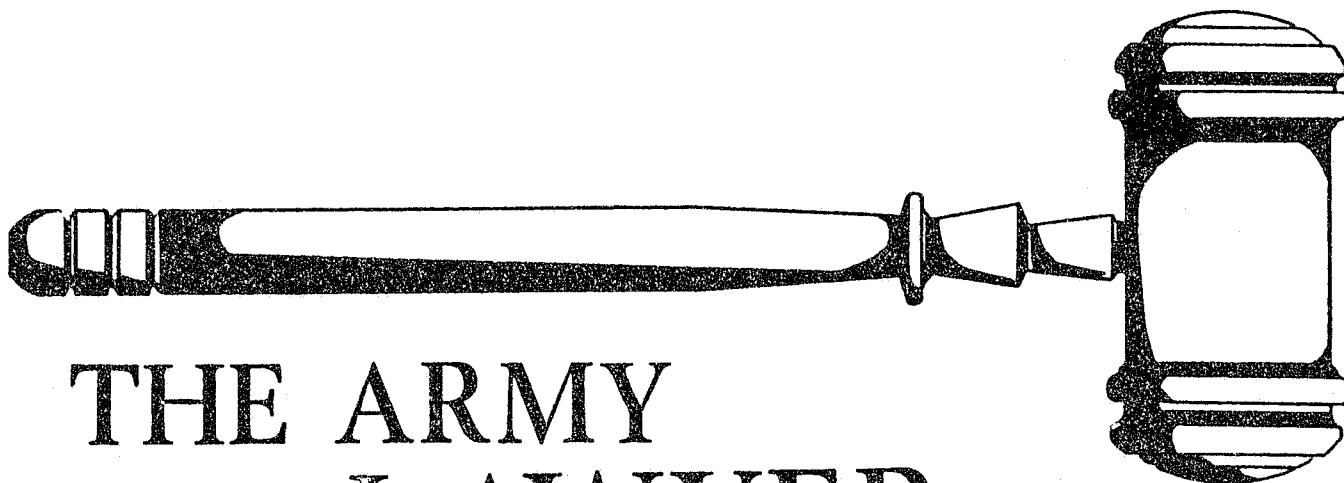


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Table of Contents

Articles

Crime in the Home 11.2.9.6.7 3
Lieutenant Colonel Alfred F. Arquilla

The Misrepresentation Exception to the Federal Tort Claims Act 18
Major Russell J. Fontenot

USALSA Report 24
United States Army Legal Services Agency

The Advocate for Military Defense Counsel 24
"Secret Trials" 24
Captain Debra D. Stafford

DAD Notes 28
Sixth Amendment Renaissance—Hearsay and Confessions; To Deport or Not to
Deport—That Is the Question; Stipulations of Fact: Say No More Than Necessary; Watch
Out for Waiver; In Bargaining With the SJA—Be Aware of Sales; Pretrial Agreement:
Restitution and Indigency

Government Appellate Division Notes 34
United States v. Holt: The Use of Providence Inquiry Information During Sentencing 34
Captain Jody M. Prescott

Article 32(c): A Forgotten Provision Can Assist the Prosecutor 39
Captain Gary L. Hausken

Trial Defense Service Note 43
Use of a Clinical Psychologist During Sentencing in Child Abuse Cases 43
Major Louis C. Cashiola

Trial Judiciary Note 46
Recent Developments in Instructions 46
Colonel Herbert Green

Clerk of Court Note 53
Court-Martial Transcript Pages; Army Court of Military Review, Calendar Year 1987

Contract Appeals Division—Trial Note.....	53
Hindsight—Litigation That Might Be Avoided	
Major Edward J. Kinberg	53
TJAGSA Practice Notes	55
Instructors, The Judge Advocate General's School	
Administrative and Civil Law Note	55
Digest of Opinion of The Judge Advocate General, DAJA-ALP 1987/2356	
Criminal Law Note	55
United States v. Lindsey Scott: The Final Act; Neutral Explanations for Peremptory Challenges of Minorities	
Legal Assistance Items	58
Consumer Law Notes (Faulty Home Appraisals Lead to Congressional Inquiry, Discounts on Early Rental Payments May Be Disguised Late Fees, Penalties for Credit Card Offenses May Be Escalating, Pan Am Panned); Tax Notes (More Developments on the Taxability of Military Retired Pay Received By Former Spouse, IRS Rules Couple May Defer Gain When Separate Homes Are Sold); Family Law Notes (Divorce Revokes Will Provisions in Favor of Spouse, Divorce May Not Invalidate Life Insurance Designation, Former Spouses' Protection Act Benefits)	
Contract Law Note	62
Distribution of Budget Authority From Congress: The Army Model	
Claims Report	63
United States Army Claims Service	
Personnel Claims Note (Lost or Damaged Property); Tort Claims Note (Recent FTCA Actions); Management Note (Certificates of Achievement)	
Automation Notes	64
Information Management Office, OTJAG	
Energize Mel; Tape Backup Blues; Observe Copyrights; Automation SOP	
Enlisted Update	66
Guard and Reserve Items	67
Judge Advocate Guard and Reserve Affairs Department, TJAGSA	
FICA Tax Now Imposed on Reservists Performing Inactive Duty Training; Digest of Opinion of The Judge Advocate General, DAJA-CL 1988/5027	
CLE News	68
Current Material of Interest	71

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Major Thomas J. Feeney

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Crime in the Home

Lieutenant Colonel Alfred F. Arquilla
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Introduction

This article addresses the one aspect of the Army Family Advocacy Program¹ that causes the most friction between Army lawyers and family advocacy staff² in handling the problems of spouse and child abuse³ in military communities across the Army: The prosecution of soldiers who are accused of crime in the home⁴—that is, abuse-related crimes committed by soldiers against members of their families. The friction that arises in many of these cases is purely a matter of professional perspective. What a social worker might view as a manifestation of family dysfunctioning in need of treatment is often viewed by a lawyer as a crime warranting prosecution and punishment.

Not all instances of spouse or child abuse, as defined, involve criminal acts, and fortunately, most of the abuse that does occur, even when criminal in nature, does not constitute serious crime, as this article will demonstrate. Nevertheless, the number of court-martial cases involving crime in the home is enough to cause discord between lawyers and family advocacy staff on some Army installations.

Sometimes those feelings have become strong enough that members of Congress have gotten involved in the fray. At the Department of Army level, the professional differences that arise at the installation level frequently surface in

the form of requests for changes in the law or in regulatory guidance. This article addresses one such proposal, Issue 14 of the Army Family Action Plan, that suggests that there is a need to protect the so-called "retirement benefits" of family members when soldiers are tried, convicted, and punished by court-martial for crime in the home. After examining the available statistical data and existing regulatory guidance, the article concludes that Issue 14 is a "phantom issue" and there is no need to change our present policy.

Only those abuse-related crimes committed by soldiers against members of their families are within the purview of this article. Assaults and sexual offenses committed by soldiers against children not related to them by blood or marriage are generally outside the scope of the Army Family Advocacy Program and will not be addressed.⁵

The Army Family Advocacy Program

The Army Child Advocacy Program was established in 1975. Initially, the program was conceived as a medical program directed only at the treatment of child abuse. Later, the program was broadened to address the social aspects of this problem as well. In 1977, the program was placed under the general responsibility of Army Community Service.⁶ In 1981, the program was expanded to address the

¹ The objectives of this program are listed in Dep't of Army, Reg. No. 608-18, Personal Affairs—The Army Family Advocacy Program, para. 1-5 (18 Sept. 1987) [hereinafter AR 608-18].

² The reference to family advocacy staff throughout this article is intended to include all social workers, nurses, dentists, psychologists, psychiatrists, and other medical personnel who treat the perpetrators and victims of spouse or child abuse.

³ AR 608-18, glossary section II, defines these terms as follows:

Spouse Abuse

An assault, a battery, a threat to injure or kill, any other unlawful act of force or violence, or emotional maltreatment inflicted by one spouse in a marriage against the other when the victim, regardless of age, is authorized treatment in a medical facility of the Military Services. Emotional maltreatment is conduct which, although not criminal, is so offensive to the victimized spouse that a reasonable person would find such conduct abhorrent within a marital relationship.

Child Abuse

Except as otherwise indicated in this regulation, child abuse includes child sexual abuse and child neglect, and means the physical injury, sexual maltreatment, deprivation of necessities, or other maltreatment of a child by a parent, guardian, or any other person (including an employee of a residential facility or any staff person providing out-of-home care) who is responsible for the child's welfare on a temporary or permanent basis.

As defined, both spouse and child abuse include conduct that is criminal as well as noncriminal in nature. It should be noted that with regard to criminal acts of child abuse, family advocacy staff should not be advising commanders on the disposition of crimes other than those committed by a soldier against his or her child, step-child, or other minor military dependant living within the home. Commanders are cautioned to consider the recommendations of the Family Advocacy Case Management Team before taking or recommending disciplinary and administrative actions against soldiers only in cases of abuse occurring within the family. The FACMT would not make a recommendation on the disposition of a case involving a soldier who has assaulted a child unrelated to the soldier, even if such child was under the care of the soldier at the time of the assault. See AR 608-18, para. 4-1.

⁴ The term "crime in the home" is used throughout this article to describe abuse-related crimes committed by soldiers against their spouses and children that involve such offenses as assault, battery, and threats to injure or kill. Also included are all sexual offenses committed by soldiers against their children, such as rape, carnal knowledge, and indecent assault. A complete listing of these offenses is at *infra* note 27. Almost all such criminal acts between members of the family occur in the home. For this reason, "crime in the home" is used synonymously with abuse-related crimes throughout this article. A few decades ago, the barrier posed by the walls of a home were enough to remove all but the most serious abuse-related crimes from public scrutiny and criminal prosecution. Those who suggest that those walls should be completely ignored today are just as wrong, in the author's opinion, as are those who suggest that they make a crucial difference in deciding how these crimes should be handled.

