A "CIVIL DEATH" OF THE MILITARY ACCUSED: THE VAST IMPACTS OF COLLATERAL CONSEQUENCES OF COURT-MARTIAL CONVICTIONS AND THE NEED TO REFORM MILITARY SENTENCING PRACTICE

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The effects of these collateral consequences can be devastating. As Professor Michelle Alexander has explained, "[m]yriad laws, rules, and regulations operate to discriminate against ex-offenders and effectively prevent their reintegration into the mainstream of society and economy. These restrictions amount to a form of 'civi[l] death' and send the unequivocal message that 'they' are no longer part of 'us.'"[1]

"In our society, we just keep punishing. I've done my time, so why am I still being punished? . . . You can't get a job

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[1] United States v. Nesbeth, 188 F. Supp. 3d, 179, 180 (E.D.N.Y. 2016) (quoting MICHELLE ALEXANDER, THE NEW JIM CROW 142 (2010)).

because of the felonies, you can't get an apartment because of the felonies, and it goes around and around."[2]

I. Introduction

In Fiscal Year (FY) 2021, 624 Service members were convicted at general courts-martial, and 491 were convicted at special courts-martial.[3] It is well-known that individuals convicted at general and special courts-martial may face a punitive discharge, resulting in a loss of benefits and attached social stigma.[4] What is less well-known and discussed by military

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[2] Hannah Wiley & Mackenzie Mays, *"We Just Keep Punishing." Californians with Criminal Records Still Face Housing Barriers*, LA TIMES (Aug. 2, 2022, 5:00 AM), https://www.latimes.com/california/story/2022-08-02/californians-criminal-records-face-housing-barriers [https://perma.cc/5BYU-M2JY] (quoting Cynthia Blake).

[3] In Fiscal Year (FY) 2021, the Air Force convicted 111 persons at general courts-martial and 118 at special courts-martial. JUDGE ADVOC. GEN., U.S. AIR FORCE, REPORT TO CONGRESS: DEPARTMENT OF THE AIR FORCE REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2021, at 18 (2021). In FY 2021, the Army convicted 321 persons at general courts-martial and 153 persons at special courts-martial. OFF. OF JUDGE ADVOC. GEN., U.S. ARMY, REPORT TO CONGRESS: U.S. ARMY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2021, at 15 (2021). In FY 2021, the Navy convicted 79 persons at general courts-martial and 75 at special courts-martial. OFF. OF JUDGE ADVOC. GEN., U.S. NAVY, REPORT TO CONGRESS: U.S. NAVY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2021, at 14 (2021). In FY 2021, the Marine Corps convicted 105 persons at general courts-martial and 129 at special courts-martial. JUDGE ADVOC. DIVISION, U.S. MARINE CORPS, REPORT TO CONGRESS: U.S. MARINE CORPS REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2021, at 10 (2021). In FY 2021, the Coast Guard convicted 8 persons at general courts-martial and 16 at special courts-martial. JUDGE ADVOC. GEN. & CHIEF COUNSEL, U.S. COAST GUARD, MILITARY JUSTICE IN THE COAST GUARD (FY 2021): REPORT TO CONGRESS 2 (2021).

[4] U.S. Dep't of Army, Electronic Military Judges' Benchbook 2.42, Complete Script, sec. 2-5-23, https://www.jagcnet.army.mil/EBB [https://perma.cc/RDU3-G7BJ] (21 Apr. 2025) (choose "Scripts" drop down menu; then choose "Complete Script"; then scroll to "2-5-23. Types of Punishment") [hereinafter Electronic Benchbook] ("The stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that the accused has served honorably. A punitive discharge will affect an accused's future with regard to legal rights, economic opportunities, and social acceptability."). The myriad impacts of punitive and administrative discharges are outside the scope of this paper. For those interested in those impacts, see Major John W. Brooker et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 8 (2012); Hugh McClean,

counsel and courts, are the collateral consequences imposed by civilian laws and regulations that accompany a conviction once a person attempts to reenter civilian society, especially if that person was convicted of a felony.[5] The Uniform Code of Military Justice (UCMJ) does not delineate which level of court-martial can adjudicate misdemeanor or felony convictions.[6] However, collateral consequences are likely to follow a convicted Service member regardless of whether they were court-martialed at a general or special court-martial.

The consequences discussed in this article are those that result from the conviction itself, not from the sentence—this article does not address the impact that being sentenced to a discharge or dismissal has on

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Essay: Discharged and Discarded: The Collateral Consequences of a Less-Than-Honorable Military Discharge, 121 COLUM. L. REV. 2203 (2021). *See* Gabriel J. Chin, *Collateral Consequences*, *in* 4 REFORMING CRIMINAL JUSTICE 371, 372 (Erik Luna ed., 2017).

[5] *See, e.g.*, United States v. Griffin, 25 M.J. 423, 425 (C.M.A. 1988) (Everett, C.J., concurring) (noting the difficulty for a military judge in crafting instructions on collateral consequences due to military justice practitioners' familiarity with them in the military justice system). While each jurisdiction determines how they will delineate a felony versus a misdemeanor, felonies are commonly defined as offenses for which more than one year's confinement may be adjudged. *See* 18 U.S.C. § 3156(a)(3) ("[T]he term 'felony' means an offense punishable by a maximum term of imprisonment for more than one year . . . ."); CAL. PENAL CODE §§ 17, 18.5 (Deering, Lexis Advance through the 2024 Regular and Special Session) (providing that felonies are offenses which may be punishable by death or confinement in state prison and misdemeanors are not punishable by more than one year; (only those convicted of felonies can go to state prison)); FLA. STAT. ANN. § 775.08 (LexisNexis, Lexis Advance through the 2025 Third Extraordinary session) (defining felony as an offense where a person is sentenced to more than one year in the state penitentiary). *But see* TEX. PENAL CODE ANN. §§ 1.07, 12.21, 12.31–12.35 Tex. Penal Code § 1.07 (LexisNexis, Lexis Advance through the 2023 Regular Session; the 1st C.S.; the 2nd C.S.; the 3rd C.S. and the 4th C.S. of the 88th Legislature; and the November 7, 2023 general election results) (hereinafter, the currency of the Texas Code will be annotated with Lexis Advance through the 2023 Regular Session) (defining felony as an offense punishable by confinement in a penitentiary, which includes state jail felonies which can include adjudged confinement of 180 days, and misdemeanor as an offense that may not exceed one year's confinement in jail). *See generally* Chin, *supra* note 4, at 371. This is not to say that misdemeanors do not also have devastating collateral consequences—misdemeanor offenses can lead to loss of professional licenses and other impacts to employment, consequences for housing, and others. *Id.* at 393–94 (citations omitted).

[6] UCMJ arts. 18, 19(a) (2016). Special court-martial convictions are generally viewed as misdemeanors and general court-martial convictions are viewed as felonies because individuals can be sentenced to more than twelve months' confinement.

retirement benefits or employment prospects.[7] Collateral consequences that result from convictions can include well-known consequences like sex offender registration and deportation, but they also can include a loss of voting rights, disqualification from public assistance and public housing, inability to secure employment, prohibitions on possessing firearms or serving on juries, and more.[8]

Military courts generally impose limitations on counsel presenting evidence and argument on collateral consequences to the sentencing authority.[9] Even if an accused discusses collateral consequences in an unsworn statement during presentencing, military judges can instruct the sentencing authority to disregard that information when determining the sentence.[10] This prevents the factfinder from creating a holistic sentence that accounts for the additional restrictions society will impose post-conviction. This practice must change to make the military justice system more just. The "civil death" that convicted persons face in civilian society divests a person of the eligibility to engage in common government programs, employment fields, civil liberties, and, really, life as they knew it. This is due to laws and regulations aimed at setting these individuals apart is significant.[11] These often-lifelong impacts need to be candidly discussed by commanders and counsel, in determining an appropriate

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[7] In the court-martial system, the law does allow for instruction on one type of collateral consequence: the impact of discharges on retirement benefits. *See* Griffin, 25 M.J. at 424 (holding that it was permissible for the military judge to instruct the members on the impact an adjudged discharge would have on the accused's retirement benefits).

[8] This article is covering the primary collateral consequences that would attach after a court-martial conviction. The Federal Government and states have wide latitude to create collateral consequences for a convicted person so long as it does not run afoul of the Constitution. *See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PENN. L. REV. 1789 (2012).

[9] Electronic Benchbook, *supra* note 4, para. 2-5-24. *See* United States v. Talkington, 73 M.J. 212 (C.A.A.F. 2014). The FY 22 National Defense Authorization Act implemented changes to military sentencing and only military judges can be the sentencing authority for non-capital offenses committed after 27 December 2023. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021). Because panels currently may have a role in sentencing and will still have a role in capital cases, this paper uses the generic term "sentencing authority."

[10] United States v. Palacios Cueto, 82 M.J. 323 (C.A.A.F. 2022); Talkington, 73 M.J. at 213.

[11] *See generally* Chin, *supra* note 8 (describing the historical practice of "civil death" and how the Federal and state governments created a "new civil death" in the second half of the 20th century).

disposition, and addressed by counsel and the accused in consultations and court.

This article first examines the development of collateral consequences in the United States and the policy reasons behind that development in Section II. Section III provides an overview of the primary collateral consequences faced after a court-martial conviction, providing counsel with a multi-state overview of these consequences in California, Florida, and Texas. Section IV proposes that military defense counsel advise the accused about collateral consequences and discusses how this can be accomplished. Section V examines the current state of the law on presenting evidence on collateral consequences in courts-martial, and Section VI then proposes revisions to the law. Finally, Section VII describes how defense counsel and the accused could present evidence of collateral consequences in presentencing. Military courts should follow civilian jurisdictions that do allow discussion of collateral consequences. This will benefit the accused, the government, and the military justice system as a whole.

II. Background

Collateral consequences are not unique to American society. They were utilized in ancient Rome, ancient Athens, and Medieval Europe.[12] The early United States engaged in these practices as well by "denying offenders the right to enter into contracts, automatically dissolving their marriages, and barring them from a wide variety of jobs and benefits."[13] These forms of criminal punishment for felons were referred to as "civil death" and commonly required a convicted person to forfeit their property to the government, forbade transferring property to others, and disabled them from having standing in court.[14] In the mid-twentieth century, the

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[12] Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 17 (Marc Mauer & Meda Chesney-Lind eds., 2002) (describing the history of "civil death" and collateral consequences).

[13] *Id.* at 17–18. Even the Fourteenth Amendment "explicitly recognizes the power of the states to deny the right to vote to individuals guilty of 'participation in rebellion or other crimes.'" *Id.* at 18.

[14] Chin, *supra* note 8, at 1793–96. Scholar Gabriel Chin refers to the modern practice of collateral consequences as the "new civil death." *Id.*

Federal and state governments made an effort to reform their laws and enable convicted individuals to be restored to their full status as citizens.[15] However, that reform was not to last.

Since the "War on Drugs" of the 1980s and '90s, conviction and incarceration rates have steadily increased.[16] This rise in convictions coincided with an increase in state legislation and rulemaking that implemented more collateral consequences for convicted individuals, and a "new civil death" began to emerge.[17] In 1996, a study documented that, in the previous ten years, the number of states that implemented collateral consequences increased, impacting the right to vote, parental rights, gun possession, and more.[18] During this time, states made certain convicted offenders ineligible for certain professions, criminal background checks became more accessible, and Congress created a regime that disabled certain individuals from accessing federal benefits and used its power to encourage states to enact laws that extended those prohibitions.[19]

This led to a surge of people who were not just convicted of crimes and formally punished, but who also continued to suffer from the secondary and tertiary effects of that original punishment.[20] These impacts disproportionately affect poor people and racial minorities.[21] Depending

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[15] Travis, *supra* note 12, at 21; Chin, *supra* note 8, at 1790.
[16] Travis, *supra* note 12, at 22.
[17] *Id.* at 18. Chin, *supra* note 8, at 1799–1803.
[18] Travis, *supra* note 12, at 22 (citing Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROB. 10, 11–14 (1996)).
[19] *Id.* at 22–23.
[20] *Id.* at 18; Chin, *supra* note 4, at 373–75 (discussing the increase in mass convictions since the 1980s and the prevalence of individuals being sentenced to short or no sentences, but also being subject to the collateral consequences of their conviction).
[21] The mass conviction and incarceration rate in America disproportionately impacts racial minorities and their families. INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 33 (Marc Mauer & Meda Chesney-Lind eds., 2002). It then follows that these individuals disproportionately feel the effects of collateral consequences:

> Today a criminal freed from prison has scarcely more rights, and arguably less respect, than a freed slave or a black person living "free" in Mississippi at the height of Jim Crow. Those released from prison on parole can be stopped and searched by the police for any reason—or no reason at all—and returned to prison for the most minor of infractions . . . . The "whites only" sign may be gone, but new signs have gone up—notices placed in job applications, rental agreements, loan applications, forms for welfare benefits, school applications, and

on the offense, individuals "can be denied public housing, welfare benefits, the mobility necessary to access jobs that require driving, child support, parental rights, the ability to obtain an education, and, in the case of deportation, access to the opportunities that brought immigrants to this country."[22] Some, harkening back to a time when convicted persons were shipped off to another continent, refer to collateral consequences as "internal exile."[23]

Criminal law scholar Jeremy Travis notes that, under the current legal regime, "punishment for the original offense is no longer enough; one's debt to society is never paid."[24] He refers to collateral consequences as "invisible punishment."[25] They are "invisible" because the laws and regulations that impact convicted persons "operate largely beyond the public view, yet have very serious, adverse consequences."[26] Because these consequences operate outside the criminal code and are functions of civil code, in most jurisdictions, they are not considered part of the sentencing equation when determining an appropriate punishment.[27]

Travis also discusses a third "dimension" of invisibility that makes it difficult for defense attorneys to fully advise their clients on collateral consequences: these consequences are nearly impossible to completely account for because they are not codified in the criminal code.[28] Instead, they are scattered throughout federal law, other states' laws, civil laws,

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> petitions for licenses, informing the general public that "felons" are not wanted here.

MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 176 (2020 ed.). The judge in *United States v. Nesbeth* discusses Professor Alexander's work and uses it to support his reasoning to incorporate collateral consequences into his sentencing. 188 F. Supp. 3d 179 (E.D.N.Y. 2016). Unfortunately, this statistic is also true in the military. Black and Hispanic Service members are more likely to be investigated and court-martialed. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-344, MILITARY JUSTICE: DOD AND THE COAST GUARD NEED TO IMPROVE THEIR CAPABILITIES TO ASSESS RACIAL AND GENDER DISPARITIES 40–43 (2019).

[22] Travis, *supra* note 12, at 18.
[23] *See id.* at 19 (citations omitted).
[24] *Id.* at 19.
[25] *Id.* at 15–17.
[26] *Id.* at 16.
[27] *Id.*
[28] *Id.* at 16-17.

and civil regulations.[29] Under current military jurisprudence, this is the system in which convicted Service members will blindly enter without anyone to guide them. The accused become subject to these regimes of civilian laws, the most significant of which are discussed below.

III. Collateral Consequences of a Criminal Conviction

Sergeant First Class (SFC) Smith was just convicted at a general court-martial of sexual assault and acts of domestic violence against his spouse after 19 years of service. He was sentenced to three years' confinement and a dishonorable discharge. He was a military police officer and intended to enter civilian law enforcement after retiring from the U.S. Army.

First Lieutenant (1LT) Clark was just convicted at a general court-martial for possession, use, and distribution of cocaine. He was sentenced to one year's confinement and dismissal from the service. He grew up in subsidized housing, went to college on an ROTC scholarship, and commissioned as a field artillery officer. He intended to complete his service obligation and become a teacher.

As will be demonstrated with the SFC Smith and 1LT Clark vignettes, civilian laws and regulations imposing collateral consequences can reach into nearly every facet of a convicted person's life. This section provides an overview of the primary collateral consequences that are found in federal and state law.[30] Each collateral consequence is explained and then

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[29] *Id.* at 17 ("These punishments are invisible ingredients in the legislative menu of criminal sanctions."); Chin, *supra* note 4, at 382–83 ("The law governing convicted persons is of inferior quality for several structural reasons. Anyone can go to the code of any state and find the title "Securities Law," but laws governing convicted persons are scattered throughout codes and regulations. If for some reason securities law were scattered in the same way as are collateral consequences . . . market forces would likely lead to some trade association or publishing house hiring capable lawyers to comb the laws and produce a compendium containing all relevant provisions. . . . However, 'as Robert F. Kennedy said long ago, the poor person accused of a crime has no lobby.'" (quoting Steven B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1877 (1994)).

