

**THE MODERN-DAY SCARLET LETTER: CHALLENGING THE
APPLICATION OF MANDATORY SEX OFFENDER
REGISTRATION AND ITS COLLATERAL DESIGNATION ON
MEMBERS OF THE ARMED FORCES**

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I. Introduction

“Guilty.” The only word that you hear over the racing of your heart. The only word that your twenty-year-old brain can process. Behind you, your mother is crying. To your right, your defense counsel is in disbelief. In your lap, your hands are shaking. You half listen to your attorney explain what sentencing is and what she plans to present on your behalf. She seems confident that she can convince the panel members to sentence you to only a brief period of confinement, despite the maximum penalty of thirty years.¹ “A brief period? In jail?” you wonder. *Any* period feels too long. It was a drunken night, and you should have known better. You should have known she was also too drunk. You should have been better. You will be better in the future—if only you have the chance.

In your frantic attempt to grasp what is happening, you remember the ten-page handout that outlined requirements for sex offender registry that

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¹ The maximum punishment for a penetrative sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), includes thirty years confinement and a dismissal or dishonorable discharge, depending on the rank of the accused. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 60d(1)–(2) (2019) [hereinafter MCM].

your attorney mentioned months ago.² She told you that a conviction for violating Article 120, Uniform Code of Military Justice (UCMJ), would require you to register as a sex offender.³ While she told you that she cannot advise you on each individual state's requirements, you remember her explaining that because the offense with which you were charged includes penetration, conviction would most likely make you a Tier III sex offender—for life.⁴ During sentencing, the panel members will be able to consider your whole life, your family support system, your work performance, and your character. Yet the panel will hear next to nothing about your *lifetime* sex offender registration because it is considered “collateral” to your conviction. You guess “collateral” means that it is not important enough for the panel members to know and consider in determining your sentence. How is that fact not important? It is your life, your future.

Twelve months pass. Your future after confinement leads you back to your hometown. You live with your parents because no landlord will rent to you. You cannot find a job because no company will hire you. You complete your mandatory offender registration with the local police department and are warned that failure to update your information every three months will land you back in jail for longer than your original sentence.⁵ Falling asleep is difficult; staying asleep is impossible. You are restless at night worried that you will never marry, never have children, and never live on your own. You fear that someone will find your photograph online and kill you because you have heard that has happened.⁶ You served your sentence, but your punishment is just beginning.

The current application of sex offender laws in the United States is inflexible. It discriminates against non-violent offenders and those unlikely to reoffend. In particular, the mandatory three-tier classification unfairly and disproportionately affects the military community because offender

² U.S. DEP'T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 2 (11 Mar. 2013) (C4, 19 Aug. 2020) [hereinafter DoDI 1325.07].

³ *Id.* app. 4.

⁴ 34 U.S.C. § 20911(4).

⁵ *Id.* § 16913(e).

⁶ “Registered sex offenders face ostracism, job loss, eviction or expulsion from their homes, and the dissolution of personal relationships. They confront harassment, threats, and property damage. Some have endured vigilantism and violence. A few have been killed. Many experience ‘despair and hopelessness;’ some have committed suicide.” HUM. RTS. WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 78–79 (2007) (citations omitted).

demographics significantly distinguish the military offender from the typical civilian offender. To redress these inequities, sex offender registration must be designated in courts-martial as mitigation evidence, as it is logically relevant for the sentencing authority to consider during deliberations.

This article begins with an overview of the Sex Offender Registration and Notification Act (SORNA), how it evolved, and how it applies to the military. It next explores the offense based, tiered classification system SORNA mandates and the reasons this system might be unnecessary for the small population of sex offenders in the military whose offenses were non-violent and involved adult victims.⁷ This article then proposes that the designation of sex offender registration as an inconsequential collateral consequence for panels is unjust and that the President must amend the Rules for Courts-Martial (RCMs) to afford the defense the opportunity to present evidence on the effect sex offender registration has on the convicted, including registration duration and recidivism rates. Finally, this article addresses the morality of sentencing and how the change to individualized sentencing in the Military Justice Act of 2016 (MJA 16) supports a case-by-case analysis for each individual's registration.⁸

II. From Wetterling to Walsh: The Evolution of Sex Offender Registration in the United States

During the last three decades, the reformation of sex offender registration laws and requirements rapidly expanded from state discretion to the creation of a national registry and mandatory duration minimums for the convicted.⁹ This expansion steadily increased after a handful of horrific sex crimes were committed across the country, mostly against children. With each crime, state and federal legislators took a progressively harsher stance on crime, operating under the belief that convicted sex offenders have

⁷ Because the focus of this article is adult-victim offenses, discussion of Service members convicted of sex offenses against minors is purposely absent.

⁸ UCMJ art. 56(c)(2) (2017).

⁹ California enacted the country's first state-wide sex offender registration in 1947; by 1989, only eleven additional states had sex offender registration laws. WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA ch. 3 (2009).

disproportionally high recidivism rates and that child and adult victim sex crimes should be impacted by the same by legislation.¹⁰

A. The Wetterling Act

One October 1989 night in St. Joseph, Minnesota, a masked gunman confronted eleven-year-old Jacob Wetterling, his ten-year-old brother, and his eleven-year-old friend while they were riding bicycles.¹¹ The gunman, later identified as Danny Heinrich, forced the boys off of their bicycles and ordered Jacob's brother and friend to run away, threatening to shoot them if they looked back.¹² The boys complied, leaving Jacob alone with the armed Heinrich, who sexually assaulted Jacob before shooting him twice in the head and burying him in a shallow grave.¹³

In response to this heinous offense, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration (Wetterling Act), which required states to create offender registries for individuals convicted of sexually violent offenses or offenses against children.¹⁴ The Wetterling Act's recommendations included a broad list of crimes requiring offender registration, the duration of their registration, how frequent the offenders were required to verify their addresses, and the option of community notification.¹⁵

The Wetterling Act was the first of many congressionally mandated statutes that required state compliance in furtherance of a national effort to prevent sex offenses. States could be subjected to a ten percent reduction in federal funding if they failed to comply within three years.¹⁶ While the

¹⁰ MARIEL ALPER & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., NCJ 251773, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005–14)* (2019). The Adam Walsh Child Protection and Safety Act of 2006 (AWA) subjects all offenders to the same tier classification and registration requirements, regardless of the age of the victim. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111, 120 Stat. 587, 591–93.

¹¹ *Minnesota Man Describes Killing 11-Year-Old Jacob Wetterling in Chilling Detail*, GUARDIAN (Sept. 6, 2016, 3:01 PM), <https://www.theguardian.com/us-news/2016/sep/06/jacob-wetterling-killing-minnesota-danny-heinrich-admits>.

¹² *Id.*

¹³ *Id.*

¹⁴ 42 U.S.C. § 14071(b)(1) (repealed 2006). In 2005, Congress created a national sex offender registry, which it later named the “Dru Sjodin National Sex Offender Public Website” with the signing of the AWA. Adam Walsh Child Protection and Safety Act of 2006 § 118.

