

# ARTICLE

## HOW THE MILITARY PROCESSES REPORTS OF DOMESTIC VIOLENCE: A BRIEF LOOK AT THE WAYS A UNIFORMED-ABUSER IS PROSECUTED AND WHAT CAN CHANGE TO ENSURE PROSECUTION

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## I. INTRODUCTION

On Friday, August 31, 2007, Brent Burke (Brent), a sergeant in the United States Army, murdered his wife, Tracy Burke (Tracy).<sup>1</sup> Brent began displaying violent tendencies in 2005 while on a deployment.<sup>2</sup> Specifically, Brent told his platoon leader “that he would kill . . . Tracy . . . if Tracy left him.”<sup>3</sup> Brent also stated that he was going to kill his platoon leader.<sup>4</sup> Because of the threat to the platoon leader, and with no acknowledgment of the threat to Tracy, the Army sent Brent back to his home base in Kentucky.<sup>5</sup>

The Army removed Brent from duty and Brent began to receive mental health treatment and medication to help with “anger, depression, and other psychological disorders.”<sup>6</sup> Despite still being on medication, the Army deployed Brent to Afghanistan in 2006.<sup>7</sup> While this took him away from Tracy, Brent’s anger increased while he was away.<sup>8</sup> Eventually, in 2007, Brent returned to live with Tracy and their children.<sup>9</sup> Tracy wanted to leave Brent and she tried to get away from him, however, Brent physically restrained her from doing so.<sup>10</sup> Law enforcement reported the domestic violence to Brent’s chain of command, and following “Policy 7: Command Response to Incidents of Domestic Violence,” (Policy 7) the Army conducted an investigation, finding domestic violence occurred.<sup>11</sup>

Two years after his initial threat of Tracy’s life, the Army finally ordered Brent away from Tracy.<sup>12</sup> However, he was only sent away for seventy-two hours.<sup>13</sup> When a service member is sent away because of domestic violence, part of the Army’s Policy 7 was to confiscate the offender’s privately owned weapons.<sup>14</sup> In

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1. Wilburn v. United States, No. 14-5732, 2015 U.S. App. LEXIS 14767, at \*2–6 (6th Cir. Aug. 21, 2015) (Brent also murdered Tracy’s former mother-in-law, with whom Tracy stayed while trying to escape Brent).

2. *Id.* at \*2.

3. *Id.* at \*3.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *See id.* (stating that while Brent was in Afghanistan on deployment, he expressed hatred to detainees and used an unnecessary form of punishment on them).

9. *Id.* at \*4.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at \*11.

this case, the Army was careless and merely reported the weapons confiscated without actually taking them away from Brent.<sup>15</sup> Before long, Tracy filed for divorce.<sup>16</sup>

After this filing, Brent moved into the Army's barracks, where Brent was to store his weapons in the "unit arms room."<sup>17</sup> However, the Army failed to ask or inquire about Brent's weapons in order to store them properly.<sup>18</sup> Tracy knew Brent possessed weapons, and Tracy feared for her life—she even told Brent's command she was worried about Brent's weapons.<sup>19</sup> To make matters worse, Brent told another soldier, "I'm going to shoot that bitch [Tracy] and . . . ' . . . take her into the woods and shoot her.'"<sup>20</sup> The soldier reported the comments but the supervisor dismissed the comments, alleging that Brent was "blowing off steam."<sup>21</sup>

In fall of 2007, Brent committed another act of domestic violence toward Tracy.<sup>22</sup> Law enforcement again notified the Army.<sup>23</sup> The Army failed to investigate per Policy 7, failed to take away Brent's firearms, and failed to put him in counseling.<sup>24</sup> After this, Brent again told a soldier that Tracy was better off dead.<sup>25</sup> Finally, a fellow sergeant, out of "concern for Tracy's well-being" took Brent's firearm away.<sup>26</sup>

A few weeks later, Brent asked the sergeant for his firearm so he could have it for "recreational use."<sup>27</sup> Believing him, the sergeant returned the weapon, and ten days later, Brent used the same gun to kill Tracy.<sup>28</sup> The Army had a strong hand in Tracy and Brent's tragic situation and had a duty to keep Brent away from Tracy.<sup>29</sup>

Tracy is not alone—there are many domestic violence incidents<sup>30</sup> where the military failed to take action against their

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15. *Id.* at \*4.