[30] The laws and regulations discussed in this article are current as of submission for publication. Laws and regulations can change at any time. Readers should not assume the laws and regulations discussed herein are current at time of reading or all-encompassing of collateral consequences. These are examples of collateral consequences. This article does not serve as legal advice. For specific inquiries specific to an accused's situation, one should consult with an attorney for legal advice.

draws on the applicable federal law and the laws of California, Florida, and Texas to show how numerous former Service members will be affected based on 1) the offense of which they were convicted, and 2) where they choose to live after serving any term of confinement and discharge from the military. California, Florida, and Texas were selected because these states have the highest Veteran populations.[31] Each section concludes by applying the law to SFC Smith's and 1LT Clark's convictions to demonstrate how outcomes can vary based on the offense charged and where the Service member resides. These collateral consequences include impacts on sex offender registration, immigration, voting, employment, public assistance, housing, gun possession, child custody, driving privileges, and jury service.[32]

A. Sex Offender Registration

Sex offender registration is perhaps the most visible collateral consequence. It is the one consequence where federal and state laws

[31] *See* Nat'l Ctr. for Veterans Analysis & Stat., *Veteran Population*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/vetdata/veteran_population.asp [https://perma.cc/P7K2-QX5D] (scroll down to "Population Tables," select the "+" symbol to expand the menu, scroll down to "The States" and select "Age/Sex" for a table of veteran populations in each state in 2023) (last visited Aug. 19, 2025).

[32] Civil commitment is another collateral consequence that is discussed by scholars. *See, e.g.*, ZACHARY HOSKINS, BEYOND PUNISHMENT? A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION (2019). This paper will not discuss civil commitment as it is not a function of the military courts, nor does federal law have a mechanism where a Service member can be detained in civil commitment as a direct result of their court-martial conviction. *See* United States v. Joshua, 607 F.3d 379 (4th Cir. 2010) (holding that even where the Service member was serving his court-martial sentence to confinement in a U.S. Bureau of Prisons facility, the provisions of 18 U.S.C.S. § 4248 that allow for civil commitment did not control). However, it is worth noting that twenty states permit having individuals civilly committed, especially if they are believed to be sexual predators. *See Civil Commitment: Best Practice Informed Recommendations*, ATSA, https://members.atsa.com/ap/CloudFile/Download/LzAKDqkP [https://perma.cc/9M3Z-9GY3] (Feb. 2021; last visited Aug. 19, 2025). Traditionally, individuals with drug-related convictions were precluded from receiving federal student loans; however, the Federal Government no longer inquires about criminal history as of 1 July 2023. *See* BENJAMIN COLLINS & CASSANDRIA DORTCH, CONG. RSCH. SERV., R46909, THE FAFSA SIMPLIFICATION ACT 22 (2022). Applicants were still required to answer a question regarding whether they had a drug-related conviction, but as of 2021, an affirmative response no longer impacted eligibility for federal student aid. *Id.*

require a person to provide personally identifiable information, to include a photo, for use in a searchable online database.[33] The duration of sex offender registration varies by jurisdiction and the type of offense, but it is a requirement that follows individuals for years or for a lifetime. This section first examines the federal law governing sex offender registration—The Sex Offender Registration and Notification Act (SORNA)—and then discusses how the federal requirement intersects with the laws of California, Florida, and Texas.

1. SORNA and Department of War Policy

Courts-martial for sex offenses make up a large portion of military justice practice.[34] Upon conviction of a qualifying sex offense, federal law requires Service members to register as sex offenders.[35] Congress required the then-titled Secretary of Defense to identify which Uniform Code of Military Justice (UCMJ) offenses qualify as sex offenses under SORNA.[36] The Secretary of Defense implemented this mandate by issuing Department of Defense Instruction 1325.07.[37] The UCMJ offenses requiring sex offender processing pursuant to Department of Defense Instruction 1325.07 and its referenced "covered offenses" table are numerous and include offenses such as abusive sexual contact,[38] sexual

[33] *See SORNA In Person Registration Requirements*, SMART, https://smart.ojp.gov/sorna/current-law/implementation-documents/person-verification [https://perma.cc/FP64-PKV9] (last visited Aug. 19, 2025).

[34] *See* U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY app. A, tbl.4 (reporting that 826 court-martial cases were initiated in FY 21 for sexual assault offenses).

[35] Sex Offender Registration and Notification Act, 34 U.S.C. § 20913. For an in-depth discussion of sex offender registration and collateral consequences in courts-martial, see Major Alex Altimas, *The Modern Day Scarlet Letter: Challenging the Application of Mandatory Sex Offender Registration and Its Collateral Designation on Members of the Armed Forces*, 230 MIL. L. REV. 189 (2022).

[36] 10 U.S.C. § 951 note.

[37] U.S. DEP'T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (21 Nov. 2024) (C1, 6 June 2025) [hereinafter DoDI 1325.07]. The "covered offenses" table referenced therein can be retrieved from https://prhome.defense.gov/Portals/52/Documents/OED/DoDI%201325.07%20Sex%20Offender%20Registration%20Tables.pdf?ver=F3dqoBcnntnOdB2gYZ7Mpw%3D%3D [https://perma.cc/3LDR-FPJ7] (last visited Aug. 19, 2025).

[38] UCMJ art. 120(c) (2017).

assault,[39] rape,[40] sexual abuse of a child,[41] rape of a child,[42] indecent viewing,[43] child pornography offenses,[44] and others.[45]

Once a person has been convicted of a sex offense, they must register before they leave confinement or, if no confinement is adjudged, not more than three business days after sentencing.[46] Sex offenders must then keep their registration current.[47] Any time an offender changes their "name, residence, employment or student status," they must personally update their information with the relevant jurisdiction within three business days.[48] That jurisdiction then updates other jurisdictions where the offender must register.[49]

The Secretary of War is required to provide sex offender registration information to the Attorney General for any Service member who is released from a military confinement facility or convicted at a court-martial but not sentenced to confinement.[50] This information goes into two national databases: the National Sex Offender Registry and the Dru Sjodin National Sex Offender Public Website.[51] The Dru Sjodin National Sex Offender Public Website enables anyone with access to the internet to search "sex offender registries for all 50 states, the District of Columbia, U.S. Territories, and Indian Country."[52]

The information that is provided to authorities for inclusion in these databases includes: 1) the person's name and aliases, 2) their social security number, 3) each address where they live or will live, 4) employer name and address information, 5) name and address of any school they may attend, 6) vehicle description and license plate number, 7)

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[39] *Id.* art. 120(b).
[40] *Id.* art. 120(a).
[41] UCMJ art. 120b(c) (2016).
[42] *Id.* art. 120b(a).
[43] UCMJ art. 120c (2011).
[44] UCMJ art. 134 (2016).
[45] DoDI 1325.07, *supra* note 37, Sex Offender Registration Tables (providing the full list of offenses that require sex offender processing).
[46] 34 U.S.C. § 20913(b).
[47] *Id.* § 20913(c).
[48] *Id.*
[49] *Id.* Federal law requires each state to criminalize failing to register as a sex offender with a penalty that includes confinement for more than one year. *Id.* § 20913(e).
[50] 34 U.S.C. § 20931(1).
[51] *Id.* § 20931.
[52] *Dru Sjodin National Sex Offender Public Website*, U.S. DEP'T OF JUST., https://www.nsopw.gov/ [https://perma.cc/JC4Z-37VG] (last visited Aug. 15, 2025).

international travel information, and 8) other information the Attorney General requires.[53] Each jurisdiction then ensures that the following information is included in the registry, most of which is made available to the public: 1) physical description, 2) "the text of the provision of the law defining the criminal offense for which the sex offender is registered," 3) information related to the offender's criminal history, 4) "a current photograph," 5) finger and palm prints, 6) DNA sample, 7) photocopy of the offender's driver's license or identification card, and 8) other information the Attorney General requires.[54]

These laws were passed and the databases created "[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims."[55] In seeking to promote public safety in this way, Congress and the states have ensured that all individuals convicted of a sex offense will have their status known for as long as they are required to register to anyone who has access to the Internet. This is what makes sex offender registration the most visible collateral consequence of a conviction.

2. California

In California, a sex offender must register for ten years, twenty years, or life, depending on whether they are a tier one, two, or three offender.[56]

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[53] 34 U.S.C. § 20914(a)(1)–(8).
[54] *Id.* § 20914(b)(1)–(8).
[55] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, pmbl., 120 Stat. 587, 587.
[56] CAL. PENAL CODE § 290(d) (Deering, Lexis Advance through the 2024 Regular and Special Sessions). Tier one offenders must register for at least ten years; they are persons convicted of a misdemeanor sex offense or a not-serious or violent felony sex offense. *Id.* § 290(d)(1). Violent felonies are listed in California Penal Code § 667.5(c) and include rape, sodomy, oral copulation, lewd and lascivious acts, and others. *Id.* § 290(d)(1). Other "serious felonies" include those listed in California Penal Code § 1192.7 and includes offenses similar to those listed above. *Id.* Tier two offenders must register for at least twenty years; they are persons convicted of sex offense felonies that are more serious than tier one felonies but less serious than tier three felonies. *Id.* § 290(d)(2). They include violent felonies, serious felonies, incest, certain sodomy offenses, certain acts of oral copulation, certain acts of penetration by a foreign object, and annoying or molesting a child under the age of eighteen or an adult they believe to be under the age of eighteen if it is a "second or subsequent conviction for that offense that was brought and tried

Registered sex offenders in California face several restrictions. They are prohibited from residing with another registered sex offender in a single-family residence while on parole unless related by blood, marriage, or adoption.[57] Unlike states that prohibit sex offenders from living within a certain distance of a school or park, there is no blanket restriction on where a sex offender can live in California; individualized residency restrictions are permissible "as long as they are based on, and supported by, the particularized circumstances of each individual parolee." [58] Other examples of restrictions include not being able to work as an ambulance attendant;[59] being denied licensure to be a tow truck driver;[60] being denied licenses to be a physician assistant, vocational nurse, physician, and surgeon in most circumstances;[61] and those who committed sex offenses against minors may not work or volunteer in day care or foster homes,[62] or public schools.[63] The most serious and violent offenders may be designated as a "sexual predator" by a jury.[64]

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separately." *Id.* Tier three offenders must register for life because they have been convicted of the most serious sex offenses. *Id.* § 290(d)(3). These offenses are numerous and include, but are not limited to, murder while attempting to rape someone, being a habitual sex offender, being sentenced to fifteen to twenty-five years to life for certain offenses, and felony possession of child pornography. *Id.*

[57] CAL. PENAL CODE § 3003.5(a) (Deering, Lexis Advance through the 2024 Regular and Special Sessions).

[58] *See In re* Taylor, 60 Cal. 4th 1019, 1023 (2015) (holding that California's Proposition 83 that prohibited sex offenders from living within 2,000 feet of schools, parks, or where children regularly gather was unconstitutional).

[59] CAL. CODE REGS. tit. 13 § 1101(b)(1) (Lexis Advance through Register 2025, No. 13, March 28, 2025).

[60] CAL. VEH. CODE § 2431 (Deering, Lexis Advance through the 2024 Regular and Special Sessions) (requiring background checks to be a tow truck driver).

[61] CAL. CODE REGS. tit. 16 §§ 1399.523.5, 2524.1 (Lexis Advance through Register 2025, No. 13, March 28, 2025); CAL. BUS. & PROF. CODE § 2221(c) (Deering, Lexis Advance through the 2024 Regular and Special Session).

[62] CAL. PENAL CODE § 3003.6(a) (Deering, Lexis Advance through the 2024 Regular and Special Session).

[63] CAL. EDUC. CODE §§ 44836(a), 45123 (Deering, Lexis Advance through the 2024 Regular and Special Session). All three examples exempt denial based on a misdemeanor conviction of indecent exposure.

[64] CAL. WELF. & INST. CODE § 6600 (Deering, Lexis Advance through the 2024 Regular and Special Session).

3. Florida

Florida requires individuals convicted of any qualifying sex offense to submit to lifetime registry.[65] Sex offenders in Florida are required to get a driver's license or identification card that contains the label "943.0435, F.S." (referencing the Florida sex offender registration statute) and sexual predators' cards will be labeled "SEXUAL PREDATOR."[66] Individuals who commit a sexual battery, lewd or lascivious offense, child pornography offenses, and child sex trafficking offenses on a child younger than 16 years of age are prohibited from living within 1,000 feet of a school, child care facility, park, or playground.[67] Some counties, such as Miami-Dade County, have even more restrictions on where sex offenders can live.[68] Florida has similar employment restrictions to California.[69]

Florida also has a specific mechanism for designated individuals as "sexual predators," which carries even more restrictions. In Florida, a sexual predator is an individual who a court finds has committed the most serious of sexual offenses against minors, repeat offenders, or those who have engaged in sexually violent acts.[70] This designation is noted in the

[65] FLA. STAT. ANN. § 943.0435(11). Registration may be terminated earlier upon petition and consideration by a court if the individual is pardoned, the conviction is set aside, they have completed their confinement or supervision for twenty years or more without being arrested, or for some offenses committed while a juvenile subject to specific requirements. Fla. Stat. Ann. § 943.0435(11)(a)-(b).

[66] FLA. STAT. ANN. §§ 943.0435(3), 322.141(3) (LexisNexis, Lexis Advance through the 2025 Third Extraordinary session); CARLOS J. MARTINEZ, MIAMI-DADE PUBLIC DEFENDER'S OFFICE, WHAT YOU DON'T KNOW CAN HURT YOU: THE COLLATERAL CONSEQUENCES OF A CONVICTION IN FLORIDA 66 (2020).

[67] FLA. STAT. ANN. § 775.215(2)(a), (3)(a) (LexisNexis, Lexis Advance through the 2025 Third Extraordinary session).

[68] MARTINEZ, *supra* note 66, at 67 (prohibiting certain sex offenders from living within 2,500 feet of a school). Unlike the California Supreme Court in In re *Taylor*, 60 Cal. 4th 1019 (2015), a Florida court held that the Miami-Dade County restrictions were constitutional. Doe v. Miami-Dade Cnty., No. 1:14-cv-23922-PCH, 2015 U.S. Dist. LEXIS 190396, *29 n.10 (S.D. Fla. Apr. 3, 2015).

[69] *See generally* MARTINEZ, *supra* note 66, at 69 (noting that private employers can ask about convictions, sex offenders are unable to secure employment in any state job where they would have to pass a background check, and sex offenders are required to disclose their professional licenses and will likely lose that license as a result).

[70] FLA. STAT. ANN. §775.21 (LexisNexis, Lexis Advance through the 2025 Third Extraordinary session) ("Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to public safety.").

publicly-available sex offender registry, and, notably, requires law enforcement to notify the community in which the predator will be living and any licensed child care centers and schools within one mile of that person's presence.[71]

4. Texas

Unlike Florida, Texas has two tiers of registration duration depending on the offense: ten years or lifetime registration.[72] Generally, if an offense was committed against a child, the offender may not enter the "child safety zone" established by the parole panel.[73] They may not engage in any programs where minors participate in athletic, civic, or cultural activities or go within a certain distance (as determined by the parole panel) of places where children normally gather, such as schools, daycares, playgrounds, or public swimming pools.[74] Texas also has a sexual predator designation for those who are civilly committed because of their offenses, and has a community notification process similar to Florida's.[75] Texas also places restrictions on employment, including driving a bus, taxi, or limousine and operating an amusement ride;[76] being an emergency

[71] FLA. STAT. ANN. § 775.21(6)(k), (7) (LexisNexis, Lexis Advance through the 2025 Third Extraordinary session).

[72] *Restrictions After a Criminal Conviction*, TEX. STATE L. LIBR., https://guides.sll.texas.gov/criminal-conviction-restrictions/sex-offenders [https://perma.cc/NX28-4722] (Aug. 27, 2025). For a helpful comparison chart of Texas's registration duty duration versus the SORNA's requirement that was current as of September 2022, see Texas Length of Duty to Register Compared to the Minimum Required Registration Period Under Federal Law (34 USC § 20911), TEXAS.GOV, https://sor.dps.texas.gov/PublicSite/sor-public/SORNA.pdf [https://perma.cc/QKC9-XZ42] (Sep. 2022).

[73] TEX. GOV'T CODE ANN. § 508.187 (LexisNexis, Lexis Advance through the 2023 Regular Session). These child safety zones are unique to each offender and generally preclude entering certain distances within playgrounds, public pool, daycares, etc. TEX. GOV'T CODE § 508.225.

[74] *Id.* There are caveats to the rule and the offender may request modifications. *Id.*

[75] TEX. CODE CRIM. PROC. ANN. art. 62.201 (LexisNexis, Lexis Advance through the 2023 Regular Session).

[76] TEX. CODE CRIM. PROC. ANN. art. 62.063(b) (LexisNexis, Lexis Advance through the 2023 Regular Session).

paramedic;[77] being a healthcare provider;[78] and working for school districts,[79] among others.

SFC Smith would be best served by moving to California because it places the fewest residency restrictions on sex offenders of the states surveyed, and depending on the type of sexual offense, could face a shorter registration duration requirement than Florida and Texas. Depending on which type of sexual assault he was convicted of, he may be subject to sexual predator designation in California, Florida, and Texas. 1LT Clark would not face any of these restrictions because he was not convicted of a sex offense.

