

A Higher Calling: U.S. Military Cannabis Policy After Legalization

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[Canadian Armed Forces] members are required to conduct themselves in a professional manner and are expected to make responsible choices in respect of their use of cannabis for recreational or medical purposes.¹

I. Introduction

After work on a Tuesday, Corporal David Smith, an infantryman in the Canadian Army, heads home, eats dinner, turns on a horror movie,

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¹ Can. Dep't of Nat. Def., DAOD 9004-1, Use of Cannabis by CAF Members para. 4-4 (7 Sept. 2018) [hereinafter DAOD 9004-1].

and eats a cannabis² gummy candy.³ This fact pattern may seem odd to a member of the U.S. military; however, the Canadian Armed Forces' (CAF) authorized cannabis use policy permits Corporal Smith's consumption of cannabis. During the work week, a typical CAF member may consume cannabis as long as it is more than eight hours prior to the next duty period.⁴ Corporal Smith's unit intends to go to the rifle range on Friday. On Wednesday at final formation, his platoon leader reminds unit members that no CAF member handling a loaded weapon may consume cannabis within the prior twenty-four hours.⁵ This would not prohibit cannabis use on Wednesday night, but it does prohibit cannabis use on Thursday night. As Corporal Smith considers whether he will legally use cannabis that night, he remembers a recent suggestion from a superior that he become a helicopter door gunner within the Canadian Air Force,⁶ a position with stricter limits on cannabis use (not within twenty-eight days of any air gunner duty period).⁷ This duty restriction would effectively prevent use of cannabis during his two-year assignment.⁸ Although this situation is fictional, CAF members have been complying with cannabis use restrictions based upon periods of service and job types with waiting periods since 17 October 2018, when the Canadian military's authorized cannabis use policy went into effect.⁹

Currently, the CAF remains the only military within the North Atlantic Treaty Organization (NATO) to authorize its members to use cannabis.¹⁰ Although Canada is currently the outlier on this issue, its experience with authorizing cannabis use by CAF members offers three important lessons

² This paper will use the term cannabis rather than marijuana when describing the cannabis plant. Marijuana, or marihuana, is a slang term and is less-precise than the scientific plant name, cannabis. See Stephen Siff, *The Illegalization of Marijuana: A Brief History*, ORIGINS (May 2014), https://origins.osu.edu/article/illegalization-marijuana-brief-history?language_content_entity=en.

³ This scenario of Corporal David Smith is fictitious but used to illustrate the Canadian military's cannabis use policy.

⁴ DAOD 9004-1, *supra* note 1, para. 5-2.

⁵ *Id.*

⁶ See, e.g., Ian Coutts, *Door Gunners*, CANADIAN ARMY TODAY (July 2, 2020), <https://canadianarmytoday.com/door-gunners>.

⁷ DAOD 9004-1, *supra* note 1, para. 5-2.

⁸ See, e.g., Coutts, *supra* note 6.

⁹ DAOD 9004-1, *supra* note 1, para. 1.

¹⁰ Interview with Mark McGaraughty, Senior Strategic Pol'y Advisor, Dir. Mil. Pers. Pol'y Integration, Dep't of Nat'l Def., Ottawa, Can. (Nov. 5, 2021) (on file with author).

for the U.S. military. First, the CAF, like the U.S. military, does not have legal authority to authorize cannabis use without action by the country's political leadership.¹¹ Second, the CAF began working on a draft authorized cannabis use policy once the Canadian Liberal Party campaigned to legalize cannabis use even though the Canadian military had the legal authority to retain a prohibition on cannabis use.¹² Third, the Canadian military has provided a framework for authorized cannabis use within a similarly organized NATO military, which can be used as a model for a future U.S. military cannabis policy.¹³ Based upon the clear trend toward lessening restrictions on cannabis use within U.S. states and territories, Federal cannabis legalization appears inevitable.¹⁴ This potential should prompt the U.S. military to prepare for that occasion. First, the U.S. military should immediately liberalize its accession policies that currently restrict opportunities for applicants who have used cannabis previously or continue using cannabis legally in accordance with state or territorial law. Second, once Congress acts to legalize cannabis use, an authorized cannabis use framework should be adopted across the U.S. military using the Canadian military's authorized cannabis use policy as a model.

This article will review the background, history, and legal basis for current cannabis use prohibitions in the U.S. military before proposing a legal framework for cannabis use for Service members in the event of Federal cannabis legalization. Part II will show the broad normalization of cannabis use, which will force the U.S. military to adjust cannabis policies to recruit in a democratic society with legalized cannabis use. Part III will provide historical background of cannabis use and prohibition within the U.S. military and the initiation and legal authority for its drug testing regime. Part IV will review the statutory and regulatory prohibitions on

¹¹ See *Canada's New Liberal Government Repeats Promise to Legalize Marijuana*, THE GUARDIAN (Dec. 4, 2015), <https://www.theguardian.com/world/2015/dec/04/canada-new-liberal-government-legalize-marijuana>; Nikki Frias, *Congress Set to a Vote on MORE Act the First Week of December*, FORBES (Nov. 30, 2020), <https://www.forbes.com/sites/nikkifrias/2020/11/30/congress-set-to-a-vote-on-more-act-the-first-week-of-december>.

¹² Interview with Commander (Retired) Mike Madden, Former Dir. of Mil. Pers. L., Dep't of Nat'l Def., Ottawa, Can. (Oct. 22, 2021) (on file with author).

¹³ *Id.*; DAOD 9004-1, *supra* note 1.

¹⁴ See Michael Hartman, *Cannabis Overview*, NAT'L CONF. OF STATE LEGISLATURES (June 22, 2023), <https://www.ncsl.org/research/civil-and-criminal-justice/cannabis-overview.aspx>. "Twenty-three states, two territories, and the District of Columbia have legalized small amounts of cannabis for adult recreational use." *Id.*

cannabis use for Service members while also highlighting required revisions to the Uniform Code of Military Justice (UCMJ) and other regulatory policies to comply with an authorized cannabis use policy. Part V will offer a suggested model U.S. military cannabis use policy that includes two elements: (1) a liberalized accession policy, and (2) an authorized cannabis use policy within the U.S. military that mirrors the Canadian military's authorized cannabis use policy. Failure to plan for the widespread legalization of cannabis across the United States will not make its occurrence less likely; therefore, this paper will serve as a proposed model¹⁵ for the U.S. military to reconcile with normalized, legal cannabis use during state and territorial legalization and after Federal legalization.

II. Inevitable Cannabis Legalization, Military Legal Authority, and Accessions

In the United States, the vast majority of states and territories have authorized cannabis use for medical purposes, while a growing minority have authorized recreational use of cannabis.¹⁶ While cannabis still remains illegal under Federal law, broad state legalization could force Congress to act on cannabis legalization.¹⁷ When Congress legalizes cannabis, the U.S. military would be able to continue its cannabis use prohibition. However, continued cannabis prohibition in the military would increase the military-civilian divide and negatively impact recruitment and retention.¹⁸

¹⁵ A *Military Law Review* article from 1971 proposed limited accommodations the U.S. military could take if cannabis was legalized. "An exploration of permissible use based upon time and geographical considerations should be undertaken. . . . Nevertheless, there would be no reason based upon good order and discipline for prohibiting use while the member is on pass or leave, unless, as within a war zone, he would be subject to immediate recall." Charles G. Hoff, Jr. *Drug Abuse*, 51 MIL. L. REV. 147, 208 (1971). The present author hopes that in fifty plus years, his article is not being read by a Judge Advocate Officer Graduate Course student researching liberalized cannabis use in the military.

¹⁶ Hartman, *supra* note 14.

¹⁷ Deirdre Walsh, *House Approves Decriminalizing Marijuana; Bill to Stall in Senate*, NPR (Dec. 4, 2020), <https://www.npr.org/2020/12/04/942949288/house-approves-decriminalizing-marijuana-bill-to-stall-in-senate>.

¹⁸ BETH J. ASCH ET AL., RAND CORP., AN EMPIRICAL ASSESSMENT OF THE U.S. ARMY'S ENLISTMENT WAIVER POLICIES 38, 40-41 (2021).

A. Cultural Pressure, Legalization, and Normalization of Cannabis Use

When President Nixon announced the War on Drugs in 1971,¹⁹ approximately 4 percent of adult Americans had used cannabis.²⁰ Fifty-one years later, 49 percent of adult Americans have used cannabis.²¹ Normalization of cannabis use in U.S. society²² has correlated with cannabis legalization across U.S. states and territories.²³ In 1996, California became the first state to authorize medical cannabis use.²⁴ Since 1996, all but seven states and territories have liberalized cannabis use policies in some form, ranging from adult recreational cannabis use to medical cannabis use to decriminalized possession of cannabis to authorized use of low levels of tetrahydrocannabinol (THC),²⁵ the primary psychoactive ingredient in cannabis.²⁶ However, the trend for liberalized cannabis use continues beyond merely low levels of THC or medical cannabis use.²⁷ Twenty-three states, two territories, and the District of Columbia have authorized adult recreational cannabis use.²⁸ States and territories have already rapidly responded to changes in cannabis use normalization and cultural pressure through liberalization largely using citizen ballot initiatives.²⁹ The repeated success of cannabis use liberalization through ballot initiatives passed by voters, not legislatures, reflects popular political support for reducing cannabis prohibitions.³⁰

¹⁹ *Public Enemy Number One: A Pragmatic Approach to America's Drug Problem*, RICHARD NIXON FOUND. (June 29, 2016), <https://www.nixonfoundation.org/2016/06/26404>.

²⁰ Jeffrey M. Jones, *Nearly Half of U.S. Adults Have Tried Marijuana*, GALLUP (Aug. 17, 2021), <https://news.gallup.com/poll/353645/nearly-half-adults-tried-marijuana.aspx>.

²¹ *Id.*

²² Tom Angell, *Study: Rise in Marijuana Use Not Caused by Legalization*, FORBES (Sept. 14, 2017), <https://www.forbes.com/sites/tomangell/2017/09/14/study-rise-in-marijuana-use-not-caused-by-legalization>.

²³ Angela Dills et al., *The Effect of State Marijuana Legalizations: 2021 Update*, CATO INST. (Feb. 2, 2021), <https://www.cato.org/policy-analysis/effect-state-marijuana-legalizations-2021-update#marijuana-other-substance-use>.

