



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON DC 20310-2200

December 6, 2013

The Judge Advocate General

Honorable Harvey L. Bryant
Response Systems to Adult Sexual Assault Crimes Panel
One Liberty Center
875 North Randolph Street, Suite 150
Arlington, Virginia 22203-0101

Dear Mr. Bryant:

I understand there have been some questions regarding civilian prosecutions of military members in local jurisdictions. I wanted to provide some context of what tools are at the commander's disposal to ensure good order and discipline are maintained within the ranks. From a military perspective, the maintenance of both ensures a commander's unit is combat ready. Sometimes deferring to the local prosecutor best serves these goals, such as in domestic violence cases and driving under the influence (DUI) cases.

To begin, I want to assure you that Army commanders, and their judge advocates who advise them, actively work with the local prosecutors to ensure that all parties seek a fair and just result in every case. Yet there are two unique aspects to the crime of domestic violence in the Army that affect a commander's disposition decision in misdemeanor allegations. First, Army commanders have a comprehensive set of both disciplinary tools and rehabilitative programs to address the issue of family violence. Second, a misdemeanor civilian conviction for domestic violence carries a unique consequence for servicemembers under federal law that can influence the advice of a judge advocate and the decision of a commander to defer jurisdiction over off-post offenses.

Commanders' administrative options to address domestic violence allow for immediate actions to protect victims that are not as readily available in the civilian community. Immediately upon receipt of a report of a domestic violence allegation against a Soldier, without a hearing, a commander may issue a Military Protective Order (TAB A) to: issue a restraining order; remove a Soldier from their residence and order them to temporarily live in the barracks; attend mandatory counseling; surrender their government weapons custody card; surrender personal weapons stored in on-post facilities to the commander; and, other specific provisions based on individual facts and **circumstances of an allegation. The commander does not need to take jurisdiction of the allegation to accomplish any of these actions.**

The Army's comprehensive Family Advocacy Program, a mandatory referral after an allegation is substantiated by the Case Review Committee, also allows commanders to require Soldiers who are the subjects of domestic violence allegations to participate in social service intervention programs without taking jurisdiction of the offense.

In addition, a misdemeanor conviction for a domestic violence offense in a civilian court triggers a unique consequence under The Domestic Violence Amendment to the Gun Control Act of 1968, 18 USC 922, commonly referred to as the "Lautenberg Amendment." Under Army Regulation 600-20, paragraph 4-23 (TAB B), in compliance with the federal law, a Soldier convicted of a misdemeanor domestic violence offense in civilian courts may not carry or use firearms, including in a hostile fire zone, and is barred from re-enlistment. Essentially, a civilian misdemeanor conviction for domestic violence could terminate a Soldier's career. This same consequence applies in the event of a conviction at a general or special court-martial, but not after conviction at a summary court-martial or the imposition of nonjudicial punishment. Therefore, civilian prosecution often has a greater collateral effect than a misdemeanor equivalent action in the military system.

Finally, civilian prosecutions have the flexibility to offer a military defendant nolo pleas, deferred adjudications and probation. These options are not available in the military system. Given the context of the case, this flexibility might be in the interest of justice and could even be a benefit to the Soldier.

As a result, there are unique advantages to a civilian prosecution in these circumstances and, as a result, judge advocates often advise commanders not to seek primary jurisdiction over an off-post misdemeanor level domestic violence allegation. Regardless of disposition, our specially-selected and trained Special Victim Prosecutors that handle sexual assault prosecutions have responsibility for tracking all domestic violence offenses that result in serious injury or death. This cooperation with the local District Attorney's office is imperative to ensure that the correct jurisdiction is selected.

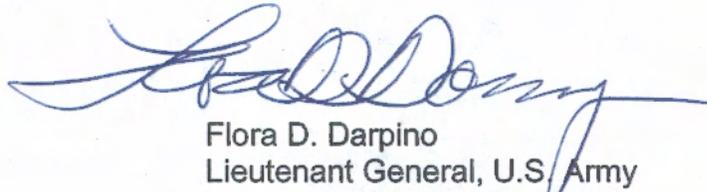
A similar situation exists for charges of driving while intoxicated, where civilian convictions carry unique administrative consequences for driver's license and insurance reporting that are not duplicated in the military justice system. As a result, judge advocates routinely advise commanders not to request jurisdiction over off-post driving offenses.