B. Immigration

Immigration consequences impact numerous Service members. In FY 2024, 16,290 Service members became naturalized U.S. citizens.[80] To become a U.S. citizen, an individual must generally establish certain qualifications and meet certain timelines. Some of these include being a "lawful permanent resident . . . for at least five years," "continuous residence in the United States . . . for at least five years immediately preceding the date of filing the application and up to the time of admission to citizenship," "[physical presence] in the United States for at least 30 months out of the five years immediately preceding the date of filing," and "good moral character for five years prior to filing, and during the period leading up to the administration of the Oath of Allegiance."[81] There is currently a special process in the U.S. Code that enables Service members

[77] 25 TEX. ADMIN. CODE § 157.37(e)(5)(a) (LexisNexis, Lexis Advance through the 2023 Regular Session) (including indecency with a child, aggravated sexual assault, sexual assault).

[78] TEX. OCC. CODE ANN. § 108.052(1) (LexisNexis, Lexis Advance through the 2023 Regular Session).

[79] TEX. EDUC. CODE § 22.085(a) (LexisNexis, Lexis Advance through the 2023 Regular Session).

[80] *Military Naturalization Statistics*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/military/military-naturalization-statistics [https://perma.cc/6GFC-RQ7W] (Nov. 6, 2024).

[81] USCIS Policy Manual, vol. 12, pt. D, ch. 1, para. B, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 29, 2025), https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-1 [https://perma.cc/MQJ7-BWZ7]; 8 U.S.C. § 1427.

to "fast-track" their naturalization applications, essentially waiving the five-year residency and physical presence requirements.[82]

Pursuant to federal law, non-U.S. citizens residing in the United States and Service members naturalized through military service are subject to deportation if they commit certain criminal offenses.[83] To become a U.S. citizen, an individual must show that they are eligible to become citizens by a preponderance of the evidence.[84] One of the requirements includes establishing that the individual has "good moral character" for the five years before applying to be naturalized.[85] For Service members naturalized through military service during a period of hostilities, the required showing is reduced to one year.[86] A conviction may preclude a

[82] Generally, this special process waives the five-year statutory residence and physical presence requirement for Service members during declared periods of hostilities. 8 U.S.C. § 1440(b). A period of hostility is determined by Executive Order. *Id.* On 3 July 2002, then-President George W. Bush declared that the United States was in a period of hostilities for the purposes of expedited naturalization. Exec. Order 13269, 67 Fed. Reg. 45287 (July 3, 2002). That executive order is still in effect as of the date of this writing. *Policy Manual, Chapter 3–Military Service During Hostilities (INA 329)*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-3#footnote-18 [https://perma.cc/TSJ6-NHVT] (last visited Aug. 29, 2025). *See generally* HOLLY STRAUT-EPPSTEINER & LAWRENCE KAPP, CONG. RSCH. SERV., IF12089, U.S. CITIZENSHIP THROUGH MILITARY SERVICE AND OPTIONS FOR MILITARY RELATIVES (2022) (summarizing the current process for naturalization through military service).

[83] 8 U.S.C. § 1227(a)(2).

[84] Immigration and Naturalization Act, 8 U.S.C. § 1429; USCIS Policy Manual, vol. 12, pt. D, ch. 1, para. B, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-1 [https://perma.cc/867W-X3MF] (last visited Aug. 29, 2025); USCIS Policy Manual, vol. 12, pt. D, ch. 9, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-9 [https://perma.cc/K6PB-AR4Y] (last visited Aug. 29, 2025).

[85] Immigration and Naturalization Act, 8 U.S.C. § 1427(d)–(e); USCIS Policy Manual, vol. 12, pt. D, ch. 1, para. B, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-1 [https://perma.cc/X3UA-NXM3] (last visited Aug. 29, 2025); USCIS Policy Manual, vol. 12, pt. D, ch. 9, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-12-part-d-chapter-9 [https://perma.cc/G3PC-LBLQ] (last visited Aug. 29, 2025).

[86] USCIS Policy Manual, vol. 12, pt. I, ch. 3, para. A, U.S. CITIZENSHIP & IMMIGRATION SERVS. https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-3 [https://perma.cc/3JLG-PPH5] (last visited Aug. 29, 2025).

finding of good moral character.[87] Qualifying offenses that are most likely to be seen in the military justice system include crimes of moral turpitude;[88] multiple criminal convictions;[89] aggravated felonies;[90] many types of drug offenses;[91] being or having a history of being a drug abuser or addict;[92] domestic violence, stalking, violating a protective order, and crimes against children;[93] and engaging in acts of espionage.[94]

Service members naturalized through military service face an additional concern. Though they may have been naturalized and granted citizenship, if they fail to serve five years honorably and receive an other than honorable, bad conduct, or dishonorable discharge, or if an officer is dismissed, their citizenship may be revoked and they may be deported.[95] Because immigration is under the purview of the Federal Government, state laws are not being addressed in this section.

If either SFC Smith or 1LT Clark were in a position where they were naturalized through military service and had not yet served for five

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[87] Pursuant to federal law, general court-martial convictions are qualifying convictions for the purpose of the good moral character determination process. USCIS Policy Manual, vol. 12, pt. F, Ch. 2, para. C.3, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2 [https://perma.cc/WT9H-BBX9] (last visited Aug. 29, 2025); Matter of Juan Carlos Rivera-Valencia, Respondent, 24 I. & N. Dec. 484 (BIA 2008).

[88] 8 U.S.C. § 1227(a)(2)(A)(i).

[89] *Id.* § 1227(a)(2)(A)(ii).

[90] *Id.* § 1227(a)(2)(A)(iii).

[91] *Id.* § 1227(a)(2)(B)(i) (including convictions for "(or a conspiracy or attempt to violate) any law or regulation of a Sate, the United States, or a foreign country relating to a controlled substance (as defined in . . . 21 U.S.C. 802[] other than a single offense involving possession for one's own use of 30 grams or less of marijuana . . . .").

[92] *Id.* § 1227(a)(2)(B)(ii).

[93] *Id.* § 1227(a)(2)(E) (including child abuse, neglect, or abandonment). Domestic violence crimes include: any crime of violence (as defined in [18 U.S.C. § 16]) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.
Id. § 1227(a)(2)(E)(i).

[94] *Id.* §1227(a)(4).

[95] 8 U.S.C. § 1439(f).

years,[96] *their convictions would subject them to possible revocation of their U.S. citizenship and deportation.*

C. Voting

The right to vote in the United States has had a tumultuous road from the country's founding. Perhaps surprisingly, the right to vote is not explicitly granted in the Constitution; it is cobbled together through "decades of court rulings and legislative decisions, most of them—but hardly all—slowly expanding a legal guarantee of the ability to cast a ballot."[97] Initially, only white men over the age of twenty-one could vote.[98] Generally, states govern the "time[], place[], and manner" of elections, but those state rules are checked by federal law.[99] For example, the Fifteenth Amendment prohibits the Federal Government and states from infringing on the right to vote "on account of race, color, or previous servitude,"[100] the Nineteenth Amendment prohibits denying the right to vote based on sex,[101] the Twenty-Fourth Amendment provides that failure to pay taxes cannot be used to deny the right to vote,[102] and the Twenty-Sixth Amendment prohibits denying the right to vote to citizens over the age of eighteen.[103] Though treated as an explicit constitutional right afforded to most Americans, states are enabled to restrict voting rights to those convicted of crimes. These narrow prohibitions placed on states have

[96] Because officers must be U.S. citizens in order to commission, for the purposes of this vignette, 1LT Clark naturalized through prior service as an enlisted Soldier. *See* 10 U.S.C. § 532(a)(1).
[97] *See* Michael Wines, *Does the Constitution Guarantee a Right to Vote? The Answer May Surprise You.*, N.Y. TIMES (Oct. 26, 2022), https://www.nytimes.com/article/voting-rights-constitution.html [https://perma.cc/34WB-BY7S].
[98] *Elections and Voting*, THE WHITE HOUSE PRESIDENT BARACK OBAMA https://obamawhitehouse.archives.gov/1600/elections-and-voting [https://perma.cc/KB54-DXA3] (last visited Aug. 15, 2025).
[99] *See* Wines, *supra* note 97.
[100] U.S. CONST. amend. XV, § 1.
[101] U.S. CONST. amend. XIX.
[102] U.S. CONST. amend. XXIV § 1.
[103] U.S. CONST. amend. XXVI § 1.

led to varied outcomes in how states govern the way in which voting is conducted and who may vote, to include those convicted of offenses.[104]

In California, felony offenders are prohibited from voting while serving a state or felony prison term.[105] Once they are released, they may apply to have their voting rights restored.[106] In Florida, many felony offenders may vote after they complete their sentences, to include any period of probation or parole or payment of fees or restoration.[107] However, those convicted of murder or a felony sex offense continue to be barred from voting even after completion of their sentence unless they are successful in petitioning the State Clemency Board for restoration of the right.[108] In Texas, felony offenders may vote if they have completed their sentence, to include parole or probation.[109] Interestingly, even the official Texas State Law Library online resource for restoration of voting rights notes that "it is not always clear as to when a sentence has been fully

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[104] The Department of Justice has published a guide on how voting rights intersect with state laws regarding convictions. *See* CIV. RTS. DIV., U.S. DEP'T OF JUST., GUIDE TO STATE VOTING RULES THAT APPLY AFTER A CRIMINAL CONVICTION (2022).

[105] Stefanie Dazio, *California Proposal Would Reinstate Prisoners' Voting Rights*, AP NEWS (Feb. 8, 2023), https://apnews.com/article/politics-california-state-government-maine-vermont-67b8ca6b281fbf0304762af32633062f [https://perma.cc/WK8B-RQPP].

[106] *Id. Voting Rights Restored*, CAL. SEC'Y OF STATE, https://www.sos.ca.gov/elections/restore-your-vote [https://perma.cc/TY4H-H74L] (last visited Aug. 27, 2025). People incarcerated for misdemeanors are unaffected by these rules as they maintain their right to vote during and after confinement. *Id.* Once released from confinement for a felony conviction, an individual simply needs to fill out a voter registration card online or by mail and certify that they "[a]re not currently serving a state or federal prison term for conviction of a felony." *Quick Guide: California Voter Registration/Pre-Registration Application*, CAL. SEC'Y OF ST., (May 2024), https://elections.cdn.sos.ca.gov/pdfs/quick-guide-vrc.pdf [https://perma.cc/7BWK-CH9Q].

[107] FLA. CONST. art. VI, §§ 4; *Constitutional Amendment 4/Felon Voting Rights*, FLA. DEP'T OF STATE (July 10, 2024), https://dos.myflorida.com/elections/for-voters/voter-registration/constitutional-amendment-4felon-voting-rights/ [https://perma.cc/A22C-HW2H].

[108] *See* sources cited *supra* note 107. Those convicted of murder or a felony sex offense must apply to the State Clemency Board for restoration of their right to vote. Constitutional Amendment 4/Felon Voting Rights, *supra* note 107. Unlike California, Florida has made it difficult for individuals to determine if they have their voting rights restored and several people were prosecuted for trying to vote, incorrectly believing that they were qualified after completing their sentences. *See Voting Rights Restoration Efforts in Florida*, Brennan Ctr. For Just. (Nov. 18, 2024), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida [https://perma.cc/W323-V5BZ].

[109] TEX. ELEC. CODE §§ 11.002(a)(4), 13.001(a)(4) (LexisNexis, Lexis Advance through the 2023 Regular Session).

completed."[110] This is further complicated by that fact that some terms of parole or probation may require the payment of "fines, fees, and restitution."[111] However, the Texas constitution explicitly bars individuals convicted of bribery, perjury, forgery, or "other high crimes" from regaining the right to vote.[112]

Though it may seem as if it is a straightforward process to have one's right to vote restored, some states, like Texas and Florida, have laws and regulations that lack clarity as to when someone truly qualifies to have their rights restored based on the terms of their supervision or parole. This may be further compounded when military parole terms intersect with civilian jurisdictions' interpretation of those terms and how a state interprets whether a special court-martial equates to a felony or misdemeanor conviction. While there are resources available online to help individuals determine if they can have their right to vote restored or not, they contain legal disclaimers that they should not be solely relied upon by users.[113] There is a danger in misunderstanding when one's right to vote has been restored, as wrongfully registering to vote can subject a person to further criminal sanctions, so it is critical that military members who have been convicted know if they are eligible to vote before voting.

SFC Smith would be allowed to vote in California after release from confinement; however, if he moved to Texas, he would need to complete any parole period or pay any fines before he could vote. He could not vote in Florida because he is a sex offender. 1LT Clark would also be allowed to vote in California after confinement, and would be allowed to vote in Florida and Texas once his sentence was complete. This is all assuming that there were no complications derived from a civilian jurisdiction interpreting any terms of military parole or military sentences, such as fines or adjudication of forfeitures.

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[110] *Reentry Resources for Former Prisoners*, TEX. ST. L. LIBR. (Aug. 27, 2025 9:58 AM), https://guides.sll.texas.gov/reentry-resources/voting [https://perma.cc/R2UQ-YHWY].
[111] U.S. DEP'T OF JUST., *supra* note 104, at 17.
[112] TEX. CONST. art. 6, § 1(b).
[113] *See, e.g.*, *Restore Your Vote: I Have a Felony Conviction. Can I Vote?*, RESTORE YOUR VOTE, https://campaignlegal.org/restoreyourvote [https://perma.cc/7WS7-MVTM] (last visited Aug. 27, 2025) ("[T]his toolkit is not an offer of legal services or legal advice. The website serves to provide the best information available to make restoration accessible for citizens with felony convictions. We do not guarantee that by following these steps that your voting rights will be restored; that power ultimately rests with state authorities. Also, restoration of rights processes can be complicated and unclear in some states.")

D. Employment

When a convicted Service member's confinement is complete and their military career ends, they must find a job or risk becoming homeless. Unfortunately, this is no easy task, as many states place onerous prohibitions on criminals that prevent them from readily finding employment.[114] This manifests in background checks conducted by prospective employers, the availability of criminal records online, and the exclusion of certain offenders from certain licensures or types of employment.[115] The most common fields in which Veterans seek employment include government work, manufacturing, professional and business services, and education and health services.[116] As these are the most popular areas of employment for Veterans, this section examines some of the restrictions placed on convicted persons in those fields.

1. Federal

Convicted persons can apply for federal jobs, but federal law prohibits people convicted of certain crimes from serving in some positions.[117] When applying for most jobs, federal agencies do not ask about criminal records.[118] Once someone receives a conditional offer of employment, they must complete the Declaration for Federal Employment form and await the results of a background check.[119] The agency then considers criteria such as the applicant's character, the nature of the offense,

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[114] *See* HOSKINS, *supra* note 32, at 13–14, 170–71.
[115] *Id.* ("This sort of stigmatization is not itself a formal legal consequence of conviction, but such hiring practices are facilitated by state policies that make criminal records easily accessible to potential employers.").
[116] BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., EMPLOYMENT SITUATION OF VETERANS—2021, tbl.5 (2021) (providing different breakdowns of the data by industry type and sex). According to the 2021 survey, 22.9 percent of Veterans worked for government agencies, 12.1 percent worked in manufacturing, 10.4 percent worked in professional and business services, 9.2 percent worked in education and health services, and 8 percent worked in transportation and utilities. *Id.*
[117] *Can I Work for the Government If I Have a Criminal Record?*, USAJOBS, https://help.usajobs.gov/faq/application/eligibility/ex-offender/ [https://perma.cc/A8LK-NRPE] (last visited Aug. 19, 2025) (for example, prohibiting federal employment if convicted of treason or disqualifying individuals convicted of misdemeanor domestic violence offenses from jobs that require the person to be involved with firearms).
[118] *Id.*
[119] *Id.*

rehabilitation efforts, and how much time has passed since the conviction before making a determination.[120]

2. California

In 2018, California amended its Fair Housing and Employment Act (FEHA) to include a "ban-the-box" provision, prohibiting employers with five or more employees from asking applicants if they have a criminal record.[121] Employers are only permitted to ask about a person's conviction history or run a background check once they have extended a conditional offer of employment.[122] If an employer does learn of criminal history and intends to deny them employment, FEHA places certain requirements on the employer, including providing written notice of the intent to rescind the offer and the opportunity to respond.[123]

Though there are these protections in place, there are still several restrictions placed on individuals who would need licenses to work in their desired career field. These restrictions are determined by each licensing board,[124] but disqualification from employment generally requires the offense to be directly related to suitability for that profession.[125] Specific

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[120] *Id.*

[121] CAL. GOV'T CODE § 12952(a) (Deering, Lexis Advance through the 2024 Regular and Special Session). *See* Sachi Clements, *California Laws on Employer Use of Arrest and Conviction Records*, NOLO, https://www.nolo.com/legal-encyclopedia/california-laws-employer-use-arrest-conviction-records.html [https://perma.cc/KD8H-U5RS] (last visited Mar. 12, 2023). This law does not prohibit background checks if required by law and in other specific circumstances. *See* CAL. GOV'T CODE § 12952(d).

