

Collateral Consequences of Court-Martial Convictions and the Need to Reform Military Sentencing Practice

MAJ Emma Fowler

These views do not represent the U.S. Army Trial Defense Service, U.S. Army, or Department of War.

Agenda

- The Evolution of Collateral Consequences in U.S. History
- The “Invisible Punishment” of the Military Accused
- The Current State of Military Law
- Punishment Principles Require Consideration of Collateral Consequences
- Civilian Jurisdictions Incorporate Collateral Consequences
- The Arguments Against Incorporating Collateral Consequences
- Proposed Changes to the *Manual for Courts-Martial* and *Military Judges’ Benchbook*
- Incorporating Collateral Consequences into Military Sentencing Acknowledges Reality
- Advising the Accused and Command
- How It Would Work at Trial
- Key Takeaways
- Conclusion



The Evolution of Collateral Consequences in U.S. History

- The “Civil Death” in Early America for Felons
 - Loss of property and property rights
 - Disabled from entering contracts
 - Barred from numerous jobs and benefits
- Mid-20th Century Reform
 - Federal and state governments enable convicted persons to be restored to full status
- 1980s-90s and the War on Drugs
 - Conviction numbers increase
 - Laws and rules implementing collateral consequences increase
 - Public housing, welfare, driving privileges, parental rights, deportation
 - The “new civil death” and “internal exile” emerge



The “Invisible Punishment” of the Military Accused

- Sex Offender Registration
- Deportation
- Voting Rights
- Employment
- Public Assistance
- Housing
- Firearm Possession Prohibition
- Child Custody
- Driving Privileges
- Jury Service

Punishments are “invisible” in that the laws and rules “impact largely beyond the public view.”

“Punishment for the original offense is no longer enough; one’s debt to society is never paid.”

– Scholar Jeremy Travis

The Current State of Military Law

- Loss of retirement benefits are relevant; other collateral consequences of a conviction are not.
- *United States v. Quesinberry*, 31 C.M.R. 195 (C.M.A. 1962)
 - Courts 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.”
- *United States v. Talkington*, 73 M.J. 212 (C.A.A.F. 2014)
 - Sex offender registration consideration at sentencing
 - Held: “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.”
- *United States v. Quezada*, No. 201900115, 2020 CCA LEXIS 378 (N-M. Ct. Crim. App. Oct. 26, 2020).
 - Immigration consequences consideration at sentencing
 - Held: “Even if the sentencing authority gave no punishment at all, it would not change the likelihood [the accused] would be deported.... [It] would only serve to confuse the sentencing authority about what an appropriate sentence should be...even if it wanted to take account of deportation.”
- Jurisprudential reasoning is missing the point; sentences are being adjudged in a vacuum intentionally disconnected from reality

Punishment Principles Require Consideration of Collateral Consequences

- Prohibition against double jeopardy: being punished more than once (U.S. CONST. amend V.)
- Punishments must be just (18 U.S.C. § 3553(a))
- Deterrence through knowledge of collateral consequences
 - Article 56, UCMJ
 - R.C.M. 1002

Civilian Jurisdictions Incorporate Collateral Consequences

- Second, Fourth Circuits do
 - *United States v. Thavaraja*, 740 F.3d 253 (2d Cir. 2014): risk of deportation can be considered
 - *United States v. Pauley*, 511 F.3d 468 (4th Cir. 2007): loss of teaching certificate can be considered
 - *United States v. Nesbeth*, 188 F. Supp. 3d 179 (E.D.N.Y. 2016): Pre-Sentence Report ordered to include collateral consequences of drug offenses
 - Reasoning: “sufficient but not greater than necessary” (*Nesbeth*) & “just punishment,” “adequate deterrence” (*Pauley*)
- But, Sixth, Seventh, Tenth, Eleventh Circuits do not
 - E.g., Error to consider loss of law license (*U.S. v. Morgan*, 635 F. App’x 423 (10th Cir. 2015))
- American Bar Association
 - Advocates for including collateral consequences as a sentencing factor. Standard 19-1.2(a)(v), *ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (2004).

The Arguments Against Collateral Consequences

- Collateral consequences are not punishment in SCOTUS jurisprudence
- Legislatures offer “non-punitive” justifications and courts defer to stated legislative intent
 - Sex offender registration: Protection of the community
 - Disenfranchisement: Protection of the integrity of the voting system
 - Loss of benefits: prevent fraud
- Increased burden on defense counsel
- Creates potential inefficiencies in military justice

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

- Article 56, UCMJ
- Sentencing Parameters
- R.C.M. 1001
 - Evidence in mitigation: “any matter that may lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation of clemency.” R.C.M. 1001(c)(2)(C).
- R.C.M. 1002
 - Add collateral consequences to sentencing factors
- *The Military Judges' Benchbook*
 - Chief Judge Baker's concurrence in *U.S. v. Talkington*

Advising the Accused and Command

Defense Counsel Advice

- Defense counsel should provide generalized advice on the existence of collateral consequences
- Army Defense Counsel are already required to provide general advice on sex offender registration (*U.S. v. Miller*), immigration (*U.S. v. Padilla*), and firearm restrictions using DCAP Forms 2.1, 1.2, 10

Government Considerations

- Appendix 2.1—Non-Binding Disposition Guidance requires decisionmakers to consider “[t]he probable sentence or other consequences to the accused of a finding of guilty.” Sec. 2.1g.
- Special Trial Counsel (OSTC) already consider and emphasize collateral consequences in disposition decisions and negotiations

How It Would Work at Trial

- Discussion of significant collateral consequences between parties
- Stipulation of fact of collateral consequences if parties can agree
- Defense counsel motion the court
 - Judicial notice of law or regulation
 - Evidence tailoring law to the accused
 - Subject to MRE 403 balancing
- Military Judge provides updated instruction to the panel
- *United States v. Rodriguez*, No. ACM 38519 (reh), 2019 CCA LEXIS 35 (A.F. Ct. Crim. App. Jan. 30, 2019) as a template

Key Takeaways

- RCM 1002(c): “...a court-martial shall impose punishment that is sufficient, *but not greater than necessary*, to promote justice and to maintain good order and discipline...” (emphasis added)
- Collateral consequences are often long-term or life-long punishments
- Current jurisprudence requires the sentencing authority to turn a blind eye to the “new civil death” awaiting our Service members in many cases
- Consequences must be relevant and tailored to the Accused

Conclusion

- Current sentencing practice allows consideration of an accused's past and present, but is prohibited from considering how their past and present will alter their future once they reenter civilian society.
- Only once everyone can consider the whole picture will the command, OSTC, 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.



Questions

“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 because of the felonies, you can’t get an apartment because of the felonies, and it goes around and around.”