The decision to pursue or not pursue an offense, like every criminal case that faces a commander, must be decided on a case-by-case basis and always grounded in justice. It is the commander's involvement with the process and his or her decisions that sets a tone within the command. This tone is driven by the commander's ability to

act, not necessarily the act itself. I would not want to leave you with the impression that a failure of commanders to actively seek jurisdiction or to protest civilian prosecutions reflects any suggestion that the central role of the commander in the disposition of criminal offenses is not essential to good order and discipline.

I thank you for your consideration on my points and I would welcome the opportunity to discuss this topic with you and the Panel further.

Sincerely,



Flora D. Darpino
Lieutenant General, U.S. Army
The Judge Advocate General

cc:
Honorable Barbara Jones

MILITARY PROTECTIVE ORDER

PRIVACY ACT STATEMENT

In accordance with the Privacy Act of 1974 (Public Law 93-579), this notice informs you of the purpose of the form and how it will be used. Please read it carefully.

AUTHORITY: 5 U.S.C. 301, Departmental Regulations; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; and National Defense Authorization Act for Fiscal Year 1995, Sec. 534.

PRINCIPAL PURPOSE(S): To inform the service member and the protected person that the commanding officer is issuing an order to the member prohibiting contact or communication with the protected person or members of the protected person's family or household and directing that the member take specified actions that support, or are in furtherance of, the prohibition.

ROUTINE USE(S): Any release of information outside of the Department of Defense shall be compatible with the purposes for which the information is being collected and shall be in accordance with an established routine use for the record system where the information is maintained.

DISCLOSURE: Voluntary. Failure to disclose/verify information will not delay either the issuance of the order or the enforceability of the order.

1. SERVICE MEMBER				2. PROTECTED PERSON <i>(Important: see NOTE)</i>			
a. RANK	b. LAST NAME	FIRST NAME	MI	a. RANK	b. LAST NAME	FIRST NAME	MI
c. UNIT				c. UNIT			
d. INSTALLATION				d. INSTALLATION			

NOTE: Omit information in Item 2 that, if known to the service member in Item 1, could endanger the protected person.

3. INFORMATION SUPPORTING ISSUANCE OF THIS MILITARY PROTECTIVE ORDER

4. THE PROTECTED PERSON HAS ALSO BEEN ISSUED THE FOLLOWING COURT ORDERS:

a. Civil protection order issued <i>(Date - YYYYMMDD)</i> _____, in _____ Court, _____ County, State of _____	
b. Order issued <i>(Date - YYYYMMDD)</i> _____, in _____ Court, _____ County, State of _____	Property Settlement Custody and/or Visitation

5. As a Commanding Officer with jurisdiction over the above-named service member, I find that there is sufficient reason to conclude that the issuance of an order is warranted in the best interest of good order and discipline. It is hereby ordered that *(Initial applicable portions):*

a. The above-named service member is restrained from initiating any contact or communication with the above-named protected person either directly or through a third party. For purposes of this order, the term "communication" includes, but is not limited to, communication in person, or through a third party, via face-to-face contact, telephone, or in writing by letter, data fax, or electronic mail. If the protected person initiates any contact with the service member, the service member must immediately notify me regarding the facts and circumstances surrounding such contact.

b. The above-named service member shall remain at all times and places at least _____ feet away from the above-named protected person and members of the protected person's family or household including, but not limited to, residences and workplaces. Members of the protected person's family or household include:

c. The above-named service member will vacate the military residence shared by the parties located at:

d. Until further notified, the above-named service member will be provided temporary military quarters at:

e. The above-named service member will attend the following counseling:

f. The above-named service member will surrender his/her government weapons custody card at the time of issuance of this order.

g. The above-named service member will dispose of his/her personal firearm(s) that are located or stored on the installation at the time of issuance of this order.

h. Exceptions to this order will be granted only after an advance request is made to me and approved by me.

i. Other specific provisions of this order:

6. DURATION: The terms of this order shall be effective until _____, unless sooner rescinded, modified, or extended in writing by me.
 ENFORCEABILITY: Violation of this order or an applicable civilian protection order shall constitute a violation of Article 90 of the Uniform Code of Military Justice.

a. COMMANDING OFFICER'S SIGNATURE

b. DATE (YYYYMMDD)

7. I hereby acknowledge receipt of a copy of this order and attest that I understand the terms and conditions it imposes on me.

a. SERVICE MEMBER'S SIGNATURE

b. DATE (YYYYMMDD)

DISTRIBUTION:

Service member

Protected person (Custodial parent of protected child)