[122] *Id.* § 12952(a), (b).

[123] *Id.* § 12952(c).

[124] *See* CAL. BUS. & PROF. CODE div. 3, chs. 1–21.5 (Deering, Lexis Advance through the 2022 Regular Session) (listing over twenty professions governed by the California Business and Professions Code).

[125] *Id.* §§ 480, 490. *See* PAC. JUV. DEF. CTR., COLLATERAL CONSEQUENCES OF JUVENILE DELINQUENCY PROCEEDINGS IN CALIFORNIA 117 (Sue Burrell & Rourke F. Stacy eds., 2011) (citing Hughes v. Board of Architectural Examiners, 17 Cal. 4th 763, 788 (1998)). Clients may ask the following:

> Will this affect my future career opportunities?" The answer depends on whether the client needs a license to work. If the client chooses a career in neurology, car sales, teaching, plumbing, cosmetology, pest control, or truck driving, among many others, he or she will need a

examples of employment prohibitions include: many sex and drug offenders may not be employed by public schools,[126] and individuals convicted of certain felonies are also prohibited from serving as school team coaches.[127]

3. Florida

Private employers in Florida have an almost unfettered ability to deny employment based on criminal records.[128] However, Florida does prohibit its government agencies and municipalities from denying employment "solely because of a prior conviction for a crime" unless "the crime was a felony or first-degree misdemeanor and directly related to the position of employment sought."[129] However, convictions for certain drug offenses, such as sale and trafficking of controlled substances, are exempt from this prohibition unless they meet certain conditions.[130]

For individuals who hold or would want a professional license, a conviction may preclude future employment in that field.[131] Generally, the Florida Department of Public Health will deny a license to an applicant if

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> license. If the client is an entrepreneur, he or she will face licensing requirements in fields as diverse as construction, child care, moving and storage, selling estate jewelry, and security alarm services. If the client is a chef who simply wants to open a little café, a license will still be needed to serve alcoholic beverages.

Id. at 116.

[126] CAL. EDUC. CODE §§ 44836(a)(1), 44836(b)(1). (Deering, Lexis Advance through the 2024 Regular and Special Session). Private school employment requiring student contact is contingent on a Department of Justice background check. *Id.* § 44237.

[127] CAL. CODE REGS. § 5592 (West 2025).

[128] *See* MARTINEZ, *supra* note 66, at 34.

[129] FLA. STAT. ANN. § 112.011(1)(a) ((LexisNexis, Lexis Advance through the 2025 Ordinary session).

[130] *Id.* Such conditions include completion of an adjudged term of confinement or "supervisory sanctions" or if under supervisory sanctions, they comply with numerous law-imposed requirements. FLA. STAT. ANN. § 775.16.

[131] Some examples include: home inspectors (denial for theft, sexual battery, child or adult abuse, battery, etc.), veterinary medicine (denial for drug offenses), and nursing (anything related directly to ability to practice). FLA. ADMIN. CODE ANN. r. 61-30.102 (Lexis Advance through April 16, 2025); FLA. STAT. ANN. § 474.214(1)(c) (LexisNexis, Lexis Advance through the 2025 regular session); FLA. ADMIN. CODE ANN. r. 64B9-8.006(3)(c) (Lexis Advance through April 16, 2025); FLA. STAT. ANN. § 456.0635(2)(a) (LexisNexis, Lexis Advance through the 2025 regular session); MARTINEZ, *supra* note 66, at 75–77.

convicted for any drug offense until certain conditions are met.[132] Other professions that require a background check include athletic coach, child care personnel, correctional officers, healthcare providers, law enforcement officers, school employees, and others.[133] Most individuals wishing to be employed by the State of Florida must pass a background check, which precludes employment based on convictions for offenses such as felony-level battery, felony drug offenses, domestic violence, and others.[134]

4. Texas

Texas allows consumer reporting agencies to report arrest records, indictments, and convictions dating back seven years in most cases.[135] Offenders face restrictions in applying to numerous employment fields, including working as a firefighter,[136] healthcare provider,[137] medical device distributor or manufacturer,[138] and plumber.[139]

SFC Smith and 1LT Clark would face similar employment restrictions in California, Florida, and Texas. However, they would both have more due process in California, where a "ban-the-box" measure was passed, and the prospective employer must meet several requirements before they could refuse employment based on a conviction.

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[132] MARTINEZ, *supra* note 66, at 76.
[133] *Id.* app. B.
[134] *Id.* at 35–36.
[135] TEX. BUS. & COM. CODE ANN. § 20.05(a)(4) (LexisNexis, Lexis Advance through the 2023 Regular Session) (allowing for longer periods of time in certain circumstances, e.g., where a person will earn more than $75,000). *See generally Employment*, TEX. STATE L. LIBR., https://guides.sll.texas.gov/reentry-resources/employment [https://perma.cc/3LKM-YJDB] (Aug. 27, 2025, 9:58 AM).
[136] 37 TEX. ADMIN. CODE § 403.7 (2025).
[137] TEX. OCC. CODE ANN. § 108.052 (LexisNexis, Lexis Advance through the 2023 Regular Session).
[138] TEX. HEALTH & SAFETY CODE ANN. § 431.279 (LexisNexis, Lexis Advance through the 2023 Regular Session).
[139] 22 TEX. ADMIN. CODE § 363.15 (2025).

E. Public Assistance

The Federal Government and states provide help to families in need of financial assistance. The Federal Government enacted the Food Stamp Act of 1977 and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996.[140] The Food Stamp Act of 1977 established the Supplemental Nutrition Assistance Program (SNAP).[141] The intent of SNAP benefits (formerly referred to as "food stamps") is to "provide[] food benefits to low-income families to supplement their grocery budget so they can afford the nutritious food essential to health and well-being."[142] The PRWORA created the Temporary Assistance to Needy Families (TANF) program.[143] The TANF program provides federal dollars to states to assist families financially and with other support services.[144]

However, the 1996 PRWORA also provided that individuals with a felony drug conviction were ineligible for TANF and SNAP benefits.[145] States can opt out of this requirement and allow individuals convicted of drug-related felonies to receive the aid.[146] Most states have either modified the TANF ban or removed it entirely from their state code.[147] Only seven

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[140] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; Food Stamp Act of 1977, Pub. L. No. 95-113, 91 Stat. 913.
[141] Food Stamp Act of 1977, Pub. L. No. 95-113, 91 Stat. 913.
[142] *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP'T OF AGRIC., https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program [https://perma.cc/BMW8-SZYL] (last visited Aug. 22, 2025).
[143] Pub. L. No. 104-193, 110 Stat. 2105.
[144] *Temporary Assistance for Needy Families*, BENEFITS.GOV, https://www.benefits.gov/benefit/613 [https://perma.cc/32MB-K8US] (last visited Aug. 29, 2025).
[145] Pub. L. No. 104-193, § 115(a). If a felon is part of a family who receives TANF or SNAP benefits, that family's benefit amount is reduced by the amount that person would have received. *Id.* § 115(b)(1).
[146] *Id.* § 115(d).
[147] *No More Double Punishments: Lifting the Ban on SNAP and TANF for People with Prior Felony Drug Convictions*, CLASP, https://www.clasp.org/publications/report/brief/no-more-double-punishments/ [https://perma.cc/UPZ7-9962] (Apr. 2022) (describing some of the ways in which states have modified the eligibility for SNAP and TANF benefits, including requirements such as completing drug treatment, reducing the length of the ban so that it is not a lifetime ban, etc.); Ali Zane, *Remaining States Should Lift Racist TANF Drug Felony Bans; Congress Should Lift It Nationwide*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/blog/remaining-states-should-lift-racist-tanf-drug-felony-bans-congress-should-lift-it-nationwide [https://perma.cc/SZ5D-2GDD] (June 30, 2021, 1:46 PM) ("Seven states—Arizona, Georgia, Missouri, Nebraska, South Carolina, Texas, and West Virginia—still maintain the full lifetime ban in TANF for all.").

states have a full ban on TANF for convicted drug felons.[148] South Carolina is the only state that has a full ban on SNAP benefits.[149]

California, Florida, and Texas differ in their eligibility criteria for TANF and SNAP. In California, individuals with drug felony convictions are eligible to receive the state's versions of TANF and SNAP benefits.[150] Florida has opted out of most of the provisions of the PRWORA—the state only prohibits "temporary cash assistance" and food assistance for individuals convicted of felony drug trafficking.[151] Florida also requires that the individual convicted of a drug felony complete substance abuse treatment.[152] Texas does not have a lifetime ban on SNAP benefits for a single felony drug conviction, but does place restrictions if a person violates parole or community supervision, or if a person is convicted a subsequent time.[153] Texas prohibits those convicted of a felony drug offense from receiving TANF.[154]

1LT Clark would be able to receive SNAP and TANF benefits in California. He would be eligible for benefits in Florida if he completed substance abuse treatment. In Texas, he could receive SNAP benefits, but he could not receive TANF because he was convicted of a drug offense at a general court-martial. Though he was convicted of assaulting his

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[148] CLASP, *supra* note 147.

[149] *Id.*

[150] STATE OF CAL. HEALTH & HUMAN SERVS. AGENCY, TEMP 3005, CHANGES FOR PEOPLE WITH A PRIOR FELONY DRUG CONVICTION (Dec. 2014), https://www.cdss.ca.gov/cdssweb/entres/forms/English/Temp3005.pdf. [https://perma.cc/59AX-MRLL] California removed these conviction barriers to benefits in 2015. *Id.*

[151] FLA. STAT. ANN. § 414.095(1) (LexisNexis, Lexis Advance through the 2025 regular session). *See also Supplemental Nutrition Assistance Program (SNAP)*, FLA. DEP'T OF CHILD. & FAMILIES, https://www.myflfamilies.com/services/public-assistance/supplemental-nutrition-assistance-program-snap [https://perma.cc/89ZT-PWTW] (last visited Aug. 29, 2025).

[152] FLA. STAT. ANN. § 414.095(1) (LexisNexis, Lexis Advance through the 2025 regular session).

[153] 1 TEX. ADMIN. CODE § 372.501 (2025) (imposing a two-year restriction for violation of parole and a lifetime ban if there is a subsequent felony drug conviction, effective September 2015). *See also* Liz Crampton, *Relaxed Food Stamp Rules to Help Felons*, TEX. TRIB. (Aug. 30, 2015, 6:00 AM), https://www.texastribune.org/2015/08/30/supporters-new-law-hopeful-it-will-reduce-repeat-o/ [https://perma.cc/D2TG-C53H] (sponsoring the Texas House bill, State Representative Senfronia Thompson stated, "It seems disproportional to punish persons for life for a mistake that might not even get them jail time.").

[154] 1 TEX. ADMIN. CODE § 372.501(a)(2).

spouse, SFC Smith would be eligible for both SNAP and TANF in California, Florida, and Texas.

F. Housing

The housing of Veterans is a highly visible issue in America, with nearly 33,000 unhoused Veterans as of January 2024.[155] The Federal Government provides subsidized housing in several forms, and those programs are administered by local public housing authorities.[156] These programs include housing provided by the Federal Government, private housing that the Federal Government specifically subsidizes, and "Section 8" housing vouchers, where the tenants can live anywhere and the government subsidizes the rent.[157]

However, obstacles remain for some persons convicted under federal and state law, including public housing authorities engaging in background checks.[158] There are federal and state restrictions on who is eligible for government-subsidized housing based on the kind of conviction a person has or how long ago the offense occurred. Some federal restrictions provide that individuals who are lifetime registered sex offenders are not eligible for federal subsidized housing assistance[159], and landlords may terminate occupancy in federally assisted housing for drug abusers.[160] The inability of convicted offenders, especially sex offenders,

[155] *Everyone Counts in the Effort to End Veteran Homelessness*, U.S. DEP'T OF VETS. AFFS., https://www.va.gov/homeless/pit_count.asp [https://perma.cc/YJ63-WSJY] (Jan. 17, 2025).
[156] PAC. JUV. DEF. CTR., *supra* note 125, at 124.
[157] *Id.*
[158] *Id.*
[159] 42 U.S.C. § 13663. Note that under Florida's requirement that all sex offenders are lifetime registers, even less egregious sex offenses would bar Florida residents from this benefit. This also has consequences for a sex offender's family as the prohibition precludes "admission to [federally assisted] housing for any *household* that includes any individual who is subject to a lifetime registration requirement . . . ." *Id.* § 13663(a) (emphasis added). *See generally* U.S. DEP'T OF JUST., FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 10 (2006).
[160] 42 U.S.C. § 13662(a). *See generally* U.S. DEP'T OF JUST., *supra* note 159, at 10. President Joseph Biden directed the Department of Housing and Urban Development to update their rules on who can apply for federal assistance in order to assist racial minorities who are subject to criminal convictions at a much higher rate than White people. Memorandum from Sec'y Marcia L. Fudge, U.S. Dep't of Hous. & Urb. Dev., to Principal

to secure access to low-income housing makes it especially difficult for them to reintegrate into society.[161] There are some variations on how each state's public housing authorities run these federal programs, but California,[162] Florida,[163] and Texas[164] are required to complete background checks and disqualify individuals who have "been convicted

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Staff, subject: Eliminating Barriers That May Unnecessarily Prevent Individuals with Criminal Histories from Participating in HUD Programs (Apr. 12, 2022). *See* Romina Ruiz-Goiriena, *Exclusive: HUD Unveils Plan to Help People with a Criminal Record Find a Place to Live*, USA TODAY, https://www.usatoday.com/story/news/nation/2022/04/12/can-get-housing-felony-hud-says-yes/9510564002/ [https://perma.cc/B6GT-7JF6] (Apr. 12, 2022, 11:41 AM).

[161] MOLLY SIMMONS ET AL., VA NAT'L CTR. ON HOMELESSNESS AMONG VETERANS, RESEARCH BRIEF: VETERAN SEX OFFENDER ACCESS TO HOUSING AND SERVICES AFTER RELEASE FROM INCARCERATION: OBSTACLES AND BEST PRACTICES 1–3 (2018) ("Stakeholders reported that one of the most significant barriers to housing was the federal prohibition on using federal housing funds to assist with housing for people who were lifetime registered sex offenders. This includes Section 8 housing vouchers. This made the task of procuring housing even more difficult. The VA also does not have long-term housing for individuals convicted of a sex offense, though they do have residential substance use disorder (SUD) treatment facilities which can accept someone with a sex offense conviction.").

[162] *See generally CalWORKs Housing Support Program*, CDSS, https://www.cdss.ca.gov/inforesources/cdss-programs/housing-programs/calworks-housing-support-program [https://perma.cc/8TY4-JZWC] (last visited Aug. 27, 2025) (including programs such as CalWORKs Housing Support Program and CalWORKs Homeless Assistance). For CalWORKs eligibility, see *supra* E. Public Assistance. *See generally* CATHERINE MCKEE, NAT'L HOUS. L. PROJECT, CALIFORNIA LAW LIMITS HOUSING AUTHORITY ACCESS TO ARREST RECORDS (n.d.), https://nhlp.org/files/California%20Law%20Limits%20Housing%20Authority%20Access%20to%20Arrest%20Records-2.pdf [https://perma.cc/NQF9-PBJA] (California does not allow the use of *arrest* records in eligibility determinations).

[163] *See generally* MARTINEZ, *supra* note 66, at 28 (noting that some public housing authorities in Florida consider criminal records from the previous ten years instead of the recommended five by the Housing and Urban Development agency). In Florida, drug offenders also face housing hurdles as they are disqualified from receiving a home loan from Florida's Department of Economic Opportunity. FLA. STAT. ANN. §§ 420.633, 420.635 (LexisNexis, Lexis Advance through the 2022 regular and extra sessions). *See* MARTINEZ, *supra* note 66, at 32.

[164] *See generally* TEX. PROP. CODE ANN. § 92.3515(a) (LexisNexis, Lexis Advance through the 2023 Regular Session); 40 TEX. ADMIN. CODE §819.132(c)(4)–(5) (enabling landlords to deny tenancy based on records of drug abuse or certain drug convictions so long as notice is provided) (2025).

of the manufacture of methamphetamine on the premises of federally assisted housing."[165]

Because they were convicted of sex offenses and drug offenses, both SFC Smith and 1LT Clark could face discrimination in applying to rent a residence and could be excluded from public housing assistance depending on the state in which they apply, and depending on whether they seek federally subsidized or state-subsidized housing programs. If facing lifetime sex offender registration, SFC Smith would be barred from federal housing subsidies in all states. Given the high rates of unhoused Veterans and coupled with difficulties in obtaining employment, federal and state policies in conducting background checks could further hinder them from rehabilitating and reintegrating into society.

