

THE DEPARTMENT OF DEFENSE’S APPROACH TO MILITARY PROTECTIVE ORDERS: HOW IT FAILS TO PROVIDE JUSTICE FOR SURVIVORS OF DOMESTIC ABUSE

JULIAN MOSS*

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INTRODUCTION

On February 2, 2017, a jury in Broward County Circuit Court found Thomas Maffei guilty on two counts of attempted first-degree murder after he shot his estranged wife, Kate Ranta, and her father.¹ Maffei, a retired U.S. Air Force Major, arrived at Ranta’s home with a gun and fired several

* J.D. Candidate, 2022, American University Washington College of Law; B.A. Government & International Politics, George Mason University Schar School of Policy and Government, 2018. Thank you to my parents for their support and Leah Hamilton for being an incredible editor and friend.

1. Vanessa Medina, *Retired Air Force Major Found Guilty in Shooting of Estranged Wife*, WSVN (Feb. 9, 2017), <https://wsvn.com/news/local/closing-arguments-underway-for-retired-air-force-major-who-allegedly-shot-family/>.

shots into the door before forcibly entering and shooting Ranta and her father several times.² Both survived, Ranta holds Maffei's Air Force command responsible.³ Ranta alleges that after previously reporting an incident to Maffei's command, the Air Force Office of Special Investigations initiated an extensive case and recommended court-martialing.⁴ Instead, his commanding officer handled the case privately and let Maffei retire with pay.⁵ The violent incident can be linked directly to the Air Force's numerous failures to address domestic violence complaints, including the failure to respond to Ranta's complaints and provide her with a protective order.⁶

Although Congress and the Department of Defense (DoD) have created policies aimed to prevent domestic violence and support survivors,⁷ domestic abuse remains prevalent among military families.⁸ The DoD created the

2. *Id.*

3. Patricia Kime, *Commands Protect Troops and Fail Families in Domestic Abuse Cases, Victims Say*, MILITARY.COM (Sept. 19, 2019), <https://www.military.com/daily-news/2019/09/19/c-commands-protect-troops-and-fail-families-domestic-abuse-cases-victims-say.html> (reporting that according to Ranta's testimony, the command knew that Maffei was dangerous and decided not to take any action).

4. *Id.* See generally Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801–940 (demonstrating similarities between court-martialing and the civilian criminal justice system—the accuser initiates a charge against the defendant, followed by a probable cause hearing and a trial before a military judge with or without a jury).

5. See Kime, *supra* note 3; see also *Military Justice Overview*, U.S. DEP'T OF DEF., <https://vwac.defense.gov/military.aspx> (last visited Aug. 12, 2021). Commanding officers have total discretion in deciding whether to initiate a complaint by means of court-martial, or one of the several nonjudicial disciplinary methods at their disposal. *Military Justice Overview, supra*. Within the military branch, an internal military investigative agency often looks into serious offenses and reports its findings to the commanding officer to make a final determination. *Id.*

6. Kime, *supra* note 3.

7. See Cynthia M. Menta, Comment, *The Misapplication of the Lautenberg Amendment in Voisine v. United States and the Resulting Loss of Second Amendment Protection*, 51 AKRON L. REV. 189, 193–94 (2017) (stating that Congress passed several pieces of legislation aimed at restricting the possession of firearms by alleged perpetrators of abuse starting with the 1968 Gun Control Act and the Violence Against Women Act in 1994).

8. In 2018 alone, the Department of Defense (DoD) reported 16,912 instances of spousal and intimate partner violence (IPV). KRISTY N. KAMARCK ET AL., CONG. RSCH. SERV., R40697, MILITARY FAMILIES AND INTIMATE PARTNER VIOLENCE: BACKGROUND AND ISSUES FOR CONGRESS 8 (2019), <https://fas.org/sgp/crs/natsec/R40697.pdf> (discussing the impact of IPV as both a public health and military issue). Of the reported incidents, over half met the criteria of domestic abuse under the DoD's definitions. See *id.*; see also U.S. DEP'T OF DEF., FAMILY ADVOCACY PROGRAM: ADDRESSING DOMESTIC ABUSE 3 (2019),

Family Advocacy Program to address domestic issues within the military—including abuse—by providing the appropriate resources to survivors.⁹ In light of the Covid-19 pandemic, the DoD launched a training program to educate military officials on the best practices for detecting domestic abuse stemming from the use of technology.¹⁰ However, the DoD has failed to provide comprehensive and unified policy, leaving the military branches under its umbrella confused and without meaningful guidance.¹¹

The DoD is acutely concerned with domestic violence and intimate partner violence (IPV) due to its impact on military effectiveness.¹² IPV is a subset of domestic violence that is committed against a current or former partner, spouse, or dating partner regardless of whether the partner still resides in the shared home.¹³ The Centers for Disease Control and

<https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/Sept2019/FAP%20RFI%208.pdf> (defining domestic abuse as “[a] pattern of behavior resulting in emotional/psychological abuse, economic control, and/or interference with personal liberty that is directed toward a person who is: a current or former spouse, a person with whom the abuser shares a child in common; or a current or former intimate partner with whom the abuser shares or has shared a common domicile”).

9. OFF. OF UNDER SEC’Y OF DEF. FOR PERS. & READINESS, DoD INSTRUCTION 6400.01: FAMILY ADVOCACY PROGRAM (2019) [hereinafter DODI 6400.01], <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/640001p.pdf> (establishing a DoD policy to promote awareness, provide access to reports, and provide appropriate resources).

10. U.S. DEP’T OF DEF., DoD TAKES NEW MEASURES TO ADDRESS THE DIGITALIZATION OF DOMESTIC VIOLENCE (2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2406978/dod-takes-new-measures-to-address-the-digitalization-of-domestic-violence/>.

11. U.S. DEP’T OF DEF., DoD RETALIATION PREVENTION AND RESPONSE STRATEGY: REGARDING SEXUAL ASSAULT AND HARASSMENT REPORTS (2016) [hereinafter DoD RETALIATION AND RESPONSE STRATEGY], https://www.sapr.mil/sites/default/files/DoD_Retaliatio_n_Strategy.pdf (noting a lack of standardized definition of retaliation causing inconsistency of application of guidelines across military branches).

12. U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-923, SUSTAINED LEADERSHIP AND OVERSIGHT NEEDED TO IMPROVE DoD’S PREVENTION AND TREATMENT OF DOMESTIC ABUSE 21–22 (2010) [hereinafter GAO-10-923]. Domestic abuse has a negative effect on combat readiness for a variety of reasons. Commanding officers spend a significant amount of time responding to complaints and ensuring victims receive the care they need. *Id.* at 12. Additionally, unresolved complaints within the unit can lead to instability. *Id.* at 17. This does not take into account the health issues victims suffer that are not unique to the military environment. *Id.* at 26.

13. Olivia Moorer, *Intimate Partner Violence vs. Domestic Violence*, YWCA (Jan. 5, 2021), <https://ywcaspokane.org/what-is-intimate-partner-domestic-violence/> (explaining that while domestic violence and IPV appear similar, domestic violence is broader and can occur between any two members of a household, while IPV refers to violence between romantic partners who may not even be living together).

Prevention (CDC) states that approximately 35% of female IPV survivors and 11% of male survivors suffer some physical injury related to IPV, and U.S. crime reports suggest that roughly 20% of homicide victims are killed by an intimate partner.¹⁴ IPV can also lead to negative physical and mental health outcomes, including heart issues, chronic illness, and post-traumatic stress disorder.¹⁵ In addition to the health issues that survivors suffer, the CDC also notes a substantial cost to society, estimating over \$3.6 trillion in costs.¹⁶

Numerous factors unique to members of the armed forces present risks to survivors of IPV.¹⁷ Spouses of service members like Kate Ranta find themselves isolated from their support system as they frequently uproot their lives.¹⁸ In addition, service members' demanding workload and heightened risk of trauma and substance abuse issues raise the risk of IPV and create barriers to obtaining help.¹⁹ Service members also have many risk factors that heighten their propensity to engage in acts of domestic violence.²⁰ These risk factors include stress and a higher

14. CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING INTIMATE PARTNER VIOLENCE (2020), https://www.cdc.gov/violenceprevention/pdf/ipv/IPV-factsheet_2020_508.pdf

15. *Id.* at 2.

