RESTORING ORDER: A CASE FOR THE PRESIDENT TO CONTROL SUBSTANCES UNDER ARTICLE 112A(B)(2), UCMJ

MAJOR ANDREW R. BRITT[1]

> *[D]rug abuse in the military . . . represents a most serious threat to our military readiness.*
> *–Senator Roger W. Jepsen, 1982*[1]

I. Introduction

More than three decades ago, the Court of Appeals for the Armed Forces (CAAF) in *United States v. Bickel* observed that:

> [D]rug use in the armed services harms the military mission. It diminishes the military effectiveness of the servicemembers who are using drugs; and, when such persons are entrusted with important responsibilities—sometimes involving access to complex equipment or to

[1] Judge Advocate, United States Army. Presently assigned as Associate Professor, Criminal Law Department, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia. LL.M., 2025, University of Virginia; LL.M., 2024, The Judge Advocate General's Legal Center and School, United States Army; J.D., 2011, Temple University Law School; B.A., 2008, Georgetown University. Previous assignments include Appellate Attorney, Defense Appellate Division, Fort Belvoir, Virginia, 2020–2023; General Crimes Prosecutor, Eighth Army, Camp Humphreys, Korea, 2019–2020; Trial Counsel, 210th Field Artillery Brigade, 2d Infantry Division, Camp Casey, Korea, 2018–2019; Administrative Law and Operational Law Attorney, 2d Armored Brigade Combat Team, 1st Armored Division, Fort Bliss, Texas and Camp Buehring, Kuwait, 2017–2018; Legal Assistance Attorney, 1st Armored Division, Fort Bliss, Texas, 2016–2017. Member of the Bars of New Jersey, the United States Army Court of Criminal Appeals, the United States Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This paper was submitted in partial completion of the Master of Laws requirements of the 72d Judge Advocate Officer Graduate Course.

[1] *The Military Justice Act of 1982: Hearing on S. 2521 Before the Subcomm. on Manpower and Pers. of the S. Comm. on Armed Servs.*, 97th Cong. 14 (1982) [hereinafter *MJA 1982 Hearing*] (statement of Sen. Roger W. Jepsen, Chairman, S. Comm. on Armed Servs.).

> lethal weapons—it may endanger other persons, their property, and government property.[2]

While the rate of illegal drug use in the military has decreased in recent years,[3] substance abuse and related offenses remain a significant issue that affects military readiness, individual Service members, and their families.[4]

Congress faced this same scourge in 1983 when it enacted Article 112a, Uniform Code of Military Justice (UCMJ), as the first specific punitive provision to address controlled substances.[5] Congress structured the statute into two parts.[6] The first part proscribes different types of

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[2] United States v. Bickel, 30 M.J. 277, 280 (C.A.A.F. 1990) (upholding the validity of drug screening as a military inspection under Military Rule of Evidence 313).

[3] *See* Sarah O. Meadows, Charles C. Engel, Robin L. Beckman, et al., *2015 Health Related Behaviors Survey: Substance Use Among U.S. Active-Duty Service Members*, RAND CORP. (2018), https://www.rand.org/pubs/research_briefs/RB9955z7.html [https://perma.cc/GUA7-MT9E].