²⁴ Siff, *supra* note 2.

²⁵ Hartman, *supra* note 14.

²⁶ Kimberly Holland, *CBD vs. THC: What's the Difference?*, HEALTHLINE (June 30, 2023), <https://www.healthline.com/health/cbd-vs-thc#chemical-structure>.

²⁷ Hartman, *supra* note 14.

²⁸ *Id.*

²⁹ Dills et al., *supra* note 23.

³⁰ See *2023 Marijuana Policy Reform Legislation*, MARIJUANA POL'Y PROJECT, (June 8, 2023), <https://www.mpp.org/issues/legislation/key-marijuana-policy-reform>.

Political and economic pressures have also been building within state legislatures, which has subsequently prompted legislative action in several states and territories.³¹ Increasing legalization of recreational cannabis use only increases the likelihood that Federal legalization of cannabis use will occur.³²

Despite this broader move toward authorized use of cannabis, the Federal Government³³ and the Department of Defense (DoD)³⁴ retain criminal prohibitions on the use of cannabis. The current U.S. Federal drug policy is outlined in the Controlled Substances Act (CSA) and outlaws the “illegal importation, manufacture, distribution, and possession and improper use of controlled substances.”³⁵ The CSA classifies controlled substances into five schedules from most to least dangerous.³⁶ Cannabis has been classified, since the 1970 passage of the CSA,³⁷ as a Schedule I controlled substance.³⁸ A Schedule I controlled substance indicates the “drug or other substance has a high potential for abuse; [t]he drug or other substance has no currently accepted medical use in treatment in the United States; [and] [t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.”³⁹ Federal criminal prohibitions on cannabis have failed to dampen Americans’ enthusiasm for cannabis; 68 percent of American adults favor legalizing cannabis use.⁴⁰ Support for legalization has increased nearly 20 percent in the past ten years, which corresponds with the cannabis use liberalization trend across the country.⁴¹ The U.S. military’s prohibition on cannabis remains codified in the statutory language of Article 112a, UCMJ, and also mirrors the CSA prohibitions.⁴² If the U.S. military wanted to remove cannabis use

³¹ *Id.*

³² See Hartman, *supra* note 14.

³³ See, e.g., 21 U.S.C. § 844.

³⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 112a (2019).

³⁵ 21 U.S.C. § 801.

³⁶ 21 U.S.C. § 812.

³⁷ LISA N. SACCO, CONG. RSCH. SERV., IN11204, THE SCHEDULE I STATUS OF MARIJUANA (2022).

³⁸ Siff, *supra* note 2.

³⁹ 21 U.S.C. § 812.

⁴⁰ Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, GALLUP (Nov. 9, 2020), <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx>.

⁴¹ *Id.*

⁴² See UCMJ art. 112a (2019).

prohibitions for its Service members, Congress would first be required to remove cannabis from the statutory text in Article 112a, UCMJ.

Congress has yet to take action to legalize cannabis use or other related measures; however, political pressure is being brought to bear on Congress.⁴³ Cannabis sales are expected to exceed \$24 billion in 2021.⁴⁴ In 2020, state excise taxes on cannabis sales totaled \$1.7 billion.⁴⁵ Congress has begun acting upon these factors. One piece of cannabis legislation, The Secure and Fair Enforcement (SAFE) Banking Act,⁴⁶ which has been pushed by cannabis business groups, banks, and other business interests,⁴⁷ has passed the House of Representatives seven times.⁴⁸ The Marijuana Opportunity Reinvestment and Expungement (MORE) Act⁴⁹ was passed by the House of Representatives and would have removed cannabis from the Controlled Substances Act, authorized states and territories to set cannabis regulation policies, and imposed an excise tax on cannabis sales.⁵⁰ The MORE Act was the first time a congressional chamber had passed a bill that would remove legal

⁴³ See Mona Zhang, *Marijuana Legalization May Hit 40 States. Now What?*, POLITICO (Jan. 20, 2020), <https://www.politico.com/news/2020/01/20/marijuana-legalization-federal-laws-100688>; Al Weaver, *Senate GOP Faces Politics vs. Policy Battle on Marijuana*, THE HILL (Dec. 16, 2022), <https://thehill.com/homenews/senate/3777205-senate-gop-faces-politics-vs-policy-battle-on-marijuana>.

⁴⁴ Courtney Connley, *Cannabis Is Projected to Be a \$70 Billion Market by 2028—Yet Those Hurt Most by the War on Drugs Lack Access*, CNBC (July 1, 2021), <https://www.cnbc.com/2021/07/01/in-billion-dollar-cannabis-market-racial-inequity-persists-despite-legalization.html>.

⁴⁵ Jeremiah Nguyen, *States Projected to Post Higher Marijuana Revenues in 2021*, TAX FOUND. (Aug. 3, 2021), <https://taxfoundation.org/states-projected-post-higher-marijuana-revenues-2021>.

⁴⁶ See, e.g., SAFE Banking Act of 2023, S. 1323, 118th Cong. (2023).

⁴⁷ The SAFE Banking Act would dramatically increase the ease with which consumers could purchase cannabis by preventing Federal banking regulators from treating cannabis business proceeds and purchases as “unlawful activity,” which effectively requires cannabis businesses to only use cash for all transactions. See Chris Roberts, *Marijuana Banking Reform Advances, but Senate Unlikely to Pass—Here’s Why*, FORBES (Sept. 24, 2021), <https://www.forbes.com/sites/chrisroberts/2021/09/24/marijuana-banking-reform-advances-in-congress-thanks-to-old-trick-but-passage-through-senate-unlikely>.

⁴⁸ *SAFE Banking Act Passes House*, AM. BAR ASS’N (July 28, 2022), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washington-letter/july-22-wl/safe-banking-0722wl.

⁴⁹ Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2021).

⁵⁰ Frias, *supra* note 11.

prohibitions on cannabis use.⁵¹ The MORE Act failed to pass,⁵² but once Congress responds to the growing pressure, the U.S. military has a decision to make. It could retain a cannabis use prohibition or promulgate an authorized cannabis use policy.

B. U.S. Military's Authority to Retain Cannabis Use Prohibition Post-Legalization

Once Congress legalizes cannabis, the U.S. military would have the legal authority to retain cannabis prohibition; however, retention of cannabis prohibitions would harm recruiting and retention in a society with normalized cannabis use.⁵³ The U.S. Supreme Court provided a legal framework for curtailing certain rights for Service members that are protected for American civilians in *Parker v. Levy*.⁵⁴ Captain Howard Levy was court-martialed for failing to provide a training program for Special Forces medics and repeatedly criticizing the U.S. Army and its mistreatment of Black Service members throughout the Vietnam War to subordinates.⁵⁵ The Supreme Court acknowledged that Levy's statements may be protected under the First Amendment for a civilian, but the court also "has long recognized that the military is, by necessity, a specialized society separate from civilian society," and that members do not have "the same autonomy as there is in the larger civilian community."⁵⁶ While no specific cases⁵⁷ have been brought to challenge the cannabis use restrictions within the U.S. military, this holding has been repeatedly

⁵¹ Walsh, *supra* note 17.

⁵² *The MORE Act*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/policy/federal/the-more-act> (last visited Feb. 7, 2024).

⁵³ ASCH ET AL., *supra* note 18, at 38, 40-41.

⁵⁴ *Parker v. Levy*, 417 U.S. 733 (1974).

⁵⁵ *Id.* at 735-37.

⁵⁶ *Id.* at 758, 743, 751.

⁵⁷ *See, e.g.*, *United States v. Pugh*, 77 M.J. 1 (C.A.A.F. 2017). While not a challenge to cannabis restrictions, the Court of Appeals for the Armed Forces overturned an Article 92, UCMJ conviction for consuming hemp in Strong & KIND bars. The Air Force had restricted use of hemp products even if approved by the Food and Drug Administration to protect the Air Force Drug Testing Program. Testimony at trial indicated commercially available hemp products had insufficient THC to result in a positive drug test. Cannabis and hemp are the same plant with different levels of THC. This case demonstrates the challenge of enforcing prohibitions within a broader world that has normalized cannabis consumption and use. *See* Jeffrey Chen, *Hemp vs. Marijuana: What's the Difference?*, HEALTHLINE (Feb. 13, 2023), <https://www.healthline.com/health/hemp-vs-marijuana>.

upheld as standing for the proposition that the military retains broad deference about control of its forces, including Service members' actions.⁵⁸ The U.S. military's requirement to maintain good order and discipline seems likely to permit retention of cannabis use prohibitions under the UCMJ even if those prohibitions are more restrictive than those found in civilian society.

C. U.S. Military Cannabis Waiver Policies and Impact on Recruitment and Retention

While it is legally permissible to continue cannabis use prohibition, the impact on recruitment and retention within the U.S. military should force a change in cannabis use policy. Under current accession guidelines, 71 percent of potential candidates are already not eligible according to U.S. Army Recruiting Command (USAREC) because of “obesity, drugs, physical and mental health problems, misconduct, and aptitude.”⁵⁹ As states or territories continue liberalizing cannabis use, candidates will be more likely to have used cannabis prior to enlistment or accession. For example, in Fiscal Year (FY) 2018, 57 percent of enlistment contracts came from states or territories with cannabis authorized for medical use and 19 percent of enlistment contracts came from states or territories with recreational cannabis use.⁶⁰ More importantly, as more states and territories authorize recreational cannabis, or once Federal cannabis legalization occurs, military recruiters will be forced to deal with entire populations who used cannabis legally within a military accession system that presumes strict limits on cannabis use.

1. Military Accession Limits on Cannabis

The presumed strict limits become clear when examining military accession policies. Under DoD accession policy, if a candidate refuses a

⁵⁸ See also *Greer v. Spock*, 424 U.S. 828 (1976); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Chappell v. Wallace*, 462 U.S. 296 (1983). In this vein, the Court has provided deference to “essentially professional military judgments” concerning the “composition, training, equipping, and control of a military force.” *Gilligan v. Morgan*, 413 U.S. 1, 15 (1973).

⁵⁹ *Facts and Figures*, U.S. ARMY RECRUITING COMMAND OFFICIAL WEBSITE, https://recruiting.army.mil/pao/facts_figures (last visited Feb. 7, 2024).