16. *Id.*

17. *Id.* at \*4–5.

18. *Id.* at \*5.

19. *Id.* Tracy requested a protective order to try to keep Brent away from her. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at \*5–6.

26. *Id.* at \*6.

27. *Id.*

28. *Id.*; Wilburn v. U.S., 22 F. Supp. 3d 691, 693 (W.D. Ky. 2014).

29. After four civilian mistrials, Brent's charges were initially dropped. Marcelena Spencer, *Honor and Dishonor*, CBS NEWS (Feb. 16, 2013), <http://www.cbsnews.com/news/honor-and-dishonor-the-trials-of-sgt-brent-burke/>. Then, two years after the murder, the Army picked up the case and convicted Brent to life in an Army prison. *Id.* He is currently appealing his conviction. *Id.*

30. For the past five years, the combined military branches have averaged around 8,000 domestic violence complaints each year, with one-third of female abusers and two-

uniform-wearing offenders.<sup>31</sup> This inaction cannot stand. The military has a duty to ensure the effects of war do not come home.<sup>32</sup> To ensure this, the military has a duty to reduce the effects and take action before tragic deaths, like Tracy Burke's, occur.<sup>33</sup> This Essay discusses how the military handles incidents of domestic violence.<sup>34</sup> It addresses the reporting process for victims and how the military may respond.<sup>35</sup> Next, the Essay describes what happens to a service member's career when they are convicted of domestic violence.<sup>36</sup> By detailing this, it reveals why so many spouses are reluctant to come forward and report their abuse. To conclude, the Essay suggests a more regulated system that military branches can use to reduce domestic violence and protect military spouses, like Tracy Burke.<sup>37</sup>

## II. HOW THE MILITARY PROCESSES DOMESTIC VIOLENCE

In 2000, Congress required the Secretary of Defense to create the Defense Task Force on Domestic Violence (DTFDV).<sup>38</sup> The DTFDV studied domestic violence in the military and suggested ways to improve the Department of Defense (DoD) response to incidents.<sup>39</sup> The DTFDV lasted for three years, culminating in the conclusion that the DoD must “[d]emand a

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thirds of male abusers. Andrew Tilghman, *One-third of Domestic Violence in Active-Duty Military Families are Men*, MILITARY TIMES (Aug. 27, 2014, 12:10 PM), <http://archive.militarytimes.com/article/20140827/NEWS/308270080/One-third-domestic-violence-victims-active-duty-military-families-men>. In 2013, the numbers decreased slightly, to 7,640 total, 64% female and 36% male. *Id.*

31. See Lizette Alvarez, *Despite Army's Assurances, Violence at Home*, N.Y. TIMES (Nov. 22, 2008), [http://www.nytimes.com/2008/11/23/us/23abuse.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/11/23/us/23abuse.html?pagewanted=all&_r=0) (discussing the case of Ms. Renteria, a military spouse abused by her husband who, instead of being prosecuted after Ms. Renteria's reports, was promoted and deployed as to avoid arrest warrants); Valerie G. Davis, *How the Military Failed This Victim of Domestic Violence*, TASK & PURPOSE (Oct. 15, 2014), <http://taskandpurpose.com/military-failed-victim-domestic-violence/> (stating that the commander and personnel in charge of handling the case agreed “to sweep the issue under the rug” and refused to reprimand the military offender).

32. From 2006 to 2011, military calls to the domestic violence hotline has tripled, per the Battered Women's Project. Chip Brewster, *Number of Domestic Violence Incidents Involving Veterans on the Rise*, FOX6NOW.COM (Aug. 25, 2013), <http://fox6now.com/2013/08/25/number-of-domestic-violence-incidents-involving-veterans-on-the-rise/>.

33. Note, men account for one-third of domestic violence victims in the military. *Supra* note 30.

34. *Infra* Part II.

35. *Infra* Part II.A.

36. *Infra* Part II.B.

37. *Infra* Part III.

38. Defense Task Force on Domestic Violence, *Third Year Report*, U.S. DEPT OF DEF. at 3 (2003), <http://www.ncdsv.org/images/Year3Report2003.pdf>.