G. Gun Possession

The Second Amendment to the Constitution guarantees the freedom to bear arms.[166] However, this right is not without limits, which impacts many Service members who care deeply about this Constitutional right.[167] The Gun Control Act prohibits possession of a firearm by those convicted of an offense that is punishable by more than one year of imprisonment, illegal drug users, those convicted of misdemeanor domestic assault, and Service members who receive a dishonorable discharge.[168] California further restricts who may own a firearm, including persons convicted of

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[165] Housing Choice Voucher Program Guidebook: Eligibility Determination and Denial of Assistance, para. 10.1.4 (Nov. 2019), https://www.hud.gov/sites/dfiles/PIH/documents/HCV_Guidebook_Eligibility_Determination_and_Denial_of_Assistance.pdf#page=18 [https://perma.cc/4Z5L-QCBR].

[166] U.S. CONST. amend II.

[167] This assertion is based on the author's recent professional experiences as Senior Defense Counsel, Fort Bragg, NC, from 2024 to 2025; Senior Trial Counsel for 7th Army Training Command from 2019 to 2020; Trial Defense Counsel, U.S. Army, at Tower Barracks, Germany, from 2017 to 2019; and Trial Counsel, 31st Air Defense Artillery Brigade from 2014 to 2016 [hereinafter Professional Experiences].

[168] Gun Control Act, 18 U.S.C. § 922(g). Though originally passed in 1968, The Gun Control Act has been amended to extend the prohibition on firearm possession, ownership, etc. to individuals convicted of misdemeanor crimes of domestic violence. *See generally 1117. Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence*, ARCHIVES: U.S. DEP'T OF JUST., https://www.justice.gov/archives/jm/criminal-resource-manual-1117-restrictions-possession-firearms-individuals-convicted [https://perma.cc/M3WP-UDL4] (July 2013).

violent offenses[169] and certain misdemeanor offenses are usually restricted for ten years post-conviction.[170] Florida prohibits felons from possessing firearms and ammunition.[171] Texas restricts the possession of firearms for five years after release from confinement or supervision for a felony offense, but after five years, allows possession in the person's home.[172] If a person is convicted of a Class A misdemeanor assault on a family member, they are prohibited from possessing a firearm for five years from their release from confinement or community supervision.[173] Many Veterans seek employment in law enforcement post-military service.[174] This prohibition on owning or possessing firearms would negatively impact such an individual from pursuing their desired employment, as there is no law enforcement exception to the Gun Control Act.[175]

SFC Smith and 1LT Clark would be prohibited from possessing firearms under federal law because their crimes were punishable at a general court-martial by more than one year's confinement and they were dishonorably discharged or dismissed from the service. Additionally, because 1LT Clark was convicted of illegal drug use, his Second

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[169] CAL. PENAL CODE §§ 29900, 29905 (e.g., murder, rape, lewd acts on a child under 14, kidnapping) (Deering, Lexis Advance through the 2024 Regular and Special Session).

[170] CAL. PENAL CODE § 29805 (Deering, Lexis Advance through the 2024 Regular and Special Session). *See* BUREAU OF FIREARMS, CAL. DEP'T OF JUST., FIREARMS PROHIBITING CATEGORIES 2 (2020) (listing qualifying misdemeanors). Misdemeanor offenses normally result in a ten-year restriction on firearm possession. *Id.*

[171] FLA. STAT. ANN. § 790.23(1) (LexisNexis, Lexis Advance through the 2025 Regular session).

[172] TEX. PENAL CODE ANN. § 46.04(a) (LexisNexis, Lexis Advance through the 2023 Regular Session).

[173] *Id.* § 46.04(b).

[174] *See* Mclain Brown, Sean, *5 Reasons Why Vets Should Consider Careers in Law Enforcement*, MILITARY.COM (Oct. 2, 2018), https://www.military.com/veteran-jobs/career-advice/5-reasons-why-vets-should-consider-careers-law-enforcement.html [https://perma.cc/TZ88-XJPG] ("According to the U.S. Justice Department, 'nearly 25% of the police force in the United States has a military background, and that's in part, because of how much these careers complement each other.'"); *Veterans*, U.S. SECRET SERV., https://www.secretservice.gov/careers/veterans [https://perma.cc/4V4E-2LE9] ("20.5% of Secret Service employees are veterans from all services . . . ."). The U.S. Department of Justice even has a website dedicated to assisting Veterans transition to law enforcement. *Vets to Cops*, COMMUNITY ORIENTED POLICING SERVS.: U.S. DEP'T OF JUST., https://cops.usdoj.gov/vetstocops [https://perma.cc/DA7W-DANT] (last visited Aug. 27, 2025).

[175] *1117. Restrictions on the Possession of Firearms by Individuals Convicted of a Misdemeanor Crime of Domestic Violence*, *supra* note 168.

Amendment rights may be temporarily impacted. Had SFC Smith been convicted at a special court-martial of domestic violence, he would have a misdemeanor domestic violence conviction that would similarly prohibit him from possessing firearms. SFC Smith would not be able to pursue his intended law enforcement career.

H. Child Custody

Some convictions may impact child custody. For example, under federal law, certain prison sentences may impact a person's ability to regain custody of a child after serving the confinement term: Federal law currently mandates the termination of parental rights once a parent has been imprisoned for 15 of the most recent 22 months and the children are in foster care for that time.[176] In California, drug convictions, child sex abuse, and domestic violence can impact a person's parental rights going through a custody proceeding regarding their child.[177] Florida places restrictions on child placement and custody for individuals with criminal records. This includes the loss of parental rights where a parent has killed or conspired to kill the other parent or the parent is serving confinement and meets certain criteria (e.g., was convicted of first-degree sexual battery or is determined to be a sexual predator).[178] Florida courts can also make the determination that, if the convicted person will remain in jail for much of the child's childhood, parental rights may be terminated.[179] Texas

[176] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §103, 111 Stat. 2115, 2118. *But see* John Kelly, *Bill to Remove Federal Requirement to Terminate Parental Rights Resurfaces*, IMPRINT (Mar. 15, 2024 8:24 AM), https://imprintnews.org/youth-services-insider/bill-rewrite-federal-rules-terminating-parental-rights/248136 [https://perma.cc/VL2K-Z5TQ] [Bill Would Rewrite Federal Rules on Terminating Parental Rights.pdf] (describing the proposed 21st Century Children and Families Act that, if enacted, would extend the foster care timeline to begin at 24 months in foster care, add an exception for children who are under the care of "kin," and remove the mandatory initiation of termination of parental rights provision); H.R. 7664, 118th Cong. (2023-2024) (referred to the Subcommittee on Work and Welfare on Dec. 17, 2024). .

[177] *See* CAL. FAM. CODE §§ 3041.5, 3118, 3044 (Deering, Lexis Advance through the 2024 Regular and Special Session).

[178] *See generally* MARTINEZ, *supra* note 66, at 41–45 (citing FLA. STAT. §§ 39.802(1), 39.806(1)(d)(1), 39.806(1)(d)(2)).

[179] FLA. STAT. ANN. § 39.806(1)(d) ((LexisNexis, Lexis Advance through the 2025 Regular Session).

restricts child custody where a parent is a registered sex offender for an act against a child, abuses their child, or engages in family violence.[180]

While most accused are very concerned about how their conviction and possible confinement will impact their relationship with their child(ren), their ability to provide for them, and custody in contentious family situations, many may be unaware that federal and state laws place specific restrictions or presumptions against custody depending on confinement terms and offense type.

While SFC Smith and 1LT Clark could have their custody rights impacted in California, Florida, and Texas, 1LT Clark would likely face less risk of losing custody unless a court determined he had an addiction problem or his drug use endangered his child.

I. Driving Privileges

Certain convictions can result in suspension or revocation of a driver's license. While this may seem like a minor inconvenience, when coupled with a need to go to job interviews, go to work, drive during work, drop children off at school, and all of the everyday things for which cars are used, not having a driver's license only further burdens a convicted person's ability to reintegrate into society.[181] Pursuant to the Solomon-Lautenberg Amendment, the Federal Government withholds a percentage of highway funding for states that do not revoke or suspend the driver's license for individuals convicted of certain drug offenses for six months.[182] While most states have opted out of this requirement, Florida has not, and Texas's opt-out is in effect only as of 25 February 2023.[183] California,

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[180] *See, e.g.*, TEX. FAM. CODE ANN. §§ 262.2015, 161.001 (LexisNexis, Lexis Advance through the 2023 Regular Session).
[181] *See* MARTINEZ, *supra* note 66, at 21 ("In Miami-Dade County, this is a particularly serious collateral consequence. Getting around Miami using only public transportation can be a serious burden, especially during the hot summer months. Although this can lead to the temptation to drive on a suspended license, that in itself can lead to additional criminal charges.").
[182] 23 U.S.C. § 159.
[183] *See* MARTINEZ, *supra* note 66, at 24 (discussing the Solomon-Lautenberg Amendment's effect in Florida). A Senate Bill was introduced in Florida to opt out of the federal requirement, but it died in committee. *See SB: 870: Driver License Suspensions*, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2022

Florida, and Texas otherwise have similar restrictions on driving privileges that are based on driving-related offenses.[184]

SFC Smith would not have his driving privileges restricted. 1LT Clark would lose his driving privileges for six months in Florida, even though his offenses were not related to driving.

J. Jury Service

To some, being barred from jury service may be seen as the one upside to having a felony conviction. However, this superficial view ignores the fact that it is one more way in which the law makes felons "lesser" in the eyes of society.[185] Federal law prohibits those convicted of an offense punishable by more than one year from serving on federal grand and petit (trial) juries unless their civil rights have been restored.[186] California does not allow felons to serve on grand juries, but they are allowed to serve as trial jurors so long as they are not currently confined, "on parole, postrelease community supervision, felony probation, or mandated supervision for the conviction of a felony."[187] Registered sex offenders are not permitted to serve on jury duty.[188] Florida's prohibitions go further: a person cannot serve on a jury if they have been convicted of "bribery, forgery, perjury, larceny, any felony, or any offense that would be a felony

/870 [https://perma.cc/6TMN-TAPE] (last visited Mar. 13, 2023). *See* TEX. TRANSP. CODE ANN. § 521.372 (effective until contingency met) (LexisNexis, Lexis Advance through the 2023 Regular Session). However, with Texas Senate Bill 181, § 3.03, the legislature provided the notice requirements to Congress to enable them to opt out of 23 U.S.C. § 2359 suspensions for drug offenses. S.B. 181 § 3.03 (Tex. 2021). This became effective 25 February 2023. *See* 47 Tex. Reg. 7937 (Nov. 25, 2022).

[184] *See* CAL. VEH. CODE §§ 13350–13392 (Deering, Lexis Advance through the 2024 Regular and Special Session); MARTINEZ, *supra* note 66, at 25 (summarizing driving restrictions related to criminal history); TEX. TRANSP. CODE ANN. §§ 521.341–521.377 (LexisNexis, Lexis Advance through the 2023 Regular Session).

[185] *See* Chin, *supra* note 8, at 1825–26.

[186] 28 U.S.C. § 1865(b)(5). It is also worth noting that this prohibition is often viewed as discriminating against racial minorities and violates the Constitution and Voting Rights Act. *See* U.S. DEP'T OF JUST., *supra* note 159, at 1-2.

[187] CAL. PENAL CODE § 893(b)(3) (Deering, Lexis Advance through the 2022 Regular Session). CAL. CODE CIV. PROC. § 203(a)(9)–(10) (Deering, Lexis Advance through the 2024 Regular and Special Session). *See* *Jury Service*, CAL. COURTS, https://www.courts.ca.gov/juryservice.htm [https://perma.cc/89WA-FAM9] (last visited May 5, 2025).

[188] CAL. CODE CIV. PROC. § 203(a)(11).

had it been committed in Florida."[189] Texas prohibits those convicted of misdemeanor thefts and felonies from serving on a jury.[190]

SFC Smith and 1LT Clark could not serve on federal juries. Because he is a felon and sex offender, SFC Smith could not serve on a jury in California, Florida, or Texas. 1LT Clark could serve on a trial jury in California after completing any parole; he could not serve on juries in Florida or Texas because of his felon status.

IV. Advice to the Accused

In light of these myriad consequences, it is incumbent upon the military justice system to ensure that an accused is informed of the existence of collateral consequences. While a military judge should ensure that an accused has been informed about the existence of collateral consequences—similar to their colloquy with the accused regarding immigration, sex offender registration, and firearm ownership[191]—the defense counsel is ultimately best positioned to advise on potential collateral consequences.[192] This advice should be memorialized in writing and entered into the record as an appellate exhibit.

Defense counsel can have candid conversations with their clients within the protections of attorney-client confidentiality.[193] A defense attorney is able to engage with the accused in a way that a trial counsel or military judge cannot. The attorney and client can speak freely about the accused's job, housing, family, and other concerns as they discuss the future that the accused may face if convicted. The natural difficulty for

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[189] MARTINEZ, *supra* note 66181, at 64 (citing FLA. STAT. §40.013, FLA. R. CIV. P. FORM 1.983).
[190] TEX. GOV'T CODE § 62.102(8) (LexisNexis, Lexis Advance through the 2023 Regular Session). *See Jury Service in Texas*, TEX. CTS., https://www.txcourts.gov/about-texas-courts/juror-information/jury-service-in-texas [https://perma.cc/BZ23-GWMH] (last visited May 5, 2025).
[191] DA PAM. 27-9, *supra* note 9, para. 2-2-9.
[192] *But see* HOSKINS, *supra* note 32, at 31, ch. 8 ("[O]ne question no one has really asked is who should bear the central responsibility for ensuring that defendants are properly informed about the range of [collateral legal consequences] they may face. It appears to be largely assumed that this responsibility falls to defense counsel. I argue, instead, that the central responsibility for providing defendants access to relevant information about [them] should fall to prosecutors.").
[193] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 1.6 (28 June 2018).

military defense counsel is that they do not practice state law; their expertise is in the UCMJ. However, there is an online database maintained by the National Reentry Resource Center—the National Inventory of Collateral Consequences of Conviction (NICCC)—that allows users to search for collateral consequences in the United States.[194] The NICCC seeks to consolidate all collateral consequences scattered throughout federal and state codes and regulations, and allow individuals to narrow their search by state, specific offenses, and specific consequences.[195]

This is an extremely helpful tool for counsel, but depending on the query, hundreds or thousands of results may populate. For example, when searching "California" and "sex offenses," 356 consequences result; when just searching "California," 1,628 result.[196] So, while defense counsel should try to gain at least a general understanding of collateral consequences based on the offenses charged and where the accused will live in order to advise their client, it would be unrealistic to ask military defense counsel to become experts on those collateral consequences for every court-martial client. Because Service members can move to any state once discharged, it would be impossible for defense counsel to gain the expertise required to fully counsel their clients on consequences they may face. However, this difficulty should not preclude providing baseline advice such as potential impacts to the right to vote, employment, public assistance, housing, child custody, driving privileges, child custody, and jury service.

A. Defense Counsel Already Advise on Three Collateral Consequences

Military defense attorneys are already required to give basic advice to their court-martial clients about three collateral consequences: immigration, sex offender registration, and firearm restrictions, as circumstances may require, given the unique facts of the case and accused. That advice is committed to writing and entered into the record as an appellate exhibit. In Army practice, this is accomplished using Defense

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[194] NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/ [https://perma.cc/QZ8J-9P3S] (last visited Aug. 29, 2025).
[195] *Id.*
[196] *Id.* (searching "Jurisdiction" for "California" and "Offense Type" for "Sex offenses" on 5 May 2025).

Counsel Assistance Program (DCAP) forms. A similar form could meet the need of advising clients about other collateral consequences.

1. Immigration Consequences

Defense counsel with clients who are aliens or naturalized citizens through military service must advise them about immigration consequences before they can plead guilty, pursuant to *Padilla v. Kentucky*.[197] In *Padilla*, the U.S. Supreme Court found that it was ineffective assistance of counsel for a defense attorney to not advise their client of immigration consequences based on his plea of guilty.[198] The lower court previously held on appeal that this did not violate "the Sixth Amendment's guarantee of effective assistance of counsel" because immigration consequences are a "'collateral' consequence of his conviction."[199] The U.S. Supreme Court reasoned that changes in the law made deportation "nearly an automatic result for a broad class of noncitizen offenders" and thus it was "'most difficult' to divorce the penalty from the conviction in the deportation context."[200]

Military defense attorneys are not required to go into the minutiae of whether there will actually be revocation or deportation post-conviction.[201] Because immigration law is a specialized practice area, counsel are only required to advise that a client may be subject to revocation and/or deportation based on their status and charged offense(s).[202] Clients are then advised to consult with an immigration law attorney.[203] This advisement is committed to writing and the form is

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[197] *E.g.,* Defense Counsel Assistance Program, U.S. Dep't of Army, Form 2.1, Advice to Clients Who Are not U.S. Citizens or Nationals or Were Granted Their Citizenship Due to Military Service (16 Sep. 2014) [hereinafter DCAP Form 2.1]; DA PAM. 27-9, *supra* note 9, para. 2-2-9 (requiring the military judge to engage in a colloquy with a non-citizen accused about whether their defense counsel "may have an adverse impact on [their] immigration status"). While *Padilla*'s holding requires an advisal on immigration consequences prior to pleading guilty, DCAP Form 2.1 and good practice require an advisal on potential adverse immigration consequences even if the charge(s) lead to a contested trial or alternative disposition.

