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**SAFE AT HOME BASE? A LOOK AT THE MILITARY'S NEW
APPROACH TO DEALING WITH DOMESTIC VIOLENCE ON
MILITARY INSTALLATIONS¹**

I. INTRODUCTION

As American soldiers returned home from Operation Enduring Freedom in Afghanistan during the summer of 2002, disturbing reports began to come out of Fort Bragg² in North Carolina. In the space of six weeks, four women and one man were murdered by their spouses.³ Two of the murdered women's husbands then committed suicide.⁴ The women who were killed were attempting to get out of troubled marriages; their soldier husbands "refused to let go."⁵ These tragic deaths turned a much-needed spotlight on the way the military handles domestic violence within its ranks.⁶ Sorely needed reforms were already being discussed before the Fort Bragg deaths. It is hoped that this tragedy will spur faster implementation of reforms that will bring increased protections for all victims of domestic violence living in military communities.

This Comment will explore the occurrence of domestic violence in the United States as a whole and efforts by the state and federal government to deal with the problem. The Comment will then explore the military's past

1. This Comment was originally conceived and written as an argument in favor of expanding the protections of the full faith and credit and enforcement provisions of the Violence Against Women Act to residents of military bases in recognition of the fact that a loophole in the law led to the exclusion of federal enclave residents. The need for such an argument has been obviated by the passage of the Armed Forces Domestic Security Act, Pub. L. No. 107-311, § 2(a), 116 Stat. 2455 (December 2, 2002) (codified as amended at 10 U.S.C.A. § 1561a (West Supp. 2003)). This Act will be discussed in detail, as will other efforts the military is making to better address the problem of domestic violence within its ranks.

2. Fort Bragg, located near Fayetteville, North Carolina, is the world's largest airborne facility and one of the largest Army bases in the United States. See Fayetteville Area Convention & Visitor's Bureau, *Military Installations*, at <http://www.visitfayettevillenc.com/bragg.htm> (last visited Nov. 14, 2003).

3. Niles Lathem, *How GI Heroes Turned Homes into Killing Fields*, N.Y. POST, Aug. 4, 2002, at 8. Two of the women were shot in the head, one woman was strangled, and one woman was stabbed fifty times. *Id.* The man, an Army major, was shot by his civilian wife. Barbra Bateman, *How Will Fort Bragg Face the Murders?*, N.Y. POST, Aug. 1, 2002, at 27.

4. Lathem, *supra* note 3, at 8.

5. *Id.*

6. See Ron Martz, *Lawmakers Study Military Spouse Abuse: Fatal Violence Spurs Search for Solutions*, ATL. J.-CONST., Oct. 1, 2002, at A15.

responses to domestic violence and the reasons the military's efforts were largely unaffected by previous changes in state and federal laws. Next, the new steps being taken by the military in response to domestic violence in military communities and the effect these changes should have on domestic violence intervention and prevention will be explored. Finally, recent changes in federal law that will have a substantial effect on the way the military handles domestic violence will also be discussed.

Domestic violence is a persistent and widespread problem in American society. The statistics are chilling. Estimates indicate that four million American women are battered by their husbands or partners each year.⁷ Domestic violence accounts for more injuries to American women than the injuries caused by muggings, stranger-to-stranger crimes, and occupational hazards combined.⁸ An incident of domestic violence will occur at least once in more than a quarter of all marriages.⁹ One husband in eight is physically aggressive toward his wife at least one time a year.¹⁰ One in fourteen marriages involve severe and repeated violence.¹¹ Domestic violence "accounts for thirty-one percent of all murders of women."¹² Women of all races and economic classes experience domestic violence.¹³ "An estimated fifty percent of all American women are battered at some time in their lives."¹⁴

7. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 807-08 (1993). This estimate may be conservative; the majority of "national estimates are obtained from surveys which have typically excluded the very poor, those who do not speak English fluently, those whose lives are especially chaotic, military families, and persons who are hospitalized, homeless, institutionalized, or incarcerated." *Id.* at 809.

8. G. Kristian Miccio, *Male Violence—State Silence: These and Other Tragedies of the 20th Century*, 5 J. GENDER RACE & JUST. 339, 343-44 (2002).

9. Klein & Orloff, *supra* note 7, at 808-09.

10. *Id.* at 809.

11. *Id.*

12. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1849 (2002). Epstein's argument is that states have gone so far in the direction of trying to aid the victim that the rights of alleged offenders are often infringed. *See id.* at 1845-46.

13. Klein & Orloff, *supra* note 7, at 807. While men are sometimes victims of domestic violence, 90-95% of reported domestic assault victims are women abused by their partners. Russell P. Dobash, *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 74-75 (1992). For this reason, victims of domestic violence will be referred to as female throughout this Comment.

14. Klein & Orloff, *supra* note 7, at 808.

II. LEGISLATIVE ATTEMPTS TO ADDRESS DOMESTIC VIOLENCE IN THE CIVILIAN SECTOR

For centuries, the legal system condoned domestic violence.¹⁵ Physical punishment of wives by husbands was explicitly legal in the United States well into the nineteenth century.¹⁶ Even when such conduct was no longer expressly legal, the states were unwilling to interfere with family affairs except in cases of extreme violence.¹⁷ This attitude persisted until late in the twentieth century.¹⁸ Spurred on by the efforts of victim advocates within the battered women's movement, reforms such as relaxed standards for warrantless arrests, mandatory arrest statutes, increased aggressiveness in the prosecution of domestic violence cases, and automatic issuance of no-contact orders as a condition of pretrial release have become widespread in recent decades.¹⁹ In addition to the increased response to domestic violence by the states, Congress became involved in the struggle against domestic violence when it passed the Violence Against Women Act (VAWA)²⁰ in 1994 and amended the Gun Control Act of 1968²¹ with the 1996 Lautenberg Amendment,²² which gave the federal government the power to prosecute certain types of domestic violence crimes.²³

Currently, all states have civil protective order statutes. These statutes provide basic tools that victims of domestic violence might utilize in their efforts to leave the abusive relationship, including immediate ex parte protection,²⁴ child support, temporary child custody, a safe means of exchanging children for scheduled visits with the non-custodial parent, and stay-away provisions.²⁵ A full order of protection is generally valid for one to three years and may be renewed if a need for continued protection is

15. See Epstein, *supra* note 12, at 1850.

16. *Id.*

17. *Id.* at 1850-51.

18. *Id.* at 1851.

19. *Id.* at 1853-58.

20. Pub. L. No. 103-322, Title IV, § 40001, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C. and 42 U.S.C.).

21. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-928 (2000)).

22. Pub. L. No. 104-208, § 658, 110 Stat. 3009-371 (1996) (codified as amended at 18 U.S.C. § 922(g) (2000)). The Violence Against Women Act was originally passed in 1994 and amended by Congress in 2000.

23. See James M. Peters, *Federal Domestic Violence Laws-2001*, ADVOC. (Idaho), Aug. 2001, at 15.

24. An ex parte order of protection is granted solely on the basis of the victim's petition and grants protection until a full hearing is held. See, e.g., MO. REV. STAT. § 455.035 (2000).