⁶⁰ ASCH ET AL., *supra* note 18, at 38.

drug test then the candidate will not be permitted to enlist.⁶¹ If an enlistee tests positive for any controlled substance, including cannabis, during the accession process, then a misconduct waiver would be required to enter military service even if used legally under the law of the state or territory where the applicant resides.⁶² However, the waiver cannot be processed until a disqualification period has passed.⁶³ In the Army, a positive drug test for cannabis requires an enlistee to wait six months to retest.⁶⁴ Only after testing negative for controlled substances can the enlistee request a misconduct waiver, which is not guaranteed to be approved.⁶⁵ A second positive drug test for cannabis would require the enlistee to wait twenty-four months before another re-test and permanently exclude that enlistee from service in the Army National Guard.⁶⁶ A third positive test for cannabis would permanently exclude that enlistee from service in the Regular Army and the U.S. Army Reserve.⁶⁷

As an additional hurdle, a misconduct waiver for a positive drug test for cannabis would also require a criminal background check and permanently prevent enlistment into any job that requires a security clearance.⁶⁸ This restriction on job opportunities serves as merely another reason not to join the U.S. military, which only further reduces the population eligible for military service. Another restriction is whether the applicant scored between the 10th and 31st percentile, which is classified as Category IV, on the Armed Forces Qualification Test.⁶⁹ Only 4 percent of total enlistees may be Category IV, but those enlistees are also not

⁶¹ U.S. DEP'T OF DEF., INSTR. 1010.16, TECHNICAL PROCEDURES FOR THE MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM para. 6.5b (15 June 2020) [hereinafter DoDI 1010.16].

⁶² U.S. DEP'T OF DEF., INSTR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION encl. 4, para. 1d (23 Mar. 2015) (C3, 26 Oct. 2018) [hereinafter DoDI 1304.26].

⁶³ *Id.*

⁶⁴ U.S. DEP'T OF ARMY, REG. 601-210, REGULAR ARMY AND RESERVE COMPONENTS ENLISTMENT PROGRAM para. 4-18b(1)(a) (31 Aug. 2016) [hereinafter AR 601-210].

⁶⁵ *Id.* para. 4-18b(1)(b).

⁶⁶ *Id.*

⁶⁷ *Id.* para. 4-18b(1)(c).

⁶⁸ *Id.* para. 4-18d, 4-18e.

⁶⁹ U.S. DEP'T OF DEF., INSTR. 1145.01, QUALITATIVE DISTRIBUTION OF MILITARY MANPOWER para. 3.b(1) (12 Dec. 2013) (C2, 4 May 2020) [hereinafter DoDI 1145.01].

eligible for any misconduct waivers including cannabis use.⁷⁰ Finally, if a candidate tests negative for cannabis, but has a conviction for cannabis possession, the candidate would require a misconduct waiver prior to enlistment.⁷¹

These accession policies are not sacrosanct. During periods of increased recruitment, misconduct waivers increased;⁷² the maximum amount of Category IV enlistees have increased;⁷³ and the cannabis positive retest period has repeatedly shifted based upon recruitment needs of the Army from 45 days to 180 days.⁷⁴ Between 2018 and 2022, the Army approved more than 3,300 waivers for applicants who failed a drug test or admitted prior drug use.⁷⁵ This flexibility shows that the DoD could choose to officially liberalize accessions for applicants who have used cannabis or been convicted of cannabis possession. A system that responds to broad scale cannabis legalization through misconduct waivers remains piecemeal and fails to comprehensively deal with the increased scale of legalized cannabis use.

2. *Piecemeal Policy of Cannabis Waivers and Congressional Action*

Army leaders and researchers have acknowledged that growing legalization of cannabis use will likely lead to increased cannabis use waivers and, eventually, a reduction in cannabis conviction waivers.⁷⁶ Misconduct waivers related to drug and alcohol tests or convictions have

⁷⁰ Meghann Myers, *As the Army Modernizes its Standards to Join, Legal Marijuana Use is Still an Open Question*, ARMY TIMES (Aug. 29, 2018), <https://www.armytimes.com/news/your-army/2018/08/29/as-the-army-modernizes-its-standards-to-join-legal-marijuana-use-is-still-an-open-question>.

⁷¹ AR 601-210, *supra* note 64, para. 4-6a(4)(b).

⁷² U.S. Army Recruiting Command, Drug and Alcohol and Possession of Marijuana Approved Waivers (document on file with author) [hereinafter Approved Waivers].

⁷³ Fred Kaplan, *GI Schmo*, SLATE (Jan. 9, 2006), <https://slate.com/news-and-politics/2006/01/why-dumb-recruits-cost-the-army-big-time.html>.

⁷⁴ ASCH ET AL., *supra* note 18, at 40.

⁷⁵ Ernesto Londoño, *Needing Younger Workers, Federal Officials Relax Rules on Past Drug Use*, N.Y. TIMES (Apr. 30, 2023), <https://www.nytimes.com/2023/04/30/us/marijuana-drugs-federal-jobs.html>. Over the last three years, the Navy granted 1,375 waivers, while the Air Force and Marine Corps also routinely permitted an additional drug test for applicants who tested positive.

⁷⁶ *Id.*

been rising.⁷⁷ The Army approved zero waivers in FY 2013 and FY 2014.⁷⁸ The number of waivers rose to 21 in FY 2015 before dramatically increasing to 191 in FY 2016, 506 in FY 2017, and more than 600 in FY 2018.⁷⁹ Between 2016 and 2018, USAREC approved nearly 1,800 waivers for cannabis possession convictions.⁸⁰ The former commanding general of USAREC and waiver approval authority, Major General Jeff Snow, agreed that increased legal cannabis use would increase cannabis use waivers.⁸¹ He said, “Provided they understand that they cannot do that when they serve in the military, I will waive [cannabis] all day long.”⁸²

With continued state and territorial cannabis legalization and potential Federal cannabis legalization, more of the recruited population would have legal access to cannabis. If the military retains a prohibition on cannabis with required misconduct waivers for legal cannabis use, the only way to recruit cannabis users would be through a piecemeal system of waivers. While Congress does not limit cannabis use or conviction waivers, Congress previously held hearings and delayed DoD nominees based upon expanded use of mental health and cannabis waivers.⁸³ After Congress’s intervention, the Army backtracked and approved less than a hundred conviction waivers and only a few dozen cannabis use waivers in 2019.⁸⁴ Prior to this policy shift, drug and alcohol test waivers had been increasing in line with increasing cannabis legalization.⁸⁵ If cannabis use continues to disqualify applicants, and Congress remains opposed to increased cannabis waivers, the available recruitment population after Federal cannabis legalization will only further narrow. With a smaller pool of

⁷⁷ Jeff Schogol, *The Army Missed Its Recruiting Goal for The First Time Since 2005*, TASK & PURPOSE (Sept. 21, 2018), <https://taskandpurpose.com/bulletpoints/army-recruiting-goal-2018>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Approved Waivers, *supra* note 72.

⁸¹ Myers, *supra* note 70.

⁸² *Id.*

⁸³ See Meghann Myers, ‘No Changes to Standards’: Army Leaders Take Control of Waiver Controversy, ARMY TIMES (Nov. 15, 2017), <https://www.armytimes.com/news/your-army/2017/11/15/no-changes-to-standards-army-leaders-take-control-of-waiver-controversy>.

⁸⁴ Approved Waivers, *supra* note 72.

⁸⁵ Schogol, *supra* note 77.

recruits available, the importance of retaining Service members will only increase.

3. *Legalized Cannabis and Military Retention*

No specific data indicates that Service members are choosing to leave military service based upon the continued prohibition on cannabis use, but it could be a factor. In an effort to gain an understanding, the viewpoints of veterans and veterans' organizations on liberalizing cannabis use prohibitions can be utilized. The American Legion (Legion) has passed a resolution urging Congress to remove cannabis from Schedule I of the CSA.⁸⁶ The Legion also conducted a survey to gauge veterans' perspectives on cannabis use: 92 percent supported additional medical research; 82 percent supported full legalization; and 83 percent supported cannabis as a medical treatment option.⁸⁷ The Legion is one large example that highlights veterans' interest in low THC products, medical cannabis, further medical study, and even cannabis legalization.⁸⁸ Initial research has shown cannabis to be an effective treatment for post-traumatic stress disorder (PTSD), depression, and chronic pain, which tend to impact Service members and veterans at a higher rate than the broader population.⁸⁹ These examples do not specifically show that continued cannabis prohibition impacts Service member retention, but it does show Service members and veterans may be disproportionately helped by cannabis use. This may indicate that continued prohibition of cannabis use is a factor in some Service members' decisions to leave military service,

⁸⁶ Bruce Kennedy, *How Federal Marijuana Policy Is Pushing Veterans into the Black Market*, POLITICO (May 27, 2020), <https://www.politico.com/news/magazine/2020/05/27/federal-marijuana-policy-veterans-black-market-271197>.

⁸⁷ *Survey Shows Veteran Households Support Research of Medical Cannabis*, AM. LEGION (Nov. 2, 2017), <https://www.legion.org/veteranshealthcare/239814/survey-shows-veteran-households-support-research-medical-cannabis>.

⁸⁸ *Id.*

⁸⁹ See Nick Etten, *Our Veterans Deserve the Well-Being that Medical Cannabis Can Provide*, MIL. TIMES (Dec. 17, 2019), <https://www.militarytimes.com/opinion/commentary/2019/12/17/our-veterans-deserve-the-well-being-that-medical-cannabis-can-provide>; *How Common Is PTSD in Veterans*, VETERANS ADMIN., https://www.ptsd.va.gov/understand/common/common_veterans.asp (last visited Apr. 7, 2024); Ismael Rodriguez Jr., *Federal Study Finds Cannabis Beneficial for PTSD Treatment*, VFW MAG. (Sept. 21, 2021), <https://www.vfw.org/media-and-events/latest-releases/archives/2021/9/federal-study-finds-cannabis-beneficial-for-ptsd-treatment>.

especially if they suffer from one of those conditions. A continued prohibition on cannabis use with its impact on recruitment and retention becomes more difficult to justify when examining historical cannabis policies.