[4] *See generally* Stella Kim & Chantal Da Silva, *U.S. Soldiers Accused of Smuggling and Distributing Synthetic Marijuana in South Korea*, NBC NEWS (Sept. 20, 2023, at 10:55 AM), https://www.nbcnews.com/news/world/us-soldiers-accused-smuggling-synthetic-marijuana-south-korea-rcna107946 [https://perma.cc/78QF-BGLK] ("Police in South Korea have accused 17 American Soldiers of smuggling and distributing synthetic marijuana, which they say was brought into the country through the U.S. military's postal service."); Meryl Kornfield, Kyle Rempfer, & Steven Rich, *Fentanyl Has Taken a Record Toll on the Army. Families Demand Answers.*, WASH. POST (June 12, 2023, at 07:00 AM), https://www.washingtonpost.com/national-security/2023/06/12/fentanyl-overdoses-military-fort-bragg/ [https://perma.cc/P8SA-N2NU] ("In total, the Pentagon told lawmakers in a letter that fentanyl has claimed more than half of the 332 service members who died from drugs between 2017 and 2021 . . . More than 15,000 troops overdosed but survived during that time frame."); Rachel Nostrant, *Man Indicted in Fentanyl Overdoses of West Point Cadets on Spring Break*, ARMYTIMES (May 19, 2022), https://www.armytimes.com/news/your-army/2022/05/19/man-indicted-in-fentanyl-overdoses-of-west-point-cadets-on-spring-break/ [https://perma.cc/H2EW-GKLA] ("A Florida man from Lauderhill was indicted this week on federal drug charges after dealing to a group of West Point cadets fentanyl-laced cocaine in March, causing at least four to overdose."); *6 West Point Cadets Face Drug Conspiracy Charges*, ARMYTIMES (Nov. 11, 2016), https://www.armytimes.com/news/your-army/2016/11/11/6-west-point-cadets-face-drug-conspiracy-charges/ [https://perma.cc/8KVV-A5VH] ("Six West Point cadets are facing charges they conspired to distribute drugs.").

[5] *See* Military Justice Act of 1983, Pub. L. No. 98-209, § 8, 97 Stat. 1393, 1403–04 (1983) (codified at 10 U.S.C. § 912a).

[6] *See* 10 U.S.C. § 912a. Prior to the enactment of Article 112a, UCMJ (Article 112a), the military addressed controlled substance offenses through clauses one and two of Article 134, UCMJ (Article 134), assimilation of federal civilian offenses under clause three of

conduct attendant to controlled substances, such as possession, use, or distribution.[7] The second part defines controlled substances in three subparts.[8] These subparts include a provision for congressionally named substances, an authorization for the President to list substances on a prescribed schedule through executive order, and an incorporation of those substances previously listed by Congress in a specific part of the Controlled Substances Act (CSA).[9]

Since the enactment of Article 112a, UCMJ (Article 112a), the President promulgated rules and definitions related to the statute, but never exercised the authority to prescribe a schedule of additional substances.[10] In drafting the final version of the statute, Congress intended the President to use this authority as an efficient and flexible means of combating drug offenses, so it limited the extent to which Article 112a incorporated other sections of the CSA.[11] While military courts have not yet recognized this limitation, a plain reading of the statutory language and legislative history supports this limitation, particularly where congressional hearings addressed the removal of more burdensome regulatory provisions of the CSA in exchange for greater executive authority.[12] With the removal of this CSA provision from Article 112a and the absence of presidential action, the coverage of Article 112a has remained relatively limited in scope.

However, Congress never intended Article 112a to be the exclusive means for addressing drug offenses in the military, and military courts have affirmed other avenues to proscribe substances.[13] Specifically, the Army, Navy, Air Force, and Coast Guard have each issued their own general regulations and orders with punitive provisions related to

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Article 134 and general regulation violations under Article 92, UCMJ (Article 92). *See* United States v. Reichenbach, 29 M.J. 128, 129–30 (C.M.A. 1989) (citing United States v. Ettleson, 13 M.J. 348, 358 (C.M.A. 1982)) (examining the legislative history of Article 112a in the context of the preemption doctrine).

[7] *See* 10 U.S.C. § 912a(a).

[8] *Id.* § 912a(b).

[9] *Id.*

[10] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 50.b.–c. (2024) [hereinafter 2024 MCM] (outlining and explaining the elements of each offense).

[11] *See* discussion *infra* Section II.A.3.b.

[12] *See* discussion *infra* Section II.A.3.