39. *Id.*

culture shift that Does Not Tolerate Domestic Violence,” that holds offenders accountable, and “punishes criminal behavior.”<sup>40</sup> Today, created with that mindset, there is a process the victims follow when reporting domestic violence. Following the report, the commander has a few options to address the incident.

A. *How to Report Domestic Violence When the Offender is in the Military*

The process of reporting changes depending on the military branch, but there are three basic components.<sup>41</sup> The same process applies whether or not the abuse happens in the states or overseas.<sup>42</sup> The first component, Phase I, is when someone reports domestic violence. Next, Phase II occurs when the report is investigated.<sup>43</sup> To conclude, Phase III allows the military to respond to the report.<sup>44</sup>

1. *Phase I.* When the report of domestic violence is made, Phase I requires the report be made to the Family Advocacy Program, the military police, or the command.<sup>45</sup> Whichever party learns of the abuse first should typically report to the other two parties.<sup>46</sup> Various parties may report domestic violence, including, but not limited to, the survivor, the offender, the command, coworkers, or health-care personnel.<sup>47</sup> There are two methods available when making a report of domestic violence.<sup>48</sup>

First, a victim (or whoever else makes the report) may use restricted reporting.<sup>49</sup> This requires the victim to report to the Family Advocacy Program, clinician, victim advocate, or a health care provider.<sup>50</sup> Created by the Department of Defense, the Family Advocacy Program is designed to prevent abuse by “offering programs to put a stop to domestic abuse before it

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40. *Id.* at 170.

41. K.J. WILSON, WHEN VIOLENCE BEGINS AT HOME: A COMPREHENSIVE GUIDE TO UNDERSTANDING AND ENDING DOMESTIC ABUSE 230 (2d ed. 2006).

42. *Domestic Violence: Victims and Survivors*, STATESIDE LEGAL, <http://statesidelegal.org/domestic-violence-victims-and-survivors> (last visited Nov. 3, 2016).

43. *The Family Advocacy Program and Confidentiality*, WOMENSLAW.ORG, [http://womenslaw.org/laws\\_state\\_type.php?id=10864&state\\_code=US&open\\_id=10848#content-10416](http://womenslaw.org/laws_state_type.php?id=10864&state_code=US&open_id=10848#content-10416) (last updated June 25, 2013).

44. *Id.*

45. WILSON, *supra* note 41, at 230.

46. *Id.*

47. *Id.* at 230–31.

48. *Domestic Abuse Military Reporting Options*, MILITARY ONE SOURCE, [http://www.militaryonesource.mil/abuse?content\\_id=266707](http://www.militaryonesource.mil/abuse?content_id=266707) (last visited Nov. 3, 2016).

49. *Id.*

50. *Id.*

starts.”<sup>51</sup> After the victim makes a restricted report, the Family Advocacy Program will not notify law enforcement or military command of the incident.<sup>52</sup> Restricted reporting is not permitted in child abuse cases or when the victim may be in imminent risk of grave harm.<sup>53</sup> With this method, the victim can receive help on developing a safety plan, information about military protective orders, and information about legal and community services.<sup>54</sup> If a victim feels that more help is needed than this, a victim may use unrestricted reporting.

The second reporting option is called unrestricted reporting.<sup>55</sup> A victim uses this when they believe an investigation of the abuse is needed and when they want military command involved.<sup>56</sup> When a victim uses this method, the report goes through the chain of command and offers the victim support and protection.<sup>57</sup> If a victim uses this, the command can take action against the offender.<sup>58</sup> Under this method, the victim can also receive help in contacting law enforcement.<sup>59</sup>

2. *Phase II.* The next step, under unrestricted reporting only, requires the domestic violence report be investigated.<sup>60</sup> The military police, military investigators, or command office conducts the investigation.<sup>61</sup> The Family Advocacy Program concurrently performs a clinical assessment and brings the report before a case review committee.<sup>62</sup> That committee will make recommendations to the offender’s commander as to how best handle the situation.<sup>63</sup>

3. *Phase III.* In this part of the process, the military official, usually the commander, responds to the report.<sup>64</sup> There are three potential outcomes, depending on the severity of the

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51. *The Family Advocacy Program*, MILITARY ONE SOURCE, [http://www.militaryonesource.mil/phases-military-leadership?content\\_id=266712](http://www.militaryonesource.mil/phases-military-leadership?content_id=266712) (last visited Oct. 30, 2016).