⁵ As those familiar with court-martial practice know, the number of court-martial cases involving child sexual offenders has increased dramatically over the past several years. In 1974, only one inmate of the United States Disciplinary Barracks (USDB), Fort Leavenworth, Kansas, was incarcerated for a child sexual offense. As many as 85 such offenders were incarcerated during a one-week period in 1985. As of 17 December 1987, 255 inmates (18% of the prison population) were child sexual offenders. Approximately 35% of these offenders assaulted children outside their families (i.e., not related to them by blood or marriage). Not all of these offenders are soldiers because the USDB incarcerates military prisoners from the U.S. Air Force and the U.S. Marine Corps, as well as from the U.S. Army. Letter from Lieutenant Colonel (LTC) Ray V. Smith, MS, Director of Mental Health, USDB, to LTC Jim Schlie, Military Family Resource Center, Arlington, Virginia (Dec. 29, 1987). For a general discussion of the prosecution of sexual abuse cases, see Andrews, *The Child Sexual Abuse Case*, Parts I & II, *The Army Lawyer*, Nov. 1987, at 45 and Dec. 1987, at 33.

⁶ Dep't of Army, Reg. 608-1, Personal Affairs—Army Commun. Service (1 Oct. 1978).

problem of spouse abuse and was redesignated the Army Family Advocacy Program.⁷

The Army Family Advocacy Program is designed to prevent child and spouse abuse by providing services that improve family functioning and reduce the kinds of stress that can trigger abuse.⁸ Family advocacy staff try to identify abuse in families as early as possible so that treatment services can be provided. The full scope of the program addresses the prevention, identification, reporting, investigation, and treatment of spouse and child abuse throughout the Army.⁹ Family advocacy treatment and counselling services are available to all soldiers and their families, as well as all others who are eligible for care in military treatment facilities.¹⁰

Army lawyers are involved on a day-to-day basis with advising family advocacy personnel on a wide variety of legal issues concerning such matters as jurisdiction (civil and criminal), the release of information from records, and the application of various laws and regulations to the program.¹¹ Lawyers and family advocacy staff are common allies in taking the necessary, legally-supportable actions that will protect victims of abuse, particularly children, from further harm or injury.

The professional differences between military lawyers and family advocacy staff, when they arise, usually concern not the protection of victims, but rather the handling of soldiers whose abusive acts constitute serious violations of the Uniform Code of Military Justice.¹² While military trial counsel view such abuse in the context of potential court-martial charges,¹³ family advocacy staff generally consider prosecution and punishment in many such cases to be

counterproductive to the treatment of abusers and the well-being of their families.¹⁴

AR 608-18 properly takes the middle ground by indicating that treatment of an abuser does not preclude disciplinary action in appropriate cases.¹⁵ It is up to the commander of the accused soldier to decide on whether a particular report of an abuse-related crime is supported by the available evidence, and, if so, whether the offense warrants prosecution or another disposition.¹⁶ Family Advocacy staff and trial counsel can be expected to do their best to persuade the commander on the best course of action to follow from their own professional viewpoints. In some cases, they will agree in the advice they give to the commander, and in others they will disagree. Nevertheless, in most cases justice will prevail, and the family will also receive the necessary medical and social services to cope with the abuse that has occurred and to prevent it from re-occurring. Those who would like to see a uniform disposition of all such cases are properly doomed to frustration and disappointment.

Issue 14 of the Army Family Action Plan

At the Department of Army level, those who seek to advance the interests of Army families in spouse and child abuse cases, as well as in all other areas of military life, have a forum in the annual Army Family Action Plan Planning Conference. Each conference, which is attended by command and family representatives from all the major Army commands, produces an Army Family Action Plan¹⁷ for the coming year. The conference meets each year to evaluate the progress and impact of issues previously raised

⁷ The expansion and redesignation of the program occurred as a result of the publication of Dep't of Defense Directive No. 6400.1, Family Advocacy Program (May 19, 1981) (current version dated July 10, 1986). This directive required that each service create a program to address the prevention, evaluation, and treatment of spouse and child abuse. This directive was issued as a result of a May 1979 U.S. General Accounting Office study (U.S. General Accounting Office, *Report to Congress: Military Child Advocacy Programs—Victims of Neglect*, (1979)), as well as numerous conferences and studies that focused on the problem of domestic violence in the military. See, e.g., J. Santos, *Domestic Violence in the Military Community* (Washington, D.C., Center for Women Policy Studies).

⁸ Stress, such as that resulting from problems or long hours at work, financial difficulties, pregnancy, and household moves, is a leading cause of spouse and child abuse in the home. Stressful situations frequently arise in younger families. In the general population, the rate of spouse and child abuse for husband and wives under 31 years of age is more than twice that of those in the age group 31 through 50 years. M. Straus, R. Gelles, & S. Steinmetz, *Behind Closed Doors—Violence in the American Family* 129, 140-44, and 181-90 (1981). Seventy-three percent of Army soldiers are under the age of 31 years. Many of these young soldiers are married and have children. U.S. Dep't of Defense, *Defense 87 Almanac* 30, 33 (Sept.-Oct. 1987). Family Advocacy staff generally classify young families to be a "high risk" population insofar as the likelihood of spouse and child abuse is concerned. Nonetheless, the rate of child abuse generally is much lower in the Army than in the general population. During the period 1 October 1986 through 30 September 1987, the rate of child abuse was 10.2 children per 1,000 in the Army; the national rate during calendar year 1985 was 30.6 children per 1,000. No national statistics are available for spouse abuse.

⁹ AR 608-18, para. 1-1.

¹⁰ Dep't of Defense Directive No. 6400.1, Family Advocacy Program, para. B.3 (July 10, 1986). Accordingly, the program covers military active duty personnel and their dependents, and military retirees and their dependents. At military installations outside the United States, the program covers DOD civilian personnel and their families who receive treatment in military medical treatment facilities.

¹¹ AR 608-18, para. 1-7j.

¹² 10 U.S.C. §§ 801-940 (1982 & Supp. III 1985) [hereinafter UCMJ].

¹³ Trial counsel will find support for this position in the Attorney General's Task Force on Family Violence, U.S. Dep't of Justice, Final Report 10 (Sept. 1984) [hereinafter Attorney General's Report], which recommends that family violence "be recognized and responded to as a criminal activity."

¹⁴ Representative of this view, as articulated by a lawyer with regard to child abuse, is B. Caulfield, *Child Abuse and the Law: A Legal Primer for Social Workers* 8 (1979):

When the law steps in—with talk of rights, statutes, and precedents—there has been a catastrophic failure of the human values that have far more force than any rule of law. . . . [T]he law is cold and formal, and such warmth as can come in the process issues only from the hearts of people.

And again at 12:

An unsuccessful prosecution can result in further hazards to the child should the abuser choose to vent on the child his or her anger and frustration arising from the criminal charge. And successful prosecution can lead to the breakup of the family without concern for the impact this may have on the child, and whether other means, such as family treatment, might better meet the child's needs.

¹⁵ AR 608-18, para. 3-29b.

¹⁶ Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 306 and 307 [hereinafter R.C.M.]; see *infra* note 72.

¹⁷ Dep't of Army, Pamphlet No. 608-41, Personal Affairs—The Army Family Action Plan IV (19 June 1987) [hereinafter DA Pam 608-41]. This pamphlet is part of the UPDATE system. Army family action plans have been published annually since 1984.

and to insert new issues in the Plan that identify the concerns of family members, determine the actions required to resolve those concerns, and task the appropriate Army agencies to come up with solutions.

Army Family Action Plan IV contains an issue¹⁸ on crime in the home, which this article addresses, regarding the perceived need to protect the military retirement benefits of family members who are victims of such crime. Specifically, the issue provides as follows:

e. Issue 14. Family Member Retirement Benefits Protection.

(1) *Issue.* Family members lose entitlement to retirement benefits when punitive discharges occur¹⁹ because of child/spouse abuse.

(2) *Required Action.*

(a) DACF-FSA²⁰ will coordinate with DACF-FSR²¹ to—

1. Research and provide best method to rectify situation.

2. Research and propose corrective legislation as required.

3. Prepare approved legislative proposal.

(b) DACF-FSA will revise policy if legislation is approved.

(c) DAJA-ZA²² will explore feasibility of developing guidance for JAGs²³ and Commanders²⁴ who sentence soldiers involved in child/spouse abuse. Guidance should address the whole family situation and family cooperation in the conviction.

(3) *Lead agency.* DACF-FSA

(4) *Support agencies.* DAPE-HRP-C,²⁵ DAJA-ZA, and DACF-FSR.

This issue appears to be premised on the following tentative conclusions:

1. Soldiers are being tried by court-martial for crimes involving both spouse and child abuse.

2. Soldiers who are convicted by court-martial for these crimes are eligible for military retirement benefits

and are losing their military retirement benefits because they are being sentenced to punitive discharges.

3. Family members—both spouses and children—have, or should have, entitlements to these lost military retirement benefits.

4. These entitlements would not be lost if judge advocates, and the commanders they advise, properly considered the degree of family cooperation involved in obtaining convictions in these cases, and were better educated as to the effect punitive discharges have on the families of these soldiers.

5. There is a problem, and it is capable of being solved with legislation.

These tentative conclusions are often accepted as fact by many who view the military justice system to be a hindrance in assisting Army families who are affected by problems of spouse and child abuse. A corollary of Issue 14 is the often-repeated assertion by some social workers that family members of soldiers who are convicted by court-martial for crime in the home are "victimized twice"—that is, once by the soldier-spouse or soldier-parent who abuses them, and then again by the military justice system which, by punishing the soldier, indirectly punishes them as well by taking away their livelihood, military benefits, and whatever future prospect they have to financially benefit from the soldier's military retired pay.

A victim, of course, is a person against whom a crime is committed. Bringing criminals to justice does not produce additional victims. Family members who are dependent on the financial support of a criminal who has been brought to justice for a serious crime are usually going to suffer a loss of that support regardless of whether the crime was committed against them or someone outside the home. This is no more true in the military than in civilian society.

Record Systems Used

The best way to examine the tentative conclusions upon which Issue 14 is based is to look at the facts. The facts bearing on Issue 14 are contained in records maintained by

¹⁸ *Id.* para. 3-4e.