16. *See id.* (describing costs related to medical services rendered for injuries directly caused by IPV incidents, treatment for chronic illness stemming from IPV incidents, loss of productivity, and legal proceedings).

17. *See* Jamie Kwan et al., *Prevalence of Intimate Partner Violence Perpetration Among Military Populations: A Systematic Review and Meta-analysis*, *AGGRESSION & VIOLENT BEHAV.* 53, 53 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7375166/#> (finding that daily stressors of military life, male predominance, and relative youth may all contribute to a prevalence of IPV within the military compared to the civilian population).

18. JOHN W. WILLIAMS JR. ET AL., DEP'T OF VETERANS AFFS. HEALTH SERVS. RSCH. & DEV. SERV., *INTIMATE PARTNER VIOLENCE: PREVALENCE AMONG U.S. MILITARY VETERANS AND ACTIVE DUTY SERVICEMEMBERS AND REVIEW OF INTERVENTION APPROACHES* 11 (2013), https://www.hsrd.research.va.gov/publications/esp/partner_violence-REPORT.pdf (discussing how frequent moves may prevent nonmilitary spouses from establishing financial independence, posing a barrier to obtaining permanent employment); *see also* MARGARET C. HARRELL ET AL., NAT'L DEF. RSCH. INST., *WORKING AROUND THE MILITARY: CHALLENGES OF MILITARY SPOUSE EMPLOYMENT* 1 (2005), <https://apps.dtic.mil/sti/pdfs/ADA595919.pdf>.

19. *See id.*; *see also* Scot Thomas, *Substance Abuse in the Active Military Personnel*, *AM. ADDICTION CTRS.* (May 4, 2020), <https://americanaddictioncenters.org/occupational-stress-influences/military-substance-abuse> (stating that nearly a quarter of active duty members show signs of mental health disorder, the rate of post-traumatic stress disorder is up to fifteen times higher, and service members use painkillers and alcohol at quadruple the rate of civilians).

20. *See* Simeon Stamm, Note, *Intimate Partner Violence in the Military: Securing our Country, Starting with the Home*, 47 *FAM. CT. REV.* 321, 324–25 (2009) (explaining that service members fit a different demographic than the general population because they have lower academic achievement rates and a higher propensity for drug and alcohol abuse stemming from job related trauma).

likelihood to engage in coercion and violence stemming from a desire for power in the relationship.²¹

Commanding officers have the authority to issue nonjudicial punishment to service members under their command.²² Commanding officers have broad discretion to impose punishments, regardless of whether the service member is a party to an ongoing or resolved legal matter.²³ One tool commanding officers have at their disposal is the military protective order (MPO).²⁴ Protective orders refer to any injunction or order issued to prevent violence or harassment toward another person.²⁵ A properly executed MPO automatically updates the National Crime Information Center database, alerting local civilian law enforcement authorities; however, it does not authorize local law enforcement to arrest a service member for violating the MPO.²⁶ MPOs are similar to civilian protective orders (CPOs), although there are a few key differences.²⁷ Contrary to CPOs, survivors do not need to file in court to obtain MPOs.²⁸ Additionally, there is no formal expiration date or appeals process; thus, an MPO may remain in effect indefinitely

21. *Id.* at 323–25 (noting that abuse is characterized by a pattern of power and control by the abuser over the survivor).

22. 10 U.S.C. § 815(b) (stating that nonjudicial punishments may include additional duties, reduced pay, confinement of the officer to custody, the application of protective orders, and other punishments).

23. *See id.*

24. *See* 10 U.S.C. § 1567; *see also* OFF. OF UNDER SEC'Y OF DEF. FOR PERS. & READINESS, DoD INSTRUCTION 6400.06: DOMESTIC ABUSE INVOLVING DoD MILITARY AND CERTAIN AFFILIATED PERSONNEL 8–9 (2017) [hereinafter DoDI 6400.06], <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/640006p.pdf>.

25. *See* 18 U.S.C. § 2266(5) (defining “[protective] order”); ALAN OTT, CONG. RSCH. SERV., IN11484, ANALYSIS OF MILITARY COURT PROTECTIVE ORDER PROVISION IN H.R. 6395 1 (2020), https://www.everycrsreport.com/files/2020-08-19_IN11484_36cc0c4d285d06fb5bfea8ab9580eb07235ff08b.pdf (explaining that the DoD adopted a federal civilian definition of “protecti[ve] order” for its domestic abuse policy).

26. Mark D. Stoup, *Legal Assistance and Crime Victims: Understanding the Boundaries*, REPORTER, Jan. 2017, at 39, 46, https://www.afjag.af.mil/Portals/77/documents/44_02%20WEB3.pdf?ver=2017-09-20-120748-753 (explaining that notifying local law enforcement authorities empowers them to assist a survivor).

27. *See Domestic Violence in the Military*, WOMENSLAW.ORG, (Oct. 9, 2019) <https://www.womenslaw.org/laws/federal/domestic-violence-military/military-protective-orders/basic-info-about-military> (stating that a military protective order (MPO) is only enforceable on the military base or installation and only while the service member is attached to the command that issued it).

28. *See* DoDI 6400.06, *supra* note 24, at 8 (outlining the process of obtaining an MPO).

without any ongoing proof of threat to the individual.²⁹ Although the DoD authorizes commanding officers to restrict service members' movement and access to firearms,³⁰ the DoD's instructions on MPOs are broad and leave it up to the individual military branches to fill in the blanks.³¹

The DoD's lack of rules regarding obtaining and handling MPOs paves the way for possible misuse or negligence by commanding officers, putting survivors at risk of further harm. Part I discusses existing legislation designed to protect survivors, including how the government can restrict service members' usage of firearms. Part II examines the benefits and drawbacks of MPOs, highlighting that while MPOs may appear more accessible than CPOs to survivors, their resulting protections are sparse and effectively negated. Part III analyzes inconsistencies across the military branches and highlights the implications stemming from the lack of uniformity. Part IV recommends that the DoD exercise its authority to clarify MPO procedures across all military branches further and enact MPO reforms to protect survivors of domestic abuse.

I. CURRENT LEGISLATIVE INFRASTRUCTURE SURROUNDING DOMESTIC VIOLENCE PERPETRATED BY SERVICE MEMBERS

Over the past few decades, Congress and the DoD have shown greater willingness to proactively address domestic abuse and hold perpetrators accountable.³² This Part first discusses legislation aimed at preventing violent offenders from possessing firearms and the gaps in the policies. Then, this Part addresses the DoD's authority to discipline service members through nonjudicial punishment, including MPOs.

29. See Aaron Meyer, *Why Your Military Protective Order Is Illegal: A Guide*, AARON MEYER L. (Dec. 9, 2014), <https://aaronmeyerlaw.com/358/why-your-military-protective-order-is-illegal-a-guide/> (explaining that an alleged offender can have their personal life and military career put on hold indefinitely without any opportunity for relief); see also DoDI 6400.06, *supra* note 24, at 8–9 (authorizing a commanding officer to contact the gaining commanding officer to recommend issuing a new MPO when a service member transfers commands as long as it is “still necessary to protect the victim(s)”).