[198] Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

[199] *Id.* at 359–60.

[200] *Id.* at 366 (citation omitted).

[201] Professional Experiences, *supra* note 167; DCAP Form 2.1, *supra* note 197.

[202] DCAP Form 2.1, *supra* note 197.

[203] *Id.*

entered into the record as an appellate exhibit after the military judge's colloquy with the accused.[204]

2. Sex Offender Registration

In *United States v. Miller*, the Court of Appeals for the Armed Forces (CAAF) affirmed that sex offender registration is a collateral consequence "that is separate and distinct from the court-martial process."[205] However, unlike the Supreme Court in *Padilla*, CAAF held that it was not ineffective assistance of counsel to fail to inform the client about sex offender registration prior to pleading guilty.[206] The court did, however, create a rule that, going forward, defense counsel would be required to advise their client of sex offender registration and to put that fact of advisement on the record at the court-martial.[207] In Army practice, this is completed using DCAP Form 1.2, which is then admitted into the record of trial as an appellate exhibit.[208]

B. Introducing a New DCAP Form

Similar to advising on immigration, sex offender registration, and firearm restrictions, defense counsel should provide general advice that the accused may face a number of collateral consequences upon conviction and that they should seek advice from a civilian attorney from the jurisdiction to which they will move after their service.[209] This advice

[204] *Id.*; DA PAM. 27-9, *supra* note 9, para. 2-2-9.
[205] United States v. Miller, 63 M.J. 452, 457 (C.A.A.F. 2006).
[206] *Id.*
[207] *Id.* at 459.
[208] Defense Counsel Assistance Program, U.S. Army, Form 1.2, Advice Concerning Requirements to Register as a Sex Offender (Oct. 2021) [hereinafter DCAP Form 1.2]; DA PAM. 27-9, *supra* note 9, para. 2-2-9.
[209] *See also Miller*, 63 M.J. at 459 ("Given the plethora of sexual offender registration laws enacted in each state, it is not necessary for trial defense counsel to become knowledgeable about the sex offender registration statutes of every state. However, we do expect trial defense counsel to be aware of the federal statute addressing mandatory reporting and registration for those who are convicted of offenses within the scope of this statute. . . . In our view, the importance of this rule springs from the unique circumstances of the military justice system. More often than not, an accused will be undergoing court-martial away from his or her state of domicile. Also, the court-martial and plea may occur without the assistance of counsel from the accused's domicile state.").

should be captured on a DCAP form, similar to DCAP Form 1.2, DCAP Form 2.1, and DCAP Form 10.[210] This document should inform the client that military defense counsel do not have specialized training on collateral consequences, and that they may face consequences based upon their offense(s) and where they will live.[211] The form should recommend that the accused consult with an attorney in the jurisdiction where they will move to learn more about consequences there. A proposed DCAP form is in Appendix A.[212]

C. Putting the Advice on the Record

Before an accused's plea of guilty is accepted, the military judge should engage in a colloquy with them to ensure they are aware that they may face collateral consequences from their conviction. This should occur at the same point where the military judge would engage with the accused about sex offender registration, immigration consequences, and firearm restrictions.[213] The DCAP form should then be entered into the record as an appellate exhibit. Proposed changes to the Army's court-martial script are in Appendix B.[214] While defense counsel are required to advise their client about the collateral consequences of immigration, sex offender registration, and firearm restrictions, courts have generally limited their ability to present evidence of or argument about those consequences to the sentencing authority at trial.[215]

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[210] DCAP Form 1.2, *supra* note 208; DCAP Form 2.1, *supra* note 197; Defense Counsel Assistance Program, U.S. Army, Form 10, Acknowledgement of Federal Firearm Prohibitions in 18 U.S.C. §922(g) (July 2025).
[211] *See Miller*, 63 M.J. at 459 (requiring counsel only to advise the accused of any charged offense that appears in Department of Defense Instruction 1325.7, Enclosure 27, *supra* note 37).
[212] *Infra* Appendix A at A-1.
[213] DA PAM. 27-9, *supra* note 9, para. 2-2-9.
[214] *Infra* Appendix B at B-1.
[215] This does not include the accused's nearly unfettered right to make an unsworn statement, in which the accused can say almost anything. *See* United States v. Talkington, 73 M.J. 212, 215–16 (C.A.A.F. 2014).

V. Collateral Consequences in Current Military Law and Policy

Military courts generally prohibit the presentation of evidence or argument pertaining to the collateral consequences an accused may face because of their conviction. In *United States v. Talkington*, CAAF affirmed that evidence of and arguments about collateral consequences were properly excluded from presentencing proceedings.[216] In *Talkington*, the accused told the panel during his unsworn statement that he would have to register as a sex offender because of his conviction, stating, "I will have to register as a sex offender for life . . . I am not very sure what sort of work I can find."[217] When the military judge instructed the panel members on the accused's unsworn statement, he told them,

> . . . as a general evidentiary matter, evidence regarding possible registration as a sex offender . . . , and the consequences thereof, would be characterized as a collateral consequences [sic], and thus inadmissible outside of the context of an unsworn statement. . . . Possible collateral consequences of the sentence, beyond those upon which you are instructed, should not be a part of your deliberations . . . .[218]

In finding that the military judge committed no error, CAAF reasoned that while an accused could say nearly anything in an unsworn statement, a military judge may provide limiting instructions to the members as to what they may consider in reaching a sentence.[219] The court held that "collateral consequences of a court-martial do not constitute R.C.M. 1001 material, and while they may be referenced in an unsworn statement . . . , they should not be considered for sentencing."[220] However, an accused may discuss loss of retirement benefits at sentencing if the person is discharged, and the military judge may instruct on proper consideration of such information.[221] The distinction here, according to CAAF, is that whether an accused loses retirement benefits is a direct result of the

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[216] United States v. Talkington, 73 M.J. 212 (C.A.A.F. 2014).
[217] *Id.* at 213.
[218] *Id.* at 214.
[219] *Id.* at 215–16 (citations omitted).
[220] *Id.* at 216 (citations omitted).
[221] Electronic Benchbook, *supra* note 4, sec. 2-5-23.

sentence imposed, not the *conviction* itself: if the accused is discharged, they will lose their retirement benefits.[222] The court reasoned that "nothing about the sentence has any impact on the requirement or duty to register as a sex offender. Sex offender registration operates independently of the sentence adjudged and remains a collateral consequence."[223]

The lower military appellate courts have followed *Talkington*'s reasoning as applied to the collateral consequence of immigration. For example, the Navy-Marine Corps Court of Criminal Appeals followed *Talkington*'s reasoning in *United States v. Quezada*.[224] In his unsworn statement, the accused told the panel that he would likely be deported because of his conviction.[225] The military judge instructed the members to disregard the information because it was a collateral consequence of the conviction.[226] Applying CAAF's reasoning in *Talkington*, the appellate court affirmed the military judge's ruling on the basis that

> there was no action the sentencing authority could take that would influence the outcome of potential deportation . . . . [I]t is the conviction itself that influences deportation. Even if the sentencing authority gave no punishment at all, it would not change the likelihood [the accused] would be deported. As a result, it is by definition a "collateral matter" that would only serve to confuse the sentencing authority about what an appropriate sentence should be . . . even if it wanted to take account of deportation.[227]

In light of *Talkington*, military judges continue to prohibit consideration of most collateral consequences by the sentencing authority.[228] This practice needs to change.

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[222] Talkington, 73 M.J. at 217.
[223] *Id.* at 216–17.
[224] United States v. Quezada, No. 201900115, 2020 CCA LEXIS 378 (N-M. Ct. Crim. App. Oct. 26, 2020).
[225] *Id.* at *15.
[226] *Id.* at *14.
[227] *Id.* at *17–18.
[228] *See, e.g.,* United States v. Wassan, No. ACM 39512, 2020 CCA LEXIS 152 (A.F. Ct. Crim. App. May 8, 2020) (prohibiting the accused from presenting documents demonstrating he would be subject to deportation and instructing members that

VI. Court-Martial Practice Must Change to Account for Collateral Consequences

Military courts miss the point when they rely on reasoning that because the sentence adjudged will not impact the collateral consequences of the conviction, they should not be considered by the sentencing authority. It is already permissible for a collateral consequence to be considered if the adjudged *sentence* triggers it.[229] However, if a collateral consequence is triggered by the conviction, it must also be considered in determining the appropriate sentence because it is material to the purposes of sentencing. It is critical that the collateral consequences of an individual's conviction be openly considered by counsel, the accused, the military judge, and panel members.[230] Consideration of these consequences will bring to light the very real—and sometimes lifelong—impacts an accused will face because of a conviction. It should be part of the sentencing process so that a holistic, just sentence is reached in each case. The sentencing authority needs to be educated on these collateral consequences so they understand the effects a conviction will have on an accused and take those into account. No sentencing authority should be forced to make life-altering decisions in a vacuum; they must be able to consider these consequences that may last a lifetime. There will be cases where there are no significant collateral consequences. However, for those

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immigration consequences were not to be considered as part of the sentence, but allowing defense counsel to include the consequence in argument).

[229] Electronic Benchbook, *supra* note 4, sec. 2-5-23.

[230] *See generally* Travis, *supra* note 12. Travis argues:

> these punishments should be brought into open view. They should be made visible as critical elements of the sentencing statutes of the state and federal governments. They should be recognized as visible players in the sentencing drama played out in courtrooms every day, with judges informing defendants that these consequences flow from a finding of guilt or plea of guilty. Finally, they should be openly included in our debates over punishment policy, incorporated in our sentencing jurisprudence, and subjected to rigorous research and evaluation.

Id, at 17. As of 27 December 2023, panel members can only be the sentencing authority for cases where a finding of guilty is returned where an offense occurred prior to 27 December 2023. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §539E(a), 135 Stat. 1541, 1701 (2021). Panels are still the sole sentencing authority for capital cases. *Id.*

cases where a former Service member will have difficulty finding housing or employment, will likely be deported or have to register as sex offenders, and face other significant burdens and hurdles—i.e., where they will experience a "new civil death"—these consequences must be factored into a sentence.

This section first discusses the jurisprudential underpinnings as to why collateral consequences must be part of sentencing deliberations. The second section provides an overview of some jurisdictions that do consider collateral consequences in their sentencing practice to demonstrate that the military justice system would be in-line with other courts in adopting this practice. Third, it draws on Supreme Court precedent to reinforce the reality that collateral consequences do have a place in the courtroom. The fourth section acknowledges that, especially in court-martial practice, there are difficulties in ascertaining an accused's collateral consequences and presenting that evidence in court to the sentencing authority. The final section proposes specific changes to Article 56, UCMJ, the Sentencing Parameters, Rule for Courts-Martial 1001, and court-martial instructions that will enable the sentencing authority to formulate a holistic, just sentence.

A. Punishment Principles, Collateral Consequences, and Holistic Justice

One of the primary arguments that collateral consequences should be considered at sentencing is that they are, in fact, punishment.[231] Legislatures often claim that these consequences are not punishment, and courts often defer to those claims.[232] However, these claims do not mean that these laws and regulations do not function as punishment, and some courts have found that sex offender registration laws are punishment.[233] It

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[231] HOSKINS, *supra* note 32, at 36; Travis, *supra* note 12.

[232] HOSKINS, *supra* note 32, at 34. *See infra* VI.D.1.

[233] *See, e.g.*, Doe v. Snyder, 834 F.3d 696 (6th Cir. 2016) ("[Michigan's] SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families . . . . It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information. We conclude that Michigan's SORA imposes

then follows that if they are punishment, they need to be factored into sentencing or else Constitutional protections afforded to the accused are violated.[234] One of these Constitutional protections include "the prohibition against double jeopardy: being prosecuted or, more important . . . , punished more than once for the same offense. . . .'"[235] It is also integral to the United States' legal system that an accused should only enter into an agreement to plead guilty if they have knowledge of the consequences of that plea, which includes the restrictions they will face as they reenter society after any confinement has been served.[236] If an accused does not have at least basic knowledge of the consequences they may face, there is an argument that the plea was not made knowingly.

Another principle of punishment is that the punishment must fit the crime, i.e., a sentence must be just.[237] Federal courts are required to consider the factors in 18 U.S.C. § 3553(a) in reaching a sentence. One factor includes providing "just punishment."[238] In *United States v. Nesbeth*, the judge determined that considering collateral consequences was required to reach a just punishment.[239] He ordered the probation officer to update the Pre-Sentence Report to include the collateral consequences the defendant would face for her drug-related offense.[240] In determining that the defendant should not serve any confinement, the judge reasoned,

> the collateral consequences Ms. Nesbeth will suffer, and is likely to suffer—principally her likely inability to pursue a teaching career and her goal of becoming a principal . . . —has compelled me to conclude that she has been sufficiently punished, and that jail is not necessary

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punishment."); Doe v. State, 167 N.H. 382, 11 A.3d 1077 (2015) (finding New Hampshire's sex offender registration statute to have a punitive effect); Starkey v. Okla. Dep't of Corrections, 2013 OK 43, 305 P.3d 1004 (finding provisions of Oklahoma's sex offender registration statute to have a punitive effect).

[234] *Id.* at 36.

[235] *Id.*

[236] *See id.* at 37 ("If [collateral consequences] count as forms of punishment, then it follows that defendants are entitled to be informed not only about the potential range of prison terms, fines, or probation they face, but also about the various other legal restrictions—on employment, housing, and so on—to which they may be subject.").

[237] *See id.*

[238] 18 U.S.C. § 3553(a)(1)–(2).

[239] United States v. Nesbeth, 188 F. Supp. 3d 179 (E.D.N.Y. 2016).

[240] *Id.* at 188.

> to render a punishment that is sufficient but not greater than necessary to meet the ends of sentencing.[241]

The judge then crafted a sentence that would impart the seriousness of the defendant's actions and require her to educate the community about the consequences of similar actions.[242] The *Nesbeth* judge used his knowledge of collateral consequences to create a just sentence for the defendant based on the additional punishment she would face because of her conviction.

The final punishment principle addressed is that of deterrence. Article 56, UCMJ, and RCM 1002 require courts-martial to consider "the need for the sentence to . . . promote adequate deterrence of misconduct."[243] Bringing collateral consequences into the open at courts-martial and making it a known part of the process can only aid in deterring Service members from committing misconduct that would impose similar consequences.[244] Many Service members may think that committing misconduct—for example, using cocaine—may be worth the risk of a reduction in grade or being sentenced to a short period of confinement, but they may not think it is worth the loss of access to housing, employment opportunities, or federal financial assistance.[245] Many Service members likely know about sex offender registration, and that likely deters some from committing sexual assault. However, it is unlikely that they know about other collateral consequences because they are obscure and undiscussed. If these consequences are made known, the military justice system will become an even more effective tool for good order and discipline.

In the interest of good order and discipline, the Non-Binding Disposition Guidance in the *Manual for Courts-Martial* requires commanders to consider "[t]he probable sentence or other consequences to the accused of a conviction . . . ."[246] These conversations with commanders are generally limited to discussions of sex offender

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[241] *Id.* at 194.
[242] *Id.* at 194–96.
[243] UCMJ art. 56(c)(1)(C)(iv) (2021); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. II, R.C.M. 1002(c)(3)(D) (2024) [hereinafter MCM].
[244] HOSKINS, *supra* note 32, at 76.
[245] *Id.* ("For many people, the threat of, say, loss of access to housing or employment may be even more frightening than the threat of a short prison term.").
[246] MCM, *supra* note 243, app. 2.1, sec. 2.1(m).

registration and immigration.[247] Military attorneys need to be aware of collateral consequences so that commanders and the Office of the Special Trial Counsel (OSTC) can meet the intent of the Non-Binding Disposition Guidance and create a more holistic view of what justice is in a particular case. Moreover, with the advent of OSTC, the military legal community has an opportunity to formally incorporate collateral consequences into its decision-making process for covered offenses.[248] This is especially relevant now that the military justice system has seen the priority of OSTC—securing Lautenberg Amendment-qualifying convictions in domestic violence cases, regardless of how serious (or minor) the underlying offense is.[249] It appears that OSTC's primary driver in these cases is whether an accused will be subject to restrictions on their Second Amendment rights, regardless of whether a firearm was used in the commission of the alleged offense.[250] If it is a driving force in their decision-making process, then it should certainly be discussed in the presentencing proceedings and used to formulate a just sentence—the same holds true for sex offender registration, immigration consequences, and all other collateral consequences.

Based on punishment principles, making all collateral consequences part of the decision-making and sentencing framework would lead to more just outcomes and would make military justice a better tool for commanders. While this may seem like a significant change for military justice, the Services would not be alone in accounting for the impacts of collateral consequences.