Service member's local personnel file

Army Regulation 600-20

Personnel-General

Army Command Policy

Rapid Action Revision (RAR) Issue Date: 20 September 2012

Headquarters
Department of the Army
Washington, DC
18 March 2008

UNCLASSIFIED

4-23. Domestic Violence Amendment to the Gun Control Act of 1968

a. General. The Domestic Violence Amendment to the Gun Control Act of 1968 (Section 922, Title 18, United States Code (18 USC 922)), the Lautenberg Amendment, makes it unlawful for any person to transfer, issue, sell or otherwise dispose of firearms or ammunition to any person whom he or she knows or has reasonable cause to believe has been convicted of a misdemeanor crime of domestic violence. It is also unlawful for any person who has been convicted of a misdemeanor crime of domestic violence to receive any firearm or ammunition that has been shipped or transported in interstate or foreign commerce. This chapter applies to all Soldiers throughout the world, including those in hostile fire areas.

b. Definitions. For the purpose of this paragraph only, the following definitions apply:

(1) *Crime of domestic violence.* An offense that involves the use or attempted use of physical force, or threatened use of a deadly weapon committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person who was similarly situated to a spouse, parent, or guardian of the victim. Persons who are similarly situated to a spouse include two persons who are residing at the same location in an intimate relationship with the intent to make that place their home.

(2) *Qualifying conviction.* A state or Federal conviction for a misdemeanor crime of domestic violence and any general or special court-martial for an offense that otherwise meets the elements of a crime of domestic violence, even though not classified as a misdemeanor or felony. A qualifying conviction does not include a summary court-martial conviction or the imposition of nonjudicial punishment under UCMJ, ART. 15. By DOD policy, a state or Federal conviction for a felony crime of domestic violence adjudged on or after 27 November 2002, will be considered a qualifying conviction for purposes of this regulation and will be subject to all the restrictions and prohibitions of this regulation. A person will not be considered to have a qualifying conviction unless the convicted offender was represented by counsel or knowingly and intelligently waived the right to counsel, and, if entitled to have the case tried by a jury, the case was actually tried by a jury, or the person knowingly and intelligently waived the right to have the case tried by a jury; and, the conviction has not been expunged or set aside, or the convicted offender has not been pardoned for the offense, or had civil rights restored; unless the pardon, expungement, or restoration of civil rights provides that the person may not ship, transport, possess, or receive firearms.

(3) *Security clearance.* If a completed security clearance investigation reveals that a Soldier has a qualifying conviction, then the investigation will be referred to the Soldier's chain of command for appropriate action consistent with this regulation.

(4) *Commander.*

(a) Unless otherwise stated, the senior mission commander is as delineated in General Order No. 4 (2002), ACSIM. Delegation of authority is authorized.

(b) For the USAR, unless otherwise stated, the commander is the commander of the appropriate Army Reserve command (USAR command, 7th ARCOM, 9th RRC, USACAPOC, AHRC). Delegation of authority is authorized.

c. Commander's responsibilities.

(1) The commander will ensure that all Soldiers who have a qualifying conviction are notified that it is unlawful to possess, ship, transport, or receive firearms and ammunition as prohibited in this regulation.

(2) In coordination with HQDA, the commander will implement a program of instruction to educate all Soldiers on the domestic violence amendment to the Gun Control Act and the policy as stated in this regulation. Instruction will normally be provided on an annual basis. In addition to formal instruction, an extract of this chapter will be prominently displayed outside unit arms rooms and all facilities in which Government firearms or ammunition are stored, issued, disposed, or transported.

(3) The commander will notify Soldiers that they have an affirmative, continuing obligation to inform commanders or supervisors if they have, or later obtain, a qualifying conviction and that the revised DD Form 2760 (Qualification to Possess Firearms or Ammunition) will be made available to those Soldiers who come forward to report a qualifying conviction in compliance with their obligation to do so. Soldiers will also be notified that neither the information nor evidence gained by filling out the DD Form 2760 may be used against them in any criminal prosecutions for a violation of 18 USC 922, including prosecutions under the UCMJ, based on a violation of 18 USC 922 for conduct that occurred prior to the completion of the DD Form 2760. Company and battery-level commanders will collect completed DD Form 2760 and file it in the Soldier's local military personnel file in accordance with AR 600-8-104 and AR 25-400-2.

(4) The commander will ensure that policy and procedures are in place to enforce the provisions of this chapter if privately owned firearms or ammunition are permitted in Government quarters. The commander will also ensure that policy and procedures are in place in morale, welfare, and recreation activities and other Government sponsored or sanctioned activities on their installation that engage in the transfer or sale of firearms or ammunition.