30. See DoDI 6400.06, *supra* note 24, at 9.

31. See *generally id.* at 5–8 (specifying in procedures for response to domestic abuse that “[c]ommanders shall . . . [e]nsure protection . . . from domestic abuse by issuing and enforcing an appropriate military protection order (MPO) that is coordinated with those civilian authorities that enforce the protection orders issued by civilian courts.”).

32. See Menta, *supra* note 7, at 193–95 (discussing the evolution of legislation restricting firearms in relation to public discourse and Congressional debate surrounding victims of domestic abuse in the 1980–90s).

A. Congressional Action to Prevent Domestic Violence

Starting with the Gun Control Act of 1968, Congress sought to regulate the sale and ownership of firearms by violent felons.³³ The Act prohibits the sale and possession of firearms to violent felons, yet gaps in legislation allow service members to maintain firearms in limited situations.³⁴ By exempting members of the Armed Forces, the Act failed to protect family members of violent service members: service members convicted of violent felonies could still possess a weapon in their homes.

In 1997, the Lautenberg Amendment to the Gun Control Act removed the service member exception and extended the firearm prohibition to include individuals convicted of a misdemeanor crime of domestic violence.³⁵ However, the Lautenberg Amendment failed to extend the firearm prohibition to all individuals subject to protective orders.³⁶ So, while a service member convicted of any crime of domestic violence is subject to a firearm prohibition, a service member restrained by a protective order is not, even when that protective order results from domestic violence.

Congress updated the laws prohibiting the possession of firearms by individuals, expanding the law to apply to any person subject to a civilian court order that “restrains such person from harassing, stalking, or threatening an intimate partner,” otherwise known as a protective order.³⁷ These updated laws provide additional options for restricting an abuser’s

33. Gun Control Act of 1968, Pub. L. No. 90-618, § 922(d), 82 Stat. 1213 (1968) (codified at 18 U.S.C. § 922(d)) (prohibiting the sale of firearms or ammunition to individuals who are under indictment for or have been convicted of a felony).

34. See *id.* at §§ 925(a)(3)–(4), (d)(1) (carving out exceptions for service members on active duty and members of certain DoD-recognized sporting-type clubs to retain firearms and permitting transport of firearms to service members stationed outside the United States).

35. Pub. L. 104-208, 110 Stat. 3009-372 (1996) (codified at 18 U.S.C. § 922(g)(9)) (providing specifically that “[i]t shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence[] to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

36. See Marshall J. Wilde, *Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment*, 60 A.F.L. REV. 115, 122–23 (2007) (describing how due process exempts individuals subject to temporary or ex parte protective orders from the Lautenberg Amendment’s firearm prohibition).

37. See 18 U.S.C. § 922(g)(8) (prohibiting the sale of firearms to individuals subject to restraining orders when the court order was issued after a hearing where the respondent received notice and a finding was made as to “a credible threat to the physical safety of [an] intimate partner or child”).

access to firearms beyond criminal convictions of domestic violence crimes.³⁸ Intimate partners who have a reasonable fear of injury to themselves or their children can obtain an order restricting their partner's ability to purchase or possess firearms and ammunition.³⁹

Following the passage of the Lautenberg Amendment to the Gun Control Act, Congress passed the Armed Forces Domestic Security Act of 2002.⁴⁰ Through this law, Congress mandated that CPOs apply on military installations.⁴¹ Thus, service members subject to firearm prohibitions resulting from off-base CPOs are now also subject to these restrictions on the installation.⁴² However, for service members who must carry a firearm on duty, the firearm prohibition only applies to those service members with "Lautenberg convictions" of domestic violence offenses; otherwise, the Gun Control Act allows service members to carry a firearm in performance of their duties, rendering the order powerless on base.⁴³

Commanding officers have the authority to impose a firearm prohibition on service members under their command and are responsible for ensuring that service members subject to an off-base firearm prohibition do not store their personal firearms within unit armories.⁴⁴ Critics of the exception to the firearm prohibition for service members on duty point to its inconsistency

38. See VERONICA ROSE, OFF. OF LEGISLATIVE RSCH., 2014-R-0181, FIREARM POSSESSION AND DOMESTIC VIOLENCE RESTRAINING OR PROTECTIVE ORDERS AND CONVICTIONS, at 2–3 (2014), <https://www.cga.ct.gov/2014/rpt/pdf/2014-R-0181.pdf>.

39. See 18 U.S.C. § 922(g)(8)–(9).

40. Pub. L. 107-311, 116 Stat. 2455 (2002) (codified at 10 U.S.C. § 1561a).

41. Armed Forces Domestic Security Act, 10 U.S.C. § 1561a ("A civilian order of protection shall have the same force and effect on a military installation as such order has within the jurisdiction of the court that issued such order.").

42. See *id.*

43. See 18 U.S.C. § 925(a)(1) (carving out an exception to the firearm prohibition for government employees, including service members, who use a firearm in performance of their job duties); see also Sec'y of the Air Force Command Info., *Air Force Implements Additional Security Measures*, U.S. AIR FORCE (Jan. 20, 2016), <https://www.af.mil/News/Article-Display/Article/643651/> (enabling more airmen to carry firearms to respond to active shooter situations during and outside of work hours).

44. See BATTERED WOMEN'S JUST. PROJECT, FIREARMS AND AMMUNITION PROHIBITIONS IN THE MILITARY (Nov. 27, 2017), https://www.bwjp.org/news/firearms_and_ammunition_prohibitions_in_the_military.html (describing a commanding officer's discretionary authority to force a service member to surrender military-issued firearms); see also DEP'T OF THE NAVY, MARINE CORPS BULLETIN 5810: CRIMINAL JUSTICE INFORMATION REPORTING REQUIREMENTS AND GUIDANCE 2–3, 2–4 (Aug. 30, 2018), https://www.loc.gov/rr/frd/Military_Law/pdf/10-2000.pdf (ordering servicemembers not to take their firearms home with them—they have an assigned weapon stored in an armory on base).

and failure to fully enumerate the convictions which trigger a prohibition.⁴⁵ Given Congress's failure to close all firearm loopholes, the DoD must provide stronger protections to domestic violence survivors like Kate Ranta. By providing more MPO guidance to commanding officers, the DoD can broaden the range of survivors it protects.

B. Military Justice and the DoD's Role in Preventing Domestic Violence

Under the Uniform Code of Military Justice (UCMJ),⁴⁶ the DoD may punish service members through two main avenues: court-martialing through Article 16⁴⁷ or nonjudicial punishment through Article 15.⁴⁸ Congress enacts and modifies the UCMJ; the President issues the Manuals for Courts-Martial through an executive order, interpreting and implementing the statutes set forth in the UCMJ; and the Secretary of Defense has the authority to prescribe nonjudicial punishment for the military branches under its umbrella.⁴⁹ The Secretary's authority to prescribe nonjudicial punishment includes promulgating additional rules and regulations for preventing domestic violence on base.⁵⁰

The UCMJ applies to active-duty and reserve service members at all times.⁵¹ The DoD's authority to punish service members is especially critical when it is the only remedy available to survivors who live on military bases under exclusive federal jurisdiction.⁵² Some military installations house

45. See E. JOHN GREGORY, DEP'T OF THE ARMY PAMPHLET 27-50-335, THE LAUTENBERG AMENDMENT: GUN CONTROL IN THE ARMY 6 (2000) (noting that when soldiers plead nolo contendere, it is unclear whether the plea constitutes a conviction for firearm prohibition purposes).

46. 10 U.S.C. § 801–946(a).

47. 10 U.S.C. § 816.

48. 10 U.S.C. § 815.

49. See 10 U.S.C. § 815(a) (authorizing the President to implement UCMJ policies through the Manual for Courts-Martial (MCM)); see also 10 U.S.C. § 113(a)–(b) (stating that the Secretary of Defense is responsible for overseeing and controlling the DoD).