25. Epstein, *supra* note 12, at 1858-59.

demonstrated.²⁶ Every state has made the violation of a protective order a criminal offense.²⁷

Several provisions within the VAWA have contributed to the effectiveness of protective orders by enabling women to escape violent intimate partners and not just violent spouses. Under the VAWA, an “intimate partner” is a spouse, former spouse, a past or present cohabitant (if the relationship resembled a marriage), parents who have a child in common, and other persons similarly situated to spouses (including same-sex partners) if they are protected by the domestic or family violence laws of the state or reservation where the victim resides or was injured.²⁸

It is now a federal crime to travel across state lines or into or out of tribal lands with the specific intent to violate a valid order of protection.²⁹ The VAWA also provides that valid protective orders issued by a state court or Native American tribe be accorded full faith and credit by the courts of other states or tribes and enforced as the state or tribe would enforce its own orders, as long as certain criteria are met.³⁰ Permanent, temporary or ex parte orders can satisfy full faith and credit requirements.³¹ To qualify for full faith and credit, an order must be issued by a court that has jurisdiction over the parties and must comport with due process requirements in that the defendant must have had reasonable notice and the opportunity to be heard.³² A mutual order of protection³³ will not qualify for full faith and credit if “(a) the original respondent did not file a cross or counter petition seeking a protective order or (b) if such a cross or counter petition was filed, but the court did not make specific findings that each party was entitled to such an order.”³⁴ Mutual or consent orders of protection are often issued without a hearing or a specific finding of abuse, and because of this procedure, they do not fulfill the VAWA’s requirement of reasonable notice or opportunity to be heard necessary to qualify for recognition of the orders in other jurisdictions.

26. *Id.* at 1859-60.

27. *Id.* at 1860.

28. 18 U.S.C. § 2266 (2000).

29. *Id.* § 2262(a)(1).

30. *Id.* § 2265(a).

31. *Id.*

32. *Id.* § 2265(b).

33. Under a mutual order of protection, both parties are subject to the terms of the order. Mutual orders are also known as consent orders. See Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 266-68 (1995) (discussing mutual protection orders).

34. Peters, *supra* note 23, at 18.

III. DOMESTIC VIOLENCE IN THE MILITARY

A. *History and Overview of Treatment of Domestic Violence in the Military*

While state and federal laws, along with community-based advocacy and assistance programs, have combined to give victims of domestic violence in the civilian sector many resources to end abusive relationships more safely, victims of domestic violence within the military have been largely excluded from the purview of these laws. The Violence Against Women Act explicitly applies to states and Native American lands, but it does not mention military installations, which are often areas of exclusive federal jurisdiction. To explain why efforts to prevent and respond effectively to domestic violence in the military have lagged behind similar efforts in the civilian sector, a brief discussion of the deference that Congress and the courts have traditionally shown the military and military base commanders is necessary.

Congress has passed legislation that gives military base commanders broad discretion, and the courts have been unwilling to interfere in decisions made within the military in the exercise of that discretion. An example of such discretion includes the right to exclude specific individuals from the base.³⁵ Whom to exclude is left largely to the commander, and the courts will not question or reverse the commander's decision unless the denial of access is found to be "patently arbitrary or discriminatory."³⁶ The rationale for this broad authority is that it is the commander's "duty to maintain the order, security, and discipline necessary to military operations."³⁷ This power has been exercised to exclude civilians working on military bases without allowing the worker the opportunity for a hearing or a chance to counter the charges (or even to know specifically what they were),³⁸ and to prohibit the door-to-door distribution of printed advertising material because it interfered with the ability of the Civilian Enterprise Newspaper (CEN)³⁹ to attract advertisers.⁴⁰ The

35. 18 U.S.C. § 1382 (2000).

36. *United States v. May*, 622 F.2d 1000, 1006 (9th Cir. 1980), *cert denied*, 449 U.S. 984.

37. *United States v. Gourley*, 502 F.2d 785 (10th Cir. 1973).

38. *See Cafeteria and Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 898 (1961) (summarily revoking the identification badge and security clearance of worker because of unspecified security concerns did not violate the takings clause of the Fifth Amendment or the worker's due process rights under the Fourteenth Amendment).

39. A CEN is a civilian-run publication that publishes only content prepared by the public affairs department of the base. *See Shopco Dist. Co. v. Commanding Gen. of Marine Corps Base, Camp Lejeune, North Carolina*, 885 F.2d 167, 169 (4th Cir. 1989). The CEN is the primary medium used by the commander to communicate with base personnel. *Id.*

40. *See id.* at 172 (noting that military bases have traditionally been considered a nonpublic forum, and the base commander could prohibit content neutral door-to-door distributions in residential areas of the base to protect the monopoly of the CEN without violating the First Amendment).

base commander also has the discretion to declare a base either open or closed to the public and to exclude groups or specific individuals from the base, a right that has been exercised through the use of so-called “bar letters” to ban protesters and political activists.⁴¹ Interestingly, the United States Department of Defense (DoD) has indicated some reservations about using this authority to ban civilian domestic violence offenders from the base.⁴²

Given this broad authority, it is not surprising that the military had been left largely untouched by efforts to effectively combat domestic violence. Despite this deference,⁴³ the murders at Fort Bragg reinforced an already apparent need for a stronger approach to domestic violence in military communities.⁴⁴

Military families are not immune to domestic violence. Some studies indicate that the domestic violence rate in the military is five times as high as that of the civilian population, although other studies find the rates to be roughly equivalent.⁴⁵ Whatever the rate, the realities of military life can make it extremely difficult for victims of domestic violence to get the services they

41. *United States v. Albertini*, 472 U.S. 675, 681-82 (1985) (holding a nine-year-old bar letter still valid to prevent recipient from attending military open house); *United States v. LaValley*, 957 F.2d 1309, 1313 (6th Cir. 1992) (holding that the granting of an easement to the state government for use as a road did not give the recipient of a bar letter the right to be on the land).

42. U.S. DEP’T OF DEF., DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, THIRD YEAR REP. 2003, at 155, available at www.dtic.mil/domesticviolence/reports/DV_RPT3.PDF [hereinafter DEFENSE TASK FORCE ON DOMESTIC VIOLENCE]. The Task Force had recommended such action; the DoD agreed only to study the issue. *Id.*

43. The Supreme Court has held that “judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.” *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). Recurrent evidence of this high degree of judicial deference to the military can be seen in the courts’ treatment of the military’s “don’t ask/don’t tell” policy regarding homosexuals. 10 U.S.C. § 654(b)(2) (2000). Courts have subjected the policy only to rational basis review and have upheld the status/conduct distinction that allows a service member to be removed from the military for such “conduct” as making a mere statement of homosexual identity. See *Able v. United States*, 155 F.3d 628 (2d. Cir. 1998); *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1128 (9th Cir. 1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc), cert. denied, 519 U.S. 948; *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996) (en banc); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc). The reason for such deference is the view that life-appointed federal judges are not suited to make military decisions or “exercise military authority.” *Able*, 155 F.3d at 634.

44. Martz, *supra* note 6.

45. Allen G. Breed, *Does Army Breed Domestic Violence? Government to Probe Slayings at Fort Bragg*, DESERET NEWS (Salt Lake City), Sept. 3-4, 2002, at A7. There are currently proposals in place to study the issue of domestic violence in the military. For information about recommended areas of specific research, see DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at 154.

need.⁴⁶ Domestic abuse survivor and Harvard Law School graduate Sarah M. Buel cites one partner in an abusive relationship being in the military as an obstacle for the other partner to leave. She wrote:

If the victim or the perpetrator is in the military, an effective intervention is largely dependent on the commander's response, regardless of the Uniform Code of Military Justice ("UCMJ"), its provisions for a military protective order, and the availability of assistance from the Family Advocacy Programs. Many commanders believe that it is more important to salvage the soldier's military career than to ensure the victim's safety. Other victims are unaware that they are entitled to a short-term stipend if they report the abuse and lose the soldier's financial support as a result.⁴⁷

The spousal killings at Fort Bragg in the summer of 2002 have drawn attention to the ineffective way the military has handled domestic violence.⁴⁸ Critics, including a congressional fact-finding group, have called attention to the inadequacy of the services available on military bases and the lack of cooperation with civilian law enforcement and independent advocacy and support programs.⁴⁹ Critics also point to the problems presented by the unwillingness of soldiers to seek outside counseling or assistance because of the lack of privacy in the military and the detrimental effect a history of mental health or domestic problems can have on a soldier's career.⁵⁰ "Advocates who track domestic violence in the military say that although the Pentagon claims it has a zero-tolerance policy, that policy is applied inconsistently across the services, and many bases do not have effective programs for victims."⁵¹ An examination of the military's Family Advocacy Program (FAP) will show how woefully far the military had lagged behind the rest of the country in terms of its response to domestic violence.