(5) The commander will ensure that procedures are implemented to track domestic violence arrests and convictions in the civilian community. This procedure should include regular coordination with local law enforcement and judicial agencies.

(6) If a commander knows or has reasonable cause to believe that a Soldier has a qualifying conviction, then the

commander should take all reasonable action to investigate. Soldiers with qualifying convictions must be identified and reported to HQDA to ensure compliance with the law. A commander at any level may initiate the investigation by ordering the Soldier to complete DD Form 2760. Soldiers who have or may have a qualifying conviction should be referred to a legal assistance attorney. A legal assistance attorney will also be available to assist the Soldier in seeking expungement of a qualifying conviction or a pardon.

(7) If a commander knows or has reasonable cause to believe that a Soldier has a qualifying conviction, then he or she will immediately retrieve all Government-issued firearms and ammunition and advise the Soldier to consult with a legal assistance attorney for guidance on lawful disposal or sale of any privately owned firearms and ammunition. Individuals with qualifying convictions are exempt from weapons qualification in accordance with AR 350-1 and will not be assigned individual weapons or ammunition.

(8) Accommodation: Domestic violence is incompatible with Army values and will not be tolerated or condoned. However, Soldiers will be given a reasonable time to seek expungement of or to obtain a pardon for a qualifying conviction and may extend up to one year for that purpose. The following factors will be considered in the commander's determination:

(a) Whether the Soldier attempted to conceal his conviction. In no event will Soldiers be accommodated who have made false statements on the DD Form 2760.

(b) Whether firearms or deadly weapons were used in the offense that formed the basis for the Soldier's domestic violence conviction.

(c) Whether the conviction is recent or remote in time.

(d) Whether there were incidents of domestic violence before or after the qualifying conviction. In no event will Soldiers be accommodated who have more than one qualifying conviction.

(e) Whether serious injury was caused during the crime of domestic violence.

(f) Whether the Soldier cooperated with law enforcement or investigating authorities.

(g) Whether circumstances suggest the probability of future incidents of domestic violence.

(h) Whether the Soldier has expressed remorse or regret or has entered counseling.

(i) Whether the Soldier has satisfied the judgment of the court.

(j) The length and character of service of the Soldier, the ability and potential of the Soldier, and the needs of the Army for the skills of the Soldier.

(k) Whether accommodation of the Soldier is consistent with actions taken in similar cases.

(l) Whether accommodation of the Soldier would be consistent with good order and discipline and public safety.

(9) Commanders must detail Soldiers whom they have reason to believe have a qualifying conviction to meaningful duties that do not require bearing weapons or ammunition. Commanders may reassign Soldiers to local TDA unit positions that deny them access to weapons and ammunition. Commanders will not appoint or assign Soldiers with qualifying convictions to leadership, supervisory, or property accountability positions that would require access to firearms or ammunition.

d. Personnel policies.

(1) *Enlistment/reenlistment.* Enlistment of applicants with a qualifying conviction is prohibited and no waivers will be approved. Soldiers with a qualifying conviction will be barred from reenlistment and are not eligible for the indefinite reenlistment program. Soldiers in the indefinite reenlistment program will be given an expiration of term of service (ETS) not to exceed 12 months from the date HQDA is notified of the qualifying conviction. Enlistment and reenlistment policy and procedures for AA are provided in AR 601-210. Reenlistment policy and procedures for Army Reserve are provided in AR 140-111. Applicants who have enlisted in the DEP who are found to have a qualifying conviction will be separated from the Delayed Entry Program.

(2) *Commissioning/appointment.* Applicants with a qualifying conviction will not be approved for commissioning in accordance with AR 135-100 and are ineligible for voluntary indefinite status. Officers with a qualifying conviction will be separated not later than 12 months from the date HQDA is notified of the qualifying conviction.

(3) *Flags.* Soldiers with a qualifying conviction will be denied favorable personnel action in accordance with AR 600-8-2. The flag may be removed if the qualifying conviction is expunged or set aside by competent authority.

(4) *Attendance at service schools.* Soldiers with a qualifying conviction are not authorized to attend any service school where instruction with firearms or ammunition is part of the curriculum. Commanders will counsel Soldiers that inability to complete service schools may affect future promotion or retention. Soldiers with a qualifying conviction may not attend any school that requires an AD service obligation; AR 350-100 and AR 621-1 apply.

(5) *DA selection board guidance.* Selection boards for school, command, and promotion will be instructed that appropriate consideration should be given to qualifying convictions in evaluating the Soldier's potential for future service.