III. Cannabis Prohibitions and the Initiation of the U.S. Military Drug Testing

The U.S. military drug testing program's origin begins with the popular perception of significant Service member heroin and cannabis use during the Vietnam era.⁹⁰ This historical background provides the modern foundation for the U.S. military cannabis prohibitions, which ultimately led to the institution of mandatory drug testing. However, cannabis use in the military began much earlier and resulted in no adverse action.⁹¹

A. Historical Background of Cannabis Use Prohibitions before Vietnam

The documented history of U.S. military cannabis use begins in the early twentieth century.⁹² In 1907, U.S. Service members began serving in the Panama Canal Zone.⁹³ In Panama, cannabis was widely smoked for its psychoactive effect.⁹⁴ A few 1916 military reports mention that U.S. Service members stationed in the Panama Canal Zone quickly adopted cannabis use.⁹⁵ The Army conducted two research studies in 1925 and 1931, which found cannabis use did “not affect the combat efficiency and fighting spirit of the individual [S]oldier nor does it undermine military discipline.”⁹⁶ The first legal prohibition for “habit-forming narcotic drugs” was instituted in the 1917 *Manual for Courts-Martial* but limited to

⁹⁰ *Military Drug Program Historical Timeline*, OFF. OF UNDER SEC'Y FOR PERS. & READINESS, <https://prhome.defense.gov/ForceResiliency/DDR/PTimeline> (last visited Oct. 15, 2021).

⁹¹ *Id.*

⁹² LUKASZ KAMIENSKI, SHOOTING UP: A HISTORY OF DRUGS IN WARFARE 254-255 (2017).

⁹³ *Our History*, U.S. ARMY S. (SIXTH ARMY), <https://www.arsouth.army.mil/About/History> (last visited Oct. 26, 2023).

⁹⁴ KAMIENSKI, *supra* note 92, at 254-55.

⁹⁵ *Id.*

⁹⁶ *Id.* at 255.

introduction to installations and use, not possession.⁹⁷ In 1918, the Department of War's General Order No. 25 prohibited the possession of narcotic drugs.⁹⁸ However, cannabis possession or use was not prosecuted under these legal authorities until World War II, which indicates the legal interpretation initially did not include cannabis.⁹⁹

Between Panama and World War II, the popular perception of cannabis changed based upon racialized stereotypes.¹⁰⁰ While cannabis was previously used in liquid medicines, Mexican immigrants introduced smoking cannabis, which racial minorities adopted¹⁰¹ and twenty-six states legally prohibited by 1925.¹⁰² This backlash culminated in the Marihuana Tax Act of 1937 federally criminalizing cannabis possession through heavy taxation, complex administrative requirements, and presumed illegality if possessed without complying with registration requirements.¹⁰³ In this new cultural milieu, the U.S. military began treating cannabis use more seriously.¹⁰⁴ Even though military prohibitions on cannabis use were not explicitly added until after World War II, during the war, cannabis use, possession, and introduction were prosecuted using the "habit-forming narcotic drug" legal framework that had not previously been used for cannabis.¹⁰⁵ This prosecution paradigm continued until the UCMJ codified specific cannabis offenses in 1950.¹⁰⁶

⁹⁷ A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND OF OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES 166 (1917); *see also* Hoff, *supra* note 15, at 171.

⁹⁸ Hoff, *supra* note 15, at 171.

⁹⁹ *Id.*

¹⁰⁰ *See* Nathan Greenslit, *How Bad Neuroscience Reinforces Racist Drug Policy*, THE ATLANTIC (June 12, 2014), <https://www.theatlantic.com/health/archive/2014/06/how-bad-neuroscience-reinforces-racist-drug-policy/371378>.

¹⁰¹ *Id.*

¹⁰² Siff, *supra* note 2.

¹⁰³ *See* Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).

¹⁰⁴ Hoff, *supra* note 15, at 171.

¹⁰⁵ *Id.*

¹⁰⁶ Hoff, *supra* note 15, at 171.

B. Drugged U.S. Military Loses Vietnam War and Prompts Drug Testing Program

Service member drug use was a convenient explanation for the U.S. military's failure in Vietnam.¹⁰⁷ Press coverage and politicians focused attention on the "junkie army," which highlighted drugs and alcohol as part of the reason the U.S. military was losing the war.¹⁰⁸ Congressional hearings, DoD studies, and popular culture exaggerated the amount and impact of drug use on Service members in Vietnam.¹⁰⁹ In an extremely influential *Washingtonian* article, John Steinbeck IV claimed that 75 percent of Service members were regularly high, though he would later admit that he "overdramatized the nature of drug abuse in Vietnam for political purposes."¹¹⁰

While drug use among Service members did occur, any nuance to the issue was lost. For example, a 1971 DoD Study indicated that around 30 percent of all Service members had used cannabis in the last year while 12 percent had used narcotic drugs.¹¹¹ But, a majority of cannabis users used it less than once weekly.¹¹² After President Nixon's election, he proposed the Vietnamization of the Vietnam War, which would increase the capability of the South Vietnamese military through weapons and training while reducing the number of U.S. Service members in direct combat.¹¹³ The impact of reducing American Service members by 480,000 from 1969 to 1972¹¹⁴ raised concerns about Service members bringing addiction home.¹¹⁵ In response, Service members returning from Vietnam were required to participate in compulsory drug testing.¹¹⁶ A positive drug test meant the Service member would remain in Vietnam until a negative drug

¹⁰⁷ KAMIENSKI, *supra* note 92, at 278.

¹⁰⁸ *Id.*

¹⁰⁹ JEREMY KUZMAROV, THE MYTH OF AN ADDICTED ARMY 54-55 (2009).

¹¹⁰ KAMIENSKI, *supra* note 92, at 278.

¹¹¹ ALLAN H. FISHER, JR., HUM. RES. RSCH. ORG., PRELIMINARY FINDINGS FROM THE 1971 DOD SURVEY OF DRUG USE STUDY, at viii (1972) [hereinafter 1971 DOD Survey].

¹¹² *Id.* at 36.

¹¹³ *Vietnamization*, HIST. (June 7, 2019), <https://www.history.com/topics/vietnam-war/vietnamization>.

¹¹⁴ *Id.*

¹¹⁵ Adam Janos, *G.I.s' Drug Use in Vietnam Soured – With Their Commanders' Help*, HIST. (Aug. 29, 2018), <https://www.history.com/news/drug-use-in-vietnam>.

¹¹⁶ *Id.*

test was produced.¹¹⁷ Although limited drug testing did occur prior to this policy, Operation Golden Flow was the first mandatory DoD drug testing program.¹¹⁸

After a drug amnesty program, additional drug testing, and a comprehensive study,¹¹⁹ DoD Instruction (DoDI) 1010.01 codified the DoD's random drug testing program for all Service members in 1974.¹²⁰ The intention of this program was rehabilitation rather than adverse action even though rehabilitation failure could result in separation from service.¹²¹ In response to continued drug use by Service members, Deputy Secretary of Defense Frank Carlucci shifted the focus from rehabilitation by promulgating authority to use positive results from compulsory drug tests as a basis for UCMJ prosecution and administrative separation proceedings.¹²² The current cannabis use prohibitions, compulsory drug testing program, and authority to use positive drug tests for adverse action through the UCMJ and administrative separation proceedings follow directly from the 1981 Carlucci Memo.¹²³

IV. Cannabis Prohibitions and Required Changes after Federal Cannabis Legalization

A. Statutory Prohibitions on Cannabis

Congress has statutorily prohibited cannabis use, possession, and introduction to an installation by military members in Article 112a, UCMJ.¹²⁴ In addition to cannabis restrictions codified under CSA or state law, this legal prohibition against cannabis use within the UCMJ provides an additional criminal jurisdiction to which Service members are

¹¹⁷ *Id.*

¹¹⁸ See DEPUTY ASSISTANT SEC'Y OF DEF. (DRUG AND ALCOHOL ABUSE), THE DEPARTMENT OF DEFENSE EXPERIENCE IN DRUG ABUSE PROGRAMS 25-26 (June 1973).

¹¹⁹ *Military Drug Program Historical Timeline*, *supra* note 90.

¹²⁰ *Id.*; U.S. DEP'T OF DEF., INSTR. 1010.01, DEPARTMENT OF DEFENSE DRUG ABUSE TESTING PROGRAM (4 Apr. 1974) [HEREINAFTER DoDI 1010.01].

¹²¹ DoDI 1010.01, *supra* note 120, at para. 3a.

¹²² Memorandum from Deputy Sec'y of Def. to Sec'ies of the Mil. Dep'ts & Dirs. of Def. Agencies, subject: Alcohol and Drug Abuse (28 Dec. 1981).

¹²³ *Military Drug Program Historical Timeline*, *supra* note 90.

¹²⁴ UCMJ art. 112a (2019).

accountable.¹²⁵ Congress enacted the UCMJ, under its constitutional authority to govern and regulate “land and naval forces,”¹²⁶ which provides a criminal code to prosecute military members as defined under Article 2, UCMJ.¹²⁷ The *Manual for Courts-Martial* preamble states, “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the [A]rmed [F]orces”¹²⁸ The prohibition on cannabis use falls cleanly within the U.S. military’s obligation to maintain good order and discipline. The UCMJ also includes two punitive articles related to drug use that would take on a new importance if an authorized cannabis use policy was implemented.¹²⁹ Article 112, UCMJ, criminalizes Service members who are incapacitated for proper performance of duty.¹³⁰ Article 112 can be used to charge incapacitation by either alcohol or drugs, including cannabis.¹³¹ Article 113, UCMJ, criminalizes operation of a vehicle, aircraft, or vessel while impaired by either alcohol or drugs including cannabis.¹³² These statutory tools exist, but regulations are the primary tools used to enforce cannabis prohibitions in the U.S. military (as shown by the requirement to initiate involuntary separation after a positive drug test),¹³³ and, therefore, they would also need to be adjusted.

B. Regulatory Prohibitions on Cannabis Use

Congress has prescribed cannabis use prohibitions in the UCMJ and thus authorized criminal prosecution; however, cannabis use by Service members is rarely prosecuted at a court-martial.¹³⁴ Units are required to

¹²⁵ U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE paras. 4-1, 4-2 (20 Nov. 2020).

¹²⁶ U.S. CONST. art. I, § 8, cl. 14.

¹²⁷ UCMJ art. 2 (2019).

¹²⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 32 (2019).

¹²⁹ UCMJ arts. 112, 113 (2019).

¹³⁰ UCMJ art. 112 (2019).

¹³¹ *Id.*

¹³² UCMJ art. 113 (2019).