50. See 10 U.S.C. § 113.

51. See Rules for Courts-Martial (R.C.M.) 201(d)(2) (providing that crimes that violate both civilian criminal law and the UCMJ may be tried in either venue).

52. See *Privatized Housing Overview*, OFF. OF ASSISTANT SEC'Y OF DEF. FOR SUSTAINMENT, https://www.acq.osd.mil/eie/fim/Housing/Housing_overview.html (last visited Aug. 12, 2021) (reporting that approximately 37% of military personnel live in housing located on military installations, where civilian authorities do not have jurisdiction); see also U.S. AIR FORCE, THE MILITARY COMMANDER AND THE LAW 100 (16th ed. 2020) [hereinafter THE MILITARY COMMANDER AND THE LAW],

service members and their families on the base, meaning that since they live on federal territory, local authorities do not have jurisdiction to enforce orders or issue arrest warrants.⁵³

The Secretary of Defense is responsible for leading and overseeing the DoD.⁵⁴ The Secretary's responsibilities include implementation of a national defense strategy that includes each military branch's missions, roles and responsibilities, and an explanation of major investments.⁵⁵ Furthermore, the Secretary of Defense may prescribe the kind and amount of punishment that commanding officers may impose on service members.⁵⁶

The DoD is also responsible for imposing punishments in instances when the service member has yet to be convicted under the UCMJ.⁵⁷ Subject to Article 15, commanding officers may impose an array of nonjudicial punishments.⁵⁸ Under Article 15, nonjudicial punishments do not result in convictions of the accused.⁵⁹ Commanding officers also have the authority to issue MPOs, which are categorized as nonjudicial punishments but codified separately.⁶⁰ These orders last indefinitely, remaining in effect until the commanding officer terminates the order or issues a replacement order.⁶¹

In 2004, the Secretary of Defense issued a military-wide memorandum on MPOs.⁶² This "directive-type" memorandum established the DoD's policy

<https://www.afjag.af.mil/Portals/77/documents/Publications/MCL2020v2.pdf?ver=oXaSGfupmoOnoJHuwja3ug%3D%3D> (stating that exclusive jurisdiction means that the federal government has the sole authority to legislate, and while it has been federal policy to grant a state's partial or concurrent jurisdiction to its military bases for the purpose of responding to welfare and domestic relations matters, this does not apply to all federal land).

53. THE MILITARY COMMANDER AND THE LAW, *supra* note 52, at 100.

54. *See generally* 10 U.S.C. §§ 113–130k (outlining the responsibilities of the Secretary of Defense).

55. *Id.* § 113(g)(1)(A) (mandating that the national defense strategy shall support the most recent national security strategy report of the President and incorporate a strategic framework necessary to carry out the President's goals).

56. *Id.* § 815(a) (permitting the Secretary of Defense to issue binding instruction to military agencies to impose punishment provided the service member has not demanded a trial by court-martial in lieu of such punishment).

57. *Id.* § 815(b).

58. *Id.* (including the restraint of an officer and the imposition of a protective order).

59. *United States v. Johnson*, 19 U.S.C.M.A. 464, 467 (C.M.A. 1970) (citing *Manual for Courts-Martial, United States* (1969 ed.) (MCM), ¶ 127c) ("An Article 15 punishment is not a conviction; it does not empower a court-martial to adjudge permissible additional punishments under Section B of the Table of Maximum Punishments.").

60. 10 U.S.C. § 1567.

61. *Id.*

62. Memorandum from David S. Chu, Under Sec'y of Def. for Pers. & Readiness to the

to make all appropriate efforts to protect survivors of abuse from further harm and announced the official paperwork needed to apply for an MPO.⁶³ This is significant because it requires commanding officers to make a written record of why the order is being issued.⁶⁴ Previous MPOs could be issued verbally, meaning that survivors relied on enforcement by the commanding officers and authorities who knew of its existence, but written orders are less likely to be ignored.⁶⁵

The Secretary of Defense further established MPO guidelines through DoD Instruction (DoDI) 6400.06, which advises commanding officers on when they should issue an MPO.⁶⁶ Commanding officers shall issue MPOs when they are notified of incidents of IPV or when it is otherwise necessary to protect a survivor and maintain order.⁶⁷ Prior to the promulgation of DoDI 6400.06, there was no policy on issuing MPOs; however, the current Instruction leaves much to be desired, as it declines to provide any meaningful guidelines for issuing protective orders.⁶⁸ Unlike CPOs, instructions on MPOs neglect to outline temporal restrictions, rights to appeal, and the elements necessary for a complainant to establish that they should receive an order.⁶⁹ The most concrete guideline in this Instruction states that commanding officers “shall ensure that the alleged military abusers are held accountable for their conduct through appropriate disposition.”⁷⁰

Sec'y of the Mil. Dep't on Mil. Protective Ords. (March 10, 2004), <http://www.ncdsv.org/images/MilitaryProtectiveOrders.pdf>.

63. *Id.* (“assign[ing] responsibility for the issuance of MPOs barring active duty military members from having contact with specified individuals against whom they are alleged, or are confirmed, to have committed an act of domestic violence . . .”).

64. U.S. DEP'T OF DEF., MILITARY PROTECTIVE ORDER DD FORM 2873 (2020), https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2873_2020.pdf. Although the form allows commanding officers to be more thorough by setting a specific time frame, requiring counseling, or adding other specifications, there is no requirement that they add anything.

65. *Id.*

66. DoDI 6400.06, *supra* note 24, at 8 (“A commander shall issue and monitor compliance with an MPO when necessary to safeguard a victim . . . to prohibit the member from contacting or communicating with the protected person or members of the person’s family or household and to direct the member to take specific actions that support, or are in furtherance of, the prohibition.”).

67. *Id.* (noting that a commanding officer shall issue MPOs to protect victims while they take action against the alleged perpetrator).

68. *See generally id.* (updating USD(P&R) policy on domestic violence to include protocols for responding to domestic violence by active duty military members).

69. *See id.*

70. *Id.*

II. MILITARY PROTECTIVE ORDERS: INADEQUATE TO PROTECT SURVIVORS

MPOs are valuable when obtaining a CPO is impossible.⁷¹ CPOs are enforceable on military installations;⁷² however, they are inaccessible when the complainant lives on base and cannot file for one.⁷³ MPOs are useful in these circumstances. Residents who live on base must rely on MPOs to protect themselves.⁷⁴ Additionally, MPOs are viewed as highly accessible to survivors who simply have to speak with the commanding officer on the phone instead of going to court. However, while MPOs offer some benefits, the DoD's failure to implement unified policies and formal procedures makes them inadequate for protecting survivors of IPV.⁷⁵

A. Benefits of Using Military Protective Orders

Though CPOs are preferable in most circumstances, sometimes an MPO is a survivor's only option.⁷⁶ CPOs are enforceable on military installations, so survivors living off-base can obtain a CPO from their state court and forward it to the respondent's commanding officer to ensure enforcement.⁷⁷ However, certain military installations exist in locations subject to exclusive federal

71. See U.S. DEP'T OF DEF, MILITARY NO-CONTACT ORDER (3-21b) AR 608-18 (2006) [hereinafter DOD NO-CONTACT ORDER] (stating that military no-contact orders are based upon a balancing of interests and are purposefully designed to be flexible and easy to obtain based on the greater need to protect victims).

72. Armed Forces Domestic Security Act, 10 U.S.C. § 1561a.

73. See *id.*

74. Compare Leo Shane III, *Is Military Domestic Violence a 'Forgotten Crisis'?*, MIL. TIMES (Sept. 18, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/09/18/is-military-domestic-violence-a-forgotten-crisis/> (discussing how command discretion enables abusers to escape punishment with retirement or separation from the military), with Meyer, *supra* note 29 (criticizing commanding officers for overextending protective orders to err on the side of caution without any justification).