[13] *See* discussion *infra* Section II.A.3.

dangerous substances.[14] The Service regulations vary in both the specific substances prohibited and the type of conduct prohibited, such as use, possession, or distribution.[15] All of the Services prohibit the misuse of otherwise legal substances and specifically proscribe the use of hemp products.[16]

While Congress deliberately intended to tackle controlled substances in the military through different offenses, the current state of Article 112a and Article 92, UCMJ (Article 92)—the punitive provision for implementing the Service regulations—has resulted in divergence affecting courts-martial.[17] The Service regulations vary in language and coverage, and each contains certain peculiar mistakes.[18] The lack of equal treatment between members of different Services is not inherently problematic, as "Congress has never required such uniformity among the services, and it has consistently authorized the Secretary of each armed force to promulgate regulations to meet special needs of his service, as determined by him."[19] However, where the Services are aligned in intent, but not execution, in promulgating punitive regulations, this lack of parity undermines a core tenet of military law: "to promote efficiency and effectiveness."[20]

Beyond the potential for disparate enforcement and lines of jurisprudence from different regulations, splitting substance offenses between the punitive articles results in practical differences at trial. Article

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[14] U.S. DEP'T OF ARMY, REGUL. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 4-2 (4 Oct. 2024) [hereinafter AR 600-85]; U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5300.28F, MILITARY SUBSTANCE ABUSE PREVENTION AND CONTROL encl. 5 (23 Apr. 2019) [hereinafter SECNAVINST 5300.28F]; All Navy Message, 074/20, 241904Z Jul 20, Sec'y of Navy, subject: Prohibition on the Use of Hemp Products Updated para. 4. [hereinafter ALNAV Message 074/20]; U.S. DEP'T OF NAVY, CHIEF, NAVAL OPERATIONS INSTR. 5350.4E, NAVY ALCOHOL AND DRUG MISUSE PREVENTION AND CONTROL ch. 4, para. 1.d. (28 Mar. 2022) [hereinafter OPNAVINST 5350.4E]; U.S. DEP'T OF AIR FORCE, MANUAL 44-197, MILITARY DRUG DEMAND REDUCTION PROGRAM para. 1.2. (5 Sept. 2023) (C1, 1 Aug. 2025) [hereinafter AFMAN 44-197]; U.S. COAST GUARD, COMMANDANT INSTR. 1000.10B, MILITARY SUBSTANCE ABUSE AND BEHAVIORAL ADDICTION PROGRAM ch. 6, para. B., ch. 7, para. A.5.c. (Oct. 2022) [hereinafter COMDTINST 1000.10B].

[15] *See* sources cited *supra* note 14.

[16] *Id*.

[17] *See* discussion *infra* Section III.

[18] *See* discussion *infra* Section II.B.1.–4.

[19] United States v. Hoesing, 5 M.J. 355, 357–58 (C.M.A. 1978) (rejecting requests for relief due to interservice discrimination from Air Force and Army appellants based on Navy and Coast Guard regulations addressing drug offenses).

[20] 2024 MCM, *supra* note 10, pt. I, ¶ 3.

112a and Article 92 contain different elements.[21] Depending on the specifics of the offense charged, this difference affects evidentiary requirements and burdens. In particular, the CAAF has rendered a prior version of a Service regulation invalid as overbroad.[22] In *United States v. Pugh*, the provision under review concerned hemp products, even though such products are commercially available and sold on military installations.[23] Despite this outcome, every Service still maintains an expansive prohibition on the use of hemp products.[24]

Both Article 112a and Article 92 also lack a statutorily provided *mens rea* requirement.[25] Therefore, courts read in a *mens rea* requirement, which has differed in result for the two offenses.[26] Importantly, military courts have previously accorded a broad knowledge requirement for Article 112a offenses, which permitted the Government to satisfy the element through knowledge that a substance is proscribed in a regulation or order instead of statute.[27] However, since the most recent military cases on this issue, the Supreme Court of the United States in *McFadden v. United States*[28] narrowly cabined the knowledge requirement under the CSA to certain statutorily defined substances.[29] While it remains untested in application to charges brought under Article 112a, future cases may apply the same logic from *McFadden*, further dividing substance offenses between the two articles.