The FAP procedures for dealing with domestic violence in the military when the killings occurred at Fort Bragg became effective in 1992.⁵² DoD Directive 6400.1 provides that when an alleged act of abuse occurs, the FAP officer of the base must be informed and has the responsibility for assuring that

46. Advocacy groups have identified such factors as frequent and lengthy separations, infidelity, low pay, and the stresses associated with combat as factors that can trigger situations that lead to the inappropriate response of domestic violence. See T. Trent Gegax et al., *Death in the Ranks at Fort Bragg*, NEWSWEEK, Aug. 5, 2002, at 30.

47. Sarah M. Buel, *Fifty Obstacles to Leaving*, a.k.a., *Why Abuse Victims Stay*, COLO. LAWYER, Oct. 1999, at 19, 24 (footnotes omitted).

48. See Marianne Szegedy-Maszak, *Death at Fort Bragg*, U.S. NEWS & WORLD REP., Aug. 12, 2002, at 44.

49. Martz, *supra* note 6.

50. *Id.*

51. Moni Basu, *Fort Bragg Killings Change Army's Attitude on Stress*, ATL. J.-CONST., Aug. 30, 2002, at A1.

52. U.S. DEP'T OF DEF., DIRECTIVE NO. 6400.1: FAMILY ADVOCACY PROGRAM § 8, at www.dtic.mil/whs/directives/corres/dir2.html (June 23, 1992) [hereinafter DOD DIRECTIVE].

the victim receives appropriate medical treatment, that the commanding officer and military law enforcement and investigative bodies are properly notified, and that the rights of the alleged abuser are properly observed.⁵³ Each case is to be reviewed by a Case Review Committee (CRC).⁵⁴ The CRC has responsibility for reviewing the information available and making a determination of whether the alleged abuse is “substantiated,” “suspected,” or “unsubstantiated.”⁵⁵ The CRC makes recommendations to the commanding officer about placement of a service member in a treatment program and, if treatment is undertaken, keeps the commander informed of progress made.⁵⁶ To ensure timeliness, commanders, under locally-decided guidelines, are to receive full information on the case in order to make a disposition.⁵⁷ Factors to be considered in this decision include the service member’s performance in the military and the potential for future service, prognosis for treatment of the abusive behavior as determined by a clinician with experience in diagnosis and treatment, the extent to which the alleged abuser acknowledges accountability for the behavior and indicates a desire to be treated for it, and other factors deemed important by the commander.⁵⁸

While the DoD Directive covering domestic violence purports to express concern for the victim, the first factor to be considered by the commanding officer is the service member’s past performance and whether or not the soldier can be of further use to the military.⁵⁹ Also, the DoD Directive only addresses spousal abuse situations in which the abuser is the soldier; it does not appear to contemplate a situation in which a service member is abused by a civilian spouse living on the base, although such abuse surely occurs.⁶⁰ Another troubling aspect of DoD Directive 6400.1 is that while it is purportedly the policy of the DoD to cooperate with civilian authorities in responding to

53. *Id.* § 6.1.

54. *Id.* § 6.2. The Domestic Violence Task Force has suggested that the CRC be replaced with a Domestic Violence Assessment and Intervention Team in cases of spousal abuse. The DoD has not yet taken a position on the issue. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at 115-16, 167.

55. DOD DIRECTIVE, *supra* note 52, § 6.2. Substantiated cases are those where a preponderance of the information reviewed supports a finding that abuse has occurred. *Id.* § E2.1.2.1. Suspect cases are those that require further investigation, although a case cannot be in this category and be investigated for more than twelve weeks. *Id.* § E2.1.2.2. An unsubstantiated claim is one where the information does not support a finding of abuse. *Id.* § E2.1.2.3. A family in this category is deemed not to require advocacy services. *Id.*

56. *Id.* § 6.2.

57. *Id.* § 6.3.

58. DOD DIRECTIVE, *supra* note 52, at §§ 6.3.3-6.3.4.

59. *Id.* § 6.3.1.

60. *See Cobb v. Cobb*, 545 N.E.2d 1161 (Mass. 1989) (service woman abused by civilian spouse).

incidents of domestic violence,⁶¹ the base commander, in exercising his discretion under Section 6, is not required to involve the civilian authorities at all.⁶² The 1992 version of DoD Directive 6400.1 did not adequately emphasize the criminality of some domestic violence, nor did it stress the military's intolerance for such conduct and the need to hold offenders accountable. The provisions for assistance to the victim were also weak.

Victim's advocacy groups present for a congressional subcommittee meeting following the murders at Fort Bragg said: "[T]he military's internal domestic-abuse prevention program, the largest in the world, does not work for a variety of reasons."⁶³ Tyniesse Harrison, executive director of the Breast Cancer Resource Center of Fayetteville⁶⁴ and a victim's advocate, said that a major problem is that often when complaints are made to a commander, no action is taken because the commander is also abusive.⁶⁵ Another problem is that the military's desire to handle the problem internally may prevent them from using resources available in the community. "Civilian agencies could provide much-needed expertise and resources in addition to the confidentiality victims seek when they file complaints against abusive spouses, something that is not available to them on post if they ask for help . . ."⁶⁶ Lack of responsiveness on the part of base commanders and a lack of confidentiality prevented many victims from seeking assistance.

B. *Current Efforts to Address Domestic Violence in the Military*

The military knew that domestic violence within its ranks was a serious problem long before the deaths at Fort Bragg. In February 2001, the Defense Task Force on Domestic Violence (Task Force)⁶⁷ issued an initial report to the

61. *Id.* § 4.6.

62. *Id.* § 6.1. Civilian agencies and state law enforcement mechanisms and procedures, including civil protective orders, must and will play a much larger role in responding to military domestic violence in the future. *See infra* Part V.

63. Martz, *supra* note 6.

64. Fayetteville, N.C., is the town nearest Fort Bragg.

65. Martz, *supra* note 6.

66. *Id.*

67. The Task Force was created by Congress in 2000 to address the problem of domestic violence in the military. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999). The Task Force was to last three years and was directed to issue annual reports containing recommendations for improving the military's response to domestic violence. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at v. The second report dealt extensively with issues of cross-cultural sensitivity and special problems that can arise when domestic violence occurs in military families stationed overseas. *Id.* at 4. These issues are beyond the scope of this Comment.

The Task Force issued its final report in 2003. The DoD has not issued a response to many of the recommendations made in this final report. For a comprehensive compilation of the Task Force reports and DoD responses, see DEFENSE TASK FORCE ON DOMESTIC VIOLENCE,

United States Secretary of Defense, Donald Rumsfeld. The initial report acknowledged that the military's prevention "efforts have not always kept victims safe or held batterers accountable and stopped the violence."⁶⁸ In its initial report and in its two subsequent reports, the Task Force recommended that several steps be taken to address many problems, both as to the military's domestic violence prevention efforts and its response to domestic violence.⁶⁹ The third and final report, issued in 2003, contains a listing of the nearly 200 Task Force recommendations, along with the DoD's response to the recommendations and a status report showing whether any action has been taken on the recommendations.⁷⁰

The Task Force recommended several changes to the FAP guidelines dealing with domestic violence. The Task Force recognized the inadequacy of base programs and recommended that base and regional commanders be required to seek Memoranda of Understanding (MOU) with local communities to address ways of responding to violence.⁷¹ The DoD agreed with this recommendation and agreed to amend DoD Directive 6400.1 accordingly.⁷² The implementation of this and similar recommendations is an important shift away from the traditional military policy of addressing domestic violence problems internally.⁷³ Access to services away from the military base is an important way to ensure confidentiality, something of concern to both victims

COMPILATION OF REPORTS: 2001–2003 (2003), *available at* <http://www.dtic.mil/domesticviolence/reports/Start.pdf>.