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[247] Professional Experiences, *supra* note 201. These conversations also include collateral consequences of the sentence, such as retirement and Department of Veterans Affairs benefits, but those collateral consequences are outside the scope of this paper. *See* Brooker et al., *supra* note 4.
[248] *See generally* U.S. Army Pub. Affs,, *Army Establishes Two New Initiatives to Combat Harmful Behaviors*, U.S. ARMY (July 14, 2022), https://www.army.mil/article/258422/army_establishes_two_new_initiatives_to_combat_harmful_behaviors[https://perma.cc/2UDX-H6G2].
[249] Professional Experiences, *supra* note 167.
[250] *Id.*

B. Military Courts Would Not Be Alone in Considering Collateral Consequences

Federal courts are split as to whether they consider collateral consequences in sentencing. While the Sixth, Seventh, Tenth, and Eleventh Circuits do not allow evidence of collateral consequences,[251] the Second and Fourth Circuits do permit such evidence.[252] Moreover, organizations like the American Bar Association (ABA) have updated their publications to consider collateral consequences in legal practice and advocate for their consideration in plea bargaining and sentencing.[253]

As discussed above, federal courts are required to consider the factors in 18 U.S.C. § 3553(a) in reaching a sentence. These factors include providing "just punishment" and to "deter[] criminal conduct."[254] The Second Circuit upheld a judge's downward departure from sentencing guidelines when he took into account that the defendant could be deported from the United States, even though he had never been to the United States before standing trial.[255] The Court of Appeals held that "[i]n determining what sentence is 'sufficient but not greater than necessary,' to serve the needs of justice . . . a district court may take into account the uncertainties presented by . . . deportation . . . ."[256] Another case out of the Second Circuit, *United States v. Nesbeth*, discussed above, demonstrates the

[251] *See* United States v. Morgan, 635 F. App'x 423 (10th Cir. 2015) (unpublished) (holding the trial judge erroneously considered the collateral consequence that the appellant would likely lose his law license); United States v. Musgrave, 761 F.3d 602 (6th Cir. 2014) (holding the district judge erroneously considered the collateral consequence that he would lose his CPA license); United States v. Stefonek, 179 F.3d 1030 (7th Cir. 1999) (holding the district judge should not have considered the appellant's service to the community as a nurse, that it was giving her a "'middle class' sentencing discount"); United States v. Kuhlman, 711 F.3d 1321 (11th Cir. 2013) (holding that it was improper to provide a "white collar" discount to appellant after committing fraud). *See generally* United States v. Nesbeth, 188 F. Supp. 3d 179 (E.D.N.Y. 2016) (discussing the other Circuits' stances on collateral consequences).

[252] *Nesbeth*, 188 F. Supp. at 179; United States v. Pauley, 511 F.3d 468 (4th Cir. 2007).

[253] *See* Chin, *supra* note 4, at 384–85 ("The [Uniform Law Commission's Uniform Collateral Consequences of Conviction Act], ABA Standards and Model Penal Code all recognize the importance of counseling clients about collateral consequences generally.").

[254] 18 U.S.C. § 3553(a)(1)–(2).

[255] United States v. Thavaraja, 740 F.3d 253, 262–63 (2d Cir. 2014).

[256] *Id.*

importance of considering collateral consequences and how it can operate in civilian courts.[257]

The Fourth Circuit affirmed a judge's sentence where he factored into his sentence the consequences that a teacher would lose his teaching certificate and state pension.[258] The Circuit Court reasoned that the judge was justified in departing downward from the sentencing guidelines by 36 months because consideration of these consequences was "consistent with . . . the need for 'just punishment' . . . and 'adequate deterrence.'"[259]

The ABA's *Criminal Justice Standards for the Defense Function* emphasizes collateral consequences numerous times.[260] Pursuant to the ABA's standard, defense counsel have "a duty to consider . . . the collateral consequences of a conviction."[261] Further, defense counsel should advise clients early in the process about collateral consequences.[262] The ABA also places the onus on defense counsel to research the consequences that will apply to their client.[263] Armed with this knowledge, defense counsel should include collateral consequences in plea negotiations and during presentencing.[264]

Military courts would be in the minority in bringing collateral consequences into the courtroom. However, in doing so, the sentencing authority would be empowered to come to more just sentences than those jurisdictions that prohibit it.

C. The U.S. Supreme Court on the Importance of (Some) Collateral Consequences

The U.S. Supreme Court recognized the importance that collateral consequences bear on a defendant's decision to plead guilty or not guilty.[265] In *Padilla v. Kentucky*, the Court reiterated its position that "'[p]reserving the client's right to remain in the United States may be more

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[257] United States v. Nesbeth, 188 F. Supp. 3d, 179 (E.D.N.Y. 2016).
[258] United States v. Pauley, 511 F.3d 468, 474–75 (4th Cir. 2007)
[259] *Id.*
[260] AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (4th ed. 2017).
[261] *Id.* standard 4-1.3(h).
[262] *Id.* standard 4-3.3(c)(viii).
[263] *Id.* standard 4-5.4.
[264] *Id.* standard 4-5.4(c).
[265] For more on the Supreme Court's rulings regarding collateral consequences as they intersect with the Constitution, see Chin, *supra* note 4, at 378.

important to the client than any potential jail sentence.'"[266] Though the Court did not extend this reasoning to other collateral consequences besides deportation, this reasoning still holds true for other collateral consequences. The ability to secure employment and housing, vote, and possess firearms may similarly be "more important . . . than any jail sentence."[267]

The Court reasoned that bringing relevant collateral consequences into the light only benefits the process.[268] Discussing collateral consequences enables the government and defense to "reach agreements that better satisfy the interests of both parties."[269] When both sides know about the collateral consequences of a particular offense, they can be creative in the plea discussion to create an offense- or sentence-based outcome that reduces the likelihood that the accused will be subject to one or more collateral consequences.[270] This can also benefit the government as an accused's knowledge of the collateral consequence "may provide . . . a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does."[271]

In narrowly scoping its holding in *Padilla*, the Court discusses the importance of collateral consequences while at the same time dismissing most of them, drawing a distinction without a difference to those who endure life-altering collateral consequences. There are benefits to the accused and the justice system in considering collateral consequences, but there are practical reasons that doing so could also create a burden on the system.

D. The Arguments Against Incorporating Collateral Consequences into Practice

Most jurisdictions do not consider collateral consequences during sentencing.[272] A primary reason is that the Supreme Court has repeatedly

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[266] Padilla v. Kentucky, 559 U.S. 356, 368 (quoting INS v. St. Cyr. 533 U.S. 289, 322 (2001)).
[267] *Id.*
[268] *Id.* at 373.
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *See supra* Section VI.B.

held that the collateral consequences imposed by law and regulation are not punishment.[273] Military jurisprudence dictates that collateral consequences are "collateral administrative effects."[274] In addition to the prevailing jurisprudence that collateral consequences are not punishment, there are concerns that incorporating collateral consequences could also create inefficiencies in the legal system.

1. Collateral Consequences Are Not Punishment

The civil death experienced in early American history was considered punishment under the law; however, the "new civil death" is not.[275] Federal and state legislatures have offered non-punitive justifications for their imposed collateral consequences: "sex offender registration laws . . . protect the community; voter disenfranchisement provisions . . . protect the integrity of the franchise; . . . bars to government benefits . . . prevent fraud and allocate scarce resources to the most deserving."[276] It is then up to the courts to decide whether these laws are, in fact, regulatory or criminal punishment, and courts generally defer to those claims.[277] The Supreme Court has made clear that, absent a legislative intent to punish, individual collateral consequences are not punishment.[278] The argument that collateral consequences are not punishment is based on the theory that these consequences "purport to control and restrain people not for what they have done, but for what they might do."[279] Even though these consequences may have harsh, enduring impacts, because they are not *intended* to punish, they are not punishment. Therefore, they have no place in the sentencing process.

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[273] *See generally* Chin, *supra* note 8, 1807–15 (providing an overview of collateral consequences jurisprudence).
[274] United States v. Quesinberry, 31 C.M.R. 195, 198 (C.M.A. 1962).
[275] Chin, *supra* note 8, at 1793–94.
[276] Susan G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 311 (2015) (citations omitted). *See* HOSKINS, *supra* note 32, at 165–66, 170–71.
[277] Mayson, *supra* note 276, at 311–12; HOSKINS, *supra* note 32, at 34.
[278] *See* Chin, *supra* note 8, at 1825; Mayson, *supra* note 276, at 303, 313 n.65 (providing examples of cases where the Court held collateral consequences were not punishment). The Supreme Court also ruled that Alaska's sex offender registration law was not punishment. Smith v. Doe, 538 U.S. 84 (2003).
[279] Mayson, *supra* note 276, at 303.

Some scholars attack this reasoning, arguing that their effect is to punish those who have been convicted, so they are properly considered punishment.[280] While an individual consequence may not properly be considered punishment (e.g., suspension of a driver's license for a drug conviction), the fact that the regulatory regime of collateral consequences creates a "lesser" status for convicted persons on the whole makes collateral consequences punishment.[281] Even Chief Justice Earl Warren noted, "Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities."[282]

Military courts generally exclude evidence and argument about collateral consequences of the conviction from presentencing, as illustrated by *United States v. Talkington* and *United States v. Quezada*.[283] The reasoning behind these cases is rooted in *United States v. Quesinberry*, where the Court of Military Appeals determined that collateral consequences have no place in sentencing.[284] In holding that "the waters of the military sentencing process should [not] be so muddied," the court reasoned that courts-martial should "concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration."[285] While the court did not specifically say collateral consequences were not punishment, it did note that such consideration would create difficulties for the sentencing process. Regardless of whether collateral consequences are properly considered punishment or not, there are other concerns with incorporating their existence into justice practice.

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[280] *See, e.g.*, Travis, *supra* note 12; Chin, *supra* note 8, at 1792.
[281] Chin, *supra* note 8, at 1826 ("Whether or not any individual collateral consequence is punishment, the overall susceptibility to collateral consequences is punishment. This is the case at least when, as now, there is a vigorous, existing network of collateral consequences.").
[282] *Id.* at 1825. (quoting Chief Justice Earl Warren's dissent in Parker v. Ellis, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting) (emphasis added), *overruled by* Carafas v. LaVallee, 391 U.S. 234 (1968)).
[283] United States v. Talkington, 73 M.J. 212 (2014); United States v. Quezada, No. 201900115, 2020 CCA LEXIS 378 (N-M. Ct. Crim. App. Oct. 26, 2020).
[284] United States v. Quesinberry, 31 C.M.R. 195, 198 (C.M.A. 1962).
[285] *Id.*

2. The Burden on Defense Counsel

One of the primary difficulties in implementing these changes is the burden it could place on military defense attorneys.[286] Because they practice within the UCMJ and are unable to gain expertise in any one state's laws and regulations, it would be impossible to advise a client in any detail what collateral consequence they will face in any of the fifty states they could move to. For example, Florida alone has 48,229 collateral consequences, and that is excluding federal collateral consequences.[287] The military justice system could not support placing a burden on military defense counsel that would require them to become well-versed in the laws of the state that their client will likely move to post-confinement.[288]

However, the proposed changes to the system would not place such a high burden on defense counsel. As discussed above, defense counsel should be required to inform their client in writing that there may be consequences to their conviction that are controlled by federal and/or state law and provide a general overview based on basic defense counsel training. Counsel would not be required to research every jurisdiction to which the accused is considering moving. Much like advice relating to sex offender registration and immigration, the client will be advised to seek

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[286] *See* Padilla v. Kentucky, 559 U.S. 356, 375–78 (2010) (Alito, J., concurring) ("[T]he collateral consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience."); HOSKINS, *supra* note 32, at 39–40. Zachary Hoskins notes;

> In particular, courts have pointed to the difficulties that would arise in attempting to inform defendants not only of the range of punishments they might face but also the full range of [collateral consequences] that might follow from a guilty plea. . . . "It is made even more complicated by the fact that collateral consequences are not centralized, but rather are scattered throughout federal and state statutes, state and local regulatory codes, local rules, and local policies."

Id. (quoting Michael Pinard, An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals, 86 B.U. L. REV. 623, 646 (2006)).

[287] Carlos J. Martinez, Miami-Dade Pub. Def., The Consequences Aren't Minor (unpublished PowerPoint presentation) (on file with author).

[288] Professional Experiences, *supra* note 201.

civilian counsel who has expertise in the jurisdiction to which they will move.

3. It Could Make Military Justice Less Efficient

Critics of treating collateral consequences as punishment argue that it "could lead scores of defendants to appeal their convictions on grounds that they pleaded guilty without being sufficiently informed of the consequences of the plea."[289] This would then further burden the legal system. In *Padilla*, the Supreme Court addressed "the importance of protecting the finality of convictions obtained through guilty pleas."[290] The Court was unpersuaded that it would open a floodgate of appellate issues for guilty pleas based on ineffective assistance of counsel claims.[291] In part, the Court reasoned that the very nature of guilty pleas limits the desire to have a conviction set aside because, in doing so, the accused would lose the benefit of their bargain.[292] Three years later, in *Chaidez v. United States*, the Supreme Court ruled that its holding in *Padilla* could not be applied retroactively, i.e., appellants could not seek to have their guilty pleas set aside based on ineffective assistance of counsel. *Chaidez* demonstrates that creating a requirement for defense counsel to advise on collateral consequences does not need to give rise to innumerable appeals. The system can continue to operate efficiently with an added requirement to advise an accused about collateral consequences.

Another concern is that consideration of collateral consequences may make the court-martial system less efficient because fewer accused would be willing to plead guilty.[293] Fewer guilty pleas would result in more contested cases, which inherently take up more of the parties' time and energy. However, the reverse could result. It could lead to more agreements to plead guilty to lesser offenses in order to avoid a particular collateral consequence.[294] The Supreme Court utilized this reasoning in its

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[289] HOSKINS, *supra* note 32, at 40.
[290] Padilla v. Kentucky, 559 U.S. 356, 371 (2010).
[291] *Id.*
[292] *Id.* at 372–73.
[293] Professional Experiences, *supra* note 167. For example, many accused facing courts-martial for sex offenses are unwilling to plead guilty, at least in part, because they would have to register as a sex offender. *Id.*
[294] Chin, *supra* note 5, at 386.

holding in *Padilla v. Kentucky*.[295] The Court reasoned that when counsel and the accused understand the potential consequences facing the accused post-conviction, two things may occur. First, the government and defense are better positioned to reach a plea agreement that would secure a conviction for the government and perhaps reduce the chances that the accused will experience the collateral consequence(s) at stake.[296] Second, "the threat of [the collateral consequence] may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does."[297] This has been borne out in military justice as several practitioners and accused have reached plea agreements where an accused pleads guilty to a non-sex offense in exchange for the sex offense being dismissed.[298]

Ultimately, every case will have different facts and incentives, but the military justice system has already demonstrated it can overcome these efficiency concerns. Bringing consequences into the conversation will make the system more just, and that is worth the additional effort to reform military justice practice.

E. Proposed Changes to the *Manual for Courts-Martial* and *Military Judges' Benchbook*

Court-martial sentencing practice must change. It must account for the inequities in our society—that convicted persons, namely, felons, do experience a "civil death" that may last a lifetime, and that racial minorities, who are more likely to be court-martialed, are more likely to experience this civil death than their White counterparts.[299] To accomplish this reform, Congress must amend Article 56, UCMJ, the Military Sentencing Parameters and Criteria Board must update the Sentencing

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[295] Padilla v. Kentucky, 559 U.S. 356, 373 (2010).
[296] *Id.*
[297] *Id.*
[298] Professional Experiences, *supra* note 201. Another common way of avoiding sex offender registration ramifications is pleading guilty to a non-penetrative sex offense at a summary court-martial and waiving the right to a board for an other than honorable discharge, known as the "Summary OTH" deal. *Id.*
[299] *See supra* note 20 and accompanying text.