¹³³ U.S. DEP’T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 10-4 (23 July 2020) [hereinafter AR 600-85].

¹³⁴ Court-martials are rarely used for cannabis use. This assertion is based on the author’s recent professional experience as an Army judge advocate for ten years. Other branches also rarely use court-martial for cannabis offenses. See e-mail from Major Kyle Owens, U.S. Marine Corps, to author (Mar. 29, 2022) (on file with author); e-mail from Major Deepa Patel, U.S. Air Force, to author (Mar. 30, 2022) (on file with author); and e-mail from Lieutenant Lorhel Stokes, U.S. Coast Guard, to author (Mar. 29, 2022) (on file with author) [hereinafter Court-Martial Experience].

initiate administrative separations in response to positive drug tests, and most positive drug tests result in administrative separation rather than court-martial.¹³⁵ The separation procedures for officers and enlisted begin with delegations of authority from Congress to the Secretary of Defense, who publishes separation procedures and limits before each Service promulgates final regulatory authorities.¹³⁶ Currently, the four separation regulations within the Army include regulatory bases to remove a Service member for use of illicit drugs or illegal use of legal drugs but does not specifically include a list of illicit drugs.¹³⁷ Army Regulation 600-85 more clearly defines illicit drugs by prohibiting the use of drugs specifically mentioned in Article 112a, UCMJ, or the CSA, but it also includes a lengthy list of other FDA-prohibited substances, controlled substance analogues, or other controlled substance variations.¹³⁸

For the purposes of this article's analysis, cannabis or its active ingredient are mentioned by name in Article 112a, UCMJ, the CSA, and AR 600-85, along with hemp products, synthetic cannabis or synthetic tetrahydrocannabinol (THC), and "cannabidiol CBD, regardless of the product's THC concentration."¹³⁹ Service members may be separated in accordance with each of the four separation regulations for use, possession, or a positive drug test for any of the cannabis substances described in AR 600-85.¹⁴⁰

¹³⁵ AR 600-85, *supra* note 133; Court-Martial Experiences, *supra* note 134.

¹³⁶ *See, e.g.*, 10 U.S.C. § 113; 10 U.S.C. § 138; 10 U.S.C. § 1181; U.S. DEP'T OF DEF., DIR. 5124.10, ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS (ASD(M&RA)) para. 2i (14 Mar. 2018); U.S. DEP'T OF DEF., INSTR. 1332.30, COMMISSIONED OFFICER ADMINISTRATIVE SEPARATIONS para. 2.2 (11 May 2018) (C3, 9 Sept. 2021); and U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS para. 2 (27 Jan. 2014) (C7, 23 June 2022).

¹³⁷ *See, e.g.*, U.S. DEP'T OF ARMY, REG. 135-175, SEPARATIONS OF OFFICERS paras. 2-11d, 2-13d (30 Mar. 2020) [hereinafter AR 135-175]; U.S. DEP'T OF ARMY, REG. 135-178 ENLISTED ADMINISTRATIVE SEPARATIONS para. 11-1d (7 Nov. 2022) [hereinafter AR 135-178]; U.S. DEP'T OF ARMY, REG. 600-8-24 OFFICER TRANSFERS AND DISCHARGES para. 4-2b (8 Feb. 2020) [hereinafter AR 600-8-24]; and U.S. DEP'T OF ARMY, REG. 635-200 ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 14-12c (28 June 2021) [hereinafter AR 635-200].

¹³⁸ AR 600-85, *supra* note 133, para. 4-2.

¹³⁹ *Id.*

¹⁴⁰ *Id.* para 10-6.

C. Required Legal Changes Prior to an Authorized Cannabis Use Policy

1. Article 112a, UCMJ

As shown through a review of statutory and regulatory cannabis authorities, Congress codified the foundational legal prohibition on cannabis use in Article 112a; in turn, Article 112a provides the legal authority for AR 600-85 and, ultimately, the four administrative separation regulations.¹⁴¹ If the DoD wished to authorize cannabis use for Service members, it would first require congressional action to specifically remove cannabis from the statutory text in Article 112a.¹⁴² For example, if Article 112a only prohibited controlled substances prohibited by the CSA, Congress could remove the military prohibition on cannabis use simply by amending the CSA. However, Congress specifically enumerated substances in the statutory text of Article 112a; therefore, Congress would not be able to legalize cannabis use for Service members without directly amending Article 112a.

Although the executive branch could conduct administrative rulemaking to remove cannabis from the CSA, the executive branch and the DoD do not have the legal authority to override the statutory text of Article 112a.¹⁴³ On the other hand, the Secretary of Defense and Service Secretaries have been delegated authority to promulgate personnel policies and administrative separation policies for the U.S. military.¹⁴⁴ But circumventing the clear statutory prohibition on cannabis use within Article 112a by excluding cannabis from substance abuse policies and separation regulations would be legally impermissible and beyond the scope of the Secretary of Defense and Service Secretaries' authority. Therefore, Congress must remove cannabis from Article 112a and the CSA before the DoD or individual Services would have the authority to promulgate an authorized cannabis use policy.

¹⁴¹ See, e.g., UCMJ art. 112a (2019); AR 600-85, *supra* note 133, para. 4-2; AR 135-175, *supra* note 137, para. 2-11d, 2-13d; AR 135-178, *supra* note 137, para. 11-1d; AR 600-8-24, *supra* note 137, para. 4-2b; and AR 635-200, *supra* note 137, para. 14-12c.

¹⁴² UCMJ art. 112a (2019).

¹⁴³ JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10655, DOES THE PRESIDENT HAVE THE POWER TO LEGALIZE MARIJUANA? 2-3 (2021).

¹⁴⁴ See 10 U.S.C. § 113; 10 U.S.C. § 138; 10 U.S.C. § 1181.

2. *Article 112, UCMJ*

If Congress removes cannabis from Article 112a, UCMJ, in conjunction with Federal cannabis legalization, Congress should also revise the statutory text of Article 112 to explicitly include impairment by cannabis under its framework. This revision would provide additional operating space for the Service Secretaries to craft cannabis use policies that fit each Service's character. Under an authorized cannabis use policy, misconduct would be focused on cannabis impairment or incapacitation in contrast to illegal cannabis use or possession.¹⁴⁵ Revising Article 112 to include impairment by cannabis would clearly indicate the shift toward an authorized cannabis use policy. However, this change is not required to adopt authorized cannabis use. Still, a focus on cannabis impairment under Article 112 would be in line with an authorized cannabis use policy under a revised AR 600-85.

3. *Army Regulation 600-85*

An authorized cannabis use policy should be added to AR 600-85. While the four separation regulations are the primary tools used to remove Service members who fail to comply with the U.S. military's cannabis prohibitions, those regulations will not require revision to comply with an authorized cannabis use policy because those regulations do not include any mention of cannabis.¹⁴⁶ In contrast, AR 600-85, the source document for the Army's Substance Abuse Program policy, would require a great deal of revision to comply with an authorized cannabis use policy. The revisions fall into four main categories.

First, an authorized cannabis use policy will require removal of cannabis, hemp products, synthetic cannabis or THC, and "cannabidiol CBD, regardless of the product's THC concentration" from the prohibited substances that warrant adverse action if used.¹⁴⁷ Once cannabis is

¹⁴⁵ UCMJ art. 112 (2019).

¹⁴⁶ See, e.g., AR 135-175, *supra* note 137, paras. 2-11d, 2-13d; AR 135-178, *supra* note 137, para. 11-1d; AR 600-8-24, *supra* note 137, para. 4-2b; AR 635-200, *supra* note 137, para. 14-12c.

¹⁴⁷ AR 600-85, *supra* note 133, para. 4-2.

removed from the CSA and Article 112a, UCMJ, this revision should be simple.

Second, the self-referral programs for alcohol treatment should be expanded to include self-referral for cannabis abuse, which should mirror the alcohol abuse treatment program.¹⁴⁸ Even with an authorized use cannabis policy, some Service members may abuse cannabis like some Service members abuse alcohol. The current substance use disorder treatment is focused on command referral and enforces cannabis prohibition through routine drug tests to prevent illicit drug use.¹⁴⁹ If cannabis use becomes authorized, this presumption would no longer be applicable. Therefore, cannabis misuse self-referral would be required in conjunction with an authorized cannabis use policy.

Third, the Army should codify its authorized cannabis use policy within AR 600-85. Similar to alcohol use, the policy should clearly state that authorized cannabis does not provide autonomy for Service members to use cannabis at any time, any place, or in any job.¹⁵⁰ The U.S. military has restricted the use of alcohol during the duty day,¹⁵¹ prohibited underage drinking for Service members,¹⁵² and prohibited wearing a uniform in an establishment primarily serving alcohol.¹⁵³ Therefore, limitations on cannabis use by periods of service, job types, and waiting periods would permit cannabis use but maintain responsible control over its use.

Fourth, AR 600-85 should also provide clarity about the distinction of medical cannabis under the authorized use policy.¹⁵⁴ It is possible that medicinal cannabis could retain the same limitations as authorized cannabis use. However, if the Food and Drug Administration (FDA) continues to approve cannabis medical treatments, then it may be treated

¹⁴⁸ *Id.* paras. 8-1, 8-2.

¹⁴⁹ *Id.* para. 8-2.

¹⁵⁰ *See id.* para. 3-2.

¹⁵¹ *Id.*

¹⁵² *Id.*; U.S. DEP'T OF ARMY, REG. 215-1, MILITARY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 10-1c (24 Sept. 2010).

¹⁵³ U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 4-3 (26 Jan. 2021).

¹⁵⁴ AR 600-85, *supra* note 133, para. 4-14(c)(4)(d).

as simply another prescription medication.¹⁵⁵ It is also likely that FDA-approved cannabis medications may continue to be treated differently than smoking cannabis under a state law framework.¹⁵⁶ The required statutory and regulatory revisions highlight the legal issues that must be addressed prior to implementation of an authorized cannabis use policy; however, the U.S. military can learn lessons from the CAF. The CAF has authorized cannabis use by its members since 2018 with restrictions by service periods and job duties with waiting periods.¹⁵⁷ It provides a comparable NATO military model that the U.S. military should use as a framework for an authorized cannabis use policy.