68. Memorandum from the United States Department of Defense to Secretaries of the Military Departments *in* Letter from Jack Klump and Deborah Tucker, Co-Chairs of the Defense Task Force on Domestic Violence, to Donald Rumsfeld, Secretary of Defense, United States Department of Defense (Feb. 28, 2001), *available at* <http://www.dtic.mil/domesticviolence>. The letter was included as an introduction for the Secretary of Defense when he was forwarded the Initial Report of the Defense Task Force on Domestic Violence upon its completion, and it is currently incorporated into the report.

69. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at vi. The Task Force recommended improvement in several key areas: (1) programs to ensure the safety of victims; (2) emphasis on holding the offender accountable; (3) creation of a climate that effectively prevents domestic violence; (4) "coordination and collaboration among all military organizations with responsibility or jurisdiction with respect to domestic violence;" (5) cooperation among civilian and military communities regarding domestic violence issues; (6) topics that should be priorities for research; (7) collection of data regarding domestic violence and a system for managing and tracking cases; (8) establishing a curriculum and providing training to commanding officers; (9) preventing and responding to domestic violence on overseas military bases; (10) other issues deemed by the Task Force to relate to domestic violence in the military. *Id.*

70. *See id.* at 148-69.

71. *Id.* at 148. In response to a recommendation from the Task Force, the DoD agreed that DoD Directive 6400.1 would be amended so that the MOUs with civilian agencies would include a means of conducting formal and informal fatality reviews. *Id.* at 151.

72. *Id.*

73. Martz, *supra* note 6.

and offenders. A victim may also choose to seek assistance off of the military base to avoid the military's complex chain-of-command procedures.

The DoD, again in accordance with a Task Force recommendation, has agreed to amend DoD Directive 6400.1 with regard to its provisions for the issuance of military protective orders (MPOs).⁷⁴ The Task Force recommended five changes in the MPO structure: (1) the use of a standard MPO throughout the military; (2) a requirement that the MPO be in writing; (3) a requirement that the victim receive a copy of the MPO within 24 hours; (4) establishment of a centralized system to record and track MPOs; and (5) a requirement that copies of the MPO be provided to base Military Police (MP) personnel and the FAP.⁷⁵ The DoD also agreed to amend DoD Directive 6400.1 to comport with each recommendation, with the exception of the fourth issue regarding a centralized tracking system, which is being studied further.⁷⁶ These changes make it much more likely that, in the event an MPO is issued, the appropriate parties will be informed so that the MPO can be effectively enforced. A standard written MPO will also help to ensure equal treatment among domestic violence offenders against whom an MPO is issued. Most importantly, issuing a copy of the MPO to the victim should alert the victim that her complaint has been taken seriously and that steps will be taken to properly enforce the order and protect her from her abuser should the offender violate the MPO.⁷⁷

Another important addition to DoD Directive 6400.1 is the Task Force's recommendation that commanding officers receive domestic violence training within ninety days of being appointed, and then annually thereafter.⁷⁸ The DoD has agreed to amend DoD Directive 6400.1 to require such training and to further provide training for senior non-commissioned officers according to a standardized program.⁷⁹ The Task Force has also provided detailed information describing the topics that should be encompassed by the training.⁸⁰ Educating commanding officers about domestic violence is extremely important because the commander's response often determines whether or not

74. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at 149.

75. *Id.*

76. *Id.*

77. *Id.* Given the new law regarding enforcement of civil protective orders on military bases, the Task Force has also recommended that the DoD set standard enforcement policies for civilian criminal warrants and civil protective orders on military bases. *Id.* at 157. The DoD has agreed to achieve this objective through training. *Id.*

78. *Id.* at 149.

79. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at 149.

80. *Id.*

the victim receives the appropriate assistance and whether the offender will be held accountable.⁸¹

The Task Force recommended the following changes to the way the military law enforcement structure responds to domestic violence, including: (1) the development of an initial domestic violence training program for the military police; (2) ensuring domestic violence training for local MP patrollers; (3) the creation of mobile training units; (4) development of a list of state-of-the-art domestic violence equipment, and (5) initiation of evidence-based training for staff judge advocates.⁸² The DoD has agreed to amend DoD Directive 6400.1 to include the first two recommendations, but it agreed only to study further the final three recommendations.⁸³ Because law enforcement intervention often places the victim in more danger as the abuser feels a loss of control, proper domestic violence training for personnel in the military criminal justice system is critical to ensuring victim safety.⁸⁴

The Task Force made further recommendations meant to reflect the criminal nature of many incidents of domestic violence. Suggested amendments to the DoD Directive regarding the criminality of such violence included: (1) investigating each incident of domestic violence to determine whether a crime has been committed; (2) training members of law enforcement, command, and the legal department to collaborate when making a determination regarding whether a crime has been committed, and (3) developing guidelines for commanding officers in determining whether an incident of domestic violence is substantiated.⁸⁵ The DoD agreed with the first recommendation with regard to first responders.⁸⁶ DoD Directive 6400.1 will be amended to include the training recommendations included in the second recommendation, and the third recommendation will be implemented in a manner that is consistent with the Uniform Code of Military Justice and the

81. Buel, *supra* note 47, at 24. Other changes to be discussed *infra* make the commander's role less critical. Nevertheless, it is imperative that military base commanders are appropriately educated about the need to prevent domestic violence in military communities.

82. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at 149. The Task Force also recommends domestic violence training for the chaplainry; the DoD agreed to amend the DoD Directive accordingly and a signed memorandum regarding this policy was issued by the DoD on Nov. 19, 2001. *Id.* at 150. Likewise, the DoD concurred with Task Force recommendations regarding the domestic violence training of military healthcare workers and agreed to amend the DoD Directive to provide for such training. *Id.*

83. *Id.*

84. See generally Virginia E. Hench, *When Less is More—Can Reducing Penalties Reduce Household Violence?*, 19 U. HAW. L. REV. 37 (1997) (discussing the risk of increased violence because of police involvement and the need for police to be properly trained to respond to domestic violence incidents).

85. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at 151.

86. *Id.*

Manual for Courts-Martial.⁸⁷ The importance of conveying the message that domestic violence is criminal conduct that will not be allowed on military bases cannot be overemphasized. Following the deaths at Fort Bragg, the message from the highest levels of military command should be that domestic abusers will be punished for their criminal acts.⁸⁸ Having established guidelines for commanders will also help to ensure a uniform response to domestic violence in military communities.

Victim advocates have identified the lack of confidentiality as one of the major problems in obtaining help within the military.⁸⁹ The Task Force has also recognized the lack of confidentiality as an area of concern, recommending that the DoD: (1) work with the Task Force to expand the National Domestic Violence Hotline and pilot a program with the Department of Health and Human Services and the Department of Justice to make confidential community services available, and (2) explore other options for creating a means of providing services to victims confidentially.⁹⁰ These recommendations were approved, and a template is now being created for the National Domestic Violence Hotline to be used for military-related calls.⁹¹ Increased confidentiality should encourage more victims *and* more offenders to seek help.