¹⁵ 42 U.S.C. § 14071 (repealed 2006).

¹⁶ *Id.* § 14071(g)(2).

Wetterling Act was a federal initiative, it left most of the discretion to the states to determine who should register and the duration of such registration.¹⁷

B. Megan's Law

In 1994, Jesse Timmendequas lured his neighbor, seven-year-old Megan Kanka from her house in Hamilton Township, New Jersey.¹⁸ Timmendequas took Megan to his home where he raped and murdered her before dumping her body in a nearby park.¹⁹ This heinous adult on child crime caused outrage and congressional action. Timmendequas was not a first-time sex offender; he had two prior convictions for sexually assaulting minor girls.²⁰ While local police knew of his status and past, the families in the neighborhood had no idea that they were living near a convicted sex offender.²¹ The public was outraged by the possibility they, too, could be living next to sexual predators without their knowledge, spurring Congress to amend the Wetterling Act to include Megan's Law, which required mandatory community notification.²²

C. Dru Sjodin National Sex Offender Public Registry

In November 2003, Dru Sjodin, a twenty-two-year-old college student, was walking to her car at the Columbia Mall in Grand Forks, North Dakota, when Alfonso Rodriguez, Jr. abducted her.²³ Five months later, Dru's body was found in a ravine partially nude, beaten, stabbed, and sexually

¹⁷ Prior to the AWA's enactment, states had discretion to determine the level of risk a convicted sex offender posed to the public based on the offender rather than the crime. Suzanna Hartzell-Baird, *When Sex Doesn't Sell: Mitigating the Damaging Effect of Megan's Law on Property Values*, 35 REAL EST. L.J. 353, 355-56 (2006).

¹⁸ William Glaberson, *Man at Heart of Megan's Law Convicted of Her Grisly Murder*, N.Y. TIMES, May 31, 1997, at A1.

¹⁹ *Id.*

²⁰ *Repeat Sex Offender Guilty in 'Megan's Law' Case*, CNN (May 30, 1997, 6:54 PM), <http://www.cnn.com/US/9705/30/megan.kanka/>.

²¹ *Id.*

²² Megan's Law required that law enforcement officials make information about registered sex offenders available to the public. 42 U.S.C. § 14071(e)(2) (repealed 2006).

²³ *Renewed Calls for Tough Sex Offender Laws*, N.Y. TIMES (Nov. 22, 2008), <https://www.nytimes.com/2008/11/23/us/23dakota.html>.

assaulted.²⁴ Six months prior to Dru's abduction, Rodriguez had been released from a Minnesota prison after serving a twenty-three year sentence for the kidnapping, rape, and aggravated assault of a woman in 1976.²⁵ Rodriguez, which Minnesota designated a level III offender, actively refused any sex offender treatment while in prison.²⁶ Because Rodriguez served his full sentence, he was under no state restrictions or monitoring following his release from prison.²⁷ In response to Dru's murder by an unmonitored, twice-convicted sex offender, the Department of Justice implemented a National Sex Offender Registry (NSOR), which granted instant access to anyone with an internet connection an offender's name, address, photograph, and category of offense.²⁸

D. Adam Walsh Act

On 27 July 1981, while shopping with his mother in Hollywood, Florida, six-year-old Adam Walsh was abducted.²⁹ Two weeks later, Adam's severed head was found in a drainage canal in Vero Beach, Florida.³⁰ The rest of Adam's body was never discovered, and his murderer was never arrested.³¹ Since Adam's murder, his parents have

²⁴ Dave Kolpack, *Sjodin Trial Opening Statements Made*, BISMARCK TRIB. (Aug. 14, 2006), https://bismarcktribune.com/news/state-and-regional/sjodin-trial-opening-statements-made/article_4bd1dc50-3501-5a36-a899-ca8553bed211.html.

²⁵ In 1979, Alfonso Rodriguez pled guilty to aggravated rape and attempted aggravated rape, resulting in his incarceration for twenty-three years. Rachael Bell, *The Murder of Dru Sjodin*, CRIME LIBR., http://www.crimelibrary.org/notorious_murders/classics/dru_sjodin/3.html (last visited Aug. 29, 2022).

²⁶ During this time, Minnesota labeled those offenders with the "highest likelihood" of reoffending as Level III sex offenders. *Id.*

²⁷ *Renewed Calls for Tough Sex Offender Laws*, *supra* note 23.

²⁸ In honor of Dru, the national registry was later renamed the "Dru Sjodin National Sex Offender Public Registry." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 118–120, 120 Stat. 587, 596–97.

²⁹ Dan Harris & Claire Pedersen, *Adam Walsh Murder: John and Reve Walsh Re-Live the Investigation*, ABC NEWS (Mar. 2, 2011; 12:00 PM), <https://abcnews.go.com/US/adam-walsh-murder-john-reve-walsh-live-investigation/story?id=13037931>.

³⁰ *Id.*

³¹ It has never been determined if Adam was sexually assaulted by his murderer because his body has never been found. In 2008, police officially closed the case, concluding that Ottis E. Toole was likely the murderer. Yolanne Almanzar, *27 Years Later, Case Is Closed in Slaying of Abducted Child*, N.Y. TIMES (Dec. 16, 2008), <https://www.nytimes.com/2008/12/17/us/17adam.html>.

been a driving force behind the reformation of sex offender punishment and registration in the United States.³²

In 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act (AWA), which mandated that all states immediately comply with the requirements of the National Sex Offender Public Registry and created three tiers of registrants based on offense gravity.³³ Title I of the AWA enacted SORNA, which was a complete overhaul of the national standards for sex offender registration.³⁴ This enactment expanded the definition of what constitutes a sex offense,³⁵ required registration for both non-violent and violent sex offenses,³⁶ and created a tier classification based on the offense committed,³⁷ thereby

³² *Id.* In an effort to bring closure to the families of other unsolved abductions and murders, John Walsh hosted the television show *America's Most Wanted* from 1998 to 2012. *Id.*

³³ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 118, 120 Stat. 587, 596. Prior to 2006, States had the individual discretion to determine the level of risk a convicted sex offender posed to the public, with a focus on the offender not offense. Hartzell-Baird, *supra* note 17, at 355–56.

³⁴ 28 C.F.R. pt. 72 (2021).

³⁵ The Sex Offender Registration and Notification Act defines a sex offender as an “individual who was convicted of a sex offense.” 34 U.S.C. § 20911(1). A “sex offense” is defined as:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;
- (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105–119 (10 U.S.C. 951 note); or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

Id. § 20911(5)(A).

³⁶ *Id.* § 20911(5)(A)(i).