75. See Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 260 (2009), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1121&context=mjil> (noting that it is common for military abuses to go unreported and unpunished regardless of commanding officer's duty to act).

76. Wilde, *supra* note 36, at 124 (noting that the issue of exclusive jurisdiction on military bases makes enforcement of civilian protective orders (CPOs) difficult, and MPOs can remedy such enforcement issues).

77. See Armed Forces Domestic Security Act, 10 U.S.C. § 1561a; ELLEN C. SCHELL, BATTERED WOMEN'S JUST. PROJECT, REPRESENTING VICTIMS OF INTIMATE PARTNER VIOLENCE CONNECTED WITH THE MILITARY 32 (2014) (explaining that installations have different procedures for processing and enforcing CPOs once they receive them, depending on the state and base).

jurisdiction, where survivors do not have the option to apply for a CPO from a state court.⁷⁸ Approximately 37% of military personnel live on such military installations, beyond the reach of the civilian justice system.⁷⁹ In these situations, where MPOs are the only available nonjudicial remedy, MPOs are a necessary stopgap for survivors awaiting formal adjudication from courts-martial.

Even when CPOs are available, MPOs are often more accessible to survivors in emergency situations.⁸⁰ Pursuing a CPO in court costs survivors valuable time and money, so an MPO may be more easily accessible.⁸¹ Unlike CPOs, MPOs have no filing fee, which eliminates the financial barrier to obtaining the order.⁸² Court fees for obtaining CPOs can cost hundreds of dollars, hurting survivors who may already be struggling to become financially independent.⁸³ There is a strong correlation between poverty and IPV;⁸⁴ abusive partners often seek to control survivors' finances and use this as leverage in the relationship.⁸⁵ Furthermore, MPOs do not require a hearing, which is advantageous to survivors who cannot leave their job or cannot afford to file for a CPO.⁸⁶ Although commanding officers use a fairly consistent set of factors to determine whether they should instate an MPO,

78. See Armed Forces Domestic Security Act, 10 U.S.C. § 1561a (noting that state civilian authorities lack authority and all offenses including domestic violence are handled by the federal or military justice system); see also N K Shemonsky et al., *Jurisdiction on Military Installations*, 14 AM. J. FORENSIC MED. PATHOLOGY 39, 41–42 (1993) (explaining that overseas locations are controlled by special agreements that generally give the U.S. government jurisdiction over military members, their dependents, and U.S. civilian components).

79. *Privatized Housing Overview*, *supra* note 52.

80. See DOD NO-CONTACT ORDER, *supra* note 71.

81. See, e.g., *Domestic Violence in the Military*, *supra* note 27 (noting that there is no cost to file for an MPO).

82. *Our Views: Don't put barriers in the way of protective orders against domestic abusers*, ADVOC. (Mar. 9, 2020), https://www.theadvocate.com/baton_rouge/opinion/our_views/article_26ff85f6-5cc9-11ea-9294-0b4f55cf25b0.html.

83. See *id.* (describing how victims of domestic violence are often stuck in low-wage jobs with inflexible hours and missing work can put their jobs at risk and prevent them from receiving necessary income); see also ELDIN FAHMY ET AL., JOSEPH ROWNTREE FOUND., EVIDENCE AND POLICY REVIEW: DOMESTIC VIOLENCE AND POVERTY (2016), https://research-information.bris.ac.uk/ws/portalfiles/portal/80376377/JRF_DV_POVERTY_REPOR_T_FINAL_COPY_.pdf.

84. See also Fahmy, *supra* note 83, at 3–4 (noting that the strong link between poverty and IPV stems from gendered expectations regarding women's responsibilities, which hinders women's growth potential).

85. *Id.* at 30.

86. Meyer, *supra* note 29 (stating that MPOs are an essential emergency tool that potential victims can use when they face an immediate threat).

there is no official process beyond making a complaint.⁸⁷ Thus, despite the benefits of MPOs, the lack of formal procedures makes it difficult for survivors to obtain adequate protection.

B. Criticisms of MPOs

While the accessibility of MPOs makes them a compelling option for survivors, enforcement is a concern. CPOs are enforceable on military installations, but MPOs are not directly enforceable by civilian courts and local law enforcement.⁸⁸ Therefore, if a survivor obtains an MPO containing a firearm prohibition but the perpetrator lives off-installation, local law enforcement officials will not recognize the firearm prohibition in court.⁸⁹ Further, while MPOs are more accessible than CPOs, they provide much more narrow protection because they are only enforceable on base.⁹⁰ The DoD has also neglected to create a policy allowing MPOs to follow the service member when they transfer to a new command.⁹¹ Upon the service member's transfer, the survivor has to start over.⁹²

Additionally, critics—both those that advocate for the expansion of, and those who seek to restrict MPOs—allege that the indefinite nature of MPOs can have profound legal implications for the parties involved.⁹³ CPOs have defined durations for emergency protective orders and permanent protective

87. *Id.*

88. See OTT, *supra* note 25, at 2 (“[A]lthough civilian authorities must be informed of the existence of an MPO (10 U.S.C. § 1567a), they will not enforce an MPO because it is not issued through a judicial procedure that affords due process.”).

89. See *id.*

90. See *id.*; see also John Cannon, *Violations of Military Protective Orders*, CANNON & ASSOCS. (Sept. 3, 2020), <https://jpcannonlawfirm.com/2020/09/violations-of-military-protective-orders/> (noting that MPOs are only enforceable on the installation where the commanding officer who issued the order resides and only while the service member is serving in the unit where the order was issued).

91. See *Domestic Violence in the Military*, *supra* note 27; see also DODI 6400.06, *supra* note 24, at 8–9 (explaining that an MPO does not move with the service member and the filing party has to start from scratch if they still want the order in place).

92. DODI 6400.06, *supra* note 24 (noting that the commanding officer is instructed to call the new chain of command and recommend creating an MPO if they believe it is still necessary).

93. See Meyer, *supra* note 29; see also Patrick Korody, *Military Protective Orders and Military No Contact Orders*, KORODYLAW, <http://korodylaw.com/military-protective-orders-and-military-no-contact-orders/> (last visited Aug. 12, 2021) (noting the possibility that retired service members who received an MPO years earlier will find out that it is still in effect when undergoing a background check).

orders.⁹⁴ They may be renewed if the threat still exists, but the burden to do so lies on the filing party.⁹⁵ Without any adversarial process, there is no opportunity to challenge the indefinite length of an MPO.⁹⁶ Furthermore, survivors may find that commanding officers have withdrawn the order prematurely or are unwilling to initiate the order.⁹⁷ The largest issue with MPOs, however, is the lack of unified policy among the military branches, which reduces clarity for commanding officers seeking to follow guidelines.⁹⁸

III. THE LACK OF COHESIVE POLICY AMONG MILITARY BRANCHES

While the DoD issues guidance to the individual military branches, each Secretary of the respective military branch has the authority to issue its own rules, provided that the rules do not conflict with the DoD's guidance.⁹⁹ Although this discretion can benefit the individual military branches by allowing each to create policies based on its unique circumstances, these varied instructions lead to a lack of consistency and clarity within the DoD.¹⁰⁰ The DoD's failure to create meaningful policies on firearms prohibitions and issuance of MPOs ultimately hurts survivors.

A. *Lack of Specificity Can Cause Confusion Within the DoD*

While there are policy arguments for variation between the military branches due to differing responsibilities, inconsistent domestic abuse policies

94. *E.g.*, VA. CODE ANN. §§ 19.2-152.8–10 (2020) (establishing the duration of emergency protective orders and protective orders to be three days and two years respectively).

95. *Id.* § 19.2-152.10.