The reports issued by the Task Force also include several recommendations aimed at ensuring that residents of military bases are aware of the military's position on domestic violence and the resources that are available to residents, such as: (1) inclusion of information about domestic violence in the information packet given to new residents; (2) issuance of a statement on victim safety from the Secretary of Defense; (3) issuance of specific information about services offered by FAP, and (4) issuance of specific information on local community-based domestic violence services and the National Domestic Violence Hotline.⁹² The DoD has signaled its agreement with these proposals and is committed to implementing them.⁹³

87. *Id.* The Task Force also recommended that the DoD establish a policy regarding which party should be removed from military housing following an incident of domestic violence and a policy to ensure that first responders are trained to identify a primary aggressor. *Id.* at 152. The DoD agreed to amend DoD Directive 6400.1 to include a removal policy but disagreed that first responders should be trained to identify a primary aggressor. *Id.* Because the Task Force believes such identification enhances the victim's safety, the Task Force has requested that the DoD reconsider the matter. *Id.*

88. Bateman, *supra* note 3.

89. Martz, *supra* note 6.

90. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at 153.

91. *Id.*

92. *Id.*

93. *Id.* The DoD further agreed that in cases where a service member with an open domestic violence case is to be transferred to another base, the commander of the base gaining the service member should be notified that a case is pending and the FAP officer at the gaining base should

Educating residents of the military base is a critical part of the process of fighting domestic violence. A woman in the midst of an abusive situation is in crisis. In seeking help, she may not know about the full range of assistance options available to her, or she may not be aware that help is available at all. Making information about available resources part of the information families are given upon arrival will enable the woman to review her options and make decisions about how to deal with her situation before an emergency arises.

The three Task Force reports include several recommendations designed to ensure the safety of the victim, something the previous DoD Directive had not emphasized. Among these recommendations are the following: (1) development of safety plan policies for the armed services; (2) adoption of a safety plan prepared by the Task Force; (3) adoption of a tool for assessing risk prepared by the Task Force, and (4) ensuring that victim advocates are available to assist victims in risk assessment and safety planning.⁹⁴ The DoD agreed with the first two recommendations and agreed to study the third and fourth recommendations for possible implementation.⁹⁵ Completion of a risk assessment and the preparation of a safety plan are vital means of helping a victim decide on a course of action. If she decides to attempt to leave the abusive relationship, a risk assessment can help ascertain the level of danger she is currently in and how that level may change if and when her partner becomes aware that she is planning to leave. A safety plan can help the victim prepare to leave safely, but a safety plan is also necessary for the partner who chooses to remain in the relationship because safety plans typically include an emergency plan for quickly getting out of sudden violent situations. The military must provide these resources if its domestic violence victim assistance provisions is to be successful.

Finally, the Task Force made several proposals to educate the military community about domestic violence, including: (1) collaboration with agencies experienced with domestic violence prevention to develop a continuous awareness campaign; (2) emphasis on non-tolerance of domestic violence by senior leadership; (3) inclusion of domestic violence education in schools for officers and enlistees; (4) inclusion of domestic violence education as a part of local training; (5) targeting of domestic violence education to grades E1–E4; (6) highlighting the need to reach spouses who reside off the base; (7) incorporation of domestic violence education in dependent schools; and (8) provision of diversity education for members overseas.⁹⁶ The DoD agreed

inform the commander of available services. *Id.* at 156. The DoD is also of the opinion that transfer should be delayed if the domestic violence case had opened within 60 days of the transfer. *Id.*

94. *Id.* at 162.

95. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at 162.

96. *Id.* at 159.

with these recommendations, although it indicated that proposal (7) required more study.⁹⁷ This plan of raising awareness about domestic violence is much more comprehensive than anything the military has tried previously. Heightened awareness of the problem should result in some prevention and in more people within the military community coming forward to receive needed assistance.

IV. THE IMPACT OF THE LAUTENBERG AMENDMENT ON DOMESTIC VIOLENCE IN THE MILITARY

While the VAWA initially had little or no impact on the response to domestic violence in the military, another piece of legislation meant to address domestic violence in the civilian sector did have an impact (albeit uncertain) on the way the military handled domestic violence before the current sweeping changes. Around the same time the VAWA was enacted, Congress expanded the Gun Control Act of 1968 through legislation known as the Lautenberg Amendment⁹⁸ “to include domestic violence-related crimes.”⁹⁹ The Act now prohibits a person who is subject to a protective order from possessing firearms, so long as the order was issued after the respondent had reasonable notice and the opportunity to be heard, and the issuing court specifically found that the respondent threatens the petitioner’s physical safety.¹⁰⁰ The Gun Control Act also makes it unlawful to knowingly transfer a firearm to a person who is subject to a valid protective order.¹⁰¹

It is now illegal for a person to possess a firearm after being convicted of a misdemeanor crime of domestic violence.¹⁰² The prohibition is operative even for domestic violence convictions that occurred before the Lautenberg Amendment’s effective date of September 30, 1996;¹⁰³ however, the prohibition only applies if an element of the misdemeanor was the threatened use of a deadly weapon or the use or attempted use of physical force.¹⁰⁴ The prohibition will not be triggered unless the statute under which the defendant was convicted uses the appropriate language—the use of violence by itself is not enough.¹⁰⁵ “A conviction for a misdemeanor violation of a protection order will not qualify, therefore, even if the act was violent, unless the statute requires the use or attempted use of physical force or the threatened use of a

97. *Id.*

98. Pub. L. No. 104-208, § 658, 110 Stat. 3009–371 (1996) (codified as amended in 18 U.S.C. §§ 2261–2266 (2000)).

99. Peters, *supra* note 23, at 15.

100. 18 U.S.C. § 922(g)(8) (2000).

101. *Id.* at § 922(d)(8).

102. *Id.* at § 922(g)(9).

103. Peters, *supra* note 23, at 17.

104. *Id.*

105. *Id.*

deadly weapon.”¹⁰⁶ It is also illegal to make a knowing transfer of a firearm to someone who has been convicted of a misdemeanor crime of domestic violence.¹⁰⁷ Persons who buy firearms are now required to make a statement that they have not been convicted of any misdemeanor domestic violence crimes.¹⁰⁸ This legislation affects the military because § 922(d)(9) (transfers of firearms to persons with misdemeanor domestic violence convictions) and § 922(g)(9) (possession of firearms by persons who have been convicted of a domestic violence misdemeanor) are not subject to the official use exemption.¹⁰⁹ “This means that law enforcement officers or military personnel who have been convicted of a qualifying domestic violence misdemeanor cannot lawfully possess or receive firearms for any purpose, including the performance of official duties.”¹¹⁰ The inability to use or possess a firearm for any purpose is therefore, at least theoretically, career-ending for any service member who is convicted of a misdemeanor domestic violence crime.¹¹¹

Lack of clear enforcement guidelines has left the application of the Lautenberg Amendment to service members inconsistent and unsettled.¹¹² The DoD has not issued guidance beyond those policies that were announced when the Lautenberg Amendment was first passed.¹¹³ Under the current implementation scheme, unit commanders are responsible for determining which service members are affected by the Lautenberg Amendment and reassigning those service members to positions that do not require the use of firearms.¹¹⁴ Because of the military’s lack of a centralized database of persons who have been convicted of domestic violence misdemeanors, making these determinations is a very time-consuming task for the commander.¹¹⁵ When there is cause for a commander to believe that a service member has been convicted of a misdemeanor of domestic violence, the commander must pass all available information on to the military’s local legal department.¹¹⁶ The local legal department is subject to the laws of the state in which it is

106. *Id.*

107. 18 U.S.C. § 922(d)(9) (2000).

108. *See* Peters, *supra* note 23, at 17.

109. *See* 18 U.S.C. § 925(a)(1) (2000).

110. Peters, *supra* note 23, at 18.

111. *See, e.g.,* Jacey Eckhart, *When War Between Spouses Hits Home*, VIRGINIAN-PILOT & LEDGER-STAR (Norfolk, Va.), Aug. 10, 2002, at E1 (arguing that “[i]t is more likely that the consequences for reporting domestic abuse are higher for the military than for civilians” because “[a] conviction for domestic abuse means the end of the career”).

112. Jessica A. Golden, *Examining the Lautenberg Amendment in the Civilian and Military Contexts: Congressional Overreaching, Statutory Vagueness, Ex Post Facto Violations, and Implementational Flaws*, 29 FORDHAM URB. L.J. 427, 461-62 (2001).

