immediately thereafter the clause, “and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.” Many of the decisions previously mentioned in connection with alimony and support cases had been decided when Congress enacted Section 454a. In 1930 the case of \textit{United States v. Robinson}\textsuperscript{74} did not use Section 454, the predecessor of 454a, to exempt the proceeds of a USGLI policy from the community property claim of the wife. Congress did not see fit to avoid the effect of those decisions when it enacted 454a in 1935. After 1935, state and federal courts\textsuperscript{75} held that a wife to whom alimony was due was not a creditor within the meaning of Section 454a; yet Congress did not see fit to change Section 454a when it was made a part of the National Service Life Insurance Act of 1940.

C. INTERPRETATION OF SECTION 802(i)

In that part of the majority opinion dealing with the question of the constitutionality of the Act Mr. Justice Clark stated:

\textsuperscript{71} For example, see Wash. Rev. Stat. (Remington, 1932) §§ 569, 7230-1.

\textsuperscript{72} Carrier v. Bryant, 306 U. S. 545 (1939).

\textsuperscript{73} The pertinent portion of the section is as follows: “Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary... shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.”

\textsuperscript{74} 40 F. 2d 14 (C. C. A. 5th, 1930).

And since the statute which made the proceeds possible was explicit in announcing that the insured shall have the right to designate the recipient of the insurance, and that 'No person shall have a vested right' to those proceeds, 38 U. S. C. section 802(i), 38 U. S. C. A. section 802(i), appellee could not, in law, contemplate their capture. The federal statute establishes the fund in issue, and forestalls the existence of any 'vested' right in the proceeds of federal insurance.

The quoted portion of the sentence from Section 802(i), lifted from its context, and used in the manner set out above precludes even the insured from having a vested right to the proceeds. Logically carrying out the meaning given to this phrase by the majority opinion would prevent any contract rights accruing to the insured, much less the beneficiary. This is, of course, absurd. The Supreme Court had already decided in Lynch v. United States\(^7\) that Congress did not intend to forestall the existence of any vested right in the contract (policy) or in the proceeds. It was stated in the Lynch case that USGLI policies are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents: they "are property and create vested rights."\(^8\) A careful reading of Section 802(i) clearly reveals that Congress did not intend that it be applied as the majority applied it in the Wissner case.

The title of the section reads "Payment of benefits where beneficiary undesignated or dead." The beneficiary was neither undesignated nor dead in this case. The first sentence deals with the manner of payment in the event no beneficiary is designated, or in the event the beneficiary has predeceased the insured; so it clearly does not apply to this case.

Next it is provided that the payments are conditioned upon a beneficiary being alive to take the same. The remaining part of this subsection reads as follows: "No person shall have a vested right to any installment or installments of any such insurance and

\(^7\) 338 U. S. at 661.

\(^8\) 292 U. S. 571 (1934).
any installments not paid to a beneficiary during such beneficiary’s lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h) of this section.

It seems apparent from a reading of this quoted portion that when the Congress used the words “no person shall have a vested right,” it meant them in the sense that the right to the installments of insurance was not descendible or devisable to the heirs of the beneficiary, as is ordinary property in which a person has a vested right. Section 802(j) restates the same proposition in express terms.

It appears that when Congress enacted the words, “no person shall have a vested right to any installment or installments of any such insurance,” it used the words “vested right” in their ordinary legal sense and that its intendment was that the rights to the installments were to remain contingent or conditional. Under general insurance law, when the insured dies, the beneficiary he has designated, if then living, acquires a vested right to the proceeds of the policy.79

In choosing these words Congress intended merely to make an exception in the general law relating to vested rights in beneficiaries of insurance contracts.

The very nature of a vested right entails the incidents of assignability, descendibility and devisability, and Congress did not want these incidents to inure to the beneficiary. Hence it provided, in the next following subsection (802(j)), that no benefits shall be paid to an heir or personal representative of a beneficiary, and further, that if no person in the permitted class (802(h)) survives to take the benefits, then no installments shall be paid. This seems to mean that if an insured dies having designated as beneficiary a person or persons referred to in Section 802(h), and if the designated beneficiary and none of the other persons therein

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referred to survive the insured, then the government would pay absolutely nothing under the policy.

An additional fact demonstrating that the above interpretation of these subsections is correct and refuting the soundness of the application made of Section 802(i) by the majority opinion is that Congress has now made this section along with correlated sections inapplicable to insurance maturing on or after August 1, 1946. As to such insurance Congress removed several restrictions and exceptions not found in commercial insurance. The restriction on the permitted class of beneficiaries was removed so that now the insured can designate as beneficiary any one he chooses just as he can in commercial insurance. And the exception to the general insurance rule that the right to installments of insurance was not descendible or devisable was eliminated.