52. *Domestic Abuse Military Reporting*, *supra* note 48.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. WILSON, *supra* note 41, at 231.

61. Judith Beals, *Understanding the Military Response to Domestic Violence*, BATTERED WOMEN’S JUSTICE PROJECT 20 (May 2, 2003), <http://www.bwjp.org/assets/understanding-military-response-domestic-violence.pdf>.

62. *Id.*

63. *Id.* at 21.

64. *Id.*

offense.<sup>65</sup> First, the commander may issue protection for the victim and the family by providing a military protective order, relocation, or safety planning.<sup>66</sup> Second, the commander may order services be provided for the victim and the offender.<sup>67</sup> Like in Tracy's case, the offender might be forced to stay away from the victim's place of residence, attend counseling, or both.<sup>68</sup> Third, and most relevant to this Essay, the commander may issue varying degrees of disciplinary action and prosecute under the Uniform Code of Military Justice (UCMJ).<sup>69</sup>

### *B. Prosecuting Domestic Violence Abusers under the UCMJ*

After the commander is given recommendations, the commander has a choice of several tools to approach the domestic violence situation. This portion of the Essay will focus on the tools the commander has under the UCMJ. The UCMJ is federal law, and it "defines the military justice system and lists criminal offenses under military law."<sup>70</sup> The President writes the rules and regulations through an executive order called the "Manual for Courts-Martial."<sup>71</sup> This manual provides the rules, regulations, and punishment recommendations that the military court-martials follow.<sup>72</sup> A court-martial may come in various forms, and a conviction by a military court-martial is the same as a federal conviction.<sup>73</sup> A domestic violence offender can be convicted under the UCMJ, and there are provisions of the UCMJ that are used to deal with domestic violence.

1. *The UCMJ and Domestic Violence.* There are two forms of punishment under the UCMJ: judicial and non-judicial punishment.<sup>74</sup> While non-judicial punishment is administrative in nature, judicial punishment is criminal.<sup>75</sup> Each type of punishment can affect the uniformed offender's career negatively, but the commander has the discretion to choose what

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65. *Id.*

66. WILSON, *supra* note 41.

67. Beals, *supra* note 61.

68. *Id.*

69. WILSON, *supra* note 41.

70. *The Uniform Code of Military Justice (UCMJ)*, MILITARY.COM, <http://www.military.com/join-armed-forces/the-uniform-code-of-military-justice-ucmj.html> (last visited Oct. 30, 2016).

71. *Id.*

72. *Id.*

73. *Id.*

74. Patty and Steve Shewmaker, *Domestic Violence—The Camouflage Connection* 3, NORTH CAROLINA STATE BAR—LEGAL ASSISTANCE FOR MILITARY PERSONNEL, [http://www.nclamp.gov/Domestic\\_Violence.pdf](http://www.nclamp.gov/Domestic_Violence.pdf) (last visited Oct. 30, 2016).

75. *Id.*

is best for the situation.<sup>76</sup> Unfortunately, the commander would often prefer to settle issues through misdemeanor-level misconduct portions of the UCMJ or certain administrative measures rather than allow “more formal procedures of a court-martial . . . trial.”<sup>77</sup> When a commander does this, it takes away from providing protection to domestic violence victims.<sup>78</sup>

The UCMJ covers non-judicial punishment under 10 U.S.C. § 815 (Article 15).<sup>79</sup> Essentially, Article 15 acts as a form of alternative dispute resolution.<sup>80</sup> If this avenue of punishment is chosen, the commander will generally agree to a lower form of punishment while the offender settles for summary proceedings.<sup>81</sup> Punishment under Article 15 will not “result in a conviction for the accused.”<sup>82</sup> Further, no court (state or federal) considers an Article 15 conviction equivalent to a criminal conviction.<sup>83</sup> This can harm the victim when he/she later seeks civil action against the offender because the conviction will not be on the offender’s record.<sup>84</sup> To make matters worse, when this method is chosen, the victim does “not have a seat” in providing any input on the offender’s punishment, and they cannot even see the record of the proceedings with a Freedom of Information Act request.<sup>85</sup> It is also well-known that “[t]he most dangerous time for victims of domestic violence often occurs immediately after the apprehension and release of the offender.”<sup>86</sup> In Texas, to help protect victims during this time, if a person is convicted of domestic violence, it is a felony for them to subsequently possess a firearm.<sup>87</sup> Texas law therefore deters offenders from having access to firearms and ensures victim’s safety and protection. However, a commander does not have to do this; they do not have