113. *Id.* at 462.

114. *Id.* at 460.

115. *Id.*

116. *Id.*

located.¹¹⁷ The legal department then must make a case-by-case determination of “whether the soldier had been convicted of a misdemeanor crime of domestic violence under state law, and whether the soldier had knowingly and intelligently waived a jury trial.”¹¹⁸ As a result of the difficulties in identifying service members who are technically subject to the Lautenberg Amendment, the number of service members who have been discharged as a result of misdemeanor domestic violence convictions is very low, and “military personnel are being allowed to retain their weapons until they are discharged or separated from military service.”¹¹⁹ The military may also be avoiding losses in recruitment caused by the Lautenberg Amendment by issuing moral waivers¹²⁰ to individuals who have been convicted of domestic violence crimes and other misdemeanors and felonies, essentially doing an end-run around the policy underlying the Lautenberg Amendment.¹²¹ “More guidance must be given before the Lautenberg Amendment can be effectively applied, or achieve its intended purpose of reducing domestic violence in the military.”¹²²

Opponents of the Lautenberg Amendment have also argued that the Amendment is flawed because it allows service members convicted of domestic violence felonies to keep their firearms (and presumably remain in the military) while preventing service members who have misdemeanor domestic violence convictions from carrying weapons in performance of their military duties.¹²³ However, there is an alternative interpretation to the congressional purpose behind the Lautenberg Amendment:

The majority of domestic violence charges and prosecutions are misdemeanors, but the police and military only screen those with felony convictions. Given this situation, it is reasonable that Congress recognized the danger of armed police and military personnel with domestic violence misdemeanor convictions. Congress merely filled a gap by blocking those with domestic violence misdemeanor convictions in these areas of employment from access to guns as was already policy for domestic violence felonies.¹²⁴

117. Golden, *supra* note 112, at 460.

118. *Id.* at 460-61.

119. *Id.* at 462.

120. Moral waivers would allow service members to be admitted to or remain in positions that allow them to possess a firearm despite a qualifying conviction under the Lautenberg Amendment. The DoD has indicated its willingness to ensure that such waivers are granted only in appropriate circumstances. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at 151.

121. Golden, *supra* note 112, at 462.

122. *Id.* at 463.

123. Captain E. John Gregory, *The Lautenberg Amendment: Gun Control in the U.S. Army*, ARMY LAW., Oct. 2000, at 3, 13-14.

124. Alison J. Nathan, Note, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 852 (2000).

Another challenge to the Lautenberg Amendment is that the alleged disparate treatment of a service member convicted of a domestic violence felony and a service member convicted of a domestic violence misdemeanor runs afoul of the Equal Protection Clause of the Fourteenth Amendment.¹²⁵ Opponents recognize, however, that courts have almost uniformly applied rational basis review, the lowest level of scrutiny, to cases arising under the Lautenberg Amendment.¹²⁶ Under this low level of scrutiny, “a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.”¹²⁷ The Lautenberg Amendment satisfies this standard because:

The rational basis for the Amendment lies in Congress’s attempt to mend the loophole that has allowed so many violent felons to plea-bargain down to misdemeanors. Prior to the Lautenberg Amendment, felons who successfully plead down to misdemeanors evaded the Gun Control Act’s ban on gun possession by convicted felons. The Lautenberg Amendment strives to prevent this evasion and to further the government’s goal of reducing gun-related domestic violence nationwide.¹²⁸

The Lautenberg Amendment also satisfies rational basis review because there is no indication of intentional discrimination.¹²⁹

It has been argued that the Lautenberg Amendment has a negative impact on military readiness because of the burden that implementation of the Amendment places on individual base commanders.¹³⁰ The same argument could presumably be made about the “burden” of enforcing protective orders issued by state courts on military bases.¹³¹ This complaint is not surprising, given the deference that is typically shown to the military and military base commanders by both Congress and the courts.

Whatever the perceived drawbacks of the Lautenberg Amendment, the military is now committed to finding a way to implement its provisions successfully. The Task Force has recommended that the DoD: (1) conduct an awareness campaign about the Lautenberg Amendment, and (2) require further education about the Lautenberg Amendment on an annual basis.¹³² The DoD has signaled its agreement with these recommendations and its intention to

125. Gregory, *supra* note 123, at 14. *See also* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) (noting that the Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike”).

126. Golden, *supra* note 112, at 452.

127. Romer v. Evans, 517 U.S. 620, 632 (1996).

128. Golden, *supra* note 112, at 453-54.

129. Nathan, *supra* note 124, at 852.

130. *See* Gregory, *supra* note 123, at 16.

131. *See* discussion *infra* Part VI.

132. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at 150.

amend DoD Directive 6400.1 accordingly.¹³³ In addition to the obvious benefits of keeping firearms out of the hands of domestic violence offenders, clarification of the impact of the Lautenberg Amendment and a commitment to follow its requirements is an important step in the military's plan to hold offenders accountable for their actions and to ensure that military offenders are treated equally within the military's criminal justice system.¹³⁴

V. NEW CIVIL ORDER OF PROTECTION OPTIONS FOR MILITARY VICTIMS OF DOMESTIC VIOLENCE

A civil order of protection is an important tool for victims attempting to leave an abusive relationship and avoid further violence. The VAWA recognized this by making it a federal crime to cross state lines with the intent to violate a valid protective order,¹³⁵ and by ensuring that an order of protection that was issued by a court with jurisdiction over the parties and that comported with due process requirements, could be enforced in other jurisdictions.¹³⁶ Because MPOs were often issued without the respondent having the benefit of a hearing, such orders did not qualify for full faith and credit. Also, because military bases are areas subject to some level of federal jurisdiction, courts had been unsure regarding jurisdiction to issue protective orders to residents of such bases. Uncertainty about the extent of this federal jurisdiction deterred state courts and law enforcement from getting involved in domestic violence situations on military bases. State court judges, wary of overstepping jurisdictional boundaries, were reluctant to issue a protective order to a resident of a military base. The reluctance of the state to get involved with domestic violence on military bases also extended to the civilian police because of uncertainty about "authority, obligations, and liability."¹³⁷ Because this confusion about jurisdiction contributed to the belief that the VAWA protections did not extend to residents of military bases and to the fact that courts and local law enforcement agencies were seemingly reluctant to give protection to victims of domestic violence in military communities, it is useful to look at how federal enclave jurisdiction came about and how it has been viewed by the courts.

133. *Id.*

134. The DoD, pursuant to a Task Force recommendation, has agreed to issue final guidance on the Lautenberg Amendment, including discharges under the Amendment. *Id.* at 151.

135. 18 U.S.C. § 2262(a)(1) (2000).

136. *Id.* at § 2265(a). Because due process includes notice and the opportunity to be heard, many MPOs issued under the 1992 version of the DoD Directive did not meet full faith and credit requirements. *See infra* notes 29–34 and accompanying text.

137. Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 114 (1997).