96. *See* Armed Forces Domestic Security Act, 10 U.S.C. § 1561a; *see also* Rios v. Mabus, 2:13-cv-01937-ABC-MAN, at *1, *8 (C.D. Cal. June 11, 2013) (ruling that the MPO conflicting with the plaintiff's custody and visitation rights was in effect for nearly fourteen months without indication of imminent danger, and the plaintiff had no formal venue to appeal it).

97. *See, e.g.*, Meyer, *supra* note 29; *see also* Adele Uphaus, *Quantico Case Raises Questions About How Marine Corps Handles Domestic Abuse*, FREE LANCE-STAR (Mar. 9, 2019), https://fredericksburg.com/quantico-case-raises-questions-about-how-marine-corps-handle-s-domestic-abuse/article_a4bf321d-684e-554e-a634-011029a089a4.html (noting that after a service member was discharged, several commanding officers were hesitant to reinstate the MPO out of confusion over who was responsible).

98. *Infra* Part III.

99. *See* 10 U.S.C. § 113(d).

100. COLIN S. GRAY, STRATEGIC STUD. INST., CATEGORICAL CONFUSION? THE STRATEGIC IMPLICATIONS OF RECOGNIZING CHALLENGES EITHER AS IRREGULAR OR TRADITIONAL 35 (2012) (explaining that categorical confusion is produced by irregular and poor tactics which leads to reduced military effectiveness).

do not make sense. The DoD releases a biennial Unified Command Plan, which provides instructions for all branches of the Armed Forces to accomplish the plan's overall mission.¹⁰¹ To supplement the Unified Command Plan, the DoD provides specific instructions for the branches' unique roles.¹⁰² Problems arise when the DoD issues guidelines highlighting the importance of a central policy—such as addressing domestic violence through MPOs—but fails to provide explicit instructions for how to accomplish its goal. For example, the Department of the Navy issued additional guidance stating that “[c]ommanders should consult with a staff judge advocate prior to issuance” of an MPO.¹⁰³ Conversely, the Department of the Army has declined to release any further guidance on the issue.¹⁰⁴ Faced with an absence of meaningful guidance, survivors filing for MPOs within the Army cannot get clear instructions on how to proceed.

B. What the DoD Can Learn from the Air Force's Codification of the MPO Process in the Absence of DoD Guidance

Unlike the other branches, the Air Force has promulgated extensive guidance outlining the responsibilities of its commanding officers and clarifying the role of MPOs.¹⁰⁵ The Air Force separates its protective orders into two types.¹⁰⁶ The first set of orders is informal and includes no-contact

101. ANDREW FEICKERT, CONG. RSCH. SERV., R42077, THE UNIFIED COMMAND PLAN AND COMBATANT COMMANDS: BACKGROUND AND ISSUES FOR CONGRESS 1, 16 (2013), <https://fas.org/sgp/crs/natsec/R42077.pdf>.

102. *Id.* (carving out special operations for the U.S. Army and Naval Special Warfare Command based on units under their command that are highly trained and specialized).

103. *See* OFF. OF THE CHIEF OF NAVAL OPERATIONS, OPNAV INSTRUCTION 1752.2C: FAMILY ADVOCACY PROGRAM (2020), <https://www.secnav.navy.mil/doni/Directives/01000%20Military%20Personnel%20Support/01-700%20Morale,%20Community%20and%20Religious%20Services/1752.2C.pdf> (commanding officers of units underway/deployed or ashore units not located in the United States or U.S. territories will report issued MPOs if the Service Member returns to the United States or U.S. territories while the MPO is active).

104. *See* U.S. DEP'T OF THE ARMY, ARMY REGULS. AR 608-1, ARMY CMTY. SERV. 18 (2017), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN6228_AR608-1_Web_Final.pdf (incorporating DoD Family Advocacy Program but declining to issue any additional guidelines).

105. *See also* U.S. DEP'T OF THE AIR FORCE, AFI 90-6001, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM (2020) [hereinafter AFI 90-6001]. *See generally* U.S. DEP'T OF THE AIR FORCE, AFI 51-201, ADMINISTRATION OF MILITARY JUSTICE (2019) [hereinafter AFI 51-201], https://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf (outlining the commanding officer's role in protecting both the subject and accused during investigations, including issuing MPOs as necessary).

106. AFI 51-201, *supra* note 105, at 187.

orders, which temporarily stop communication between parties involved in a dispute that “does not rise to the level of a criminal investigation.”¹⁰⁷ The second set of orders are formal MPOs that protect a survivor during criminal investigations.¹⁰⁸ By separating orders into these two categories, commanding officers can apply short-term MPOs in emergency situations, but they must go through a formal process to apply for permanent ones.¹⁰⁹ Even though the Air Force has extensive policies in place, it still failed to protect Kate Ranta and many more like her.¹¹⁰

Under Air Force policy, MPOs are tied to formal claims being heard within the the UCMJ framework, and parties have all judicial remedies available to them, including the right to petition for an Article 30a UCMJ hearing before a military judge for relief from an MPO.¹¹¹ Formal MPOs within the Air Force are only available if they are tied to formal claims within the UCMJ, but no-contact orders may still be issued in other circumstances.¹¹²

One criticism of the formalization of the Air Force MPO process is the increased strain on the tribunals hearing the formal complaints that sustain MPOs.¹¹³ In the other branches, where MPOs are not tied to formal complaints, commanding officers issue MPOs without rights of appeal. While an appeals process has obvious due process merits, it would compromise judicial economy and bog down the military justice system. Increased judicial involvement also reduces accessibility for those survivors whose financial circumstances make it difficult to obtain legal advice or take

107. *Id.*

108. *Id.* at 187–88.

109. *Id.*

110. Natalie Gross, *Her Air Force Husband Tried to Kill Her. Now She's Helping Other Victims of Domestic Violence*, THE SPOUSE ANGLE (July 18, 2020), <https://thespouseangle.com/news/a-former-air-force-spouse-who-survived-a-shooting-shares-her-story-of-domestic-violence> (noting that despite warnings by Ranta, the Air Force failed to take any action).

111. See U.S. DEP'T OF THE AIR FORCE, AFI51-201_AFGM2020-02, AIR FORCE GUIDANCE MEMORANDUM TO AFI 51-201, ADMINISTRATION OF MILITARY JUSTICE, attach. 1, at *16.11.2.1 (Oct. 5, 2020), https://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf; see also AFI51-201, *supra* note 105, at 188.

112. AFI51-201, *supra* note 105, at 188.

113. See Jerrett W. Dunlap, Jr., *Measuring the Effectiveness of the Military Justice System*, ARMY LAW., Jan. 2018, at 9, 10, https://www.loc.gov/rr/frd/Military_Law/pdf/01-2018.pdf. One main priority of the UCMJ is “judicial economy and efficiency.” *Id.* The MCM recognizes the adverse impact on the command’s efficiency when it is constantly navigating the legal system. See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES, Pt. I, ¶ 3 (2016 ed.).

off work to pursue the MPO.¹¹⁴ In addition to the existing inefficient system, the caseload is unevenly distributed throughout all the branches, not just the Air Force,¹¹⁵ making it even more difficult for the DoD to design and implement a cohesive policy at this point.

C. The DoD's Deficient Guidance Leaves Dangerous Gaps in Firearms Prohibitions Policy

Present guidelines fail to address the service member exception to firearm prohibitions.¹¹⁶ Under the current system, commanding officers have the discretion to impose nonjudicial punishments without real direction from DoD leadership.¹¹⁷ Other non-military agencies have broadened the categories of government officials prohibited from receiving or possessing firearms during their employment,¹¹⁸ but the DoD has stayed silent on this matter.