The differences in the articles also affect sentencing at trial. The narrow approach of Article 112a permits a tailored sentencing scheme that can differentiate between both types of acts and substances, as well as

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[21] *Compare id*. pt. IV, ¶ 50b(2) *with id*. pt. IV, ¶ 18b(1).
[22] *See* United States v. Pugh, 77 M.J. 1, 4 (C.A.A.F. 2017) (finding that "banning legal, properly labeled food products well regulated by the United States government under the guise of protecting airmen from unlabeled, unregulated, illegal food products is well beyond the Government's stated purpose for the ban").
[23] *See id.* at 3.
[24] *See* AR 600-85, *supra* note 14, para. 4-2(l)(8)(a); ALNAV Message 074/20, *supra* note 14, para. 5a.; OPNAVINST 5350.4E, *supra* note 14, ch. 4, para. 1(d)(4); AFMAN 44-197, *supra* note 14, para. 1.2.2.; COMDTINST 1000.10B, *supra* note 14, ch. 7, para. A(5)(c).
[25] *See* 10 U.S.C. §§ 912a, 892.
[26] *See* discussion *infra* Section III.A.2.
[27] *See* discussion *infra* Section III.A.2.
[28] *See* McFadden v. United States, 576 U.S. 186 (2015).
[29] *See id*. at 195 (stating that the term controlled substance "includes only those drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act. It is not broad enough to include all substances regulated by any law.").

provide enhancements when there is a heightened military nexus.[30] By contrast, Article 92, as a general provision incorporating all general regulations and orders, has a fixed sentencing parameter regardless of aggravating or mitigating variables.[31]

The divergence and inconsistencies do not result from Congress's scheme for tackling controlled substances in the military but rather from an unused tool: Presidential authority under Article 112a(b)(2).[32] At the inception of the statute, Congress exchanged the full incorporation of regulatorily scheduled substances under the CSA for this presidential authority.[33] While both the regulatory system under the CSA and presidential authority under Article 112a(b)(2) provide methods to address dangerous substances more rapidly than by statutory amendment, the presidential authority is the least cumbersome.[34] Presidential action to prescribe a schedule of controlled substances would provide an efficient response to combat emerging drug issues, parity for common problem substances across the Services, and streamlined enforcement against dangerous substances under a single punitive article.

Given these benefits, the President should prescribe a schedule of controlled substances under Article 112a(b)(2) to streamline inconsistencies between statutorily and regulatorily proscribed substances and establish parity among the Services. To support this thesis, Section II of this article discusses the existing framework and coverage of controlled substance offenses under Article 112a and Service regulations. Section III addresses how these separate schemes for combating dangerous drugs have created divergent effects in the merits and sentencing phases of trial. Section IV examines how the President can use Article 112a(b)(2) to reestablish parity and efficiency in prosecuting controlled substance offenses.

II. Background and Existing Landscape

The principal authority under the UCMJ to control substances resides within Article 112a, which Congress enacted pursuant to the Military

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[30] *See* 2024 MCM, *supra* note 10, pt. IV, ¶ 18.d.
[31] *See id.* pt. IV, ¶ 18.d.(1).
[32] 10 U.S.C. § 912(b)(2).
[33] *See* discussion *infra* Section II.A.3.b.
[34] *See* discussion *infra* Section II.A.3.b.

Justice Act of 1983 and has not subsequently amended.[35] However, Congress did not intend Article 112a to serve as a comprehensive measure to address all dangerous substance offenses.[36] Accordingly, each Service can and has promulgated its own punitive general regulation, enforceable under Article 92, to capture additional substances outside the ambit of Article 112a.[37]

A. Article 112a, UCMJ

Article 112a of the UCMJ criminalizes the use, possession, manufacture, distribution, importation, exportation, and introduction of substances belonging to three mutually exclusive categories.[38] The first category addresses specific substances named by Congress.[39] The second category authorizes the President to create a schedule of substances.[40] The third category incorporates statutory schedules from the CSA.[41]