(6) *Promotion.* Enlisted Soldiers with a qualifying conviction may not be promoted to the next higher grade in accordance with AR 140-158 and AR 600-8-19. Officers with a qualifying conviction may not be promoted to the next higher grade in accordance with AR 135-155 and AR 600-8-29.

(7) *Separation/retention policy.* Officers on AD may request release from AD, submit requests for unqualified

resignation, or be processed for elimination under the provisions of AR 600-8-24. The RC officers not on AD may submit requests for unqualified resignation or be processed for involuntary separation in accordance with AR 135-175. Enlisted Soldiers on AD may request voluntary separation for the convenience of the Government under Secretarial plenary authority as specified in AR 635-200. They also may be processed for involuntary discharge under the misconduct provisions of AR 635-200 on the basis of the misconduct that resulted in the qualifying conviction, or for involuntary separation under Secretarial plenary authority if the commander does not believe that discharge for misconduct is warranted. The misconduct and Secretarial plenary authority provisions of AR 135-178 also apply to voluntary or involuntary separation of RC enlisted Soldiers not on AD. The foregoing separation provisions do not apply to Soldiers with statutory military retirement sanctuaries.

(8) *Mobilization/deployment.* All Soldiers known to have, or whom commanders have reasonable cause to believe have, a qualifying conviction are not mobilization assets and are nondeployable for missions that require possession of firearms or ammunition.

(9) *Utilization.* Commanders must detail Soldiers whom they have a reason to believe have a qualifying conviction to meaningful duties that do not require bearing weapons or ammunition. Commanders may reassign Soldiers to local TDA unit positions that deny them access to weapons and ammunition. Commanders will not appoint or assign Soldiers with qualifying convictions to any supervisory or to any property accountability positions that require access to firearms or ammunition.

(10) *Assignment.* All Soldiers will complete a DD Form 2760 prior to receipt of PCS orders. Soldiers with a qualifying conviction are not eligible for overseas service in accordance with AR 614-30. Assignment of Soldiers with a qualifying conviction will be restricted in accordance with AR 600-8-11 and AR 140-10. Soldiers with a qualifying conviction will not be approved for entry into the Active Guard Reserve Program in accordance with AR 135-18.

(11) *Evaluation reports.* A qualifying conviction is an appropriate subject for comment in an evaluation report in accordance with AR 623-3.

(12) *"Sanctuary" statutes.* This regulation and its policies are subject to the "sanctuary" provisions of Section 1176, Title 10, United States Code (10 USC 1176), Section 12686, Title 10, United States Code (10 USC 12686), Sections 637 and 580(a)(4)(C), Title 10, United States Code (10 USC 637(a) and 580(a)(4)(C)).

e. Reporting requirements.

(1) Commanders will add Soldiers identified as nondeployable under this chapter to unit status reports. Personnel identified will be added to the nondeployable total under the code LA in accordance with AR 220-1, chapter 4, paragraph 10, subparagraph E (PSPER nonavailable report).

(2) Active Army will report qualifying convictions using assignment consideration code L9 (Lautenberg Amendment). Army Reserve will enter Lautenberg data as ASG-CONS "L9" in T APDB-R, database table IAF-T. Refer to current MILPER messages for further guidance.

(3) The ARNG Directorate (NG-ARH-S) will report for ARNG. The Army Reserve command will report for the USAR. Biannual reports will be made (15 January) and (15 July) to HQDA (DAPE-MPE). The individual ready reserve (IRR), Standby Reserve, and Retired Reserve are not subject to reporting requirements.

Chapter 5

Other Responsibilities of Command

5-1. General

This chapter discusses additional responsibilities concerning certain Soldier activities and practices whose regulation are inherent aspects of command. Violation of this chapter will provide a basis for disciplinary action under the UCMJ for those subject to its provisions.

5-2. Appearance before congressional committees

The Department of the Army will provide maximum information about its operation and activities to congressional committees. This information is subject to AR 380-5, paragraph 7-1. When asked to appear before a congressional committee, Army military personnel will coordinate with the Chief of Legislative Liaison, Office of the SA for guidance or assistance. Coordination will be accomplished with the Assistant Secretary of the Army (Financial Management and Comptroller) on matters pertaining to the budget. See AR 1-20 for additional guidance.

5-3. Political activities

The DCS, G-1 is responsible for policy on Soldier participation in political activities, as contained in Section 973, Title 10, United States Code (10 USC 973) and DODD 1344.10, Political Activities by Members of the Armed Forces on Active Duty, 2 August 2004, as follows:

a. Obligations as a citizen. Soldiers are expected to carry out their obligations as citizens. However, while on AD,