The power to establish federal enclaves within the states was granted to Congress by the Constitution.¹³⁸ Federal enclave jurisdiction was conceived of by the Continental Congress in response to a soldier's rebellion sparked by non-payment of Revolutionary War wages in 1783.¹³⁹ For four days, the soldiers gathered outside the hall where Congress met and noisily, but without violence, demanded their wages be paid.¹⁴⁰ The Continental Congress requested that Pennsylvania call up its militia to put an end to the gatherings, but Pennsylvania refused to act in the absence of injury or property damage.¹⁴¹ The memory of what had occurred rankled with members of Congress and led to the inclusion of Article 1, Section 8, Clause 17 in the Constitution.¹⁴² The point of creating federal enclaves was "to protect federal activities by limiting or completely excluding state authority on federal lands . . ."¹⁴³ Federal legislative jurisdiction is essentially a property interest; that is, the jurisdiction is based on the federal government's acquisition of an interest in land.¹⁴⁴ The jurisdiction, and the legislative authority that accompanies it, is dependent on the terms of the grant of land from the state to the federal government.¹⁴⁵ The three types of federal legislative jurisdiction are "exclusive, concurrent, and partial."¹⁴⁶

Areas of exclusive federal legislative jurisdiction are known as enclaves.¹⁴⁷ In enclaves, all legislative authority rests with the federal government.¹⁴⁸ The only power that the state retains on a federal enclave is "the right to serve process resulting from activities or incidents which occurred off the land."¹⁴⁹ States usually do not have any power to enforce criminal laws on federal enclaves.¹⁵⁰ States are also limited in their authority to collect personal and property taxes and to enforce civil laws.¹⁵¹ "Determining what law applies on

138. U.S. CONST. art. 1, § 8, cl. 17. The clause grants Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." *Id.*

139. Castlen & Block, *supra* note 137, at 114.

140. *Id.* at 119.

141. *Id.*

142. *Id.* at 120.

143. *Id.*

144. Castlen & Block, *supra* note 137, at 115.

145. *Id.* at 116.

146. *Id.*

147. *Id.*

148. *Id.*

149. Castlen & Block, *supra* note 137, at 116.

150. *Id.*

151. *Id.*

enclaves is often confusing because it depends, in part, on how and when the federal government received jurisdiction.”¹⁵² This confusion contributed to the unwillingness of state court judges to provide the relief that is normally available to domestic abuse victims under state law.

The other two types of federal legislative jurisdiction, concurrent and partial, are characterized by some degree of nonexclusive federal control. The second kind of federal legislative jurisdiction, concurrent jurisdiction, occurs “where the state [has] reserved or obtained the right to exercise all legislative authority concurrent with the federal government.”¹⁵³ The civil and criminal law of both the state and the federal government are applicable and both have the right to exercise authority.¹⁵⁴ The third kind of federal legislative jurisdiction is partial legislative jurisdiction. “Partial legislative jurisdiction applies to parcels of land where the state granted the federal government some legislative authority, but the state reserved to itself the right to exercise other authority in addition to the right to serve civil or criminal process.”¹⁵⁵

The view of the courts until the 1950s was that federal enclave jurisdiction excluded all state governmental power.¹⁵⁶ For example, a Maryland court found that residents of federal enclaves were not considered to be citizens of the state in which the enclave was located.¹⁵⁷ Because of this exclusion from citizenship, “enclave residents were not entitled to [file for divorce,] receive state education, vote, hold office, or receive any benefits derived from state residency.”¹⁵⁸

The 1953 Supreme Court case of *Howard v. Commissioners of Sinking Fund of Louisville* began to temper this extreme view of federal enclave jurisdiction.¹⁵⁹ The *Howard* court permitted Louisville, Kentucky to levy an earnings tax on the people who lived on a naval base.¹⁶⁰ The Court stressed the need for the competing jurisdictions to coexist comfortably:

The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.¹⁶¹

152. *Id.*

153. *Id.* at 117.

154. Castlen & Block, *supra* note 137, at 117.

155. *Id.*

156. *Id.* at 122.

157. *Id.* (citing *Lowe v. Lowe*, 133 A. 729 (Md. 1926)).

158. *Id.* (footnotes omitted).

159. *Howard v. Comm'rs of Sinking Fund of Louisville*, 344 U.S. 624 (1953).

160. *Id.* at 628.

161. *Id.* at 627.

Since *Howard*, the judiciary has widened considerably the range of rights available to enclave residents. Enclave residents have been allowed to vote in the state in which the enclave is located since 1970.¹⁶² Federal courts have also allowed residents of federal enclaves to hold local political offices and receive local public assistance.¹⁶³

Of particular interest in the domestic violence context is *Cobb v. Cobb*, a case decided by the Massachusetts Supreme Judicial Court.¹⁶⁴ The *Cobb* court held that the fact that a female service member lived and worked on a military base did not preclude her from obtaining a protective order against her abusive husband under Massachusetts law.¹⁶⁵ The court further held that the order would be in force and enforceable on the military base.¹⁶⁶ The issues were moot by the time they reached the Massachusetts Supreme Judicial Court because the order had been issued and had expired by its own terms, and there was no evidence or allegation that the husband had violated the order while it was in effect.¹⁶⁷ The judge who issued the protective order, apparently concerned about his authority to do so, certified two questions to the Supreme Judicial Court on the day the order was issued.¹⁶⁸ The court decided to answer the questions despite the fact that the case was moot because “the issue was of

162. *Evans v. Cornman*, 398 U.S. 419, 426 (1970).

163. *Castlen & Block*, *supra* note 137, at 123.

164. *Cobb v. Cobb*, 545 N.E.2d 1161 (Mass. 1989). The U.S. Army and the Department of Justice, among others, submitted amici curiae briefs on behalf of plaintiff Diane Cobb. *Id.* The Army and the Justice Department were willing to invoke the power and protection of the state to prevent abuse of a service member by her civilian husband. *Id.* at 1163. It seems logical to assume that these protections should cut both ways and offer the protections of restraining orders to civilian wives of military husbands. Yet there is no case law on the issue, and the Army’s desire to handle cases of domestic violence perpetrated by soldiers internally was much discussed in the wake of the killings at Fort Bragg. Even in its support of Diane Cobb, however, the Army’s brief was careful to note that in its opinion, the *Howard* line of cases does not make it clear that the Supreme Court meant to overrule all aspects of previous enclave precedent. *Id.* at 1163 n.4. The Army’s position is that “absent a contrary Federal law, a State law adopted after the cession of the land would apply in an enclave if that subsequent regulatory scheme was consistent with the ‘basic state law’ in effect at the time the land was ceded.” *Id.* The law invoked by the plaintiff happened to be similar to laws in effect at the time the land was ceded to Fort Devens. *Id.*

165. *Id.* at 1164.

166. *Id.*

167. *Id.* at 1162.

168. *Id.* The questions were as follows:

1. Is this Court precluded from issuing a restraining order under the provisions of G.L. c. 209A barring the defendant James Cobb from approaching, contacting, or abusing the plaintiff Diane Cobb solely because the plaintiff Diane Cobb is a member of the United States Armed Forces who resides and works at Fort Devens?
2. If this Court is not precluded from issuing such an order, is the order legally effective within the confines of Fort Devens, where the plaintiff resides and works?

Id. at 1162 n.1.

public importance, was likely to arise again, and was not likely to be capable of appellate review before the recurring question would again be moot.”¹⁶⁹ The issuing judge had indicated in his certification that the question of whether persons living on Fort Devens could obtain relief under the state’s protection order laws was one that arose frequently.¹⁷⁰ The judge had also indicated that his issuance of the order was in accord with recent changes in United States Supreme Court policy “moving away from the view that this court expressed years ago that, barring a statute to the contrary, State law does not apply in lands ceded to the Federal Government.”¹⁷¹

The Massachusetts Supreme Judicial Court construed the issue as:

[W]hether this court should now abandon (indeed must abandon) its earlier view [that the federal government had exclusive jurisdiction in areas that were ceded to it, so as to bar the operation of state law] in favor of the United States Supreme Court’s more recent controlling interpretation of the Constitution of the United States.¹⁷²

The court then reviewed the *Howard* line of cases¹⁷³ and concluded that the Supreme Court of the United States has “shown that the Constitution of the United States does not bar extension of the benefits and burdens of all State laws to inhabitants of land ceded to the Federal Government.”¹⁷⁴ The court found that there was no evidence that enforcing the order on the military base would interfere with any federal function.¹⁷⁵ The court also noted that, according to the briefs submitted, there was no alternative to the Massachusetts law available on the military base, and the military had even encouraged the use of state law in such cases.¹⁷⁶

The *Cobb* court indicated that its holding was compelled by the line of Supreme Court cases that had extended the benefit of state laws to residents of federal enclaves located within the state.¹⁷⁷ Under the *Cobb* approach, a federal enclave resident would be treated as a resident of the state for purposes of obtaining and enforcing a protective order as long as the state had laws governing the issuance of protective orders at the time the land was ceded to the federal government.¹⁷⁸ This approach would negate the problem of

169. *Cobb*, 545 N.E.2d at 1162.