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76. Kim Rabb, *A Silent Epidemic: Spousal Abuse is the Military’s Best Kept Secret*, HUFFINGTON POST (Mar. 26, 2012, 9:35AM), [http://www.huffingtonpost.com/kim-rabb/best-kept-military-secret\\_b\\_1373462.html](http://www.huffingtonpost.com/kim-rabb/best-kept-military-secret_b_1373462.html).

77. Major Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military Nonjudicial Punishment*, 60 A.F. L. REV. 115, 117 (2007).

78. “A military commander’s decision to dispose of misconduct in an Article 15, rather than a formal proceeding, undermines the effectiveness of these consequences.” *Id.*

79. 10 U.S.C. § 815 (Westlaw through Pub. L. No. 114-244).

80. Wilde, *supra* note 77, at 118.

81. *Id.*

82. *Id.* at 119.

83. *Id.*

84. *Id.* at 130.

85. *Id.* at 120. The Freedom of Information Act provides exemptions for documents “related solely to the internal personnel rules and practices of an agency . . .” See Privacy Act of 1974, 5 U.S.C. § 552(a) (Westlaw through Pub. L. No. 114-244).

86. Wilde, *supra* note 77, at 122.

87. TEX. PENAL CODE ANN. § 46.04(b) (West 2015) (providing that a person convicted of domestic violence will be convicted of a felony for carrying a firearm if within five years of their release).

to forbid the offender's access to firearms.<sup>88</sup> The non-judicial punishment is a popular choice for commanders because they have an "interest in preserving [the soldier's] utility to the military."<sup>89</sup> This interest directly conflicts with the justice a victim could receive from judicial punishment.

In judicial proceedings, the victim can gain justice or varying forms of restitution from a criminal judgment.<sup>90</sup> Most importantly, if the commander chooses to punish the offender judicially, there are great benefits for the victim because the judgment may help with later custody battles and could prevent the offender from possessing any firearms.<sup>91</sup> Various provisions of the UCMJ carry criminal penalties for domestic violence offenders.<sup>92</sup> These provisions include Article 92 (Failure to Obey Order or Regulation)<sup>93</sup>; Article 128 (Assault)<sup>94</sup>; and Article 134 (General Article).<sup>95</sup> A sentencing under these provisions can result in confinement, reduction in pay, forfeiture of pay, discharge, or a combination of punishments.<sup>96</sup> The commander's selection of judicial punishment is also balanced against the competing interest of ultimately helping the family.<sup>97</sup> If any of these things happen to a service member, it could "impose further difficulties upon the family unit."<sup>98</sup> In order to understand how the non-judicial and judicial punishment affects incidents of domestic violence, a closer look at the various provisions is required.

*2. Non-Judicial Punishment.* Non-judicial punishment is a commander's way of punishing a service member for minor offenses.<sup>99</sup> As stated previously, it does not result in a conviction for the offender. Instead, there are varying levels of punishment the commander uses, depending on what he deems fit.<sup>100</sup> Article 15(b) of the UCMJ states that "any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses

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88. Wilde, *supra* note 77, at 122–23.

89. *Id.* at 119.

90. *Id.* at 120.

91. *Id.* at 121.

92. RUTKIN, FAMILY LAW AND PRACTICE, Ch. 4-43, § 43.15(2) (Matthew Bender 2015).

93. 10 U.S.C. § 892 (Westlaw through Pub. L. No. 114-244).

94. 10 U.S.C. § 928 (Westlaw through Pub. L. No. 114-244).

95. 10 U.S.C. § 934 (Westlaw through Pub. L. No. 114-244).