¹⁹ Accordingly, the statistical study upon which most of this article is based did not address cases in which soldiers have been administratively discharged from the Army for crime in the home (unless such discharges occurred following arraignment on court-martial charges). As with court-martial cases, statistics are not maintained for administrative discharges that arise from spouse and child abuse. It would be impossible to obtain this data without conducting an Army-wide survey of all installation staff judge advocate offices for a given period of time. It is reasonable to assume, however, that the statistics for administrative discharges arising from spouse and child abuse would not differ significantly from those revealed by this article for court-martial cases involving abuse-related crime. For example, few, if any soldiers would likely request or receive an administrative discharge in lieu of trial by court-martial who were near or past the time when they would be eligible for military retirement except for the most serious of offenses. But even in those rare cases, a court-martial trial rather than an administrative discharge would be the likely disposition. As with other offenses, administrative discharges for crimes in the home would likely be issued only in cases where soldiers were many years away from eligibility for military retirement. See generally Dep't of Army, Reg. No. 635-100, Personnel Separations—Officer Personnel (19 Feb. 1969) (C27, 1 Aug. 1982) [hereinafter AR 635-100]; Dep't of Army, Reg. No. 635-120, Personnel Separations—Officer Resignations and Discharges (8 Apr. 1968) (C16, 1 Aug. 1982); Dep't of Army, Reg. No. 635-200, Personnel Separations—Enlisted Personnel (5 July 1984) [hereinafter AR 635-200]; AR 601-280, Personnel Procurement—Total Army Reenlistment Program (5 July 1984) [hereinafter AR 601-280].

²⁰ This office symbol refers to the Army Community Service (ACS) Branch of the Family Support Directorate of the U.S. Army Community and Family Support Center (USACFSC), which is a field operating agency (FOA) of the Office of the Deputy Chief of Staff for Personnel (ODCSPER). ACS has responsibility for overseeing funding and resource management in the Family Advocacy Program on Army installations. See AR 608-18, para. 1-7d(2).

²¹ The Reserve Affairs Branch of the Family Support Directorate, USACFSC.

²² The Judge Advocate General.

²³ This presumably refers to judge advocate officers serving in the capacity of military judges, although the drafters of this issue may also have intended to include all judge advocate officers who advise commanders on the disposition of court-martial charges.

²⁴ Commanders, of course, do not "sentence" soldiers. They do punish soldiers during nonjudicial punishment proceedings conducted pursuant to UCMJ art. 15, but, because this issue deals with retirement benefits and punitive discharges, that is probably not the context in which the word "commanders" is used here. Rather, it would appear that the drafters of this issue probably intended to include all detailed court-martial members who sentence soldiers, as well as all commanders, including court-martial convening authorities, who act or make recommendations on the disposition of court-martial charges.

²⁵ Soldier and Family Policy Division of ODCSPER.

The Judge Advocate General and The Surgeon General. The former, through the Records and Review Branch, Office of Clerk of Court, U.S. Army Legal Services Agency, maintains a system of records containing data on all general and special court-martial cases in the Army.

The Army Central Registry, which is maintained by The Surgeon General through the U.S. Army Patient Administration Systems and Biostatistics Activity, is the other system of records containing relevant data on Issue 14. The Central Registry contains data on all reported cases of substantiated or suspected spouse and child abuse in the Army. This information is compiled from the reports made by each installation Family Advocacy Case Management Team (FACMT).²⁶

A comparison of the data on all substantiated reports of spouse and child abuse committed by soldiers and civilians alike during the two periods 1 July 1985 through 30 June 1986 and 1 July 1986 through 30 June 1987 is at appendix A. Appendix B reduces the figures in appendix A to annual averages for each category of abuse involving soldier-offenders and compares those averages to the corresponding figures obtained from the Office of Clerk of Court on all general and special court-martial cases in the Army involving crime in the home²⁷ during the period 1 July 1986 through 30 June 1987.²⁸ Appendix C contains additional information on these court-martial cases that was obtained from the Army Central Registry²⁹ and the Office of Clerk of Court.

²⁶ AR 608-18, paragraph 5-2c(1).

²⁷ The author acknowledges the assistance of Major William G. Stokes, Office of Clerk of Court, U.S. Army Legal Services Agency, who figured out the way to retrieve this data and provided the computer print-outs from which the information about court-martial cases involving abuse-related offenses was obtained. The computer database maintained by the Office of Clerk of Court was used to retrieve information on all cases referred to trial by general or special court-martial where an accused was arraigned upon charges that arose out of spouse or child abuse. Because court-martial cases involving spouse or child abuse are not designated as such by those who report to, or maintain this information at, the Office of Clerk of Court, this information was retrieved by searching the database for all cases in which the alleged victim of an offense was identified as either a minor dependent of the accused (which in each reported case was a child or step-child of the accused) or an adult dependent of the accused (which in each reported case was the wife of the accused). Cases involving these victims were reviewed for charges involving various offenses, which are listed at appendix D as involving potential spouse abuse, child abuse or both. The review included not only consummated offenses, but also attempts to commit the listed offenses, and solicitation of or conspiracy to commit the listed offenses. Only offenses involving force were included. A few reported cases involved other, non-violent offenses where the spouse was the alleged victim. These cases, which included forgery, larceny, drawing a check with insufficient funds, adultery, and wrongful cohabitation, were excluded from the study.

²⁸ This study includes all court-martial cases referred to trial by general or special court-martial upon which a court-martial convening authority took action pursuant to UCMJ art. 60 during the period 1 July 1986 through 30 June 1987. There were 83 courts-martial and all involved male offenders.

²⁹ The Army Central Registry was provided the rank, full name, and Social Security Account Number on each of the 83 soldiers tried by court-martial during the period 1 July 1986 through 30 June 1987. The Army Central Registry, however, did not have a record on the incident of abuse that was the subject of court-martial charges on 26 (or 31%) of these cases. Sixty-nine of the 83 soldiers were convicted; the Army Central Registry was unable to provide a record of the abuse incident in 21 (or 30%) of these cases. This was the first time a test was done on the accuracy of the data in the Army Central Registry, although that was not the purpose of the study. The author has always had doubts about the general accuracy of the findings made by installation FACMTs, but up until now no one ever had any reason to doubt that reports were not being submitted on all substantiated cases—or at least on those that should have been substantiated. Whether the failures pertain to bad findings or to incomplete reporting, or both, the Army Central Registry should be used with a great degree of caution in performing background employment and certification checks for child care providers and others working within Child Development Services or Youth Activities. The fact that there is or is not a record on a particular individual should not be given great weight in the absence of obtaining independent information to substantiate the entries that exist and performing other types of background checks where no entries exist. See AR 600-18, para. 3-25b.

³⁰ There were 11,931 substantiated reports of spouse abuse and 5,488 substantiated reports of child abuse (both of a sexual and non-sexual nature) involving both male and female soldier-perpetrators during the period 1 July 1985 through 30 June 1987.

³¹ This was computed by dividing the average annual number of substantiated reports of spouse abuse involving both male and female soldier perpetrators during the period 1 July 1985 through 30 June 1987 (5,965.5 reports) by the number of court-martial cases involving spouse abuse-related charges during the period 1 July 1986 through 30 June 1987 (11 cases). Because there may be as much as a 30% underreporting to the Army Central Registry on all abuse, the frequency of courts-martial involving spouse abuse-related crimes may be even less than one in 542. See *supra* note 29.

³² During the period 1 July 1986 through 30 June 1987, no soldiers were tried by court-martial for offenses that involved only spouse abuse. The few soldiers who were tried by court-martial for crimes involving spouse abuse either were accused of killing their spouses (one case)—making the issue of protecting "family member retirement benefits" moot—or they were charged with additional crimes involving child abuse (two cases) or crimes unrelated to either spouse or child abuse (seven cases, only two of which resulted in a conviction). In each instance, the child abuse-related and the unrelated charges in all these cases were much more serious in nature than those involving spouse abuse. Indeed, it was quite apparent, in light of the number and seriousness of these charges and the number of findings of not guilty entered as to the spouse abuse-related charges, that the single charge involving spouse abuse (usually simple assault and battery) in each case generally was tossed in for good measure, and would not by itself have likely resulted in the accused being tried by court-martial.

Analysis

Using the data bases from these two systems of records, let us now examine the tentative conclusions upon which Issue 14 is premised.

Soldiers Are Being Tried by Court-Martial for Both Spouse and Child Abuse

The court-martial statistics can best be examined by breaking them down into three types of abuse: spouse abuse, child abuse not involving sexual abuse, and child sexual abuse. Although the reported instances of substantiated spouse abuse far exceed those involving all forms of child abuse,³⁰ the number of court-martial cases involving spouse abuse are very few in number. Indeed, only one out of every 542 soldiers whose abuse of his spouse has been reported to—and substantiated by—the installation FACMT is tried by court-martial for a spouse-abuse related offense.³¹ Even when a court-martial occurs, the spouse abuse almost always involves a homicide or the spouse-abuse related charges are accompanied by unrelated, but more serious charges.³²

Soldiers are also rarely tried by court-martial for child abuse not involving sexual abuse. The reported instances of

child abuse not involving sexual abuse far exceed the reported instances of child sexual abuse,³³ but the latter account for most of the court-martial cases involving all abuse-related crimes. Only one out of every 183 soldiers whose non-sexual abuse of his child has been substantiated by a FACMT is tried by court-martial, but one out of every six soldiers is tried by court-martial when child sexual abuse is substantiated by a FACMT.³⁴ Almost half of the court-martial cases involving the non-sexual abuse of children involved either a homicide or unrelated charges.³⁵

The primary reason that crimes involving child sexual abuse are tried by court-martial more frequently than other types of abuse-related offenses is that these are the most serious offenses in terms of abhorrence to society and the maximum possible confinement. The seriousness of these crimes is reflected not only in the law, but also by the actions of those charged with enforcing the law.³⁶ The law makes no distinction between a man who rapes his daughter and one who rapes the daughter of his neighbor.³⁷

On the other hand, most reported incidents of spouse abuse usually involve nothing more than a simple assault and battery. The same is true with regard to most reported instances involving the physical, nonsexual abuse of children, although here, the same assault against a child is properly considered more serious under the law than if committed against a spouse. The generally more serious nature of abuse-related crimes involving children, as compared to adults, undoubtedly accounts for the higher rate of court-martial cases involving both the sexual and, to a lesser extent, the nonsexual abuse of children.³⁸

It should be clear from the foregoing that there would be no Issue 14 were it not for soldiers who get tried by court-martial for crimes involving child sexual abuse. These are

the only type of offenses that really merit any attention in addressing Issue 14.