V. A Suggested Model for U.S. Military Cannabis Policy

The U.S. military will be unable to authorize cannabis use for Service members without Congress removing cannabis from the CSA and Article 112a, UCMJ; however, this should not preclude the DoD from taking actions in response to the continued legalization of cannabis. First, the DoD should liberalize its accession policies that exclude applicants who have previously used cannabis or continue to use cannabis legally under the state or territory laws.¹⁵⁸ Second, the U.S. military should begin preparation for the inevitable legalization of cannabis by preparing to adopt a comparable policy to the Canadian military's cannabis policies¹⁵⁹ once Congress legalizes cannabis.

1. Liberalized Cannabis Accession Policies

While the U.S. military requires congressional action to authorize cannabis use for Service members, the DoD and each military department drive accession policies.¹⁶⁰ Liberalized cannabis policies by the Nation's states and territories resulted in significant increases in requests for

¹⁵⁵ *Id.* para. 4-14.

¹⁵⁶ *Id.*

¹⁵⁷ DAOD 9004-1, *supra* note 1, para. 5-2.

¹⁵⁸ See DoDI 1010.16, *supra* note 61, para. 6.5b; DoDI 1304.26, *supra* note 62, encl. 4, para. 1d.

¹⁵⁹ See DAOD 9004-1, *supra* note 1.

¹⁶⁰ See DoDI 1010.16, *supra* note 61, para. 6.5b; DoDI 1304.26, *supra* note 62, encl. 4, para. 1d; DoDI 1145.01, *supra* note 69, para. 3b(1); AR 601-210, *supra* note 64, paras. 4.18b(1)(a)-(c), 4-18d, 4-18e.

cannabis use waivers.¹⁶¹ This problem will only continue to increase with broad cannabis legalization. For these reasons, the U.S. military should liberalize four accession policies.

First, cannabis use or admission should no longer require a misconduct waiver.¹⁶² Second, the retest period for the first positive test¹⁶³ for cannabis should be shortened from 180 days to 30 days. Cannabis can remain in urine for up to 28 days.¹⁶⁴ This time will allow any lingering cannabis from legal use to be excreted. Additionally, an applicant is unlikely to wait for six months to potentially be able to join the military. A shortened re-test period will ensure a negative drug test prior to entry, but it will also allow the recruiters to make clear that continued cannabis use is not authorized in the U.S. military. Third, cannabis use or admission should no longer prevent accession into jobs that require a security clearance,¹⁶⁵ which only reduces opportunities for eligible applicants. Fourth, Category IV applicants who test positive for cannabis or admit to cannabis use should be permitted to join.¹⁶⁶ These changes in the accession policies will reduce the negative effect of normalized cannabis use. The FY 2023 active duty Army end strength was reduced by 12,000 based upon recruitment difficulties.¹⁶⁷ Strict cannabis accession policies, which discourage qualified candidates, only worsen these recruitment challenges. More importantly, the data suggests that Service members who receive cannabis waivers perform no worse than other Service members.¹⁶⁸ Limiting career options for these Service members only harms the U.S. military. The U.S. military should liberalize accession policies while learning from the Canadian military's authorized cannabis use policies.

¹⁶¹ Approved Waivers, *supra* note 72.

¹⁶² See DoDI 1304.26, *supra* note 62.

¹⁶³ See AR 601-210, *supra* note 64.

¹⁶⁴ See DAOD 9004-1, *supra* note 1, para. 4-12.

¹⁶⁵ See AR 601-210, *supra* note 64, paras. 4-18d, 4-18e.

¹⁶⁶ See DoDI 1145.01, *supra* note 69.

¹⁶⁷ Davis Winkie & Jen Judson, *Biden Budget Would Mean Smallest Army Since WWII*, MIL. TIMES (Mar. 28, 2022), <https://www.militarytimes.com/news/pentagon-congress/2022/03/28/biden-budget-would-mean-smallest-army-since-wwii>.

¹⁶⁸ Doug Irving, *Army Enlistment Waivers in the Age of Legal Marijuana*, RAND (Oct. 27, 2021), <https://www.rand.org/blog/rand-review/2021/10/army-enlistment-waivers-in-the-age-of-legal-marijuana.html>.

C. Canadian Armed Forces Cannabis Policies

The Government of Canada passed the Cannabis Act, which authorizes Canadians over the age of eighteen to possess, share, buy, grow, and use cannabis products beginning on 17 October 2018.¹⁶⁹ Even with Canadian cannabis legalization, the CAF had the option to rely upon a similar military deference doctrine as the U.S. military to enforce policies or restrictions that are more restrictive than those granted to broader Canadian society.¹⁷⁰ On multiple occasions, the Supreme Court of Canada has recognized the validity of the distinct military justice system.¹⁷¹ The Canadian Charter of Rights and Freedoms (Charter), as part of the Canadian Constitution, reigns supreme over the National Defence Act, which organizes the Canadian Military Justice system; however, “an individual’s rights can be limited where they are inconsistent with the basic obligations of military service.”¹⁷²

Even with this legal authority, the CAF began reviewing the possibility of an authorized cannabis use policy following the 2015 election.¹⁷³ The CAF continued its review through 2016; however, the policy review took on a new focus following the introduction of the Cannabis Act in Parliament.¹⁷⁴ While retaining a cannabis prohibition was considered, ultimately, the CAF determined an authorized use cannabis policy with proper limitations could comply with military service requirements.¹⁷⁵ One factor that influenced that decision is that the CAF is a professional military that relies upon volunteers.¹⁷⁶ A broader effort to increase recruitment from across the spectrum of Canadian society was

¹⁶⁹ *Cannabis Legalization and Regulation*, GOV’T OF CAN., <https://www.justice.gc.ca/eng/cj-jp/cannabis> (last visited Feb. 7, 2024).

¹⁷⁰ *Canada’s Military Justice System*, GOV’T OF CAN. (Sept. 25, 2023), <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/transition-materials/transition-assoc-dm/military-justice-system.html>.

¹⁷¹ See, e.g., *MacKay v. The Queen*, [1980] 2 S.C.R. 370 (Can.); *R. v. Généreux*, [1992] 1 S.C.R. 259 (Can.); and *R. v. Moriarity*, [2015] 3 S.C.R. 485 (Can.).

¹⁷² *An Overview of Canada’s Military Justice System*, *supra* note 170.

¹⁷³ Interview with Commander (Retired) Mike Madden, *supra* note 12; Interview with Mark McGaraughty, *supra* note 10.

¹⁷⁴ See *The Cannabis Act: An Overview*, DENTONS (Apr. 18, 2017), <https://www.dentons.com/en/insights/alerts/2017/april/18/the-cannabis-act-an-overview>.

¹⁷⁵ Interview with Commander (Retired) Mike Madden, *supra* note 12.

¹⁷⁶ *Id.*

occurring.¹⁷⁷ Continued cannabis use prohibition would only increase the divide between Canadian society and the CAF while potentially harming recruitment efforts and discouraging continued military service.¹⁷⁸

In early 2017, the CAF instituted a broader working group that included all relevant stakeholders from the Department of National Defence, CAF, and the Canadian Department of Justice.¹⁷⁹ The broader working group collected input from the field, discussed draft policies and concerns, and reviewed finalized proposals.¹⁸⁰ A narrower working group reviewed scientific research, policy reviews of other countries' cannabis policies (including state policies from the United States), and input from Canadian military stakeholders while drafting specific policy language for an authorized cannabis use policy.¹⁸¹

The Canadian military remains the only NATO partner to authorize its military members to use cannabis.¹⁸² Rather than continuing cannabis use prohibition, the Canadian military responded to its country's cannabis legalization by publishing guidance authorizing use of cannabis with limitations based upon periods of service and job types with waiting periods.¹⁸³ One important distinction in the Canadian military's authorized cannabis use policy remains the disparate legal treatment between medical cannabis and authorized cannabis use. The separate legal authorities and legal development that the CAF medical cannabis policy and CAF authorized use cannabis policy must be understood when understanding the CAF's treatment of cannabis as a whole.

1. Canadian Armed Forces' Authorized Cannabis Use Policy

The first piece of the cannabis policy framework is the authorized cannabis use policy. Members of the CAF are authorized to use cannabis provided their use complies with the cannabis use policy's main theme—

¹⁷⁷ *Id.*

¹⁷⁸ Interview with Mark McGaraughty, *supra* note 10.

¹⁷⁹ Interview with Commander (Retired) Mike Madden, *supra* note 12.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Interview with Mark McGaraughty, *supra* note 10.

¹⁸³ DAOD 9004-1, *supra* note 1, para. 5-2.

responsibility.¹⁸⁴ For that reason, cannabis use that would cause “impairment which would prevent the safe and effective performance of duties” remains prohibited.¹⁸⁵ The Canadian military’s authorized cannabis use policy is effectuated through two general limitations on cannabis use for military members.¹⁸⁶ First, CAF members are prohibited from using cannabis during specific periods of service.¹⁸⁷ These prohibition periods include: the duty day; domestic operations, exercises, collective training, or international exercises; operation or service in a vessel, vehicle, or aircraft; during initial entry training; and international operations.¹⁸⁸ Second, cannabis use is limited by job types and waiting periods. After a normal duty day, CAF members may consume cannabis so long as done more than eight hours prior to the next duty day.¹⁸⁹ If a member will be handling weapons, operating a military vehicle, beginning an exercise or collective training, parachuting, rappelling, or maintaining military aircraft then the member is prohibited from consuming cannabis for twenty-four hours prior to that duty type.¹⁹⁰ Members who serve on a submarine, conduct high altitude parachuting, serve on a military aircraft, or operate an unmanned aerial system are not permitted to use cannabis within twenty-eight days of any service period.¹⁹¹ The twenty-eight day limitation essentially precludes CAF members in those roles from using cannabis because it can remain within urine for up to twenty-eight days.¹⁹²

However, this quick synopsis of the cannabis limitations highlights the authorized cannabis use policy’s clarity. It also results in the vast majority of the CAF members being permitted to use cannabis on a daily basis. As another tool to ensure clarity, Canadian military commanders are required to notify CAF members when a period of cannabis prohibition will begin based upon operational needs or upcoming missions.¹⁹³ This requirement

¹⁸⁴ *Id.* para. 4-2.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* paras. 5-1, 5-2.

¹⁸⁷ *Id.* para. 5-1.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* para. 5-2.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* para. 4-12.

¹⁹³ *Id.* para. 5-5.

ensures clear communication between leaders and CAF members when cannabis use is not authorized.