1. Statutorily Listed Substances

Article 112a(b)(1) includes nine specific substances listed by Congress and any compound or derivative of these substances. These congressionally named substances are "[o]pium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana."[42] Since these substances are identified in statute, whether they are otherwise on a schedule of the CSA is immaterial.[43] The same section proscribes any compound or

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[35] *See* Military Justice Act of 1983, Pub. L. No. 98-209, § 8, 97 Stat. 1393, 1403–04 (1983) (codified at 10 U.S.C. § 912a).
[36] *See* United States v. Erickson, 61 M.J. 230, 233 (C.A.A.F. 2005) (holding that Congress did not preclude charging other punitive articles "to punish wrongful use by military personnel of substances, not covered by Article 112a, capable of producing a mind-altered state").
[37] *See* discussion *infra* Section II.B.
[38] *See* 10 U.S.C. § 912a.
[39] *Id.* § 912a(b)(1).
[40] *Id.* § 912a(b)(2).
[41] *Id.* § 912a(b)(3).
[42] *Id.* § 912a(b)(1).
[43] *See* United States v. Chmiel, No. S29582, 1998 WL 743504, at *1 (A.F. Ct. Crim. App. Oct. 6, 1998) ("Experienced practitioners . . . recognize that it is neither necessary nor artful

derivative of the named substances, which is an additional fact the Government must prove at trial.[44]

2. Presidentially Prescribed Schedule of Substances.

Article 112a(b)(2) includes any substances identified by the President, except those specified in Article 112a(b)(1).[45] Since the inception of Article 112a, no President has prescribed a schedule of controlled substances. No executive order since 1983 has explicitly identified a schedule of substances, and no case has addressed a conviction based upon a presidentially listed substance.

While at least one author has asserted the President used this authority to "add[] the drugs phenobarbital and secobarbital,"[46] the President did not actually add any new substances under Article 112a(b)(2). Prior to the enactment of Article 112a, the President defined "controlled substance" for the purposes of an Article 134 offense as:

> [A]mphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, phenobarbital, and secobarbital. "Controlled substance" also means any substance which is included in Schedules I through V established by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (21 U.S.C. 801 et seq.).[47]

Shortly following the enactment of Article 112a, the President provided the following updated definition of "controlled substance":

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to allege the schedule to which drugs such as cocaine, marijuana, lysergic acid diethylamide, and methamphetamine belong; the use of these substances is specifically prohibited by the terms of the statute itself, without reference to the Schedule of Controlled Substances.").

[44] *See* 10 U.S.C. § 912a(b)(1); *see, e.g.,* United States v. Reichenbach, 29 M.J. 128, 136 (C.M.A. 1989) (concluding that the Government failed to prove the charged substance was a compound or derivative).

[45] *See* 10 U.S.C. § 912a(b)(2).

[46] Major Eduardo A. Palomo, *Urine Trouble: Prosecuting Wrongful Uses of Controlled Substances with Urinalysis*, ARMY LAW., no. 5, 2019, at 55.

[47] Exec. Order No. 12383, 47 Fed. Reg. 42317, 42318 (Sept. 27, 1982) (amending MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 213 (1969) [hereinafter 1969 MCM]).

> [A]mphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, and barbituric acid, including phenobarbital and secobarbital. "Controlled substance" also means any substance which is included in Schedules I through V established by the Controlled Substances Act (21 U.S.C. 812).[48]

Notably, the revision added barbituric acid, consistent with the new statute, and qualified phenobarbital and secobarbital as specifically included types of barbituric acid.[49] The presidential definition also narrowed the inclusion of the entire Comprehensive Drug Abuse Prevention and Control Act of 1970 to only 21 U.S.C. § 812, in accordance with the text of Article 112a discussed below.[50] The adjustments to the definition of "controlled substance" served to align the definition with the new statutory text without adding any additional substances.