Convicted Soldiers Are Eligible for Military Retirement and Are Losing Retirement Benefits

Very few soldiers who are eligible for military retirement—that is, who have served over twenty years active military duty³⁹—are tried by court-martial for spouse or child abuse-related offenses. This is not surprising. Those familiar with military court-martial practice know that it is a rare case indeed when a soldier eligible for military retirement gets tried by court-martial for any offense. Long before the time a soldier completes twenty years of active military service, any serious character flaws will likely have been flushed out, particularly if they involve criminal activity. Those soldiers seldom ever become eligible for military retirement.

The same is true with regard to abuse-related offenses. The statistics establish that almost all soldiers who are tried by court-martial for abuse-related offenses have less than twenty years of active military service.⁴⁰ Those who assault their wives and physically, but not sexually, abuse their children get caught very early in their military careers. They generally have little investment in their military careers and are low in rank.⁴¹ These soldiers probably do not differ significantly in age and maturity from most soldiers who are tried by court-martial for crimes committed outside the family.

On the other hand, soldiers who sexually abuse their children constitute almost all of the soldiers who are tried by court-martial for abuse-related offenses who have any significant investment in their military careers.⁴² But even here, their investment generally is short of that required for

³³ There were 4,751 substantiated reports of soldiers whose abuse of their children was non-sexual in nature, and only 737 substantiated reports of soldiers who sexually abused their children during the period 1 July 1985 through 30 June 1987.

³⁴ This was computed by dividing the average annual number of substantiated reports of child non-sexual abuse (2,375.5 reports) and child sexual abuse (368.5 reports) involving both male and female soldier perpetrators during the period 1 July 1985 through 30 June 1987 by the number of court-martial cases involving child non-sexual abuse-related charges (13 cases) and child sexual abuse-related charges (61 cases), respectively, during the period 1 July 1986 through 30 June 1987. As with spouse abuse, because there may be as much as a 30% underreporting to the Army Central Registry on all abuse, the frequency of courts-martial involving child abuse may be even less than these figures indicate. See *supra* note 29.

³⁵ Of the 13 court-martial cases involving charges arising from a soldier's non-sexual abuse of his child or children, three cases involved a homicide relating to the child's death, one case involved charges relating to spouse abuse, and two cases involved charges unrelated to either spouse or child abuse.

³⁶ See appendix D for a comparison between the maximum authorized confinement upon conviction under the UCMJ for crimes involving spouse and child abuse. Of the 83 reported court-martial cases during the period 1 July 1986 through 30 June 1987 involving crime in the home, 75 cases were referred to trial by general court-martial, six cases were referred to trial by a special court-martial empowered to adjudge a bad-conduct discharge, and two cases were referred to trial by special court-martial not empowered to adjudge a discharge. All 61 cases involving child sexual abuse were referred to trial by general court-martial.

³⁷ Some might argue that the incest offender is often more amenable to treatment than the child molester who sexually assaults children other than his own. See Attorney General's Report, *supra* note 13, at 37. Those who accept this premise go on to argue that a social treatment response rather than a so-called "criminal/punitive response" should be used in handling incest offenders. See The American Humane Society, Criminal or Social Intervention in Child Sexual Abuse: A Review and a Viewpoint at i (Jan. 1982). Any criminal justice system that authorizes a more lenient approach (in law and practice) with regard to sexual offenders who target their own children, however, removes those children from the same protection that the law affords to other children. In effect, the sex offender's own children become fair game while only those outside the family are placed off-limits. The UCMJ makes no distinction between sexual offenses committed against children in or outside of the family.

³⁸ See appendix D for a comparison between the maximum authorized periods of confinement authorized upon conviction for crimes committed against children and adults.

³⁹ Generally, a soldier must serve 20 years of military active duty before becoming eligible for voluntary nondisability retirement. See 10 U.S.C. §§ 1293, 3911, 3914 (1982).

⁴⁰ Of the 83 soldiers tried by court-martial for crime in the home during the period 1 July 1986 through 30 June 1987, 42 had ten or more years of active military service, and 41 of these soldiers were tried for crimes involving child sexual abuse. Just four soldiers, all of whom were charged with crimes involving child sexual abuse, had more than 20 years service and hence were eligible for military retirement at the time of their court-martial. Only two of these four were convicted, and neither of them was sentenced to a punitive discharge.

⁴¹ Twenty of the 21 soldiers tried by court-martial during the period 1 July 1986 through 30 June 1987 for offenses involving spouse abuse and the physical, non-sexual abuse of their children had less than 10 years of active military service.

⁴² During the period 1 July 1986 through 30 June 1987, 41 of the 61 soldiers tried by court-martial for child sexual abuse had 10 or more years of active military service.

military retirement. Most are in the grades E5 through E7⁴³ and have between 10 and 20 years of active military duty.⁴⁴ This is the stage in a soldier's military career where he is likely to have children of an age who, if they are sexually abused, will report it to someone who will both believe them and act upon that report. The court-martial statistics reveal that most of the victims of child sexual abuse are children twelve years of age and older.⁴⁵ Older children who are victims of sexual abuse in the family are not only more likely to report the abuse, but also make better witnesses.

Soldiers have no vested interest in a voluntary nondisability military retirement until they actually retire from active duty. Those soldiers who serve less than twenty years generally are not entitled to retired pay, regardless of whether their separation is voluntary or forced. It is clear from the statistics, however, that only rarely are soldiers who are eligible for military retirement tried, convicted, and punitively discharged by court-martial for abuse-related offenses. No such case was uncovered during the one-year period examined; one might conclude that when this occurs, it is only for the most serious of abuse-related crimes.⁴⁶

Family Members Have—or Should Have—Entitlements to Lost Retirement Benefits

As has been established, retirement-eligible soldiers accused of crime in the home are not being tried by court-martial to any significant degree, and, even when they are, they are not losing their military retirement benefits as a result of a conviction and sentence by court-martial. If retirement-eligible soldiers are not losing these benefits,

then neither are their wives or children to the extent that they have any claim to those benefits.

Issue 14 probably should be given a broader reading so that it includes not only the loss of benefits by retirement-eligible soldiers and their families, but also the loss of potential benefits by those not yet eligible to retire. But where does one draw the line? All those on active duty have the opportunity to serve twenty years and retire, even if they do not have the desire to do so. Even those with the desire may not have the potential because of physical limitations, a lack of mental aptitude, or a military record that reflects a mediocre (or even less than outstanding) performance of duty or the presence of minor misconduct. Needless to say, serious misconduct is almost always a disqualifier, and abuse-related misconduct is not treated any differently.

It is difficult to draw any line, and given the small number of soldiers who are tried by court-martial for crime in the home, it is probably unnecessary to do so. Issue 14, after all, does not address other forms of separation from the Army. A soldier may also be administratively separated from the Army for an abuse-related offense.⁴⁷ Even when this does not occur, an enlisted soldier may eventually be forced to leave the Army before becoming eligible for military retirement because he has been barred from reenlistment.⁴⁸ For similar reasons, an officer may be passed over for promotion and be denied the opportunity for continued active duty.⁴⁹ An enlisted soldier may also voluntarily request a discharge for the good of the service,⁵⁰ or an officer may resign in lieu of court-martial rather than face criminal charges for an abuse-related offense.⁵¹ Even in the absence of court-martial charges, an

⁴³ During the period 1 July 1985 through 30 June 1987, 75% of all substantiated reports of male soldiers who sexually abused their children were in the three pay grades E5 through E7. Of the 61 male soldiers tried by court-martial during the period 1 July 1986 through 30 June 1987 for crimes involving child sexual abuse, 78% were in pay grades E5 through E7.

⁴⁴ See *supra* note 42.

⁴⁵ Of the 61 court-martial cases involving child sexual abuse charges during the period 1 July 1986 through 30 June 1987, only two cases did not involve female child victims. Of the 59 cases that did, 47 cases involved girls 10 years of age and older. Not all child sexual abuse cases involved incest insofar as this supported by the charges alleged (i.e., carnal knowledge or rape), but in light of the many severe sentences adjudged, it is reasonable to assume that a large number of these cases involved the presentation of evidence that incest was involved in the particular crimes charged. (Only 39 of the 61 court-martial cases involving child sexual abuse had records in the Army Central Registry as to the specific age of the children involved. These 39 cases involved 52 child victims, over half of whom were 12 years of age or older. Fourteen cases involved children 15 years of age and older. Half of all reported cases involved soldiers who were step-fathers to the children they molested.) The fact that a large number of girls who were sexually abused were over the age of 10 when the abuse was reported does not mean that the pattern of sexual abuse did not begin before the age of 10. In some cases, the girls may have only reported the abuse after they became older or, if reported earlier, they may not have been believed until they got older or until they later reported it to someone outside their family. Reports to the mother are not always believed, and, even when they are, the mother does not always take actions that will end the abuse. Doctor Vincent J. Fontana, M.D., a pediatrician and noted expert in the area of child abuse, addressed the subject of the mother's role in father-daughter incest in the following manner:

Father-daughter incest, the most-reported form of intrafamily sexual abuse of children, often occurs in families in which the total dynamics of the family are seriously awry. The mother's role may vary from complete lack of knowledge to unconscious denial or willful ignorance, to in some cases acting as an accomplice to the sexual abuse. Whether her involvement is conscious or unconscious, the mother's denial allows the abuse to continue.

See National Committee for Prevention of Child Sexual Abuse, *Dealing with Sexual Child Abuse* 2 (2d ed. 1982).