³⁷ *See id.* § 20911(2)–(4). The AWA divides sex offender registration into three separate tiers, with Tier III being the most severe and Tier I being the least severe. *Compare id.* § 20911(4) (“The term ‘tier III sex offender’ means a sex offender whose offense is punishable by imprisonment for more than 1 year and (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: (i) aggravated sexual abuse or sexual abuse . . . ; or (ii) abusive sexual contact . . . against a minor who has not attained the age of 13 years; (B) involves kidnapping of a minor (unless committed by a parent or guardian); or (C) occurs after the offender became a tier II sex offender.”), *with id.* § 20911(3) (“The term ‘tier II sex offender’ means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor: (i) sex trafficking . . . ; (ii) coercion

removing most state discretion to determine who must register and for how long.³⁸

E. Department of Defense Instruction 1325.07

The AWA's enactment expanded the definition of "sex offense" to include certain UCMJ articles.³⁹ In order to fully comply with SORNA, the Department of Defense (DoD) published Department of Defense Instruction (DoDI) 1325.07, which contains the full list of UCMJ articles for which a conviction requires registration in an appendix.⁴⁰ In accordance with Army Regulation (AR) 27-10, all offenses listed in appendix 4 to enclosure 2 of DoDI 1325.07 and in 34 U.S.C. § 20901 are considered "'covered offenses' and 'sexually violent offenses.'"⁴¹

Pursuant to Army policy and regulation, Soldiers convicted of a sexual offense (as defined by both SORNA and DoDI 1325.07) are required to register within three days of release from confinement or, if confinement was not adjudged, within three days of conviction.⁴² In 2015, lawmakers amended SORNA to require the DoD to submit to the NSOR the information of Service members convicted of sex offenses.⁴³

and enticement . . . ; (iii) transportation with intent to engage in criminal sexual activity . . . ; (iv) abusive sexual contact . . . ; (B) involves (i) use of a minor in a sexual performance; (ii) solicitation of a minor to practice prostitution; or (iii) production or distribution of child pornography; or (C) occurs after the offender becomes a tier I sex offender."), *and id.* § 20911(2) ("Tier I sex offenders are convicted of a sex offense not included either tier II or tier III.").

³⁸ Federal law requires registration minimums based on tier classification. Tier III offenders must register for life, tier II offenders for twenty-five years, and tier I offenders for fifteen years. *Id.* § 20911(1)–(3).

³⁹ *Id.* § 20911(5)(A)(iv).

⁴⁰ DoDI 1325.07, *supra* note 2, app. 4.

⁴¹ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 24-2(a) (20 Nov. 2020).

⁴² *Id.* para. 24-2(b).

⁴³ Congress requires the Secretary of Defense to report certain information about those persons that were (1) released from military correction facilities, (2) convicted of a sex offense (regardless of confinement), or (3) required to register on the sex offender registry. 34 U.S.C. § 20931.

III. The Sex Offender and Mandated Tier Classification

A. Who Are the Convicted?

1. United States Civilian Sex Offenders

The Department of Justice's National Crime Victimization Survey recorded 5,813,410 reports of violent crimes in the United States between 2015 and 2019.⁴⁴ In this survey, "violent crime" included rape, sexual assault, robbery, assault, and any threat or attempt to commit these crimes.⁴⁵ The survey found that of the nearly 6 million violent crimes, approximately 459,310, or 12 percent, were either rape or sexual assault.⁴⁶

As seen through the cases of Jacob Wetterling, Megan Kanka, and Dru Sjodin, sex offenders can have criminal histories and prior convictions. In 2009, the Bureau of Justice Statistics survey of felony defendants in large urban counties found an estimated thirty-seven percent of those defendants arrested for rape or sexual assault had at least one prior felony conviction.⁴⁷ Through its research into mandatory minimum penalties for federal sex offenses, the United States Sentencing Commission found that the average age of persons arrested for allegations of rape or sexual assault was thirty-seven years old.⁴⁸

⁴⁴ RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP'T OF JUST., NCJ 255113, NATIONAL CRIME VICTIMIZATION SURVEY 3 (2020). Violent crime, excluding simple assault, "declined 15% in 2019 (to 7.3 per 1,000) . . . This decrease was driven partly by a decline in rape or sexual assault victimizations, which declined from 2.7 per 1,000 . . . in 2018 to 1.7 per 1,000 in 2019." *Id.*

⁴⁵ *Id.*

⁴⁶ The survey uses the following definitions for sexual offenses in their surveys:

Rape. Coerced or forced sexual intercourse. Forced sexual intercourse means vaginal, anal, or oral penetration by the offender(s) . . .

Sexual assault. A wide range of victimizations, separate from rape, attempted rape, or threatened rape. These crimes include attacks or threatened attacks involving unwanted sexual contact between the victim and offender. Sexual assaults may or may not involve force and include such things as grabbing or fondling.

Id. at 35.

⁴⁷ BRIAN A. REAVES, U.S. DEP'T OF JUST., NCJ 243777, FEDERAL DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 12 tbl.10 (2013). The study found that forty-three percent of *all* arrested defendants had at least one prior felony conviction. *Id.*

⁴⁸ U.S. SENTENCING COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES 5 (2020).

2. *Military Sex Offenders*

The active duty population is composed of six armed services: Army, Navy, Marine Corps, Air Force, Coast Guard, and the recently established Space Force. In 2017, there were roughly 1.3 million active duty personnel serving within the armed forces, commonly identified as “less than one-half of one percent of the U.S. population.”⁴⁹ The active duty population is comprised of eighty-two percent enlisted personnel and eighteen percent officers.⁵⁰ Of the roughly one million enlisted personnel, around fifty percent are twenty-five years old or younger, and twenty percent are between twenty-six and thirty years old.⁵¹

In November 2019, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) published its *Court-Martial Adjudication Data Report*, which reviewed 574 court-martial records relating to adult-victim sexual assault offenses from fiscal year 2018.⁵² The data showed that the accused was almost always male and was enlisted in 529 of the cases.⁵³ The report analyzed case disposition of penetrative and contact offenses at all levels of court-martial by the pay grade of the offender.⁵⁴ Of the enlisted cases,

⁴⁹ *Demographics of the U.S. Military*, COUNCIL ON FOREIGN AFFS., <https://www.cfr.org/backgrounder/demographics-us-military> (July 13, 2020, 9:00 AM).

⁵⁰ U.S. DEP'T OF DEF., 2017 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY, at iii (2017).

⁵¹ *Id.*

⁵² In 2014, Congress directed the establishment of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD). The committee is required to analyze sexual assault cases within the Armed Forces annually. Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 546(c), 128 Stat. 3292, 3375 (2014). Data obtained from court records, case documents, and publicly available resources produced statistics regarding military case characteristics, such as offender demographics, offense prevalence, and case adjudication. *See generally* DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, COURT-MARTIAL ADJUDICATION DATA REPORT (2019) [hereinafter DAC-IPAD REPORT]. The DAC-IPAD defines sexual assault as “include[ing] the following offenses under the Uniform Code of Military Justice: rape (Article 120(a)), sexual assault (Article 120(b)), aggravated sexual contact (Article 120(c)), abusive sexual contact (Article 120(d)), forcible sodomy (Article 125), and attempts to commit these offenses (Article 80).” *Id.* at 1 n.3.