While the Air Force has taken affirmative steps to protect survivors by clarifying its MPO procedures, it has declined to fix the gaps in firearm prohibitions. By distinguishing between formal and informal types of protective orders, the Air Force draws a line between serious matters that should be handled under the UCMJ and those that do not rise to that level of severity.¹¹⁹ Additionally, by tying the orders to formal complaints instead of nonjudicial punishment, alleged perpetrators are afforded the right to appeal the order through the UCMJ.¹²⁰ Air Force procedures also call for commanding officers to consider the terms of a CPO to determine the proper parameters of the subsequent MPO.¹²¹ Tying protective orders to hearings or

114. See Fahmy, *supra* note 83, at 4 (noting in general how gendered mechanisms of poverty can particularly put women at risk when they are in situations of financial dependency).

115. *Id.* The Army accounts for half of all sexual assault claims across the entire military justice system.

116. See Menta, *supra* note 7, at 194–95 (stating that in the wake of widespread domestic violence, Congress extended the federal prohibition on firearm possession to include misdemeanor crimes of domestic violence but did not extend it to civil protective orders).

117. *Supra* Part I(B).

118. See Memorandum from John W. Magaw, Definitions for the Categories of Persons Prohibited From Receiving Firearms (Apr. 21, 1997), <https://www.atf.gov/file/84311/download> (further defining the categories of offenses that trigger a firearm prohibition to include restraining orders as well as other categories).

119. AFI51-201, *supra* note 125, at 187.

120. *Cf. id.*

121. *Id.* (“In determining whether issuance of a ‘no contact’ order or MPO is appropriate, commanders should review the terms and length of any civilian protective order This will help commanders determine which type of order is appropriate and prevent issuance of an order with terms that are contrary to that issued by civilian authorities.”).

court-martialing is advantageous to the survivor as well. Upon issuing an MPO, the commanding officer ensures that the survivor is informed about their rights, any scheduling regarding formal hearings, recorded testimony, and any other related information.¹²² Still, issuance of an MPO does not automatically trigger a firearm prohibition.¹²³ Commanding officers in the Air Force, and throughout the military, can add a firearm prohibition at their own discretion.¹²⁴

D. Congressional Efforts to Address DOD Inaction

Congress has long noticed the absence of a cohesive policy on the adjudication of sexual assault cases, directing the Secretary of Defense to recommend measures to reform the courts-martial system.¹²⁵ A Shadow Advisory Report Group of Experts (SARGE) convened to examine the military justice system and proposed several changes to resolve outstanding concerns in its initial report to the House and Senate Committees on Armed Services.¹²⁶ The SARGE report acknowledged that the existing courts-martial system moves slowly, provides unchecked power to some commanding officers, and is known for its inconsistency.¹²⁷ The present system, according to the report, makes no distinction between offenses, giving commanding officers discretion to suggest harsh sentences for minor matters and vice versa.¹²⁸ This is particularly concerning for sexual misconduct cases, which make up more than half of all cases heard.¹²⁹

122. *Id.* at 176 (authorizing commanding officers to “take reasonable and necessary steps to ensure victims are adequately protected from the subject during the period of investigation and prosecution.”).

123. *Id.* at 166–67 (applying a firearms prohibition to “[p]ersons subject to a protective order issued by a court, provided the criteria in 18 U.S.C. § 922(g)(8) are met. This prohibition is triggered only by a court order issued by a judge. A military protective order does not trigger this prohibition . . .”).

124. *See, e.g., id.* at 188.

125. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, § 540F, 133 Stat. 1198, 1367 (2021); *see also* Michel Paradis, *Is a Major Change to Military Justice in the Works?*, LAWFARE (May 4, 2020, 11:30 AM), <https://www.lawfareblog.com/major-change-military-justice-works>.

126. *See* SHADOW ADVISORY REP. GRP. OF EXPERTS, ALTERNATIVE AUTHORITY FOR DETERMINING WHETHER TO PREFER OR REFER CHARGES FOR FELONY OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE (2020) [hereinafter SARGE REP.], <https://assets.documentcloud.org/documents/6861828/Shadow-Advisory-Report-April-20-2020.pdf> (suggesting that an alternative system removing the reliance on convening authority would allow commanding officers to retain the power to oversee their unit without being as prone to misuse).

127. *Id.* at 6.

128. *See id.* at 3–4.

129. *See id.* at 3 n.9 (noting that from the 502 publicly available cases, 246 of them included sexual misconduct related offenses).

The SARGE report offered a variety of reforms that would alter the structure of the military court system, such as a system for case classification and a permanent court administrator.¹³⁰ Notably, a high-ranking Judge Advocate outside the abuser's chain of command would assume the commanding officer's traditionally discretionary authority to refer felony-level offenses for trial.¹³¹ However, the report admitted that the proposed courts-martial system can aggravate timeliness and efficiency issues, so it is unclear how the implementation of the proposed reforms would actually impact efficiency.¹³²

In April 2021, Senator Kirsten Gillibrand led a bipartisan group of senators to introduce the Military Justice Improvement and Increasing Prevention Act.¹³³ This legislation aims to shift decisionmaking power over whether to refer an offense to a court-martial from a commanding officer to a specialized team of military lawyers and experienced officers outside the chain of command, incorporating some of the SARGE report's suggestions to do so.¹³⁴ The bill has been lauded by several prominent veterans' and sexual assault survivor advocacy groups,¹³⁵ but seven of the eight Joint Chiefs of Staff criticized it in letters to the Ranking Member of the Senate Committee on Armed Services.¹³⁶ Their primary concerns include erosion

130. *See id.* at 3, 6.

131. *See id.* at 1, 6. Under the proposed system, the charging official would have a stable tour of duty, allowing for consistent decisionmaking akin to a civilian prosecutor. *See also id.* at 6. With some of their personnel management burden lifted, commanding officers will have more time to perform their many other duties. *Id.*

132. *See id.* at 7 (acknowledging that promotion of a trustworthy military justice system comes at the cost of timeliness and efficiency); Paradis, *supra* note 125 (noting that the report merely speculates that these reforms could reduce case processing times over time). The SARGE report points out that the charging Judge Advocate would likely take on a substantial new workload under the proposed system, but also suggests that the newfound uniformity of the proposed system would allow the charging Judge Advocate to act swiftly and efficiently on their in-depth understanding. Paradis, *supra* note 125.

133. S.1520, 117th Cong. (2021).

134. *See id.*; SARGE REP., *supra* note 126.

135. *Senators Gillibrand, Grassley, Ernst, Blumenthal, Cruz, Shaheen, Kelly And Military Sexual Assault Advocates Introduce New, Bipartisan Military Justice Improvement And Increasing Prevention Act*, SEN. KIRSTEN GILLIBRAND (Apr. 29, 2021), <https://www.gillibrand.senate.gov/news/press/release/senators-gillibrand-grassley-ernst-blumenthal-cruz-shaheen-kelly-and-military-sexual-assault-advocates-introduce-new-bipartisan-military-justice-improvement-and-increasing-prevention-act> (highlighting endorsements from the Veterans of Foreign Wars and the National Coalition Against Domestic Violence, among others).

136. *Inhofe Releases Letters from Top Military Officials Citing Serious Concerns with Military Justice Improvement and Increasing Prevention Act*, SEN. JAMES M. INHOFE (Jun. 22, 2021),

of commanding officers ability to lead effectively, increased complexity and opacity of the military justice system, the effect of successful appeals on victims, and brevity of the timeline to implement the bill's sweeping changes.¹³⁷ Though the Military Justice Improvement and Increasing Prevention Act has secured filibuster-proof bipartisan support, it has a long wait while it sits in the Senate Committee on Armed Services, hoping that Chairman Jack Reed and Ranking Member James Inhofe let it be a law.¹³⁸

IV. RECOMMENDATIONS

There are two avenues of policies that the DoD should pursue. First, it must issue further guidance on MPO procedures across all branches of the military rather than allowing each branch to create independent rules. By providing detailed instruction on the application of MPOs, the DoD can prevent confusion in its branches and reduce the political pressure on commanding officers to behave a certain way. This goal can be achieved by adopting the stricter policies put into place by the Air Force and by providing further procedures for commanding officers to follow.¹³⁹ Second, the Secretary of Defense should implement the recommendations proposed by SARGE, which restructure the UCMJ and alter the applicability of MPOs as nonjudicial punishments.¹⁴⁰ Through this dual-prong approach, the DoD can strengthen MPO procedures and ensure survivors of domestic abuse receive adequate protection.

