

Analysis of Military Court Protective Order Provision in H.R. 6395

August 19, 2020

Background

From the early 2000s, Congress has intensified its efforts to support victims of military-connected sex-related and domestic violence offenses. These efforts include enacting over 100 provisions and providing resources intended to address such offenses and related misconduct. Department of Defense (DOD) implementation of these legislative initiatives includes making military leaders responsible for the safety of such victims. Commanders are also required to coordinate the military response to domestic violence involving servicemembers with the local community.

Protection Order

The term *protection order* includes any “injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person,” (18 U.S.C. §2266(5)). A *protection order* is analogous to the term *court order* for purposes of the Gun Control Act of 1968 (GCA), which requires such an order to have been issued by a court after a hearing of which the individual subject to the order received actual notice, and at which such individual had an opportunity to participate (18 U.S.C. §922). The *protection order* definition is adopted for DOD domestic abuse policy under the term *civilian protection order* (CPO) (10 U.S.C. §1561a; DODI 6400.06). Like the *protection order* definition, CPO includes a *protective order* and *restraining order*. The former is typically associated with a criminal court and the latter a civil court.

A *protective order* and a *restraining order* are both intended to protect an individual from future harm or violence, but the criminal court *protective order* is related to a criminal investigation or prosecution. It is a procedure among the available criminal justice control measures used by a state when restricting an accused individual’s liberty to prevent potential harm to a victim. The *protective order* is issued as a matter of judicial discretion, typically at the request of a victim or a prosecutor while a criminal case is pending. Whereas, a civil court may issue a *restraining order* when an individual requests that the court restrain another person from engaging in specified behaviors. A criminal act or prosecution is not required

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IN11484

for a *restraining order*, but violating the order is a crime. A decision to issue a *protective order* is made independently of one to grant a *restraining order* and these orders can coexist and may overlap.

Military Protection Order

One action a military commander may take for the safety of military-connected alleged sex-related and domestic violence offense victims is issuing a *military protection order* (MPO) (DODI 6400.06). An MPO is an administrative action used to inform an accused servicemember and a protected person that a commander is issuing an order to the servicemember that prohibits contact or communication with the protected person or members of the protected person's family or household. It directs an accused servicemember to take specified actions that support, or are in furtherance of, the prohibition, but the effect of an MPO is limited.

A commander may use an MPO to exercise authority over such servicemember regardless of the individual's location. However, although 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.

Should a commander determine the subject of an MPO is at risk of self-harm or that others are at risk of harm from that individual, the military commander may also take temporary possession of the servicemember's firearms if they are located on a military installation, but not firearms that are outside a military installation. There is no way for a commander to confirm whether a servicemember possesses firearms outside a military installation because the military is prohibited from collecting or maintaining this information (P.L. 111-383, §1062). Having neither authority over, nor knowledge of, a servicemember's firearms outside a military installation means a commander must rely on unsupervised compliance by an individual who is subject to an MPO and under investigation.

Military Court Protective Order

As part of its overall efforts to address victim safety, Congress added stalking, domestic violence, and certain sex-related offenses to the military justice system. In civilian criminal courts, *protective orders* are commonly associated with these types of offenses. The military justice system does not have the capacity to issue a *protective order* that is equivalent to those used in civilian criminal courts. A military court does not have the authority to issue a judicial order, generally, that is accorded full, faith, and credit by State, local, territorial, or tribal jurisdictions (18 U.S.C. §2265). These limits on the inquiry, pre-trial, and trial phases under the Uniform Code of Military Justice (UCMJ) leave a protective gap in the military justice system that typically does not exist in civilian criminal courts.

Section 542 of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (H.R. 6395) would establish a *military court protective order* (MCPO). This section would authorize military judges and magistrates to issue MCPOs for the purpose of protecting a victim of an alleged sex or domestic violence offense, or a family member or associate of the victim, from a person subject to the UCMJ. The Senate bill does not include a related provision (S. 4049). Section 542 would not create a civil restraining order procedure or replicate a civil court process because a MCPO would be linked to the pre-referral or post-referral of charges phase under the UCMJ.

Based on the explanation provided in the House Armed Services Committee report accompanying H.R. 6395, Section 542 is meant to fill the protective gap in the military justice system. Among other matters, the provision would provide a procedural tool that could be used by military judges and magistrates during the inquiry, pre-trial, or trial phases under the UCMJ. Additionally, State, local, territorial, or tribal jurisdictions would be required to recognize and enforce a MCPO.

Administration Objections

The Trump Administration asserted in a Statement of Administration Policy (SAP) that it “strongly supports” protections for victims but “strongly objects” to Section 542. The SAP states the Administration’s primary objection is that it would greatly expand the authority of military judges into an area reserved to civil courts. However, Section 542 would not create a civil *restraining order* procedure or replicate a civil court process, it would create a criminal *protective order* procedure and it replicates a criminal court process (See *Military Court Protective Order* above). The SAP also asserts that Section 542 would expand the GCA, but Section 542 would not amend the GCA, and the objection provides no further details (See *Protection Order* above). The SAP suggests that the MCPO would be duplicative of the MPO, but this objection does not address an MPO’s limited effect outside a military installation (See *Military Protection Order* above).

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