Parameters, the President must amend RCM 1001, and the trial judiciary must update its *Benchbook* instructions.[300]

1. Article 56, UCMJ, and Sentencing Parameters

With the implementation of the sentencing parameters on 27 December 2023,[301] the court-martial system has already demonstrated that it is very capable of dramatic change that impacts sentencing practice. Article 56, UCMJ, informs court-martial parties what evidence may be considered in sentencing an accused. The purpose of sentencing is to "impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces."[302] In making its determination, four of the factors the sentencing authority can consider are providing "just punishment," deterring other misconduct, protecting others from further crimes by the accused, and rehabilitating the accused.[303] As of 27 December 2023, the military judge and panel members must also adhere to the newly established sentencing parameters.[304] While the updated Article 56 does permit consideration of collateral consequences of certain *sentences* that may impact retirement, it still does not account for collateral consequences of a *conviction*.[305] Currently, the Military Sentencing Parameters and Criteria Board is not developing sentencing guidelines that consider collateral consequences of a conviction.[306] Article 56 and the sentencing parameters must be updated to explicitly include the consideration of collateral consequences of convictions because of the significant impact they can have on a person

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[300] *See also* Altimas, *supra* note 35 (arguing that Article 56, UCMJ, RCM 1001, and *Benchbook* Instruction 2-5-23 should be amended to allow for presentation of sex offender registration evidence).
[301] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §539E(c), 135 Stat. 1541, 1701 (2021); Manual for Courts-Martial, preface (2023 ed.).
[302] UCMJ art. 56(c)(1) (2021).
[303] *Id.* art. 56(c)(1)(C)(iii), (iv), (v), (vi). Sex offender registration, firearms prohibitions, and employment restrictions would serve to protect others from further crimes committed by the accused.
[304] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §539E(c), 135 Stat. 1541, 1701 (2021). The sentencing parameters will not be considered in capital cases. *Id.* §539E(c)(5).
[305] *Id.* § 539E(e)(3).
[306] UCMJ art. 56 (2021); Manual for Courts-Martial app. 12B, app. 12D (2024 ed.).

post-conviction. Because the collateral consequences of a conviction can often be harsher than a period of confinement, it will benefit the sentencing authority, the accused, and justice if all parties consider that there may be a "sentence" of sorts imposed after an accused serves any confinement. Proposed changes to Article 56(c) are in Appendix C.

2. Rule for Courts-Martial 1001

Rule for Courts-Martial 1001(d) allows the defense to present matters in mitigation during presentencing.[307] Mitigation evidence "is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency."[308] The Rule does not expressly allow evidence of collateral consequences to be admitted as mitigation evidence, and, as discussed above, military courts have held that collateral consequences do not qualify as mitigation evidence. However, evidence of collateral consequences fits within the definition of "mitigation" in Rule for Courts-Martial 1001(c)(2)(C), which is "any matter that may lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation of clemency."[309] Rule for Courts-Martial 1001(d) must be amended to specifically permit consideration of these consequences. The rule currently provides that mitigation evidence includes certain qualities of the accused (e.g., "particular acts of good conduct or bravery . . . or [the accused's record of] efficiency, fidelity, subordination, temperance, courage . . . .").[310] This is not enough. It must also state that evidence of relevant collateral consequences may be considered because it could make the sentence less harsh. Amending RCM 1001(d) will enable the military judge to properly reach a just sentence or provide more holistic instructions to the panel.[311]

When instructing the members on what they may consider in crafting a sentence, the military judge tells them they may consider past circumstances of the accused, such as family and financial difficulties experienced by the accused, and the accused's previous education.[312]

[307] MCM, *supra* note 243, R.C.M. 1001(d)(1).
[308] *Id.* R.C.M. 1001(d)(1)(B).
[309] MCM, *supra* note 243, R.C.M. 1001(c)(2)(C).
[310] *Id.*
[311] *See* Altimas, *supra* note 35 (arguing that sex offender registration is evidence in mitigation).
[312] *See* DA PAM. 27-9, *supra* note 9, para. 2-5-23.

However, they are not permitted to consider similar future circumstances that an accused will undoubtedly face because of his conviction.[313] This is evidence in mitigation, and the sentencing authority should be permitted to consider it. Proposed changes to RCM 1001 are in Appendix D.[314]

3. Addition to Benchbook *Instructions 2-5-23*

If collateral consequences are raised during presentencing, then the military judge should instruct the members that they may consider those consequences. The concurrence in *Talkington* provides a good starting point for what that instruction should look like. In his concurrence, Chief Judge Baker provides a sample instruction on the consequence of sex offender registration.[315] The instruction informs the panel of the applicable law in general terms, that the details of the collateral consequence may differ depending on where the accused will live, that registration is not part of the sentence, and that the members may determine how much weight to give to the reference to the registration.[316] If the law and Rules for Courts-Martial were to change, Chief Judge Baker's instruction could go even further. In addition to the content in his sample instruction, it should also explicitly state that the collateral consequence raised by the accused may factor into their sentencing determination. This will enable the sentencing authority to account for the consequences that the accused will face as a result of their conviction. A proposed update to *Benchbook* Instruction 2-5-23 is in Appendix E.

VII. Putting Collateral Consequences into Practice

In a world where Congress, the President, and the judiciary implemented the proposed changes, SFC Smith and 1LT Clark would be able to present evidence of the lasting impacts their convictions would have. Mechanically, this could easily be put into practice. In a guilty plea,

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[313] As discussed above, some courts do not permit consideration of adverse consequences based on educational achievements, known as the "white collar discount." *See supra* note 251 and sources cited.
[314] *Infra* Appendix D at D-1.
[315] United States v. Talkington, 73 M.J. 212, 219 (Baker, J., concurring).
[316] *Id.*

the parties could agree to put relevant collateral consequence(s) in the stipulation of fact. If they cannot agree upon this insertion, defense counsel would motion the court to take judicial notice of the law or regulation that will impose the consequence to the accused pursuant to Military Rule of Evidence (MRE) 202(a).[317] In reaching a decision on whether to take judicial notice and to allow evidence of a collateral consequence, the military judge would need to engage in an MRE 403 balancing test to determine whether evidence is admissible.[318] The MRE 403 balancing test requires the judge to determine if the evidence's "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence."[319]

If the probative value of the impact is low compared to any confusion that may be caused, then the evidence would not come in. This confusion could take form in uncertainty as to where the accused will reside after serving the military sentence, which profession would be pursued, and whether the way the law was written is too convoluted to piece together. Accordingly, to get over the MRE 403 hurdle, an accused must be able to present concrete evidence of where they will live and which consequence(s) will impact them, as they have no control over the way a law is written.

In *United States v. Rodriguez*, the judge denied the accused's attempts to present evidence of sex offender registration, but the defense counsel went through the steps required to present the evidence to the factfinder.[320] The accused moved the military judge to take judicial notice of the sex offender law in Texas under which he would have to register.[321] He also submitted a memorandum stating he would have to register as a sex offender for fifteen years.[322] The defense asked the judge to give an instruction on sex offender registration that was consistent with the instruction proposed by Chief Judge Baker in the *Talkington* concurring opinion.[323] Though the judge denied the defense's efforts, the counsel

[317] MCM, *supra* note 243, M.R.E. 202(a).
[318] *Id.* M.R.E. 403.
[319] *Id.*
[320] United States v. Rodriguez, No. ACM 38519 (reh), 2019 CCA LEXIS 35 *28 (A.F. Ct. Crim. App. Jan. 30, 2019).
[321] *Id.*
[322] *Id.* at *30.
[323] *Id.*

showed that, if the law were to change, presenting this evidence could be seamlessly accomplished.

For example, in SFC Smith's and 1LT Clark's vignettes, their collateral consequences would be long-lasting and significant, and therefore highly probative in crafting a just sentence. In SFC Smith's case, it would be highly probative that he would have to register as a sex offender, may never vote again, and would find it extremely difficult to find employment and a place to live. In 1LT Clark's case, it would be highly probative that he could be ineligible for housing assistance, SNAP and TANF, and would face difficulty finding employment. However, if there is no concrete evidence of where they would reside or what profession they would seek, that would make the probative value of consequences such as voting rights or employment restrictions lower. This would work against them in the MRE 403 balancing test. Evidence of collateral consequences can be probative and easily presented to the sentencing authority; the military justice system needs to acknowledge these facts and enable these consequences to be considered during presentencing.

VIII. Conclusion

Court-martial convictions can have lifelong, life-altering consequences, and none of them can be openly considered by the sentencing authority. In fact, military judges instruct panel members not to consider those consequences in reaching a sentence. This prevents the sentencing authority from discharging its duty: to produce a just punishment. This is especially true in cases where it is all but certain that the accused will become another starving, homeless Veteran because they cannot find a job or qualify for government financial assistance, or where they face restrictions on where they can live, leaving them with nowhere to go. The sentencing authority is allowed to consider some evidence in mitigation about the accused's past and present, but is prohibited from considering how their past and present will alter their future once they reenter civilian society. They are prevented from considering the civil death sentence that so many accused will face because of their offenses.

Some may believe that these collateral consequences are warranted and have little sympathy for an accused. The point of this article is not to argue that collateral consequences need to go away; the point is to

demonstrate that if the military justice system is truly in the pursuit of justice and good order and discipline, then the system has failed, and will continue to fail until these consequences are brought into the discussion. Commanders should be discussing these consequences with their legal advisor, OSTC should discuss more than Lautenberg or sex offender consequences with their leaders, defense attorneys should be discussing these consequences with their clients, and the defense attorney and accused should be discussing these consequences with the sentencing authority. Only once everyone can consider the whole picture will the command, accused, and sentencing authority truly be able to come to a knowing and just outcome for this nation's Service members. Only then can military justice truly be achieved.

Appendix A[325]

(DCAP Form __ ([DATE]))

Advice to Clients on Collateral Consequences of a Conviction

Members of the Trial Defense Service do not have training on the collateral consequences that may be imposed by states and the Federal Government. However, based on our discussions, it appears that you have been charged with an offense or offenses that may have an effect on your ability to find employment, secure public housing or public assistance, vote, drive, maintain custody of your children, serve on a jury, or exercise other civil rights, if you plead guilty or are found guilty.

We are unable to predict if states or the Federal Government will or will not take action adverse to you as described above, but you are advised that is a very real possibility. Each state has different laws and regulations concerning what convicted persons can and cannot do, based upon the type of offense the person committed.

If you have more detailed or specific questions, you are encouraged to consult with an attorney who practices in the jurisdiction you wish to move to after your military service is complete.

________________________	________________________
Printed name of Defense Counsel	Signature of Defense Counsel
________________________	________________________
Printed name of Accused	Signature of Accused
________________________	
Date	

Appellate Exhibit ____

[325] This proposed form is modeled after DCAP Form 1.2, *supra* note 197.

Appendix B[326]

Proposed Change to *Benchbook* Instruction 2-2-9

NOTE: Collateral Consequence: Sex Offender Registration. If the accused pled guilty to: (1) an offense requiring sex offender registration pursuant to DoD Instruction 1325.07, (2) an offense listed in 34 U.S.C. §20911, and/or (3) an offense similar to an offense listed in DoD Instruction 1325.07 or 34 U.S.C. 20911, then the judge must ask the following questions. If not required, skip to the next NOTE.

MJ : Defense Counsel, did you advise the accused of the sex offender reporting and registration requirements (possibly) resulting from a finding of guilty in accordance with the accused's guilty plea?
DC: (Responds.)
MJ : Did you document your discussion on this issue with the accused?
DC: (Responds.)
MJ : Please have that document marked as the next appellate exhibit.
DC: (Responds.)
MJ : __________, I have Appellate Exhibit __. Did you sign this document?
ACC: (Responds.)
MJ : Did you read this document thoroughly before you signed it?
ACC: (Responds.)
MJ : Have you discussed this issue with your defense counsel?
ACC: (Responds.)
MJ : Do you understand your guilty plea carries with it (possible) sex offender reporting and registration requirements?
ACC: (Responds.)

NOTE: In all cases, continue below.

MJ : __________, are you a citizen of the United States?
ACC: (Responds.)

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326 Electronic Benchbook, *supra* note 9, para. 2-2-9 (proposed additional language is underlined).

NOTE: Collateral Consequence: Citizenship. The judge should ask the following questions if the accused is not a citizen or there is a question as to the permanence of the accused's citizenship status. See Padilla v. Kentucky, 559 US 356 (2010), US v. Denedo, 556 US 904 (2009). If not required, skip to the next NOTE.

MJ : Defense Counsel, did you advise the accused of the (possible) adverse impact on the accused's immigration, naturalization, and/or citizenship status as a result of a conviction for the offense(s) to which the accused pled guilty?
DC: (Responds.)
MJ : Did you document your discussion on this issue with the accused?
DC: (Responds.)
MJ : Please have that document marked as the next appellate exhibit.
DC: (Responds.)
MJ : __________, I have Appellate Exhibit __. Did you sign this document?
ACC: (Responds.)
MJ : Did you read this document thoroughly before you signed it?
ACC: (Responds.)
MJ : __________, do you understand that a conviction for the offense(s) to which you have pled guilty may have an adverse impact on your immigration, naturalization, and/or citizenship status?
ACC: (Responds.)
MJ : Have you discussed this with your defense counsel?
ACC: (Responds.)
MJ : Do you understand your guilty plea carries with it a risk of deportation, removal, exclusion from admission to the United States, or denial of naturalization and/or citizenship, pursuant to the laws of the United States?
ACC: (Responds.)

NOTE: Collateral Consequence: Firearms Possession. If the accused pled guilty to an offense that may criminalize firearms possession, the judge may ask the following questions. See, 18 USC 922(g). If not applicable, skip to the next NOTE.

MJ : Defense Counsel, did you advise the accused of the (possible) adverse impact on the accused's ability to legally own or possess a firearm as a result of a conviction for the offense(s) to which the accused pled guilty?

DC: (Responds.)

MJ : Did you document your discussion on this issue with the accused?

DC: (Responds.)

MJ : Please have that document marked as the next appellate exhibit.

DC: (Responds.)

MJ : __________, I have Appellate Exhibit __. Did you sign this document?

ACC: (Responds.)

MJ : Did you read this document thoroughly before you signed it?

ACC: (Responds.)

MJ : Have you discussed this issue with your defense counsel?

ACC: (Responds.)

MJ : Do you understand that a conviction for the offense(s) to which you have pled guilty (will) (may) adversely impact your ability to legally own or possess a firearm?

ACC: (Responds.)

MJ: Do you understand that a conviction for the offense(s) to which you have pled guilty may have (other) adverse collateral consequences under Federal and state law and regulations?

ACC: (Responds)

MJ: Defense Counsel, did you document your discussion on this issue with your client?

DC: (Responds.)

MJ: Please have that document marked as the next appellate exhibit.

DC: (Responds.)

Appendix C[327]

Proposed Changes to Article 56. Sentencing

(c) IMPOSITION OF SENTENCE.—

(1) IN GENERAL.—In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—

(A) the nature and circumstances of the offense and, the history and characteristics of the accused;

(B) the impact of the offense on—

(i) the financial, social, psychological, or medical wellbeing of any victim of the offense; and

(ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense;

(C) the need for the sentence, after consideration of any collateral consequences of the conviction —

(i) to reflect the seriousness of the offense;

(ii) to promote respect for the law;

(iii) to provide just punishment for the offense;

(iv) to promote adequate deterrence of misconduct;

(v) to protect others from further crimes by the accused;

(vi) to rehabilitate the accused; and

(vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;

(D) the sentences available under this chapter.

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[327] UCMJ art. 56(c) (2021) (proposed additional language is underlined). This paper does not address the collateral consequences of sentencing (e.g., retirement and Veterans Affairs benefits), so suggested changes to the law and rules are not included.

Appendix D[328]

Proposed Changes to RCM 1001

Rule 1001. Presentencing Procedure

(d) Matter to be presented by the defense.

(1) In general. The defense may present matters in rebuttal of any material presented by the prosecution and the crime victim, if any, and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.

(A) Matter in extenuation. Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) Matter in mitigation. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, collateral consequences that the accused will encounter as a result of the conviction, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

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[328] MCM, *supra* note 243, R.C.M. 1001(d) (proposed additional language is underlined).

Appendix E[329]

Proposed *Benchbook* Presentencing Instruction 2-5-23

MJ: Under [DoD Instructions] [Federal law] [state law/regulation], when convicted of certain offenses, including the offenses here, the accused [must register as a sex offender with the appropriate authorities in the jurisdiction in which he resides, works, or goes to school] [will be prohibited from receiving (food stamps) (public financial assistance) (public housing assistance)] [will be prohibited from possessing a firearm] [will have his license suspended] [may face deportation] [will be prohibited from voting] [may lose custody of his children].

[Sex offender registration is required in all fifty states; however, sex offense registration requirements may differ between jurisdictions. As a result, the registration requirements and the consequences of doing so are not necessarily predictable.]

[Eligibility for (food stamps) (public financial assistance) (public housing assistance)] [Eligibility to possess a firearm [Eligibility to vote] [Eligibility to drive] [Professional licensing] [Child custody] is determined by Federal law and the laws and regulations of each state. As a result, it can be difficult to determine how the accused will in fact be impacted based on where he moves.

[Sex offender registration] [Ineligibility for (food stamps) (public financial assistance) (public housing assistance)] [The prohibition on possessing a firearm] [The loss of driving privileges] [Deportation] [Loss of voting rights] [Loss of professional licensing] [An impact to child custody] is a consequence of conviction; however, it is not a sentence adjudged at court-martial.

The consideration and weight you give the reference in Appellant's unsworn statement to [(state collateral consequence(s))] is up to you and in your discretion. It is your duty to determine the criminal sentence to adjudge in this case, and this includes considering evidence of the collateral consequences of the accused's conviction.

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[329] This instruction is a modification of Chief Judge Baker's sample instruction in *United States v. Talkington*, 73 M.J. 212, 219 (2014).

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