⁵³ Specifically, seventy-seven percent were in the pay grade of E-4 and below. *Id.* at 8–9.

⁵⁴ Ninety-five percent of penetrative offenses were referred to a general court-martial, while contact offenses were referred evenly between general court-martial (forty-three percent) and special court-martial (forty-two percent). *Id.* at 21.

seventy-three were convicted of a penetrative offense.⁵⁵ In addition to analyzing the offender, the report examined the characteristics of the offense(s) charged. In 2018, 431 of the preferred cases contained a penetrative offense, compared to 143 which contained a contact offense.⁵⁶

Unlike the civilian convicted population, convicted Service members generally do not have prior felony convictions unless a waiver was granted in truly meritorious circumstances.⁵⁷ Specifically, the DoD established the basic eligibility criteria for all enlisted and officer applicants, which expressly prohibits any applicant who has a conviction for a sex offense that requires sex offender registration from joining any military service, and waivers for such are not permitted.⁵⁸

3. Comparison of the Civilian Sex Offender and the Military Sex Offender

In comparing the demographics of civilian sex offenders and military sex offenders, a number of staggering differences are apparent. First, the average age of the civilian accused of a sex offense has been reported as thirty-seven years, while the average age of those accused of a sexual offense in the military is younger than twenty-five years.⁵⁹ This age gap is important, as the brains of men younger than twenty-five years are

⁵⁵ *Id.* at 23.

⁵⁶ *Id.* at 14–15. Penetrative offenses are defined as “rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit these offenses, whereas contact offenses are defined as “aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses.” *Id.* at 4.

⁵⁷ U.S. DEP’T OF DEF., INSTR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION (23 Mar. 2015) (C3, 26 Oct. 2018) [hereinafter DODI 1304.26]. In the Army, the approval of waivers for major misconduct offenses, like felony convictions, is withheld to the Director of Military Personnel Management. U.S. DEP’T OF ARMY, DIR. 2020-09, APPOINTMENT AND ENLISTMENT WAIVERS para. 5(a) (20 Aug. 2020).

⁵⁸ The DoD’s conduct eligibility standards is:

to minimize entrance of persons who are likely to become disciplinary cases, security risks, or who are likely to disrupt good order, morale, and discipline. The Military Services are responsible for the defense of the Nation and should not be viewed as a source of rehabilitation for those who have not subscribed to the legal and moral standards of society-at-large.

DODI 1304.26, *supra* note 57, at 9.

⁵⁹ U.S. DEP’T OF DEF., *supra* note 50, at iv; REAVES, *supra* note 47.

still developing.⁶⁰ Prevailing scientific studies demonstrate that the adolescent brain—particularly the prefrontal cortex, which regulates executive functions such as planning, working memory, and impulse control—are the last areas of the brain to mature and may not be fully developed until roughly twenty-five years of age.⁶¹ In *Miller v. Alabama*, the Supreme Court held that younger offenders have “diminished culpability and greater prospects for reform” as compared to adults.⁶² Because adolescents are more likely to be reckless or impulsive and more vulnerable to negative influences, they are promising candidates for rehabilitation as the hallmarks of youth subside.⁶³ However, a thirty-seven-year-old is an adult well beyond the “quintessential” college years who has likely gained all of the mental and emotional maturity they will ever have.

Second, thirty-seven percent of the civilian population accused of a sex offense has a prior felony conviction.⁶⁴ This is not the case for the typical military accused. As previously discussed, DoDI 1304.26 forbids any person with a significant criminal record or a conviction of an offense requiring sex offender registration from serving in the military.⁶⁵ The majority of Service members have clean criminal records and are thus not repeat offenders or classified as offenders with a higher likelihood to reoffend.⁶⁶ While the average civilian sex offender is different than the average military sex offender, SORNA does not differentiate between offenders, but only offenses.

⁶⁰ A National Institute of Mental Health study that tracked the brain development of more than five thousand children revealed that “brains were not fully mature until 25 years of age.” Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 *Sci.* 1358, 1358–59 (2010). Further, in *Miller v. Alabama*, the Supreme Court found that the lack of brain development in juveniles causes “transient rashness, proclivity for risk, and inability to assess consequences.” 567 U.S. 460, 472 (2012) (citing *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

⁶¹ *E.g.*, Dosenbach et al., *supra* note 60.

⁶² *See Miller*, 567 U.S. at 471.

⁶³ *Id.*

⁶⁴ REAVES, *supra* note 47.

⁶⁵ While conduct waivers are available in meritorious cases, those involving a sex offense conviction requiring registration are categorically ineligible for such relief. DoDI 1304.26, *supra* note 57, at 9.

⁶⁶ In a nine-year follow-up, researchers found that “[a]bout 3 in 10 (29%) sex offenders released in 2005 were arrested during their first year after release About 1 in 5 (20%) were arrested during their fifth year after release, and nearly 1 in 6 (16%) were arrested during their ninth year.” ALPER & DUROSE, *supra* note 10, at 1.

B. Effect of SORNA's Three-Tiered Sex Offender Classification on Military Sex Offenders

As previously discussed, SORNA instituted a mandatory, tiered registration for those convicted of sex offenses in both state and federal courts, to include courts-martial.⁶⁷ This tier structure mandates registration of offenders based only on their offense, with Tier III signifying the most severe offenses,⁶⁸ including those punishable by more than one year in jail. While civilian crimes codified in the U.S. Code such as aggravated sexual abuse⁶⁹ or sexual abuse⁷⁰ fall into this category, penetrative offenses under the UCMJ fall between federal offenses because they are not directly analogous.⁷¹ The DAC-IPAD's *Court-Martial Adjudication Data Report* found that more than seventy-five percent of the sexual offenses reported in 2018 involved a penetrative offense.⁷² Tier III sex offenders are required to register on the NSOR for the duration of their life.⁷³ Therefore, based on this mandated classification, all seventy-three of the enlisted personnel who were convicted at a court-martial for a penetrative offense are now, and forever will be, registered sex offenders.⁷⁴

Regardless of classification, SORNA requires every registered sex offender to provide the following information to the appropriate official: name, social security number, address of residence, address of employment, address of school (if enrolled), license plate number, and vehicle

⁶⁷ 34 U.S.C. § 20911(2)–(4). The AWA divides sex offender registration into three separate tiers, with Tier III being the most severe and Tier I being the least.

⁶⁸ *See id.* § 20911(4).

⁶⁹ 18 U.S.C. § 2241.

⁷⁰ *Id.* § 2242.

⁷¹ MCM, *supra* note 1, pt. IV, ¶ 60(c). “Sexual act” is defined as (A) the penetration, however slight, of the penis into the vulva or anus or mouth; (B) contact between the mouth and the penis, vulva, scrotum, or anus; or (C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

Id. ¶ 60a(g)(1).