170. *Id.*

171. *Id.*

172. *Id.*

173. See discussion *supra* notes 139–53 and accompanying text.

174. *Cobb*, 545 N.E.2d at 1163.

175. *Id.* at 1164.

176. *Id.* at 1164 n.5.

177. *Id.* at 1163.

178. This approach could cause obvious problems, given the uncertainty often surrounding how and when a particular tract of land became part of a federal enclave. See Castlen & Block, *supra* note 137, at 125.

competing jurisdictions by making a valid order enforceable both on and off the military base. The lack of case law about the issuance and enforcement of protective orders on military bases from other states could indicate that other state courts chose not to follow the precedent from Massachusetts.¹⁷⁹

The *Cobb* approach negated the problem of state versus federal jurisdiction, but the decision was not widely followed. Advocates who approved of the way *Cobb* was decided encouraged Congress to enact legislation that would afford state law protections to residents of military bases.¹⁸⁰ After the decision in *Cobb*, access to state law protections became even more important. Passage of the VAWA meant that a woman who had received a qualifying protective order from a state court could invoke the protection of federal anti-domestic violence laws. Residents in military communities, however, were still denied these protections.

More than a decade after *Cobb* and nearly ten years after the passage of the VAWA, Congress finally responded to the needs of domestic violence victims on military bases. The Armed Forces Domestic Security Act¹⁸¹ provides that an order of protection issued by a civilian court has the same legal force and effect on a military installation as it has in the jurisdiction of the issuing court.¹⁸² The statute applies to both service members and civilians who are present on the base.¹⁸³

179. *See id.* at 130-31 (discussing *Cobb* and opining that “issues of enforcement of state court orders *against* soldiers may rarely arise because those courts, afraid of stepping beyond their jurisdiction, might hesitate to issue such orders.”)

180. Michael J. Malinowski, Note, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception to Exclusive Federal Enclave Jurisdiction*, 100 YALE L.J. 189 (1990). Other writers had suggested the retrocession of unnecessary jurisdiction over domestic relations to the state as a possible solution. *See* Castlen & Block, *supra* note 137 *passim*.

181. Armed Forces Domestic Security Act of 2002, Pub. L. No. 107-311, § 2, 116 Stat. 2455 (2002) (codified as amended at 10 U.S.C.A. § 1561a (West Supp. 2003)). The text of the statute reads as follows:

- (a) Force and effect.—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.
- (b) Civilian order of protection defined.—In this section, the term ‘civilian order of protection’ has the meaning given the term ‘protection order’ in section 2266(5) of title 18.
- (c) Regulations.—The Secretary of Defense shall prescribe regulations to carry out this section. The regulations shall be designed to further good order and discipline by members of the armed forces and civilians present on military installations.

Id.

182. *Id.* The definition of protective order referred to in the statute is a reference to the definition of a protective order contained in VAWA:

The term “protective order” includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil and criminal court (other than a support or child custody order

This legislation is immensely important to victims of domestic violence in military communities. A woman who lives or works on a military base and obtains an order of protection from a state court now derives the same benefit any other woman would derive from the order even though she is technically crossing a jurisdictional line by living or working on a military base. The VAWA “makes an essential step toward providing more extensive protection for victims of domestic violence.”¹⁸⁴ Federal legislation now “recognizes that domestic violence is a national problem that crosses state lines.”¹⁸⁵ This recognition is no less true when the line that is crossed is the line between a state and a federal enclave. The risk of serious violence often increases if the abused partner threatens or attempts to leave the relationship, making it necessary for the fleeing partner to be assured of legal protection wherever she goes.¹⁸⁶ This new legislation signals an attempt by Congress to ensure that one of the original goals of the VAWA—that all women who are subjected to violence by their partners should have the benefit of a validly-issued protective order—is met.

Formerly, a victim of domestic violence fleeing a federal enclave faced a dangerous situation. Issuance of a protective order subject to full faith and credit requires notice to satisfy the due process rights of the respondent.¹⁸⁷ “For the woman who has fled her attacker, this notification could prove deadly.”¹⁸⁸ The victim of domestic violence who flees a federal enclave previously faced a difficult choice between giving up the protections of an order altogether or revealing her whereabouts to her abuser. Putting the victim in this position is manifestly unfair. It is precisely this sort of untenable choice that the Full Faith and Credit provision of the VAWA sought to alleviate.¹⁸⁹

issued pursuant to State divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other Federal law) whether obtained by filing an independent order or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

18 U.S.C. § 2266(5) (2000).

183. Armed Forces Domestic Security Act, Pub. L. No. 107-311, § 2(a), 116 Stat. 2455 (2002) (codified as amended at 10 U.S.C.A. § 1561a (West Supp. 2003)).

184. Klein, *supra* note 33, at 269-70.

185. *Id.* at 270.

186. Klein & Orloff, *supra* note 7, at 816. Studies conducted in Chicago and Philadelphia found that 25% of women who were killed by male partners were either separated or divorced from their abusers, and a further 29% were killed during the process of being divorced or separated. *Id.*

187. Klein, *supra* note 33, at 355.

188. Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123, 131 (2002).

189. *Id.* at 130-31.

Likewise, under the Armed Forces Domestic Security Act, a woman who chooses to leave her abusive partner may now file for an order of protection in a court of the state where the military installation is located.¹⁹⁰ This order would be issued in conformance with the state's due process requirements and would allow the respondent notice and the opportunity to be heard. The order would then be enforceable on the military base while the victim made preparations to leave, and this same order would be enforceable without a further notice requirement in the jurisdiction to which the victim moved under the VAWA's full faith and credit provisions.¹⁹¹ The new law, in conjunction with the VAWA, ensures that the woman who has successfully removed herself from an abusive situation does not have to place herself in jeopardy by revealing her location to the very person with whom she is seeking to avoid contact. The new law also allows a woman who wishes to avail herself of the domestic violence protections afforded by state law to do so without fear that the protective order she obtains will be unenforceable in her home. In other words, the new law affords a victim of abuse the opportunity to avoid the military chain of command entirely by allowing her to go directly to the civilian courts, thus negating the possibility of having to deal with an unresponsive commander.

VI. CONCLUSION

The Defense Task Force on Domestic Violence should be commended for its dedication and hard work. Because the Department of Defense has agreed with the majority of the Task Force's nearly 200 recommendations,¹⁹² there is good reason to believe that much needed changes will occur in the way the military handles domestic violence. Accepting these recommendations, however, is just the beginning. In its final report, the Task Force expressed concern about the fatalities at Fort Bragg and about continuing weaknesses and room for improvement in provisions for domestic violence services at military bases across the country.¹⁹³ The Department of Defense has not yet reached final decisions on several of the Task Force's recommendations; particularly those related to ensuring victim safety and the creation of new advocacy positions on military installations. A combination of new laws such as the Armed Forces Domestic Security Act and a complete reevaluation and reconception of the role of the military in addressing domestic violence in military communities is needed in order to ensure that all victims of domestic

190. See Pub. L. No. 107-311, § 2(a), 116 Stat. 2455 (2002) (codified as amended at 10 U.S.C.A. § 1561a (West Supp. 2003)).

191. See *id.*

192. DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, *supra* note 42, at vii.

193. *Id.* at v.

violence in the military have access to effective assistance in ending the violence in their lives.

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