96. RUTKIN, *supra* note 92.

97. *Id.*

98. *Id.*

99. *Id.*

100. 10 U.S.C. § 815(b) (Westlaw through Pub. L. No. 114-244).

without the intervention of a court-martial”: 1) restrictions to certain limits, for no more than 30 days; 2) restriction to quarters; 3) forfeiture of pay; or 4) detention.<sup>101</sup> In addition, the commander may also issue administrative corrective measures.

The UCMJ does not define what constitutes a “minor offense.”<sup>102</sup> However, the Manual for Courts-Martial states that “a minor offense is a UCMJ offense, that if tried at a general court-martial carrying a punishment no greater than a bad-conduct discharge or one year of confinement.”<sup>103</sup> Whether or not an offense counts as a “minor offense” depends on many variables, including the offender’s “age, rank, duty assignment, record and experience, and the maximum sentence imposable for the offense if tried by general court-martial.”<sup>104</sup> It is again important to emphasize: *the commander has complete discretion to choose punishment.*<sup>105</sup> Even if something was not a minor offense, the commander may choose minor offense punishment.<sup>106</sup> The commander’s discretion is very broad, evidenced further by another form of punishment: the commander may also use administrative measures to correct the offense.

The Manual for Courts-Martial states that a commander can use “administrative corrective measures that promote efficient and good order and discipline such as counseling, admonitions, reprimands, exhortations, disapprovals, criticism, censures, reproofs, rebukes, extra military instruction, and administrative withholding of privileges.”<sup>107</sup> Administrative measures may be used when the offense violates or does not violate the code.<sup>108</sup> Taking this direction usually has a minimal impact to the service member.<sup>109</sup> For example, counseling can range from a “mild chewing-out” to formal, written counseling.<sup>110</sup> Admonitions and reprimands, simply just “write ups,” are taken more seriously—one of these could eventually lead to non-judicial punishment.<sup>111</sup> On the other hand, judicial punishment affects the uniformed-

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101. 10 U.S.C. § 815(b) (Westlaw through Pub. L. No. 114-244).

102. Major Takashi Kagawa, *Soldier’s First Offense: Article 15 or Summary Court-Martial?*, 2014 ARMY LAW. 33, 34 (2014).

103. *Id.* (citing U.S. DEP’T OF DEFENSE, MANUAL FOR COURTS-MARTIAL pt. V, 1.e (2012), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/MCM-2012.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf)).

104. U.S. DEP’T OF DEFENSE, *supra* note 103, at pt. V, 1.e.

105. Kagawa, *supra* note 102.

106. *Id.*

107. U.S. DEP’T OF DEFENSE, *supra* note 103, at pt. V, 1.g.

108. *Id.*

109. *Id.*

110. *Commander’s Quick Reference Manual for Legal Issues*, 45 (Oct. 1998) (on file with Author); Rod Powers, *U.S. Military: Letter of Admonishment*, THE BALANCE (updated Oct. 13, 2016), <http://usmilitary.about.com/od/justicelawlegislation/a/counseling.htm>.

111. Powers, *supra* note 110.

offender in the most severe way by seriously affecting their career, as described below.

3. *Judicial Punishment.* All the offenses under Articles 92, 128, and 134<sup>112</sup> require that the court-martial issue punishment. The court-martial may take three forms.<sup>113</sup> First, there is summary court-martial, which is one commissioned officer trying enlisted personnel for noncapital offenses.<sup>114</sup> Second, a special court-martial is composed of three members and one military judge or just the military judge.<sup>115</sup> This special court-martial is used for misdemeanors.<sup>116</sup> Last, there is the general court-martial, which is five members and a military judge or just the military judge.<sup>117</sup> This court handles felonies.<sup>118</sup> A domestic violence offender, depending on the offense, could face any type of court-martial, and, using the Manual for Courts-Martial, the judge decides if a violation occurred and what punishment is necessary.<sup>119</sup>

Article 92 defines punishment for failure to obey an order or regulation. In order to prove this, there must be “(a) . . . a certain lawful general order or regulation; (b) [t]hat the accused had a duty to obey . . .; (c) [and] that the accused violated or failed to obey . . .”<sup>120</sup> Punishment for a violation of Article 92 ranges from various levels of dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.<sup>121</sup> In the context of domestic violence, Article 92 can be used to charge a service member with failure to support a family member or violation of a military protective order.<sup>122<sup>c</sup></sup>

Punishment for assault is found in Article 128.<sup>123</sup> This article covers simple assault (attempt of bodily harm), assault consummated by a battery (actual bodily harm occurred), assault

112. Note, these provisions are not exhaustive. The UCMJ also provides punishment for damage to military property (Article 108), damage to nonmilitary property (Article 109), rape (Article 120), and maiming (Article 124). See generally 10 U.S.C. §§ 908, 909, 917, 920, 924 (Westlaw through Pub. L. No. 114-244).