⁷² DAC-IPAD REPORT, *supra* note 52, at 14–15.

⁷³ 34 U.S.C. § 20915(a)(3).

⁷⁴ DAC-IPAD REPORT, *supra* note 52, at 23. Registered sex offenders can have the mandated registration periods reduced if they maintain a clean record for a prescribed period. 34 U.S.C. § 20915(b). This option is not available to adult Tier III offenders. *See generally id.*

description.⁷⁵ Law enforcement keep this information in the database and ensure it is accessible to not only law enforcement but also members of the public through the click of a mouse.⁷⁶ Registration impacts the offender's entire life from privacy concerns to residency restrictions. Approximately thirty percent of states prevent any sex offender, regardless of tier classification, from living within a certain distance of a school or child-care facility, even if they have never committed a crime against a child.⁷⁷ Even though future effects of sex offender registration are often unduly harsh, military courts have designated the requirement as collateral, preventing convicted Service members from presenting this relevant and mitigating information to the sentencing authority.⁷⁸

IV. Sex Offender Registration: Collateral Consequence or Mandated Punishment?

A. Improper Designation of Sex Offender Registration as a Collateral Consequence

1. Sex Offender Registration Is Punishment as Mandated by Law, Not a Collateral Consequence

In the military justice system, sex offender registration is considered a collateral consequence of a sex offense conviction.⁷⁹ A collateral consequence is a “penalty for committing a crime, in addition to the

⁷⁵ 34 U.S.C. § 20914(a)–(b). In addition to the offender's mandatory disclosures, the jurisdiction in which the offender registers must provide certain information about the offender to the registry, to include a physical description, a current photograph, and a DNA sample. *Id.*

⁷⁶ *Id.* § 20911.

⁷⁷ The residency restrictions vary by state, ranging from the most restrictive distance of 300 feet to the least of 3,000 feet. Joanne Savage & Casey Windsor, *Sex Offender Residence Restrictions and Sex Crimes Against Children: A Comprehensive Review*, 43 *AGGRESSIVE & VIOLENT BEHAV.* 13, 14–15 (2018).

⁷⁸ *United States v. Talkington*, 73 M.J. 212, 213 (C.A.A.F. 2014).

⁷⁹ *Id.* Additionally, the Supreme Court has held that sex offender registration is a collateral consequence. *Chaidez v. United States*, 568 U.S. 342, 349 (2013) (citing *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010)). *But see United States v. Riley*, 72 M.J. 115, 121 (C.A.A.F. 2013) (“[I]n the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea.”).

penalties included in the criminal sentence.”⁸⁰ Military courts have held that collateral consequences generally should not be considered by the fact-finder in assessing an appropriate sentence.⁸¹ However, this is not a “bright-line rule” because the fact-finder often hears (or inherently knows) about other collateral consequences of the conviction.⁸² For example, military panels hear evidence about the collateral consequences of a punitive discharge on retirement benefits and the effect that confinement of more than six months will have on the accused’s pay.⁸³

While collateral consequences are considered inappropriate for courts-martial to consider when determining a sentence, RCM 1001(d)(1)(B) allows the defense to offer evidence in mitigation “to lessen the punishment to be adjudged by the court-martial.”⁸⁴ This evidence normally focuses on the accused’s characteristics and can be presented in many ways, to include through the accused’s sworn or unsworn statement.⁸⁵ In determining what evidence is permissible as mitigation, the court must find that it is logically relevant.⁸⁶ Evidence is relevant if “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”⁸⁷

The Service member should be able to present evidence mitigating the mandated lifetime sex offender registration after the court’s finding of guilt. This evidence could include expert opinion on the accused’s likelihood of reoffending or lay testimony concerning the effects that registration will have on the accused’s ability to attend activities with children, limitations on places of residence, and what employment possibilities exist. After a sex offense conviction, the accused is subjected to mandatory federal

⁸⁰ *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

⁸¹ Generally, “courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the [sentence].” *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988) (first alteration in original) (quoting *United States v. Quesinberry*, 31 C.M.R. 195, 198 (C.M.A. 1962)).

⁸² *United States v. Duncan*, 53 M.J. 494, 499 (C.A.A.F. 2000). The Court of Military Appeals has “recognize[d] that administrative consequences of a sentence are not *per se* collateral” *United States v. Henderson*, 29 M.J. 221, 223 (C.M.A. 1989).

⁸³ U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 2-6-10 (29 Feb. 2020) [hereinafter DA PAM. 27-9].

⁸⁴ MCM, *supra* note 1, R.C.M. 1001(d)(1)(B).

⁸⁵ *Id.* R.C.M. 1001(d)(2)(C).

⁸⁶ *Id.* M.R.E. 401.

⁸⁷ *Id.*

registration requirements for a predetermined amount of time.⁸⁸ Sex offender registration is more than identification on a list that simply hangs in the local police station. This list is accessible instantaneously by anyone running a search on the internet. The consequences of the registry and notification statutes are all-encompassing—restrictions on housing and employment, negative public perception, isolation, loss of relationships, and mental health issues.⁸⁹ The sentencing authority should know the actual effects of sex offender registration, as it may “lessen the [other] punishment the accused receives,” if any.⁹⁰

Instead, the Court of Military Appeals found that collateral consequences of a court-martial do not constitute RCM 1001 material⁹¹ and are not relevant to sentence determination.⁹² In *Quesinberry*, the court defended its decision by highlighting the need to prevent “the waters of the military sentencing process from being muddied by an unending catalogue of administrative information.”⁹³ The Court of Appeals for the Armed Forces took this analysis one step further in *Datavs* by finding that sex offender registration was exactly the “administrative information” that the *Quesinberry* court directed courts-martial avoid, as sex offender registration has the potential to cause significant “muddied waters” because the registration requirements are not exact and often vary from state to state.⁹⁴

This is simply not the case. With SORNA’s enactment and the mandatory compliance required by the military, in many cases no discretion remains in determining who is required to register, in what tier they are classified, or the duration for which they must remain on the registry.⁹⁵ Of the seventy-three enlisted Service members convicted of a penetrative sex offense in 2018, *all* are classified as a Tier III sex offender and are, therefore, automatically mandated to register for the rest of their lives,

⁸⁸ 34 U.S.C. § 20911(5)(A).

⁸⁹ Erika Davis Frenzel et al., *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, 11 JUST. POL’Y J. 1, 4–5 (2014).

⁹⁰ “[W]e note that a military accused has a *broad* right to present mitigation evidence to a court-martial on sentencing.” *United States v. Becker*, 46 M.J. 141, 143 (C.A.A.F. 1997) (emphasis added) (citing *United States v. Combs*, 20 M.J. 441, 442 (C.M.A. 1985)).

⁹¹ MCM, *supra* note 1, R.C.M. 1001.

⁹² *United States v. Rosato*, 32 M.J. 93, 96 (C.M.A. 1991).