While cannabis use is authorized, the Canadian military expects its leaders to examine its CAF members for cannabis use disorder and cannabis misuse.¹⁹⁴ The authorized use policy includes training for junior leaders to highlight signs of cannabis misuse or cannabis use disorder.¹⁹⁵ Cannabis use disorder includes a problematic pattern of cannabis use that results in impairment or distress meeting at least two criteria under *Diagnostic and Statistical Manual of Mental Disorders*.¹⁹⁶ Cannabis use disorder will require referral for treatment; however, CAF members are permitted to decline treatment, but it may result in other administrative actions.¹⁹⁷

In contrast, cannabis misuse can prompt adverse action.¹⁹⁸ Cannabis misuse is defined three ways: violation of federal, military, provincial, or foreign law; violations of the Canadian military's authorized cannabis use policy; or action that "undermines safety or operational effectiveness."¹⁹⁹ While the policy was being implemented, the Canadian military leadership focused its message on the responsibility of its military members.²⁰⁰ "I think we can trust in our guys and our gals to look after themselves, to police themselves," said Lieutenant General Chuck Lamarre, Chief of Military Personnel.²⁰¹ Ultimately, he thought that very few CAF members would violate the rules.²⁰² After five years of authorized cannabis use, the policy analyst who manages the cannabis portfolio for the Department of National Defence was not aware of any issues based upon authorized cannabis use.²⁰³ While authorized cannabis use continues without

¹⁹⁴ *Id.* paras. 4-7, 6, 8.

¹⁹⁵ *Id.* para. 4-7; Interview with Commander (Retired) Mike Madden, *supra* note 12.

¹⁹⁶ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM 5-TR (5th ed. 2022); DAOD 9004-1, *supra* note 1, para. 2.

¹⁹⁷ DAOD 9004-1, *supra* note 1, paras. 4-14, 7-3.

¹⁹⁸ *Id.* para. 2.

¹⁹⁹ *Id.* para. 2.

²⁰⁰ Ben Cousins, *Canadian Military Unveils Pot Policy*, CTVNEWS (Sept. 7, 2018), <https://www.ctvnews.ca/canada/canadian-military-unveils-pot-policy-1.4084015>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Interview with Mark McGaraughty, *supra* note 10.

problems, the Canadian military retains a separate policy for CAF members who are prescribed medical cannabis.²⁰⁴

2. Canadian Armed Forces' Medical Cannabis Use Policy

In 2000, the Court of Appeal for Ontario found that Canadians had a constitutional right to use cannabis as medicine under the Charter.²⁰⁵ In response, the Canadian government prescribed regulations that authorized patients to grow or purchase cannabis from regulated producers.²⁰⁶ The Canadian military permitted CAF members to use medical cannabis in accordance with the new regulations under the Charter.²⁰⁷ Based upon this policy, CAF members who are prescribed medical marijuana must notify CAF healthcare providers, who will evaluate the member's medical condition and the cannabis prescription.²⁰⁸ Canadian Armed Forces members who are prescribed medical cannabis will receive medical employment limitations (MELs).²⁰⁹ These restrictions are equivalent to receiving a physical profile in the U.S. military but also can place limits on the performance of job duties.²¹⁰ The practical effect of MELs for medical cannabis means CAF members will be referred for disability processing if medical cannabis use is continued.²¹¹ Four years after adoption of the authorized use cannabis policy, this legal distinction between authorized cannabis and medical cannabis remains in effect.

3. Disparate Treatment for Medical Cannabis and Authorized Use Cannabis

In practice, a CAF member who serves in a job without duty limitations could use cannabis every evening so long as the cannabis use

²⁰⁴ Interview with Commander (Retired) Mike Madden, *supra* note 12.

²⁰⁵ R v. Parker, [2000] 49 O.R. (3d) 481 (Can.).

²⁰⁶ *A Timeline of Some Significant Events in the History of Medical Marijuana in Canada*, CTV NEWS, <https://london.ctvnews.ca/medicalmarijuana/a-timeline-of-some-significant-events-in-the-history-of-medical-marijuana-in-canada-1.3858860> (last visited Apr. 17, 2024).

²⁰⁷ Interview with Commander (Retired) Mike Madden, *supra* note 12.

²⁰⁸ DAOD 9004-1, *supra* note 1, para. 4-8.

²⁰⁹ Interview with Commander (Retired) Mike Madden, *supra* note 12.

²¹⁰ *Id.*

²¹¹ *Id.*

does not result in cannabis use disorder or cannabis misuse.²¹² However, if the same CAF member was medically prescribed CBD, which does not contain cannabis's psychoactive element, THC,²¹³ to reduce nighttime anxiety and enhance sleep,²¹⁴ the CAF member would be required to report the prescription, receive medical evaluation, and be assigned likely career-ending MELs.²¹⁵ These disparate cannabis policies developed independently from distinct legal backgrounds.²¹⁶ Nevertheless, the Canadian military has not rationalized these policies, which continue disparate treatment between medically prescribed cannabis and authorized cannabis use for CAF members. The U.S. military should carefully review and weigh the Canadian military's cannabis policies when determining how to implement a U.S. military cannabis use policy.

D. A Proposed U.S. Military Cannabis Use Policy

While preparing for the inevitable Federal cannabis legalization, the U.S. military should use the Canadian military's authorized cannabis use policy as a model when formulating its cannabis policy. In many ways, the Canadian military provides a crystal ball that grants the U.S. military a look into the future to examine impacts of cannabis legalization. First, both militaries are filled through voluntary service that requires recruitment across a diverse democratic society.²¹⁷ Second, both militaries are NATO members that operate in similar international environments with similar partners under comparable international obligations.²¹⁸ Third, both militaries are modern militaries with high-tech equipment, a commitment to operational safety, and legal systems focused on good order and

²¹² DAOD 9004-1, *supra* note 1, para. 2.

²¹³ Holland, *supra* note 26.

²¹⁴ *Information for Health Care Professionals: Cannabis (Marihuana, Marijuana) and the Cannabinoids*, GOV'T OF CAN. para. 4.9.5.1 (Spring 2018), <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/information-medical-practitioners/information-health-care-professionals-cannabis-cannabinoids.html#a4.9.5.1>.

²¹⁵ See DAOD 9004-1, *supra* note 1, para. 4-8; Interview with Commander (Retired) Mike Madden, *supra* note 12.

²¹⁶ Interview with Commander (Retired) Mike Madden, *supra* note 12.

²¹⁷ Interview with Commander (Retired) Mike Madden, *supra* note 12; Interview with Mark McGaraughey, *supra* note 10.

²¹⁸ Interview with Mark McGaraughey, *supra* note 10.

discipline.²¹⁹ Fourth, as a North American neighbor also settled by Great Britain, Canada retains a similar cultural background in its society and military.²²⁰ Canada provides a comparable model from a partner military for the U.S. military to examine when determining a way forward with future cannabis legalization. Similar to the Canadian military, the U.S. military will also be required to wrestle with the distinction of medical cannabis use, as nearly fifty states and territories have authorized some type of medical cannabis use.²²¹

1. *Authorized Cannabis Use with Limits*

Once Congress acts to legalize cannabis use, the U.S. military should encourage the amendment of Article 112a, UCMJ, to remove cannabis, which would allow the adoption of an authorized cannabis use policy similar to the Canadian military's policy. The U.S. military already has policies in place to prevent and punish impairment while on duty from either alcohol or drugs.²²² The adoption of an impairment-focused model for cannabis use would be in line with U.S. military's alcohol policies. The U.S. military should adopt the Canadian military's two general limitations on cannabis use: periods of service and job types with waiting periods.²²³

First, the prohibition of cannabis use during the duty day; domestic operations, exercises, collective training, or international exercises; operation or service in a vessel, vehicle, or aircraft; during initial entry training; and international operations²²⁴ are common-sense limits on cannabis that mirror alcohol prohibitions the U.S. military already uses.²²⁵ One additional limitation that expands beyond the Canadian military's

²¹⁹ ALLAN D. ENGLISH, DEP'T OF NAT'L DEF. UNDERSTANDING MILITARY CULTURE: A CANADIAN PERSPECTIVE 1-5 (2001); Interview with Commander (Retired) Mike Madden, *supra* note 12.

²²⁰ Norman L. Nicholson, *British North America*, CANADIAN ENCYC. (Nov. 25, 2022) <https://www.thecanadianencyclopedia.ca/en/article/british-north-america>; ENGLISH, *supra* note 219.

²²¹ Hartman, *supra* note 14.

²²² See, e.g., UCMJ art. 112 (2019); UCMJ art. 113 (2019); AR 600-85, *supra* note 133, para. 3-2.

²²³ DAOD 9004-1, *supra* note 1, para. 5-2.

²²⁴ *Id.*

²²⁵ See, e.g., UCMJ art. 112 (2019); UCMJ art. 113 (2019); AR 600-85, *supra* note 133, para. 3-2; AR 670-1, *supra* note 153, para 4-3.

authorized cannabis use policy would be prohibition of cannabis use during international assignments like Korea, Germany, Italy, or Japan. Canada prohibits CAF members from using cannabis while outside of Canada;²²⁶ however, Canada only has four military bases outside Canada.²²⁷ The U.S. military assigns hundreds of thousands of Service members to duty locations around the world.²²⁸ Many countries retain legal prohibitions on cannabis use.²²⁹ For this reason, U.S. Service members should be prohibited from using cannabis during overseas assignments.

Second, the limitations on cannabis use based upon job types with waiting periods should also be adopted; however, each Service should be permitted to provide input upon the waiting periods for specific job types. During the Canadian military's creation of its authorized cannabis use policy, the Canadian Air Force, Canadian Special Operations Forces Command, and the Royal Canadian Navy had concerns about cannabis use based upon operational safety.²³⁰ Some research indicated impacts on mental acuity in pressurized environments after using cannabis.²³¹ For this reason, the strictest limits on cannabis use within the Canadian military's authorized cannabis use policy apply to members of the Canadian Air Force, jobs within the Canadian Special Operations Forces Command, and Navy submariners.²³² While the eight-hour²³³ and twenty-four-hour²³⁴ limitations on cannabis use in the Canadian military's authorized cannabis

²²⁶ DAOD 9004-1, *supra* note 1, para. 5-2.