Therefore, the beneficiaries of policies maturing on or after August 1, 1946, do have vested interests when the policy matures just as do the beneficiaries of commercial policies. That this interpretation is correct is borne out by Section 802(u), amended by Act of May 23, 1949, to make it clear as to insurance maturing on or after August 1, 1946, when the beneficiary is entitled to a lump sum settlement but elects some other mode of settlement and dies before receiving all the benefits, that the value of the unpaid benefits shall be payable to the estate of the beneficiary. This subsection also provides, as in the case of commercial insurance, that where no beneficiary is designated or the designated beneficiary does not survive the insured, the commuted value of unpaid insurance shall be paid to the estate of the insured. One special rule is retained in that if the designated beneficiary is not entitled to a lump sum settlement and dies before receiving all the benefits, the commuted value of the unpaid insurance likewise shall be paid to the estate of the insured.

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80 60 STAT. 781 (1946), 38 U. S. C. 1946 ed. § 802(i).
81 60 STAT. 781 (1946), 38 U. S. C. 1946 ed. § 802(g).
82 60 STAT. 781 (1946), 38 U. S. C. 1946 ed. §§ 802(i), 802(j).
It is difficult to perceive how Sections 802(h), (i) and (j), or the words "no person shall have a vested right," which were taken from context, can apply to the appellee. The facts clearly indicate that the appellee is not claiming as a beneficiary and that she is not asserting any right against the government, as was attempted in the case of Pack v. United States. That case was one with a fact situation comparable to the Wissner case, except that there the wife sued the United States directly. The court, after holding that she could not bring action against the government, stated: "The wife, in order to have the community property right adjudicated, is required to resort to an independent action because litigation of the community property rights of the wife and mother is not a determination of a claim against the United States."

Therefore, the provision against a "vested right" in Section 802(i), applying only to beneficiaries, should not be construed to apply to a widow who is not claiming any right to the proceeds as a beneficiary. There appears to be no justification in using the section to prevent the widow from asserting her right as the owner of one-half of the money used to pay for the insurance and obtaining the fruits of that money in a personal action against the named beneficiary. If the husband, upon purchasing a USGLI or NSLI policy from the United States with funds belonging equally to himself and wife, acquires a vested right to benefits contracted for in the policy, then it seems inexorably to follow that the wife whose money is used by the husband likewise acquires a vested right to the benefits.

7. Are the Community Property States Entitled to Call Army Pay Community Property?

Considerable concern has been voiced about the content of footnote Number 2 to the majority opinion, wherein it is stated: "The view we take of this case makes it unnecessary to decide whether
California is entitled to call army pay community property." If California is not entitled to call army pay community property and if army pay was used to pay the total amount of all premiums on the policy involved, then under any view or system of law the wife could not prevail. The case could have been decided solely on this point—if California is not entitled to call army pay community property. If the Court entertains doubt as to whether California is entitled to call army pay community property, then presumably the same doubt exists with respect to whether any community property state is entitled to call army pay community property. The reason for the expression is not at all apparent. Traditionally, and by statute and court decision, the earnings or acquisitions by onerous title of both the husband and wife in all community property states have been treated as community.

This expression may be based on a footnote in the Brief for the United States as Amicus Curiae to the effect that army pay represents a gift by the government rather than earnings because the government can compel any person to serve in its armed services without pay. Such conclusion is specious since in fact our government did not and does not compel persons to serve in its armed services without pay. Any serviceman would probably receive in shocked disbelief any assertion that his army pay was a gift from his government.

Such assertion further is irreconcilable with the solicitude exhibited toward the serviceman by the Solicitor General’s brief.

86 Op. cit. supra note 19, at 23. This patronizing philosophy is certainly not present in Sherburne’s Administrator v. United States, 16 Ct. Cl. 491 (1881), wherein it is stated:

"Pay is a fixed and direct amount given by law to persons in military service, in consideration of and as compensation for their personal service. Allowances, as they are now called, or emoluments, as they were formerly termed, are indirect or contingent remuneration, which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes in the nature of reimbursement. Both pay and allowances are compensation for services while in service..."

This opinion has been cited with approval many times by various federal authorities including the Attorney General of the United States. 33 Op. Atty. Gen. 543, 549 (1923). Even a government allotment received by a serviceman’s wife is compensation to the serviceman for services rendered to his government in time of war and therefore community property. Sterrett v. Sterrett, 228 S. W. 2d 341 (Tex. Civ. App. 1950).
It is probably unnecessary to state that it is also contrary to our constitutional concepts of freedom.

It is extremely difficult to understand why the majority found it necessary to insert this footnote in view of the fact that there was no issue as to the nature of the funds. The implication that there is an open question as to whether army pay can be called community property raises possibilities of tremendous ramifications. NSLI policies are but a small part of the investments made by married servicemen in community property states from their pay. They have purchased homes, businesses, securities and other types of property. They have commingled army pay with other funds and income. If army pay by some mysterious process of Federal Government red tape assumes a quality unique to ordinary earnings, it seems only logical that all pay received from the Federal Government would acquire the same status. When it is considered that the Federal Government is the nation's greatest employer, it may be that the Supreme Court is going to tell us that there is a great deal less community property in existence than we thought.