⁹³ *United States v. Quesinberry*, 31 C.M.R. 195, 198 (C.M.A. 1962).

⁹⁴ *E.g.*, *Savage & Windsor*, *supra* note 77.

⁹⁵ 42 U.S.C. § 20911(5)(A)(iv) (2006); DoDI 1325.07, *supra* note 2, at 1.

often without the eligibility for removal.⁹⁶ With the over-inclusive evolution of sex offender registration requirements, no ambiguity remains among the states as each is required to confirm and comply with the NSOR.⁹⁷

Military judges are charged with closely monitoring the accused's unsworn statement to ensure the panel is able to "put the information in proper context by effectively advising the members to ignore it."⁹⁸ The *Military Judges' Benchbook (Benchbook)* provides judges with a panel instruction for use if the accused elicits any prohibited information during an unsworn statement. In paragraph 2-5-23, following the note entitled, "Scope of Accused's Unsworn Statement," the instruction states the following:

Under DOD Instructions, when convicted of certain offenses, including the offense(s) 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. Such registration is required in all 50 states; though requirements may differ between jurisdictions.⁹⁹

This instruction recognizes that the accused *must* register as a sex offender in all fifty states based solely on the conviction and therefore encourages military judges to alert the panel to the same. While courts have deemed sex offender registration to be a collateral consequence that should never be raised, the *Benchbook* has provided an instruction that can be read but not discussed. By providing judges this instruction, the *Benchbook* highlights the importance sex offender registration has on an accused, similar to the loss of a retirement, and the requirement for the panel to be educated on the consequence and any potential effect that it may have on the adjudged sentence.

⁹⁶ 42 U.S.C. § 20915(b)–(c). Currently, seventeen states require *all* offenders to register for life, including even the most minor offenders. *50-State Comparison: Relief from Sex Offender Registration Obligations*, RESTORATION OF RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations> (last visited Aug. 29, 2022).

⁹⁷ The registry requirements of the AWA are the minimum required, and states have discretion to enact stricter requirements. HUM. RTS. WATCH, *supra* note 6, at 42.

⁹⁸ *United States v. Talkington*, 73 M.J. 212, 215 (C.A.A.F. 2014) (citing *United States v. Barrier*, 61 M.J. 482, 486 (C.A.A.F. 2005)).

⁹⁹ DA PAM 27-9, *supra* note 83, para. 2-5-23.

2. Sex Offender Registration Is Analogous to the Two Other Mandatory Minimums Prescribed Within the UCMJ

The UMCJ only requires mandatory sentencing minimums for three offenses: murder,¹⁰⁰ rape,¹⁰¹ and sexual assault.¹⁰² An accused convicted of premeditated or felony murder is subjected to a mandatory minimum sentence of imprisonment for life with the eligibility for parole.¹⁰³ Therefore, if the Government does not seek the death penalty, the only confinement the fact-finder may adjudge is life, either with or without parole.¹⁰⁴ Where an accused is convicted of a penetrative sexual act, the sentence must include a dismissal or dishonorable discharge.¹⁰⁵

In both instances, the panel is informed of the mandatory minimum requirement in more than one way, to include a potential instruction by the military judge, arguments made by counsel, or the sentencing worksheet provided before deliberation. First, if a dismissal or dishonorable discharge is mandated by the guilty charge, the judge will provide the panel with an instruction highlighting the potential collateral consequences a punitive separation can have on a person, to include “employment opportunities, economic opportunities, and social acceptability.”¹⁰⁶ Second, if life or life without parole is mandated by the murder conviction, the panel is informed of this on the sentencing worksheet that is provided to them prior to sentencing deliberations and through the trial and defense counsel’s respective arguments for either the minimum or maximum confinement applicable.¹⁰⁷

In *US v. Talkington*, CAAF reviewed a scenario in which the defense counsel attempted to prevent the trial judge from giving an instruction to the panel concerning the accused’s mention of his looming sex offender registration requirement during his unsworn statement.¹⁰⁸ The judge denied the request and instructed the panel to ignore the accused’s statements regarding his pending sex offender registration requirement.¹⁰⁹

¹⁰⁰ MCM, *supra* note 1, pt. IV, ¶ 56d(1), (4).

¹⁰¹ *Id.* ¶ 60d(1).

¹⁰² *Id.* ¶ 60d(2).

¹⁰³ UCMJ art. 118 (2016); MCM, *supra* note 1, pt. IV, ¶ 56d.

¹⁰⁴ MCM, *supra* note 1, pt. IV, ¶ 56d.

¹⁰⁵ UCMJ art. 120 (2017); MCM, *supra* note 1, pt. IV, ¶ 60d.

¹⁰⁶ DA PAM. 27-9, *supra* note 83, para. 2-6-10.

¹⁰⁷ *Id.* app. D.

¹⁰⁸ *United States v. Talkington*, 73 M.J. 212, 214 (C.A.A.F. 2014).

¹⁰⁹ *Id.*

Military courts now rely on *Talkington* to prohibit the accused from presenting evidence, even in an unsworn statement,¹¹⁰ of sex offender registration.¹¹¹ However, if the defense were permitted to present the mandatory registration requirements as mitigation evidence, as is the case with other mandatory minimum punishments, such presentation could impact military offenders' sentences.

Congress created the United States Sentencing Commission in 1984, charging it with establishing sentencing guidelines in an effort to alleviate sentencing disparities within the federal court system.¹¹² The resulting *Federal Sentencing Guidelines (Guidelines)* are non-binding rules established to provide Article III courts, juries, and judges with a uniform sentencing policy.¹¹³ The "Sentencing Table," created through the *Guidelines*, highlights the intersection of the conduct of the offense and the offender's criminal history, creating a specific sentencing range to which the court *may* sentence the accused.¹¹⁴ Some offenses, such as those involving drugs, firearms, and sexual activity, require automatic, minimum prison terms.¹¹⁵ Sex offenses are divided into two types: sexual abuse offenses (regardless of the victim's age) and child pornography offenses.¹¹⁶

Unlike Article III courts, courts-martial are classified as Article I legislative courts and are thus not required to consider the *Guidelines*.¹¹⁷ Therefore, the punishment that a court-martial can impose on an accused is arguably unlimited, so long as it does not exceed the *Manual for Courts-Martial's* presidentially prescribed limits. These limits have created

¹¹⁰ While the accused is allowed to reference sex offender registration during the unsworn statement, the judge has the discretion to instruct the panel that it should not consider the accused's mention of sex offender registration during deliberations. *See* *United States v. Barrier*, 61 M.J. 482, 485–86 (C.A.A.F. 2005).

¹¹¹ *Talkington*, 73 M.J. at 217.

¹¹² Sentencing Reform Act of 1984, sec. 217(a), § 991(a)(1), 98 Stat. 1987, 2017–18 (codified at 28 U.S.C. § 994(a)(1)).