⁴⁶ The statistics reveal that a small number of higher ranking officers and warrant officers and a larger number of higher ranking enlisted soldiers, many of whom presumably would be retirement eligible, were identified to the Army Central Registry as offenders in substantiated cases of child sexual abuse, but were not tried by court-martial. Some of these cases may not have been prosecuted because of the insufficiency of the evidence, and other cases may have resulted in administrative discharges for the soldiers involved. More likely, the disproportionately small number of prosecutions in these cases is attributed to the exercise of discretion on the part of the commanders of the soldiers involved in deciding the disposition of these cases. There is, as there should be, a natural hesitancy on the part of military judges and court-members to adjudge a punitive discharge (and hence a loss of all military retirement benefits) in court-martial cases for all but the most serious of charges. As with other crimes of equal gravity involving retirement eligible soldiers, commanders will frequently provide a soldier the option of retiring as quickly as possible—an opportunity the soldier will seldom forego in light of the alternative of facing court-martial charges and a possible loss of military retirement benefits.

⁴⁷ See AR 635-100, para. 5-12, regarding elimination of officers for misconduct or moral or professional dereliction, and AR 635-200, para. 14-12c, regarding discharge of enlisted soldiers for commission of serious offenses.

⁴⁸ See AR 601-280, para. 6-4d, regarding procedures for denying reenlistment to soldiers involved in immoral acts and other misconduct.

⁴⁹ See AR 635-120, ch. 11, regarding the elimination of certain officers not selected for promotion.

⁵⁰ See AR 635-200, ch. 10, regarding requests for discharge by enlisted soldiers pending trial by court-martial.

⁵¹ See AR 635-120, ch. 5, regarding officer resignations for the good of the service in lieu of court-martial.

enlisted soldier may voluntarily leave the service at the expiration of an enlistment—or an officer may request to resign—because a military police investigation of an abuse-related offense has ruined any prospect for promotion or has brought disgrace upon the soldier and his family in the military community.

More is involved here than just the loss of retired pay. Regardless of the type of discharge and the procedure by which it is obtained, if the soldier leaves military active duty before becoming eligible for military retirement, he and his family will suffer a loss of current income from military pay and the loss of any prospect they had of financially benefiting from military retired pay in the future. There are also many non-monetary benefits, such as post exchange, commissary, and medical benefits,⁵² that are lost to varying degrees to a soldier and his family when he leaves active duty, whether voluntarily or involuntarily, before becoming retirement eligible.

In many states, retirement benefits, including a soldier's military retired pay, are treated as marital or community property that is subject to division between husband and wife in a marital separation or divorce. The Uniformed Services Former Spouses' Protection Act, authorizes direct payments⁵³ from retired pay to a spouse (or former spouse) under certain circumstances. Federal law also authorizes involuntary allotments from military pay⁵⁴ and garnishment of military and retired pay⁵⁵ to enforce state child support and alimony orders. A soldier's spouse (or former spouse) and children face loss of entitlements for all this and

more,⁵⁶ regardless of whether the soldier is punitively discharged by court-martial for an abuse-related offense or decides to leave—or is forced to leave—the Army before becoming retirement eligible.

Certainly, the Army has an obligation to the soldier's family. But so too does the soldier. The Army can do little to protect the interests of family members, by legislation or otherwise, when the soldier, by his own misconduct, is the one that threatens those interests. The Army is not a social agency and the social programs that do exist within the Army, such as the Army Family Advocacy Program, can only be justified in the annual Defense and Army budgets to the extent that these programs enhance mission readiness and soldier retention.⁵⁷ If the soldier is more of a detriment than an asset to the military mission, then there is no reason for retaining him within the military community. The only possible obligation the Army might owe to the family under such circumstances would be to ease their reentry back into the civilian community.⁵⁸

Any statutory or regulatory⁵⁹ entitlement that family members have to military retirement benefits is derived from the soldier's entitlement to these benefits. If the soldier loses—or never earns—these benefits, then the family has no claim to these benefits either. Although one might argue that the law should be changed so as to protect these benefits, this, as will be discussed, would not only be difficult to justify, but also difficult to accomplish without radically changing the entire military retirement system of benefits. And, as the court-martial statistics clearly demonstrate, the protection of "family member retirement

⁵² 10 U.S.C.A. §§ 1071-1102 (West Supp. 1987).

⁵³ 10 U.S.C.A. § 1408 (West Supp. 1987).

⁵⁴ 42 U.S.C. § 665 (1982).

⁵⁵ 42 U.S.C. § 659 (1982).

⁵⁶ See e.g., 10 U.S.C.A. §§ 1431-1455 (West Supp. 1987), regarding the election a retiring soldier may make to provide an annuity on behalf of a surviving spouse by receiving a reduced amount of retired pay.

⁵⁷ For example, the law provides medical benefits, of which family advocacy services are part, to "create and maintain high morale" in the military services among active duty and retired members and their families. See 10 U.S.C. § 1071 (1982). Given the fact that a large number of the perpetrators of spouse and child abuse in the Army are soldiers, one might question how preventing abuse would enhance soldier morale. One answer could be that by tackling and treating the problems that give rise to spouse and child abuse, the Army can transform a troubled soldier into one who will be happier and more content with his family life and better able to manage stress and negotiate differences, and who, as a result, will be a more effective soldier on duty.

There is less justification for the Army Family Advocacy Program, in the author's opinion, with regard to soldiers who sexually abuse their children. If the Army builds morale to promote retention, one must first seriously question whether such soldiers—who are relatively small in number, but many of whom undoubtedly have severe psychological problems in need of lengthy and intensive treatment over a term of years—are the type of soldiers and officers we need to retain in the Army. As this study shows, many of these soldiers and officers are senior in rank and undoubtedly occupy positions of leadership—at least before they are apprehended. If they hold certain military occupational specialties, such as law enforcement or military intelligence, their future usefulness to the Army is almost nil. If their sexual abuse of their children is a matter of public record, because they have been apprehended or prosecuted, by either civil or military authorities, any usefulness they may have had as leaders is also compromised. In the author's opinion, the primary effort of the Army Family Advocacy Program in child sexual abuse cases should be directed at encouraging the reporting and treating the victims of such abuse. Of course, if the offenders can be treated or rehabilitated, that should be attempted. In light of the foregoing discussion, however, that would be difficult to justify, in a military context or in a military budget that will be subject to increasing cuts in the funding of family programs over the next several years, for serious crimes committed over a long period of time with great psychological harm to the children who are victimized.

Although there are those who naively suggest that discharging experienced soldiers who sexually abuse their children without making long-term efforts at rehabilitating them constitutes a waste of military resources, the author would argue that the administrative bureaucracy and medical support system that would have to be established to support a deferred prosecution program and an organized and disciplined therapeutic process for these few offenders would be what would really constitute a waste of military resources. This is especially true because so many more soldiers, just as experienced, are discharged or not allowed to reenlist before becoming retirement eligible, for a variety of other problems, such as obesity or lack of physical fitness, that are more readily treatable at less cost.

⁵⁸ See 10 U.S.C.A. § 1076(e)(1) (West Supp. 1987), which authorizes one year of military medical and dental care for abuse-related injuries or illnesses suffered by dependents of service members discharged or dismissed by court-martial for an abuse-related offense. See also 37 U.S.C.A. § 406(h) regarding the transportation of a service member's dependents, baggage, and household goods when, under specified circumstances, the service member receives a less than honorable administrative discharge or a punitive discharge in the United States. (Formerly, such transportation was only authorized for service members discharged in this manner outside the contiguous 48 states.)

⁵⁹ For an example of some military retirement benefits governed by regulation, where entitlement of the family member is based on the retired military status of the sponsor, see Dep't of Army, Reg. No. 215-2, The Management and Operation of Army Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities (31 Oct. 1986), paras. 2-3a(1)(b) (Class VI or package beverage stores), 2-4a(4) (golf and other installation sports activities), and 2-6b(3) and 5-13a (Army clubs).

benefits" is unnecessary as to those soldiers who are retirement eligible at the time they are accused of abuse-related crimes.⁶⁰ The small number of criminal actions indicate either that the problems are not as serious with those who are retirement-eligible, or that the problems that do arise are dealt with through noncriminal means.

There Is a Need for Guidance on Handling Abuse-Related Crimes

Issue 14 suggests that commanders are in need of "guidance" on handling the cases of soldiers who are accused of crimes involving spouse and child abuse, and that they are failing to properly take into account the interests of the soldiers' families in the manner they are presently handling these cases. It is important to keep in mind that the only type of abuse relevant to Issue 14 is child sexual abuse.⁶¹ Although there is no doubt that commanders and lawyers, as well as social workers, could all benefit from additional training on the handling of these cases, the use of the word "guidance" in Issue 14 reveals that the perceived problem is one of changing the attitudes of commanders and lawyers toward these cases,⁶² not one of enhancing the skills they already possess.

There are those who suggest that lawyers and commanders should defer to the expertise of social workers and other professionals before deciding whether or not to initiate court-martial charges for abuse-related crimes.⁶³ This suggestion is based on the observation that while commanders can best determine those who have the potential for further military service, only the experts can best determine whether the abuser is "motivated" to change his behavior for the better and is capable of being treated for the disorder that gave rise to the abuse.⁶⁴

The prospect for rehabilitation, however, is only one of several considerations that goes into the decision on whether or not a soldier—or any one else—should be prosecuted

and punished for committing a crime—any crime. For social workers who handle child sexual abuse offenders in the Army, rehabilitation is an overriding consideration that is directly tied to other concerns about protecting the child from further abuse, saving the marriage, maintaining the financial well-being of the family, and thereby ensuring as best as possible that the child will be cared for in the future.⁶⁵

Commanders and military lawyers are not without compassion on these matters, but they recognize, as they must, that the Army is not a social agency. When soldiers are prosecuted and punished for serious crimes, their families suffer, whether the crimes were committed against them or not. This is an unintended and regrettable consequence of crime and punishment. Although some of the adverse effects that punishment has on the soldier's family can be ameliorated by legislation⁶⁶ or by the type of sentence that is adjudged and approved,⁶⁷ concerns about family cannot be allowed to dictate the disposition of criminal cases.⁶⁸

There are other considerations involved in punishing child sexual abusers, not the least important of which is maintaining military discipline. The purposes of punishment, after all, go beyond just rehabilitating the offender, and include such ends as general and special deterrence, isolating dangerous offenders from society, and retribution—that is, enforcing the proposition that a wrongful act must be punished because, to not do so, would be to decriminalize the conduct.⁶⁹ Likewise, if serious crime is not punished with severe punishment, it can hardly be said that society considers that crime as serious, regardless of what may be the maximum authorized punishment.