As a matter of fact the majority opinion leaves uncertain whether NSLI policies or their proceeds are community property or separate property. This uncertainty exists whether the premiums are paid with army pay or from private earnings. The essence of the decision is that community property principles shall not nullify the husband's choice\(^\text{87}\) (even though he chooses to defraud his wife) of the beneficiary, who "shall be, during life, the sole owner of the proceeds"\(^\text{88}\) (even though one-half of the proceeds are fruits of the wife's property). In reaching this conclusion the majority does not reveal whether it believes Congress intended that the policy and its proceeds are not community

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\(^{87}\) It is ironical to note that even in the \textit{Wissner} case, if the widow should survive the beneficiary and the contingent beneficiary, she would receive all remaining installments due and payable under the policy. See 60 STAT. 781 (1946), 38 U. S. C. 1946 ed. § 802(h) (3) (A).

\(^{88}\) 338 U. S. at 660.
property but are separate property of the husband; or that even though the policy and its proceeds are community property, Congress intended to deprive the wife of her interest therein whenever such was the whim of the husband.

**Conclusion and Summary**

It is the opinion of the writer that the majority opinion erroneously and unnecessarily disrupted a large segment of the community property system. It not only deprives wives and widows of valuable property rights, but it may tend to disrupt family relations. In granting the insured the power to deprive his wife of her community interest, the majority says, "Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman."\(^9\) Surely the morale of the serviceman does not depend upon his being able to give away property that is not his. Surely anything that tends to unify and cement family relations enhances the morale of the married serviceman. The community property system is woven around the family relationship and tends to preserve and protect it. Surely there is no good reason in this situation to impose federal rules to the detriment of local family law. The state laws have been looked to for distribution of funds arising from government insurance.\(^9\)

The majority finds a "congressional mandate" to deprive the wife or widow of property rights secured to her under state law in its interpretation of certain subsections of Section 802. But analysis of these subsections reveals that they merely provide the usual features of commercial insurance, i.e., the preservation of powers to choose beneficiaries and to change beneficiaries and

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\(^9\) When funds from a USGLI policy are paid to the administrator of an insured's estate, they are distributed according to intestate laws of the state. Singleton v. Cheek, 284 U. S. 493 (1932). For other cases holding that state laws govern distribution of proceeds of similar insurance see United States v. Robinson, 40 F. 2d 14 (C. C. A. 5th, 1930); Succession of Jones, 185 La. 377, 169 So. 440 (1936); United States v. Rose, 57 S. W. 2d 350 (Tex. Civ. App. 1933) *er. dism'd.*
the exemption of funds received by the insured and beneficiary from the claims of creditors. It is submitted that the provisions of the Act relied upon by the majority do not reveal such a "congressional mandate" and that there is no reason to assume a congressional intent to destroy these property rights of wives and widows.

The conclusion reached by the majority is not justified by the need for uniform administration of the Act. The Government argued that the need for uniform administration, required by the detailed provisions of the 1940 Act, would be frustrated in various ways if National Service Life Insurance were distributed in accordance with community property laws of the various states. And it was protested that if established community property rights are recognized, the administration of the Act would be "complicated" and that difficult legal questions would arise. The bare facts of this case refute these protestations. The Government was not involved in the case until the Veterans Administration and the Department of Justice saw fit to jump into it. All obligations of the Government are fulfilled when the named beneficiary is paid. The community property laws are applied to the funds after they are paid. It was these government departments, not the original parties to this suit, who made the administration of the Act "complicated" and caused difficult legal questions to arise. So it is a bit amazing to find the Solicitor General of the United States suggesting that legal rights should be determined the easy way and that administrative bodies and courts should be relieved from the burden of solving difficult legal questions.

A very large segment of the population of the nation lives under the community property system. It is a practical system of husband and wife relationship and a salutary one. What better proof could be found that Congress intended these policies to be treated as are other insurance policies than the fact that Congress, the military services, and the Veterans Administration have placed

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91 Brief for the United States as Amicus Curiae, pp. 32-35.
great emphasis on the fact that these policies are valuable assets. At the time of enlistment, at regular intervals during the service career, upon discharge from the service, and by advertisement and dissemination of information since, the serviceman and ex-serviceman have been encouraged, persuaded and induced to maintain his National Service Life Insurance policy and convert it under any of the plans offered. The Congress has repeatedly extended the provisions of law permitting such insurance to be carried, long after the wars were over, and when the morale of the serviceman was no problem, for he had become an ordinary citizen again. More recently, dividends have been paid by the Veterans Administration upon such policies upon the basis of earnings from premiums paid. There can be little doubt in the face of these facts that the Congress was just as concerned about the welfare of the soldier as a soldier-citizen and in providing a savings plan for him and his family as it was in enhancing his morale.

It is safe to say that thousands of the citizens in community property states have continued their government insurance, either as term insurance or under a savings plan after conversion; and until the decision in the instant case, no question could have arisen but that such policies were community assets when paid with community funds. Here again, it is inconceivable that it was within the Congressional intent that such policies, which might perhaps represent the total community savings, could be applied for non-community purposes by the insured spouse with no remedy to the other member of the community, and that the safeguards of the community system as to this valuable property be totally wiped out. It is to be hoped that the Court or Congress may soon find the missing community property and restore it to the rightful owner—the wife-partner of the serviceman.