¹¹³ U.S. SENTENCING COMM'N, GUIDELINES MANUAL pt. A (2018) [hereinafter GUIDELINES MANUAL]. The *Guidelines* are used to create honest, fair sentencing throughout the federal justice system by establishing uniformity and proportionality in sentencing. With the *Guidelines*, sentences are determined by examining both the offender and the offense. *Id.*

¹¹⁴ *Id.* ch. 5.

¹¹⁵ U.S. SENTENCING COMM'N, *supra* note 48.

¹¹⁶ U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8 (2019).

¹¹⁷ The Constitution gives Congress the power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14. Congress has utilized this power to authorize courts-martial to punish crimes within the military. *Id.*

sentencing ceilings but no sentencing floor (except for the UCMJ's mandatory minimums described above).¹¹⁸

Similar to the two sentencing minimums, sex offender registration is mandated by law, yet it is treated wholly different by courts-martial.¹¹⁹ In a court-martial with one of the recognized mandatory minimum sentences, the defense is able to highlight the negative effects this mandated sentence will have on the accused's life, perhaps rendering any additional sentence unnecessary.¹²⁰ Unlike with those mandatory minimums, however, the panel is never informed of sex offender registration by either the judge or counsel.¹²¹ Like a punitive discharge or mandatory life incarceration (with or without parole), sex offender registration is an important fact of consequence for the panel to hear and consider in determining an appropriate sentence. Even though sex offender registration is considered a consequence rather than a punishment, the military judge or panel have, by the verdict alone, sentenced an accused to a lifetime registration for a crime they likely committed in their early twenties.

B. Challenging SORNA

In recent years, state and federal courts have seen an influx of court cases regarding the constitutionality of SORNA, to include potential violations of the First Amendment, the Commerce Clause, Ex Post Facto Clause, and the Due Process Clause.¹²² Labeling a twenty-year-old as sexually dangerous for his entire life without allowing him to challenge the label is a due process violation.

In 2017, a Pennsylvania jury convicted George Torsilieri of a non-consensual sex offense.¹²³ Based on this conviction, Torsilieri became a Tier III sex offender under SORNA which required registration for the rest of his life.¹²⁴ At the time of his conviction and sentencing, Torsilieri was twenty-five years old. Through his attorneys, Torsilieri filed a motion to stop

¹¹⁸ See *supra* note 1.

¹¹⁹ 34 U.S.C. § 20911.

¹²⁰ DA PAM. 27-9, *supra* note 83, para. 2-6-10, app. D.

¹²¹ See *supra* note 110.

¹²² See generally Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. LEGIS. 46 (2009).

¹²³ *Commonwealth v. Torsilieri*, 232 A.3d 567, 572 (Pa. 2020).

¹²⁴ *Id.* at 573.

his mandatory sex offender registration requirement, asserting eight reasons that SORNA was unconstitutional, many of which relied on the common belief and underlying premise of the AWA that “all sexual offenders are dangerous and pose a high risk of recidivation, necessitating registration and notification procedures to protect the public from recidivist sexual offenders.”¹²⁵ Torsilieri presented evidence to refute the belief that all sex offenders are the same, including unchallenged expert opinions by three leading SORNA experts who declared legislation both “overbroad and ineffective.”¹²⁶ Through the use of the experts’ affidavits, Torsilieri provided unrefuted evidence that “not all people convicted of sexual crimes are alike, and that many pose no more risk to the community of committing another sexual offense than people convicted of any other crime, from drug possession to theft.”¹²⁷ Among many things, the court held that Torsilieri’s due process rights were, in fact, violated by allowing “the imposition of enhanced punishment based on an irrebuttable presumption of future dangerousness that is neither determined by the finder of fact nor premised upon proof beyond a reasonable doubt.”¹²⁸

In June 2020, the Supreme Court of Pennsylvania remanded the case, requiring the parties to “present additional argument and evidence to address whether a scientific consensus has developed” in regard to adult sex offenders’ rate of recidivism and potential of future dangerousness.¹²⁹ Torsilieri had done the impossible: he successfully challenged the long held, yet unsupported, assumption that sex offenders have a “frightening and high” rate of recidivism and therefore must be shunned from society for

¹²⁵ *Id.*

¹²⁶ *Id.* at 574. The experts highlighted the fact that contrary to public opinion and some politicians’ tough-on-crime stance, sex offenders have a low likelihood of reoffending, rendering the mandated tier classification overly strict.

¹²⁷ Aaron J. Marcus, *PA High Court Will Again Review Sex Offender Registration*, COLLATERAL CONSEQUENCES RES. CTR. (Apr. 9, 2019), <https://ccresourcecenter.org/2019/04/09/pa-high-court-will-again-review-sex-offender-registration>. The Commonwealth stipulated to the content of the experts’ affidavits but not their validity or relevance. The Commonwealth offered no evidence in rebuttal until the case reached the Pennsylvania Supreme Court. *Torsilieri*, 232 A.3d at 596.

¹²⁸ *Torsilieri*, 232 A.3d at 575.

¹²⁹ *Id.* at 587–88. “Sexual violence is a serious problem, and any recidivism rate is too high. But recidivism rates for sex offenders are not as high as politicians have quoted in their attempts to justify the need for overly harsh sex offender laws.” HUM. RTS. WATCH, *supra* note 6, at 21 (quoting Jill Levenson).

decades, if not life.¹³⁰ This case highlights the necessity of individualized sentencing to include not only confinement and fines, but also registration and classification, as automatic lifetime registration is arbitrary and the ability to argue collateral consequences is important to the sentencing authority.

V. Morality of Sentencing

“Ignorant or misinformed juries cannot be expected to do their duty and decide the case before them without a proper understanding and appreciation of the facts in a particular case.”¹³¹ Under MJA 16, military judges would be the default sentencing authority to implement the President’s segmented sentencing parameters and to ensure fair and proportional sentences across the services.¹³² With the creation of sentencing parameters, courts-martial will be one step closer to conforming to federal civilian courts.

As military judges become the default sentencing authority with sentencing principles and discretion to tailor sentences, they would certainly be able to determine what aspect of collateral consequences they should consider. In *US v. Griffin*, the Court of Military Appeals maintained the standard collateral consequence ruling that courts-martial are to “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.”¹³³ Yet, in the same breath, the *Griffin* court highlighted the discretion trial judges have to consider or allow the consideration of collateral consequences.¹³⁴ This “discretion” was in response to the judge’s ability to answer the panel’s questions on the effect a punitive discharge (a collateral consequence) would have on the accused’s retirement benefits.¹³⁵

¹³⁰ In 2002, Justice Anthony Kennedy, with only a single citation in support, exaggeratedly declared that sex offenders have “a frightening and high risk of recidivism.” *McKune v. Lile*, 536 U.S. 24, 34 (2002). This language has been cited in more than ninety judicial briefs and used repeatedly to support the overly harsh increase in sex offender registration laws. Ira Mark Ellman & Tara Ellman, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015).