²²⁷ Martin Lukacs, *Canada Building Global Network of Military Bases in Aggressive Shift*, THE BREACH (June 29, 2021), <https://breachmedia.ca/canada-building-global-network-of-military-bases-in-aggressive-shift>.

²²⁸ "There were over 168,000 active-duty US troops serving overseas as of September 2023." *Where are the US military members stationed, and why?* USAFACTS TEAM (FEB. 2, 2024), <https://usafacts.org/articles/where-are-us-military-members-stationed-and-why/>.

²²⁹ *Countries Where Weed is Illegal 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/countries-where-weed-is-illegal> (last visited Apr. 17, 2024).

²³⁰ Interview with Commander (Retired) Mike Madden, *supra* note 12.

²³¹ DAOD 9004-1, *supra* note 1, para. 4-12.

²³² *Id.* para 5-2.

²³³ Service members may consume cannabis so long as done more than eight hours prior to next duty day. DAOD 9004-1, *supra* note 1, para. 5-2.

²³⁴ If a member will be handling weapons, operating a military vehicle, beginning an exercise or collective training, parachuting, rappelling, or maintaining military aircraft, then the member is prohibited from consuming cannabis for twenty-four hours prior to that duty type. DAOD 9004-1, *supra* note 1, para. 5-2.

use policy should be sufficient for the vast majority of U.S. Service members, some job duties beyond the types highlighted by the Canadian military (members who serve on a submarine, conduct high-altitude parachuting, serve on a military aircraft, or operate an unmanned aerial system²³⁵) may also require cannabis use preclusion. The U.S. military should solicit feedback from each Service about potential job duties that may also require a twenty-eight-day restriction on cannabis use and continued random cannabis testing. Cannabis use policies do not have to be divided between medical and authorized use.

2. Rationalized Medical and Authorized Cannabis Use Policies

The U.S. military should treat medical and authorized cannabis use with one standard rather than retaining a bifurcated system like the Canadian military. Army Regulation (AR) 600-85 already permits use of cannabis-derived medicines as authorized medical use if the medications are FDA approved.²³⁶ Primarily, state or territorial medical cannabis prescriptions do not include FDA-approved medications but rather other means of cannabis consumption such as smoking or consuming edibles.²³⁷ Under a combined cannabis policy, U.S. Service members should be required to report cannabis prescriptions to military medical providers like CAF members.²³⁸ As long as the prescription includes cannabis use that would comply with the authorized cannabis use policy, avoid impairment during duty periods, or only include short-term treatment (less than two weeks), no additional action would be required. On the other hand, if the cannabis is prescribed for use during the duty day in a manner inconsistent with job duty limitations or for long term use, then the Service member should be evaluated to determine if they meet medical retention standards in accordance with AR 635-40.²³⁹ This proposed solution would combine

²³⁵ *Id.*

²³⁶ AR 600-85, *supra* note 133, para. 4-2(1)(9)(a).

²³⁷ See *FDA and Cannabis: Research and Drug Approval Process*, U.S. FOOD & DRUG ADMIN. (Oct. 1, 2020), <https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process>; Stephanie Watson, *Medical Marijuana FAQ*, WEBMD, (Dec. 18, 2021), <https://www.webmd.com/a-to-z-guides/medical-marijuana-faq>.

²³⁸ DAOD 9004-1, *supra* note 1, para. 4-8.

²³⁹ U.S. DEP'T OF ARMY, REG. 635-40, DISABILITY EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION para. 4-7 (19 Jan. 2017).

both types of cannabis use into a workable policy. A failure to rationalize medical and authorized use cannabis policies would increase confusion for Service members while dis-incentivizing compliance.

3. Effects of an Authorized Cannabis Use Policy

An authorized cannabis use policy can increase recruitment and retention based upon normalized cannabis use in society; however, it also provides four additional positive effects for the U.S. military. First, it will save time, work, and money. The Navy Drug Screening Laboratories test 2.5 million urine samples each year, which includes samples from all components and branches along with all new accessions.²⁴⁰ While an authorized cannabis use policy would not eliminate drug testing, it would dramatically reduce the number of positive tests. Because cannabis can be detected in urine for twenty-eight days, it is the most common positive test.²⁴¹ Most other drugs are not detectable within a few days of use.²⁴² If the laboratory is no longer required to do confirmation testing²⁴³ for the vast majority of tests, it would dramatically reduce testing costs.

A positive cannabis test is only the first step in a long process. Once the test is confirmed as illicit drug use, the results are returned to the unit drug control representative who must receive the positive test and notify law enforcement, the unit commander, and unit staff.²⁴⁴ Units are required to flag the Service member, refer the Service member for a substance use disorder evaluation, and initiate administrative separation.²⁴⁵ Unit commanders may also choose to take other adverse actions against the Service member.²⁴⁶ While the vast majority of cannabis cases are not handled by a court-martial,²⁴⁷ even a small reduction in courts-martial and

²⁴⁰ NAVY & MARINE CORPS PUB. HEALTH CTR., DRUG TESTING FAQs 1 (2019), <https://www.med.navy.mil/Portals/62/Documents/NMFA/NMCPHC/root/Documents/navy-drug-screening-labs/Drug-Testing-FAQs.pdf>.

²⁴¹ DAOD 9004-1, *supra* note 1, para. 4-12.

²⁴² See Hayley Hudson, *Different Drugs Stay in your System for Different Amounts of Time*, ADDICTION CTR. (Feb. 23, 2022), <https://www.addictioncenter.com/drugs/how-long-do-drugs-stay-in-your-system>.

²⁴³ See *Drug Testing FAQs*, *supra* note 240.

²⁴⁴ AR 600-85, *supra* note 133, fig.4-2.

²⁴⁵ *Id.* para. 10-4.

²⁴⁶ *Id.*

²⁴⁷ Courts-martial are rarely issued for cannabis use or possession. See *supra* note 134.

larger reduction in administrative separation boards would dramatically reduce the amount of time devoted to cannabis use cases. An authorized cannabis use policy would save time, work, and money at every step of the process from initial drug testing, confirmation testing, personnel actions, and, finally, legal processes.

Second, authorized cannabis use would result in fewer administrative separations and increased retention of trained Service members during a challenging recruiting environment.²⁴⁸ The initial entry training cost for each new Service member ranges between \$55,000 and \$74,000.²⁴⁹ Every Service member not administratively separated for cannabis use could theoretically serve in the U.S. military for longer and save money, training costs, recruiting costs, and reduce recruitment requirements.²⁵⁰

The third potential positive effect of instating an authorized cannabis use policy would be increased opportunities for first-line leaders to engage with their formations and develop and implement leadership skills. A dramatic change in cannabis use policy would require training first-line leaders and junior officers about signs of cannabis impairment and the process to refer for drug testing.²⁵¹ This would require some initial time and investment, but it also would be an opportunity to remind and engage junior leaders about their importance within the military formation. First-line leaders are closest to their Service members, and they have the ability to help catch cannabis misuse or other problems early. This new requirement is not unlike the current expectation for junior leaders to report Service members who are impaired on duty.²⁵²

Fourth, an authorized cannabis use policy would result in additional substance abuse treatment options. While self-referral for cannabis treatment was an option,²⁵³ the current policy presumes illicit use of

²⁴⁸ Winkie & Judson, *supra* note 167.

²⁴⁹ Sean Kimmons, *OPAT Reducing Trainee Attrition, Avoiding Millions in Wasted Training Dollars, Officials Say*, ARMY NEWS SERV. (July 2, 2018), <https://www.army.mil/article/207956>.

²⁵⁰ *Id.*

²⁵¹ This requirement remains part of the Canadian military's authorized cannabis use policy. DAOD 9004-1, *supra* note 1, para. 4-7; Interview with Commander (Retired) Mike Madden, *supra* note 12.

²⁵² See, e.g., UCMJ art. 112 (2019); UCMJ art. 113 (2019); AR 600-85, *supra* note 133, para. 10-12.

²⁵³ AR 600-85, *supra* note 133, para. 7-3.

cannabis and self-referral does not prevent administrative separation.²⁵⁴ Service members are unlikely to seek treatment for an illegal drug. If cannabis use is authorized, then AR 600-85 would have to be revised to reflect authorized cannabis use and self-referral. Even with an expanded self-referral option, command referral for cannabis treatment would occur similarly to command referrals for alcohol abuse now: when Service members were impaired by cannabis, misused cannabis, or were diagnosed with cannabis use disorder.²⁵⁵ The Canadian military's authorized cannabis use policy treats cannabis misuse as a medical issue comparable to alcohol abuse.²⁵⁶ The U.S. military should adopt this method to provide more effective substance abuse treatment options while also improving recruitment and retention through authorized cannabis use.

VI. Conclusion

Federal legalization of cannabis may not occur this year, but the clear trend of legalization throughout the states and territories shows the inevitability of cannabis legalization. The U.S. military must reconcile with this reality. Even without Federal legalization, state and territorial legalization and normalized cannabis use has already impacted military recruiting through the increased need for misconduct waivers for legally used cannabis. In 2018, the Canadian military had a choice to make. It could continue a cannabis use prohibition or authorize cannabis use for CAF members. Based upon its efforts to expand recruitment throughout all facets of Canadian society, the Canadian military prepared an authorized cannabis use policy, which permitted the vast majority of CAF members to use cannabis while retaining limitations based upon service periods and job duties with waiting periods.

The Canadian military has provided the U.S. military with a framework for authorized cannabis use within a similarly organized NATO military. It should be the model for future U.S. military cannabis policy. First, the U.S. military must liberalize its accession policies, which discourage applicants who legally used cannabis under state or territorial law from joining and limits their opportunities. Second, when Congress

²⁵⁴ *Id.* para. 10-12.

²⁵⁵ *Id.* paras. 7-4, 7-5, 7-6.

²⁵⁶ DAOD 9004-1, *supra* note 1, paras. 2, 4-14.

legalizes cannabis, the U.S. military should avoid the urge to retain cannabis prohibitions; rather, it should adopt an authorized cannabis use policy that builds off the Canadian military's authorized cannabis use policy framework while also rationalizing medical and authorized cannabis use. The Canadian military has had no issues since its cannabis use policy went into effect. This success provides more evidence that the U.S. military can trust its Service members "to look after themselves, to police themselves"²⁵⁷ when cannabis use is authorized.

²⁵⁷ *Supra* note 201 and accompanying text.