113. *Court Martials Explained*, MILITARY.COM, <http://www.military.com/benefits/military-legal-matters/courts-martial-explained.html> (last visited Oct. 30, 2016).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. 10 U.S.C. § 892 (Westlaw through Pub. L. No. 114-244).

120. U.S. DEP’T OF DEFENSE, *supra* note 103, at pt. V, 1.g, pt. IV, 16.b.

121. *Id.* at pt. IV, 16.e(1).

122. *Uniform Code of Military Justice Articles Relating to Domestic Violence*, NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, <http://www.ncdsv.org/images/attachment8—ucmjarticles.pdf> 1 (last visited Oct. 30, 2016).

123. 10 U.S.C. § 928 (Westlaw through Pub. L. No. 114-244).

to a child under 16 years (resulting in bodily harm), aggravated assault (using a dangerous weapon), and assault resulting in intentionally inflicted grievous bodily harm.<sup>124</sup> The punishment for each assault ranges from three-month confinement with a reduction in pay to dishonorable discharge and confinement for ten years.<sup>125</sup> This provision can provide protection and justice to military spouses and children who are victim to domestic abuse.

The last provision relevant to this discussion is Article 134.<sup>126</sup> This article states

All disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.<sup>127</sup>

This article is very broad and “makes punishable acts in three categories of offenses not specifically covered” in the UCMJ.<sup>128</sup> Clause 1 offenses include disorders and neglects to the prejudice of good order and discipline in the armed forces.<sup>129</sup> Clause 2 includes conduct that brings discredit to the armed forces.<sup>130</sup> Last, Clause 3 allows punishment for noncapital crimes or offenses that violate Federal law.<sup>131</sup> Each Clause requires different elements in order to be proven.<sup>132</sup> Article 134 provides justice for crimes of domestic violence in the form of charging offenders for communication of a threat, discharging a firearm in order to endanger human life, kidnapping, drunk and disorderly conduct, obstructing justice, unlawful entry, assault with intent to commit rape, assault with intent to commit housebreaking, and stalking.<sup>133</sup> Despite the various available punishments for uniformed domestic violence offenders, often, the crimes go unnoticed, as illustrated by the stories in note 134.<sup>134</sup> Perhaps, if

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124. U.S. DEP'T OF DEFENSE, *supra* note 104, at pt. IV, 54.b.

125. *Id.* at pt IV, 54.e.

126. 10 U.S.C. § 934 (Westlaw through Pub. L. No. 114-244).

127. 10 U.S.C. § 934 (Westlaw through Pub. L. No. 114-244).

128. U.S. DEP'T OF DEFENSE, *supra* note 104, at pt. IV, 60.c(1).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at pt. IV, 54.b.

133. *Supra* note 122.

134. *See Alvarez, supra* note 31 (discussing the case of Ms. Renteria, a military spouse abused by her husband who, instead of being prosecuted after Ms. Renteria's reports, was promoted and deployed as to avoid arrest warrants); Davis, *supra* note 31 (stating that the personnel in charge of handling the case agreed “to sweep the issue

there were minor changes to the domestic violence process, fewer crimes would be swept under the rug.<sup>135</sup>

### III. RECOMMENDATIONS AND CONCLUSION

In 2003, the Defensive Task Force on Domestic Violence demanded a culture shift wherein the military “does not tolerate domestic violence, holds offenders accountable for their actions, and punishes criminal behavior.”<sup>136</sup> According to this culture shift, the Department of Defense changed various procedures of handling military domestic violence, including issuing military protective orders within twenty-four hours, requiring commanders to receive domestic violence training within ninety days of appointment, training military police on how to handle domestic violence situations, and increasing confidentiality of reports.<sup>137</sup> The current provisions of non-judicial and judicial punishment for domestic violence are thorough and do not need to change. However, the provisions need to be enforced and changes need to happen to ensure fair punishment of domestic violence offenders and protection of victims, especially considering the affects post-traumatic stress syndrome (PTSD) has on military members and their domestic relationships.