In the Army, those accused of crimes involving child sexual abuse frequently are senior noncommissioned officers with unblemished military records.⁷⁰ This makes the decision on whether to prosecute in certain cases all the more

⁶⁰ See *supra* note 40.

⁶¹ See *supra* notes 30 through 35 and accompanying text.

⁶² See Child Abuse, A Report From the Department of Defense Child Sexual Abuse Policy Development Conference 17 (Sept. '18-19, 1985) [hereinafter Child Abuse], wherein it is suggested that changing the philosophy of commanding officers can result in changes in local practices. Court-martialing child sexual abusers, which often eliminates the military benefits of the families involved, is the local practice that is deemed in need of change because prosecution is viewed as detrimental to the successful treatment of child sexual abusers in the military.

⁶³ See Department of the Navy Military Personnel Command, The Navy Family Advocacy Program—Legal Deskbook 56 (1987) [hereinafter Deskbook]. The Army is said to have no policy on the disposition of cases involving child sexual abuse. See Child Abuse, *supra* note 62, at 8. This is not entirely true, but when Army procedures are compared to those of the Navy's this is hard to deny. The Navy has exempted incest from mandatory processing for discharge and requires all such cases to be referred to the Department of Navy headquarters for evaluation before a commander can initiate court-martial or administrative discharge proceedings. See Child Abuse, *id.* at 9. Not surprisingly, there are very few courts-martial in the Navy for crimes involving child sexual abuse. The Army could also go this way in the future if the Army Family Advocacy Program is not carefully monitored by the Office of The Judge Advocate General and others concerned with protecting the authority and discretion that commanders presently have in handling these cases under the Manual for Courts-Martial. The Office of The Judge Advocate General for the Army is opposed to any regulatory scheme that would "limit the role of law enforcement officials, the commander, or his legal advisor, in disposition of cases of child sexual abuse." See DAJA-CL 1985/6304 (DACF-FSA/23 Oct. 1985) 1st End, 30 Dec. 1985, subject: Family Advocacy Action Plan II—Sexual Molestation Initiative.

⁶⁴ Deskbook, *supra* note 63, at 55-56.

⁶⁵ *Id.* at 54.

⁶⁶ Legislation has been implemented with regard to some medical and transportation entitlements. See *supra* note 58.

⁶⁷ Of the 54 soldiers convicted by general court-martial for crimes involving child sexual abuse, seven did not receive a punitive discharge or confinement as part of their approved sentence. Fourteen soldiers received only a partial forfeiture of pay, while 21 other soldiers received no forfeiture of pay as part of their approved sentence. Eight soldiers were not reduced to the lowest enlisted grade as part of their sentence. All this suggests that family situations are being considered in appropriate cases in the sentencing of child sexual abusers. It also rebuts the absurd statement made to the author by a staff member of a particular U.S. Senator that "the Army response to all cases of child sexual abuse is rather automatic—court-martial and 50 years confinement." The problem is obviously one of perception rather than one that is supported by fact.

⁶⁸ If the welfare of a soldier's wife and children were to be given great weight in all decisions regarding the disposition of military offenders, then only unmarried soldiers without children would be punished severely for serious crime.

⁶⁹ G. Newman, The Punishment Response 192 (1978).

⁷⁰ See *supra* note 43. These soldiers would not have the senior ranks they have achieved without possessing unblemished military records.

difficult. Many social workers undoubtedly lose much credibility by consistently evaluating soldiers accused of crimes involving child sexual abuse as being amenable to treatment and rehabilitation, which unfortunately makes their opinions an almost neutral factor in the prosecution decision.

But a commander does not need more "guidance" to assist him in this decision. That guidance already exists in the Manual for Courts-Martial⁷¹ and the applicability of this guidance is no different to these particular offenders than it is to other offenders. There is also regulatory guidance in the Army regarding the disposition of abuse-related crimes.⁷² The statistics from the Army Central Registry and the Office of Clerk of Court appear to substantiate that this guidance is being followed. As mentioned, only about one in six soldiers identified in substantiated cases of child sexual abuse is being tried by court-martial for his crimes.⁷³ The crimes that are being prosecuted are very serious as evidenced by both the level of referral and the severity of the sentences being adjudged and approved.⁷⁴ In addition, many of the prosecuted cases of child sexual abuse involved multiple victims, many of whom were older girls. This probably indicates that the abuse in many instances was not only widespread, but occurred over a long period of time before it was reported and prosecuted.⁷⁵ Finally, half of the cases prosecuted involved soldiers who were stepfathers to the children they sexually assaulted. In some situations, a soldier may have married the mother to gain access to her children.⁷⁶ These are generally not the type of cases that invoke sympathy for the soldier or strong sentiment for keeping him in the home in order to maintain the family as a unit or to save the marriage.

Issue 14 also suggests that commanders and military lawyers should consider "family cooperation" in determining the disposition of cases involving abuse-related crimes. Family members, as the victims of these crimes, do have consultation rights under the Victim/Witness Assistance Program.⁷⁷ Nevertheless, the fact that a member of the family reported the crime, and cooperated in investigating and prosecuting the soldier, should not necessarily control the subsequent disposition of the case. Punishment should fit both the offender and the crime.⁷⁸ While it may be appropriate in some cases to lessen the effect that a court-

martial sentence might have on innocent family members—such as by not adjudging or approving total forfeitures as part of the sentence, for example—this type of consideration should be related to family financial needs, and not dependent on their cooperation at trial. In any event, the statistics suggest that commanders are taking only the strongest evidentiary cases to trial. Although family members may be cooperating during the investigation of crimes involving child sexual abuse, their assistance at trial is often not required. The percentage of guilty pleas and convictions in these cases does not differ significantly from court-martial cases involving other types of crimes.⁷⁹ This is probably because prosecution of these crimes, like others, is often assisted by the presence of an admissible confession by the accused as to the offense charged.

In summary, commanders and military lawyers already have more than adequate guidance on handling crimes involving child sexual abuse, and they appear to be applying that guidance very well. Only the most serious crimes are being tried by court-martial, and military judges and court members appear to be considering the interests of the families by the type of sentences that are being adjudged and approved.

Perceived Problems Involving Loss of Retirement Benefits in Abuse Cases Can Be Solved With Legislation

Because almost all abuse-related crimes tried by court-martial involve child abuse, one might seriously question the need to protect "family member retirement benefits," as those benefits, when they are not lost, are usually enjoyed by the soldier and the spouse, not the children. Children have no legal claim to a parent's military retirement benefits. Whatever benefits they derive from a parent's military retired status are indirect at best and, in any event, disappear when they reach the age of eighteen years or complete their formal education. Given the older age of most of the child victims in these cases, the period during which they might enjoy such benefits, such as military youth activities or commissary or post exchange privileges, is only a few years at best.

⁷¹ R.C.M. 306 and the discussion following it directs that offenses should be disposed of at the lowest appropriate level, including no action at all. Among the factors that a commander is directed to consider are some of the following: the character and military service of the accused; the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline; the appropriateness of the authorized punishment to the particular accused or offense; and the reluctance of the victim or others to testify.

⁷² AR 608-18, para. 4-4 directs commanders to "consider FACMT recommendations when taking or recommending disciplinary and administrative actions against soldiers in spouse and child abuse cases which may be detrimental to a soldier's continued military career or future promotion opportunities, or the financial well-being of his or her family members." The regulation also directs commanders to consider "the interests of justice," "the needs of the accused," the "seriousness of the alleged offense," matters in aggravation and mitigation, and "the accused's potential for rehabilitation."

⁷³ See *supra* note 34 and the accompanying text.

⁷⁴ See *supra* note 36. Of the 54 soldiers convicted by court-martial for crimes involving child sexual abuse, 25 soldiers had approved sentences to confinement for terms between one and five years, nine soldiers for terms between 5 and 10 years, and 11 soldiers for terms for 10 years or more.

⁷⁵ See *supra* note 45 and accompanying text.

⁷⁶ See The National Center for Missing & Exploited Children, *Child Molesters: A Behavioral Analysis for Law Enforcement Officers Investigating Cases of Child Sexual Exploitation* 9 (1986), indicating that pedophiles sometimes marry women just to gain access to children, which sometimes results in "serial marriages." "Such individuals frequently look for women who already have children who meet their age and gender preferences. Their marriages usually last only as long as there are children in the victim preference range." After the marriages end, they marry (or just move in with) another woman who has children of the desired age and gender.

⁷⁷ See Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice ch. 18 (1 Aug. 1984).

⁷⁸ R.C.M. 306(b) discussion.

⁷⁹ During the period 1 July 1986 through 30 June 1987, there were 1,483 soldiers tried by general court-martial. Of those tried, 1,381 (or 93.1 percent) were convicted and 911 (or 61.4 percent) were convicted pursuant to their pleas of guilty. During the same period, there were 61 soldiers who appeared before general court-martial in the Army for crimes involving child sexual abuse. Out of these 61 soldiers, two were administratively discharged. Of the 59 who were tried, 54 (or 91.5 percent) were convicted and 42 (or 71.2 percent) were convicted pursuant to their pleas of guilty.

If the issue is really one of protecting the family's interest in the soldier's military retirement benefits, the question arises as to why this should be done in court-martial cases involving only abuse-related crimes, and not in others. There is nothing peculiar about court-martial cases involving child sexual abuse offenses that would appear to justify protecting the mother's claim to her husband's military retirement benefits. Indeed, in some cases, such as where the mother has known—or should have known—of the sexual abuse of her child and did not report it,⁸⁰ there may be even less justification for protecting these benefits.