A. Adoption of Stricter Guidelines by the DoD

The absence of detailed guidance harbors inconsistency and confusion between the branches.¹⁴¹ The DoD should issue instructions to commanding officers outlining more concrete requirements for obtaining MPOs, including time requirements.

<https://www.inhofe.senate.gov/newsroom/press-releases/inhofe-releases-letters-from-top-military-officials-citing-serious-concerns-with-mjiiipa>.

137. *See id.*

138. Editorial, *The Two Men Blocking Military Sexual Assault Reform*, N.Y. TIMES (Jun. 19, 2021), <https://www.nytimes.com/2021/06/19/opinion/sunday/inhofe-reed-military-sexual-assault-gillibrand.html>.

139. *See* 10 U.S.C. § 113, 136; *see also* U.S. DEP'T OF DEF., DIRECTIVE 5124.02: UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)) 2-6 (2008), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/512402p.pdf> (authorizing the USD(P&R) to promulgate DoD policy in DoD Instructions within the responsibilities, functions, and authorities assigned in accordance with DoD Instruction 5025.01 (Reference (h))).

140. *See supra* Part III(A) (discussion of SARGE report); *see also* SHADOW ADVISORY REP. GRP. OF EXPERTS, *supra* note 126.

141. *Supra* Part III(A).

Additionally, they should further develop multiple types of protective orders like civilian courts.¹⁴² In some civilian courts, one set of codes is for emergency protective orders, and the second set is for permanent protective orders.¹⁴³

The DoD should model its instructions after the Virginia Code, which authorizes the issuance of emergency protective orders. These orders are designed to be used on short notice to prevent “violence, force, or threat” to individuals and expire after only three days.¹⁴⁴ Conversely, standard protective orders awarded by the court may be issued for a period of up to two years with the option for an extension.¹⁴⁵ The distinction between the two is important given concerns surrounding MPOs. MPOs lack a time requirement and do not provide the alleged perpetrator a full hearing. CPOs remedy these deficiencies. Where service and a full hearing could cause extreme harm to the survivor, the courts opt to issue emergency protective orders for a short window of time to allow the survivor to protect themselves while they wait for a trial.¹⁴⁶ For orders that entail a prolonged period of time, due process necessitates proper service on the respondent and a hearing in which the petitioner demonstrates acts or threats of acts of violence.¹⁴⁷

The DoD should issue instructions updating the MPO to align with requirements of a CPO. Providing a temporal framework prevents commanding officers from creating arbitrary time limits on the orders.¹⁴⁸ Additionally, formalizing the process reduces concerns that petitioners will use MPOs to avoid going to court.¹⁴⁹ By giving respondents mechanisms to defend themselves, accusations can be permanently resolved one way or another.¹⁵⁰

142. See SUSAN KEILITZ ET AL., NAT’L CTR. FOR STATE CTS., CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE 1–2 (1996), <https://www.ncjrs.gov/pdffiles1/Digitization/164866NCJRS.pdf>.

143. *Id.* at 5–6.

144. See, e.g., VA. CODE ANN. § 19.2-152.8 (2018) (“An emergency protective order issued pursuant to this section shall expire at 11:59 p.m. on the third day following issuance. If the expiration occurs on a day that the court is not in session, the emergency protective order shall be extended until 11:59 p.m. on the next day that the court which issued the order is in session.”).

145. VA. CODE ANN. § 19.2-152.10 (2020) (noting that proceedings to extend a protective order shall be given precedence on the docket of the court).

146. See § 19.2-152.8.

147. § 19.2-152.10.

148. See Meyer, *supra* note 29 (pointing out the current weaknesses of MPOs, including commanding officers’ ability to issue them for an indefinite period).

149. *Id.*

150. See, e.g., Rios v. Mabus, 2:13-cv-01937-ABC-MAN (C.D. Cal. June 11, 2013) (granting a preliminary injunction to stop enforcement of an MPO because failure to do so

Creating detailed policies also shields military branches from confusion. Each branch will continue to pursue long-term plans for their programs, aimed at promoting welfare and national security.¹⁵¹ Lack of guidance can impede the branch's ability to accomplish its goals by causing coordination issues and hindering administrative implementation of policies.¹⁵² Implementation of clear MPO guidelines would allow the DoD to address criticisms of the existing guidelines and avert poorly crafted MPOs.¹⁵³

B. Updating Military Protective Orders per SARGE Recommendations

SARGE's recommendations call for a complete update to the military justice system, specifically a change to the commanding officer's authority to refer criminal charges.¹⁵⁴ Given the severity of domestic violence cases, survivors would not need to rely on commanding officers to trigger an investigation.¹⁵⁵ Additionally, revocation of the commanding officer's authority over these matters would reduce the risk of "corner-cutting, mischief, and, inevitably, litigation."¹⁵⁶

Revocation of the commanding officer's authority for certain minor offenses necessitating MPOs is one of the most critical policy changes that the DoD can make. While supporters of preserving this disciplinary authority laud it as a form of alternative dispute resolution, these proceedings rob the accused of the chance to be heard and set no burden of proof standard.¹⁵⁷ Removing domestic violence hearings from commanding officers' authority under Article 15 also creates the possibility of a final disposition and possible conviction depending on the type of charge.¹⁵⁸ It is

would irreparably harm the plaintiff and removing the case to a state family law court best served the public interest, among other factors).

151. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-498, NATIONAL GUARD BUREAU NEEDS TO CLARIFY CIVIL SUPPORT TEAMS; MISSION AND ADDRESS MANAGEMENT CHALLENGES 4 (2006) (noting that "the CSTs face challenges in personnel, coordination plans, equipment acquisition and planning, training objectives, readiness reporting and facilities").

152. *Id.* at 4–5.

153. See OTT, *supra* note 25, at 2 (explaining that without the authority to issue a judicial order, commanding officers are limited in what their order can do).

154. See SHADOW ADVISORY REP. GRP. OF EXPERTS, *supra* note 126, at 601 (stating that under the proposed updates, convening authority would not be completely abolished, but certain specified offenses would trigger without it); see also Rules for Courts-Martial (R.C.M.) 307 & 601.

155. SHADOW ADVISORY REP. GRP. OF EXPERTS, *supra* note 126, at 3–4.

156. *Id.* at 6.

157. Wilde, *supra* note 36, at 118.

158. *Id.* at 119.

in the military's best interest to establish a written record that either exonerates the respondent or permanently shows that they received a domestic violence charge.¹⁵⁹

CONCLUSION

Domestic violence and abuse are national issues leading to physical and mental trauma for survivors.¹⁶⁰ From the armed forces' perspective, domestic violence can lead to a loss of productivity, confidence in the institution, and increased costs.¹⁶¹ Where service members are involved, there is a heightened risk of domestic violence due to service members' position of power and access to firearms.¹⁶² By further developing its guidelines on MPOs, the DoD can reduce allegations of abuse and reduce pressure on commanding officers to make decisions without direction from leadership. Domestic violence is a constant issue with no end in sight; therefore, the DoD must be proactive in combatting it.

159. *Id.* at 120 (“[T]he Freedom of Information Act exempts records of nonjudicial punishment from public disclosure and the Privacy Act affirmatively prevents disclosure of certain information.”).

160. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 14.

161. GAO-10-923, *supra* note 12, at 21–22.

162. Stamm, *supra* note 20, at 324–25.