¹³¹ *United States v. Perry*, 48 M.J. 197, 201 (C.A.A.F. 1998).

¹³² UCMJ art. 53(b)(1)(A) (2019).

¹³³ *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988) (quoting *United States v. Quesinberry*, 31 C.M.R. 195 198 (C.M.A. 1962)).

¹³⁴ With the permission of the defense counsel. *Id.*

¹³⁵ *Id.*

Without providing the sentencing authority all relevant information regarding the accused's punishment, individualized sentencing can never truly happen. As the Court of Military Appeals found almost sixty years ago, "evidence in a particular case might make it arguable that the court-martial needs information on the special effects of a specific sentence, if it is intelligently to determine a punishment appropriate to the accused before it."¹³⁶ The amount of information the sentencing authority is allowed to consider, from both the trial and defense counsel, prior to making a sentencing determination, is extensive.¹³⁷ Sentencing rules in courts-martial give wide latitude to the Service member to present a myriad of evidence in extenuation and mitigation. It logically follows that the goal of the UCMJ and the RCM is for the sentencing authority to have a substantial amount of information when determining a sentence. This should include sex offender registration.

VI. Proposed Modifications to Sex Offender Registration Within the Military

This article proposes a modification to how sex offender registration is used in military courts to designate sex offender registration as mitigation evidence and to expand the *Benchbook* Instruction 2-5-23 to include information on SORNA's tier classification.

A. Mitigation Designation of Sex Offender Registration

Sex offender registration should be specifically included in the RCM as relevant and admissible mitigation evidence, and it is no different from other mandatory minimums within the military justice system.¹³⁸ Like a dishonorable discharge, sex offender registration will have an impact on the sentence as mitigation evidence. "Mitigation" is defined more than once in RCM 1001 as a matter "introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency."¹³⁹ Given the rigid, lifelong requirements of sex offender

¹³⁶ United States v. Turner, 34 C.M.R. 215, 218 (C.M.A. 1964).

¹³⁷ MCM, *supra* note 1, R.C.M. 1001.

¹³⁸ 34 U.S.C. § 20911.

¹³⁹ MCM, *supra* note 1, R.C.M. 1001(d)(1)(B).

registration, it is a matter in mitigation because it is a matter that an accused should be allowed to introduce in an effort to potentially lessen his sentence.

There are some military defense counsel that have represented a Service member who has been convicted of a sex offense and subjected to a mandatory dishonorable discharge with little or no additional punishment. In those cases, counsel was allowed to present evidence and argue about the negative effects the discharge would have on the convicted Service member's life, future, and family. Because sex offender registration is nationally enforced, there is virtually no escaping the negative impact it has on every aspect of the convicted Service member's life, to include housing, employment, personal safety, and public perception. Providing the sentencing authority with such evidence, will give practical meaning and effect to the sentence they adjudge, as well as allowing a convicted Service member to present a full mitigation case.

B. Expansion of *Benchbook* Instruction 2-5-23

As discussed above, the *Benchbook* provides military judges an instruction to assist panels when evidence of sex offender registration is raised. The current instruction highlights general registration requirements to which the accused will be subjected due to conviction. The instruction should be updated to include the most applicable tier classification and duration, as defined by SORNA, based on the most serious conviction. For example, under this proposal, a military judge would inform a panel that the accused's conviction of a penetrative offense requires the accused's classification as a Tier III sex offender with registration for life. This provides the defense with the ability to present evidence on the effect life registration will have on the average military convicted and why additional punishment is not necessary to satisfy the sentencing principles.

C. Extension of Article 56(c)(2), UCMJ

The ultimate solution to the rigid application of sex offender registration and tier classification to the military sex offender population is to extend Article 56(c)(2), UCMJ, to require segmented sentencing for punishments

specific to Article 120, UCMJ.¹⁴⁰ Currently, segmented sentences are authorized only for confinement and/or fines in judge-alone sentencing.¹⁴¹ Through the proposed extension, any conviction of an Article 120, UCMJ, offense would require the military judge to also specify the tier classification, if any, for each offense. This expansion would shift tier classification from an offense-driven analysis to one that is case-specific, in which the military judge has the discretion to determine if the mandated tier classification and subsequent registration duration is necessary given the facts of the offense and characteristics of the offender.¹⁴²

VII. Conclusion

As they have for the last three decades, legislators will likely continue to take a tough-on-crime stance against sex offenders, which manifests in the form of increasingly harsh registration requirements. Congress enacted a series of increasingly stringent requirements based on violent crimes committed against children by previously convicted sex offenders who typically had a high rate of recidivism—the worst of the worst.

The military sex offender is typically not the worst of the worst and likely not the intended target of these laws.¹⁴³ Instead, the average military sex offender is a young, immature first-time offender. After conviction, the Service member is saddled with a lifelong sentence that was never mitigated, often for a crime the sentencing authority determined was worth mere months in confinement. The Service member will be required to register as a sex offender for life, regardless of post-conviction behavior.

The current application of sex offender laws in this country is too rigid and as a result discriminates against non-violent offenders and those unlikely to reoffend. In particular, the mandatory three-tier classification unfairly and disproportionately affects the military community because of offender demographics that significantly distinguishes the military offender from the typical civilian offender. To repair these inequities, sex offender

¹⁴⁰ In judge-alone sentencing, the judge shall, “with respect to each offense of which the accused is found guilty, specify the term of confinement, if any, and the amount of the fine, if any.” UCMJ art. 56(c)(2) (2019).

¹⁴¹ *Id.*

¹⁴² Even in cases before a panel, the default sentencing forum is the military judge. *Id.* art. 53(b)(1)(A).

¹⁴³ *See supra* notes 64-66.

registration must be designated as mitigation evidence as it is logically relevant for the sentencing authority to consider during deliberations.

Those who do not view sex offender registration as punishment may believe that most sex offenders have a high recidivism rate and, if given the opportunity, will reoffend.¹⁴⁴ This incorrect, uninformed assumption may be shared by the sentencing authority. The sentencing authority must have the opportunity to appreciate not only the registration requirements but also the secondary and tertiary effects of registration. It is likely that most panel members have some vague knowledge that sex crimes carry registration requirements. However, with a defense counsel precluded from presenting relevant mitigation, panel members are left with an incomplete understanding of the conviction's full spectrum of consequences and with their own speculation about whether the accused will re-offend. Until the sentencing authority is allowed to fully and properly consider sex offender registration in its sentencing deliberations, it is disenfranchised to render a just sentence. The convicted Service member is left with nothing but a scarlet letter.

¹⁴⁴ *E.g.*, HUM. RTS. WATCH, *supra* note 6, at 4 (quoting Patty Wetterling) (“I based my support of broad-based community notification laws on my assumption that sex offenders have the highest recidivism rates of any criminal. But the high recidivism rates I assumed to be true do not exist. It has made me rethink the value of broad-based community notification laws, which operate on the assumption that most sex offenders are high-risk dangers to the community they are released into.”).