If the theory is that an "innocent" spouse should not be made to suffer for the wrongdoing of the soldier, then the type of crime or misconduct that results in the premature elimination of the soldier from the Army becomes irrelevant. And so too is the means by which the soldier is eliminated. If this is the case, then Issue 14 misses the target of the perceived injustice by a wide margin. This is especially true because retirement-eligible soldiers are rarely tried by court-martial for abuse-related offenses or are denied their military retirement benefits as a result of a sentence by court-martial.⁸¹

Perhaps the focus should be on military pay and the fact that a number of soldiers leave—or are forced to leave—the Army before becoming eligible for voluntary retirement for all sorts of misconduct and duty performance deficiencies.⁸² What might be suggested is that the law be changed to allow a spouse to collect some portion of the military retired pay that the soldier otherwise could have collected if he would have remained—or been allowed to remain—on active duty. But it would be difficult to protect the spouse's potential claim without giving the soldier a vested interest in his military retirement pay as well. Any method devised could be easily circumvented and would discriminate against soldiers who were not married.

The problem is that whether military retired pay is protected in this manner after a soldier has served ten years, fifteen years, or some other period, such a proposal would require a radical revision of the military retirement system. The military nondisability retirement system is both a personnel management tool—designed to encourage both the reenlistment and retirement of soldiers—and an income maintenance device that provides "reduced compensation for reduced current services."⁸³ Although the law has been changed recently to allow a spouse to be awarded a portion of the military retired pay as marital property pursuant to a state court decree of divorce or separation,⁸⁴ this legislative change did not detract from the purpose or nature of the military retirement system.

The system is, as it has long been, noncontributory in nature—that is, it is funded, not by soldiers on active duty, but by Congress as part of its annual appropriation to fund

the defense budget. Any change in the law to give soldiers (or their spouses) a vested interest in military retired pay before twenty years would be an expensive proposition that would have to be funded either by soldiers on active duty or by Congress via an increase in the defense budget. Funds from either source are not likely because, among other reasons, such a change would do violence to the very purpose of the military retirement system, which at present encourages soldiers to remain on active duty and to serve honorably for at least twenty years before becoming eligible to collect military retired pay.

As has been shown with regard to Issue 14, nothing is accomplished by just focusing attention on retirement-eligible soldiers because they are seldom tried by court-martial for any crime, and seldom lose their right to collect military retired pay by court-martial sentence or by administrative discharge or elimination. If a change in the law is proposed to protect whatever potential claim that a soldier's spouse might have in military retired pay before the soldier becomes eligible to collect this pay, the problem is one of drawing the line at the number of years of active duty that potential retired pay will be protected, justifying the expense involved, and saddling either the soldier or the taxpayer with the bill. It would be far easier, less expensive, and less damaging to the military retirement system not to prosecute abuse-related offenses at all, than to turn the entire military retirement system upside down just to protect the retirement interests of the few families involved in these cases. The justification for legislation or a change in practice, however, as this study has shown, is totally lacking.

Conclusion

Issue 14 is no issue at all. As has been demonstrated, soldiers generally are not being tried by court-martial for abuse-related crimes, except in cases where they have killed their wives or children, or have raped or otherwise indecently assaulted their children. Even in such cases, these soldiers seldom have served on active duty long enough to be eligible for military retirement.

The total number of abuse-related crimes being tried by court-martial is very small in relation to the total number of all substantiated reports of spouse and child abuse in the Army each year.⁸⁵ Furthermore, these court-martial cases do not even constitute a significant number of the courts-martials tried in the Army.⁸⁶ Accordingly, these cases are not significant in number either in the context of the Army Family Advocacy Program or the military justice system.

Not only are these cases insignificant in terms of numbers, but also any perception that these cases are resulting in an injustice to the families involved appears to be without merit. The statistics do not support such a perception; indeed, they support just the opposite conclusion—that is,

⁸⁰ See *supra* note 45 and accompanying text.

⁸¹ See *supra* note 40 and accompanying text.

⁸² See *supra* notes 47 through 51 and accompanying text.

⁸³ *McCarty v. McCarty*, 453 U.S. 210, 212, 222 (1981).

⁸⁴ See *supra* note 53 and accompanying text.

⁸⁵ During the period 1 July 1986 through 30 June 1987, the 83 court-martial cases involving spouse and child abuse-related crimes constituted less than one percent of the average annual number (8,709.5) of substantiated reports of spouse and child abuse involving male and female soldier perpetrators during the period 1 July 1985 through 30 June 1987.

⁸⁶ During the period 1 July 1986 through 30 June 1987, the 83 cases involving spouse and child abuse-related crimes constituted less than three percent of the 2,904 cases tried by general and special court-martial during this period.

that commanders, military judges, and court members are exercising considerable judgment in the cases that are selected for prosecution, and, when there are convictions, in the type of sentences that are adjudged and approved. The guidance that already exists for commanders and military lawyers appears to be more than adequate, and there is no need whatsoever for legislation.

The problem of protecting children from the abuse and neglect in the home that threatens their lives, safety, and mental well-being should remain the primary effort of the Army Family Advocacy Program. Lawyers and social workers would do well to focus their efforts on this noble

aspect of the program, in which they share a common humanitarian concern. The few court-martial cases involving serious crimes of child abuse pale both in number and in significance to the total problem of child abuse and neglect in the Army. Concerns about the financial well-being of the spouses of those few soldiers tried by court-martial for these serious crimes seem almost trite when compared with the long-term needs of the children who have to overcome the serious emotional, psychological, and often physical harm inflicted upon them by their parents. Meeting the needs of these children requires not only an Army family action plan, but action by society as well.⁸⁷

⁸⁷ A recommendation, based on this article, has been made to the General Officer's Steering Committee to drop Issue 14 from the Army Family Action Plan. See DA Pam. 608-41, para. 4-1.

Appendix A

Substantiated Spouse and Child Abuse Cases Army Central Registry

1 July 1985–30 June 1987

	1 Jul 85 to 30 Jun 86	1 Jul 86 to 30 Jun 87	Annual average
1. Child Physical Abuse and Neglect ¹	3,829	4,543 ²	4,186.0
a. Extrafamilial ³	83	139 ²	111.0
b. Intrafamilial ⁴	3,746	4,404 ²	4,075.0
(1) Non-soldier offenders ⁵	1,477	1,922 ²	1,699.5
(2) Soldier offenders	2,269	2,482	2,375.5
(a) Females	286	295	290.5
(b) Males	1,983	2,187	2,085.0
—death of victim ⁶	2	9	5.5
2. Child Sexual Abuse ⁷	602	815	708.5
a. Extrafamilial ³	144	283 ²	213.5
b. Intrafamilial ⁴	458	532	495.0
(1) Non-soldier offenders ⁵	83	170 ²	126.5
(2) Soldier offenders	375	362	368.5
(a) Females	3	4	3.5
(b) Males ⁸	372	358	365.0
E1	3	5	4.0
E2	1	3	2.0
E3	8	9	8.5
E4	45	35	40.0
E5	68	74	71.0
E6	125	116	120.5
E7	84	82	83.0
E8	11	12	11.5
E9	2	0	1.0
W1	1	0	0.5
W2	3	10	6.5
W3	5	2	3.5
W4	1	0	0.5
O1	0	0	0.0
O2	0	3	1.5
O3	9	5	7.0
O4	4	2	3.0
O5	2	0	1.0
O6	0	0	0.0
3. Spouse Abuse	6,670	8,085 ²	7,377.5
a. Non-soldier offenders	734	2,090 ²	1,412.0
b. Soldier offenders	5,936	5,995	5,965.5
(1) Females	321	283	302.0
(2) Males	5,615	5,712	5,663.5
—death of victim ⁶	1	7	4.0

¹ These numbers reflect the total number of perpetrators of extrafamilial and intrafamilial child abuse or neglect not involving child sexual abuse.

² The large increase in the second reporting period in extrafamilial child abuse involving both soldier and non-soldier offenders, and in spouse abuse and intrafamilial child abuse involving non-soldiers probably is attributed to several factors. One, a new and simpler form (down from 7 pages to 2) made reporting to the Army Central Registry easier for family advocacy program managers. This form was first introduced in Europe on a test basis in April 1986 and in the rest of the Army in April 1987. Secondly, since 1986 there has been an increased emphasis on reporting abuse on all families eligible for receiving treatment in military medical treatment facilities. This would include almost all Department of Defense civilian employees and contractors, and their families, living overseas, and all military retirees. Compare Dep't of Defense Directive No. 6400.1, Family Advocacy Program (July 10, 1986), which first authorized this expanded reporting, with Department of Defense Directive 6400.1, Family Advocacy Program, which only authorized reporting on active duty personnel

and their dependents. Finally, there has been an increased emphasis on reporting extrafamilial child abuse occurring in Army child care settings.

³ Extrafamilial abuse generally involves a victim other than the offender's child or step-child.

⁴ Intrafamilial abuse generally involves abuse committed by an offender against his or her child or step-child.

⁵ Non-soldier offenders include military offenders assigned to the other armed services, civilians authorized medical care in military medical treatment facilities, and all military retirees.

⁶ These numbers reflect the number of cases where the victim died as a result of the abuse inflicted.

⁷ These numbers reflect the total number of perpetrators of any intrafamilial or extrafamilial abuse or neglect involving child abuse or exploitation.

⁸ The breakdown of child sexual abuse offenders by rank is limited to male offenders since no female soldiers were tried by court-martial for any abuse-related offenses during the period 1 July 1986 through 30 June 1987.