The first recommendation is to take authority away from the commander. The uniformed offender’s commander acts as a barrier between the spouse and protection and justice for the harm caused by their military spouse. Because the commander has broad discretion in electing what to punish, hypothetically, the commander could choose not to punish a service member who battered their spouse for years and years. In fact, the commander could even choose to give this service member a promotion as opposed to punishing them. The commander should not be allowed to have this broad discretion. Further, the DoD should ensure that an unbiased party decides punishment based on the facts of each domestic violence case, rather than the utility the service member provides to the commander’s team. The DoD could do this by creating a court-

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under the rug” and refused to reprimand the military offender); Sarah Lazare, *The Military’s Hidden Mental Health Crisis: Spousal Trauma*, ALJAZEERA AMERICA (Nov. 15, 2013, 5:00AM), <http://america.aljazeera.com/articles/2013/11/13/the-military-s-hiddenhealthcrisis.html> (discussing how after reaching out about her husband’s violent tendencies, the commander told the husband to “[k]eep his wife in line”); Rabb, *supra* note 76.

135. Davis, *supra* note 31 (calling for a culture shift that welcomes the “[t]he safety of the spouse and children” before the offender).

136. Defense Task Force on Domestic Violence, *supra* note 38, at vii.

137. *Id.* at 149.

martial specifically dedicated to family issues. Perhaps, if this happened, tragic cases like Tracy Burke's would not occur.

The second method ensures the family receives any pay deducted from the abusers' pay. In domestic violence in or out of the military, there will always be spouses who are hesitant to report for fear of ruining their abuser's career or for fear of making matters worse. However, in the military, if an abuser is found guilty, the family risks losing their income and could become stuck in a town or base with which they are unfamiliar. If the military made sure the suspended pay still compensated the victimized spouse or found a way to ensure the victimized spouse could receive just compensation, more victims would come forward. These measures need to be implemented, especially considering the increase of domestic violence due to PTSD.<sup>138</sup>

In order to reduce the overall domestic violence and the staggering increase of domestic violence due to PTSD, the military has a duty to make sure the wars fought overseas do not come into the home. The military can do this by implementing early intervention<sup>139</sup> through counseling and creating an environment that does not negatively stigmatize PTSD. Further, when PTSD does manifest as domestic violence, the military should implement different measures, as described above. The military has a duty to make sure this culture shift is not just memorialized in writing but comes to life with action. Each branch of the armed forces owes a duty to its members and their spouses to reduce incidents of domestic violence.<sup>140</sup> Each spouse faced with circumstances like Tracy Burke needs the protection of *enforced* non-judicial and judicial punishment.

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138. *Supra* note 32. Also, of all the troops suffering from PTSD, "two out of three of their marriages are failing, 200,000 military marriages have been broken," with 27,000 failing in 2009. *The Statistics*, PTSD FOUNDATION OF AMERICA, <http://ptsdusa.org/what-is-ptsd/the-statistics/> (last visited Oct. 30, 2016).

139. *See PTSD: National Center for PTSD*, U.S. DEP'T OF VETERANS AFFAIRS, (Aug. 15, 2015) <http://www.ptsd.va.gov/professional/treatment/early/index.asp> (providing early intervention recommendations for PTSD).

140. Evidence indicates that there are measures that have reduced the prevalence of PTSD in the military. For example, 84.8% of Vietnam veterans who were diagnosed with PTSD after the war still suffer from the disorder, while 67% of Iraq and Afghanistan veterans suffer with it. Lacie Glover, *Post-Traumatic Stress Disorder (PTSD) Statistics for Veterans*, NERDWALLET (May 19, 2014), <https://www.nerdwallet.com/blog/health/2014/05/19/ptsd-post-traumatic-stress-disorder-statistics-veterans/>. While this is a reduction, more still needs to be done to bring the numbers even further down.