Appendix B

Court-Martial Cases Involving Crime in the Home Compared with Reports of Substantiated Spouse and Child Abuse Cases

1 July 1986–30 June 1987

	Annual average reports ¹	Court- martial cases ²
1. Intrafamilial Child Physical Abuse and Neglect by Soldiers ³	2,375.5	13
a. Females	290.5	0
b. Males	2,085.0	13
—death of victim ⁴	5.5	3
2. Intrafamilial Child Sexual Abuse by Soldiers	368.5	61
a. Females	3.5	0
b. Males ⁵	365.0	61
E1	4.0	0
E2	2.0	0
E3	8.5	1
E4	40.0	6
E5	71.0	15
E6	120.5	16
E7	83.0	17
E8	11.5	0
E9	1.0	1
W1	0.5	0
W2	6.5	1
W3	3.5	0
W4	0.5	0
O1	0.0	0
O2	1.5	0
O3	7.0	2
O4	3.0	2
O5	1.0	0
O6	0.0	0
3. Spouse Abuse by Soldiers ⁶	5,965.5	11
a. Females	302.0	0
b. Males	5,663.5	11
—death of victim ⁴	4.0	3

¹ The annual average is based on the number of reports made to the Army Central Registry on substantiated cases of abuse involving soldier perpetrators during the periods 1 July 1985 to 30 June 1986 and 1 July 1986 to 30 June 1987.

² This column reflects those cases referred to trial by general or special court-martial involving charges related to spouse or child abuse upon which a court-martial convening authority took action pursuant to article 60, UCMJ during the period 1 July 1986 through 30 June 1987.

³ These numbers reflect the total number of cases of child abuse not involving child sexual abuse, and includes cases of child abuse.

⁴ These numbers reflect the number of cases where the victim died as a result of the abuse inflicted.

⁵ The breakdown of child sexual abuse offenders by rank is limited to male offenders since no female soldiers were tried by court-martial for any abuse-related offenses during the period 1 July 1986 through 30 June 1987.

⁶ These numbers reflect the total number of perpetrators of spouse abuse even if accompanied by child abuse.

Appendix C

Court-Martial Cases Involving Crime in the Home

1 July 1986-30 June 1987

TYPE OF OFFENSES UPON WHICH THE ACCUSED WAS ARRAIGNED

Child abuse without child sexual abuse

Child abuse alone—no fatality	7
Child abuse alone—fatality	3
Child abuse accompanied by spouse abuse	1
Child abuse accompanied by charges unrelated to child or spouse abuse ¹	2
Subtotal	13

Child abuse involving child sexual abuse

Child sexual abuse accompanied by no charges other those relating to child abuse	48
Child sexual abuse accompanied by spouse abuse	1
Child sexual abuse accompanied by charges unrelated to child or spouse abuse ¹	12
Subtotal	61

Spouse abuse

Spouse abuse alone—no fatality	0
Spouse abuse alone—fatality	1
Spouse abuse accompanied by charges related to child abuse—included above (2 cases)	(2)
Spouse abuse accompanied by charges unrelated to spouse or child abuse ¹ —no fatality	7
Spouse abuse accompanied by charges unrelated to spouse or child abuse ¹ —fatality	1
Subtotal	(11) 9
TOTAL	83

Child sexual abuse

Involved in case ²	Not involved in case
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LOCATION OF TRIAL AND ACCUSED'S DOMICILE

United States

On-post quarters	25	5
Off-post quarters	8	2
Unknown ³	15	4
TOTAL	48	11

Overseas⁴

On-post quarters	7	4
Off-post quarters	1	3
Unknown ³	5	4
TOTAL	13	11

TYPE OF COURT MARTIAL

General court-martial	61	14
Special court-martial empowered to adjudge a bad conduct discharge	0	6

Special court-martial not empowered to adjudge a discharge

TOTAL 61 22

PLEA ENTERED AT TRIAL FOLLOWING ARRAIGNMENT

Guilty Plea Cases

A guilty plea was accepted to any charge or lesser included charge relating to an offense involving spouse or child abuse. 42 9

Not Guilty Plea Cases

A guilty plea was not accepted to any charge or lesser included charge relating to any offense involving spouse or child abuse. These include all cases in which the accused entered a not guilty plea to all such charges as well as those to which no plea was entered and the charges were later withdrawn or dismissed following arraignment. 19 13

TOTAL 61 22

FINDINGS⁵

Cases Involving a Finding of Guilty

A guilty finding was entered to any charge or lesser included charge relating to any offense involving spouse or child abuse. 54 15

Cases Involving Not Guilty Findings

A not guilty finding was entered to all charges and lesser included charges relating to all offenses involving spouse or child abuse. These also include any case in which a motion for a finding of not guilty was granted to all such charges. 5 3

Administrative Discharge

The convening authority withdrew or the trial judge dismissed the charges as a result of an administrative elimination of the accused in lieu of court-martial (e.g., for enlisted soldiers, pursuant to Chapter 10, AR 600-200) following arraignment. 1 2

Charges Withdrawn

The convening authority withdrew or the trial judge dismissed the charges as a result of an administrative elimination of the accused for some reason other than in lieu of court-martial following arraignment. 1 2

TOTAL 61 22

SEX OF THE ACCUSED

Male	61	22
Female	0	0
TOTAL	61	22

RELATIONSHIP OF ACCUSED TO CHILD ABUSE VICTIM

Natural parent	20	11
Step-parent	21	0
Both natural parent and step-parent	1	0
Spouse abuse not involving child abuse or unknown ³	19	11
TOTAL	61	11

ALLEGED VICTIMS IN EACH CASE⁶

Children under 10 years of age		
Female victim(s)		
1 victim in case	8	4
2 victims in case	2	0
Male victim(s)		
1 victim in case	1	5
2 victims in case	1	0
3 victims in case	0	1
Both male and female victims		
2 victims in case	1	0
Subtotal	13	10

Children 10 years of age or older, but under 18 years of age

Female victim(s)		
1 victim in case	38	0
2 victims in case	4	0
Male victim(s)		
1 victim in case	0	2
Both male and female victims		
2 victims in case	1	0
Subtotal	43	2

Children both under and over 10 years of age, but under 18 years

Female victim(s) only		
2 victims in case	1	0
Female victim(s) over and male victim(s) under 10 years of age		
2 victims in case	1	0
3 victims in case	1	0
Subtotal	3	0

Female adult victims

Alone without child victim(s)	—	9
With female victim(s) under 10 years of age		
1 child victim	1	0
2 child victims	1	0
With both male and female victims under 10 years of age		
2 child victims	0	1
Subtotal	2	10
TOTAL	61	22

TIME IN SERVICE OF ACCUSED⁷

Less than 1 year	0	0
1 year or more, but less than 5 years	5	10

5 years or more, but less than 10 years

10 years or more, but less than 15 years	19	1
15 years or more, but less than 20 years	18	0
20 years or more	4	0
TOTAL	61	22

COURT-MARTIAL SENTENCES AS APPROVED BY THE CONVENING AUTHORITY

By Type of Discharge

No discharge or dismissal	7	1
Bad conduct discharge	9	9
Dishonorable discharge	37	5
Dismissal (officers only)	1	0
TOTAL	54	15

By Years of Confinement

No Confinement	7	3
Less than 1 year	2	5
1 or more years, but less than 5 years	25	4
5 or more years, but less than 10 years	9	1
10 or more years	11	2
TOTAL	54	15

By Forfeiture of Pay or Allowances

No forfeitures	21	7
Partial forfeiture of pay	14	4
Total forfeiture of pay and allowances	19	4
TOTAL	54	15

By Reduction in Grade

To E1	46	15
To E4	1	0
To E5	1	0
To E6	1	0
No reduction in grade	1	0
Reduction in grade not applicable	4	0
TOTAL	54	15

¹ Charges unrelated to child or spouse abuse did not include charges alleging a false official statement in violation of article 107, UCMJ or false swearing under article 134, UCMJ. Unrelated charges involved narcotic offenses, drunk driving, disobeying military orders and regulations, and assaults (and sexual offenses) involving victims other than the spouse, children, or step-children of an accused.

² Includes any case, regardless of plea or disposition, in which an accused was arraigned on one or more charges involving child sexual abuse. Some cases also had additional charges involving spouse abuse and other forms of child abuse, as well as charges unrelated to either spouse or child abuse.

³ Unknown means that there is no entry or record contained in the Army Central Registry on this matter.

⁴ No overseas cases outside of Europe were reported.

⁵ The cases not resulting in a conviction are broken down by offense, type and age of victim, and disposition as follows:

Child Abuse	Male Victim	Under 10 Years	Not Guilty	2
Child Sexual Abuse	Female Victim	Over 10 Years	Not Guilty	3
			Admin Disch	1
		Under 10 Years	Not Guilty	1
			Admin Disch	1
			Chgs Withdrn	1
Spouse Abuse	Female Adult		Not Guilty	2
			Admin Disch	1
			Chgs Withdrn	2
TOTAL CASES				14

⁶ The breakdown does not include the age and genders of child victims who were not dependents of the accused since such offenses are outside the

definition of child abuse under the Army Family Advocacy Program. These offenses would be among those classified as charges unrelated child or spouse abuse.

⁷ The time in service reflects the period of active duty service between the accused's basic active service date (BASD) and the date that the court-martial convening authority took action on the record of trial.

Appendix D

Offenses Charged Involving Crime in the Home

UCMJ Article	Offense	Type of Abuse		Maximum Auth. Confinement in Years
		Spouse	Child	
118	Premeditated and unpremeditated murder	X	X	Life
119	Voluntary manslaughter	X	X	10
119	Involuntary manslaughter	X	X	3
124	Maiming	X	X	7
128	Simple Assault	X	X	1/4
128	Assault consummated by a battery	X	X	1/4
128	Aggravated Assault	X	X	8
134	Assault with intent to commit murder	X	X	20
134	Assault with intent to commit voluntary manslaughter	X	X	10
134	Negligent homicide	X	X	1
134	Pandering	X	X	5
134	Communicating a threat	X	X	3
120	Rape		X	Life
120	Carnal Knowledge		X	15
125	Sodomy ¹		X	20
128	Assault consummated by a battery upon a child under the age of 16 years		X	2
134	Indecent Assault		X	5
134	Assault with intent to commit rape		X	20
134	Assault with intent to commit sodomy ¹		X	10
134	Indecent act or liberties with a child		X	7
134	Indecent exposure		X	1/2
134	Indecent language		X	2
134	Indecent acts with another		X	5

¹ There were no reported sodomy cases where a spouse was the victim.