3. Substances Listed Under 21 U.S.C. § 812

Article 112a(b)(3), UCMJ, includes the substances in schedules I through V of Section 202 of the CSA, except those specified in Article 112a(b)(1) and (2).[51] Section 202 of the CSA, codified at 21 U.S.C. § 812, establishes five schedules of controlled substances and identifies an initial list of substances for each of the schedules.[52] Since its enactment in 1970, Congress has periodically amended the statute to revise the initial list of substances on each schedule.[53]

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[48] Exec. Order No. 12473, 49 Fed. Reg. 17152, 17349 (Apr. 23, 1984) (codified at MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 37.c. (1984) [hereinafter 1984 MCM]). This Executive Order rescinded and replaced prior versions of the Manual for Courts-Martial. Exec. Order No. 12473, 49 Fed. Reg. at 17152.

[49] *Compare* Exec. Order No. 12473, 49 Fed. Reg. at 17349 *with* 10 U.S.C. § 912a(b)(1).

[50] *See* discussion *infra* Section II.A.3.

[51] *See* 10 U.S.C. § 912a(b)(3).

[52] *See* Controlled Substances Act, Pub. L. No. 91-209, § 202, 84 Stat. 1242, 1247 (1970) (codified at 21 U.S.C. § 812).

[53] *See* Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 103, 92 Stat. 3768, 3772 (1978); Controlled Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, §§ 507(c), 509(b), 98 Stat. 2068, 2071–72 (1984); Drug and Alcohol Dependent Offenders Treatment Act of 1986, Pub. L. No. 99-570, § 1867, 100 Stat. 3207, 3207-55 (1986);

Section 202, however, is not a comprehensive provision for substances controlled at the civilian federal level. Separate from the statutorily listed substances at 21 U.S.C. § 812, Congress granted authority to the Attorney General to add substances to the schedules through regulatory procedures.[54] Additionally, Congress separately addressed controlled substance analogues at 21 U.S.C. § 813, requiring that they, "to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I."[55]

Despite the inclusion of these additional substances in the broader CSA, the narrow language enacted by Congress for Article 112a(b)(3) limits the incorporation to only those substances statutorily listed at 21 U.S.C. § 812. While appellate courts have yet to address this particular issue, statutory construction favors such a narrow view.[56] The first step in

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Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 84, 100 Stat. 3592, 3619–20 (1986); Anabolic Steroids Control Act of 1990, Pub. L. No. 101-647, § 1902, 104 Stat. 4851, 4851–52 (1990); Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, § 1151, 126 Stat. 1130, 1130–32 (2012); Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12619, 132 Stat. 4490, 5018 (2018); Halt All Lethal Trafficking of Fentanyl Act, Pub. L. No. 119-26, § 2, 139 Stat. 410, 410–11 (2025).

[54] *See* 21 U.S.C. § 811. Substances scheduled through regulatory procedures under 21 U.S.C. § 811 are listed at 21 C.F.R. ch. II, pt. 1308.

[55] 21 U.S.C. § 813. Controlled substance analogues are not controlled substances under Article 112a. *See* United States v. Reichenbach, 29 M.J. 128, 134–35 (C.M.A. 1989) (finding that "[a]lthough 21 USC § 813 states that a controlled substance analogue shall 'be treated' as a controlled substance in schedule I, this does not constitute a 'listing' of the analogue. In fact, according to the definition contained in 21 USC § 802(32)(B), the term 'controlled substance analogue' 'does *not* include—a controlled substance.'"). The court dismissed the specification for use but affirmed the specification for distribution as an Article 134 offense under the closely related offense doctrine, which the court has since found to be violative of due process and fair notice. *See id.* at 137–38; United States v. Morton, 69 M.J. 12, 13 (C.A.A.F. 2010) ("In light of the abiding principle of fair notice to an accused, we hold that [the closely related offense] doctrine, as currently relied upon by appellate courts in upholding guilty pleas in the military justice system, is no longer viable.").

[56] While the Court of Military Appeals in *Reichenbach* seemed to suggest substances scheduled through 21 U.S.C. § 811 are on the schedules at 21 U.S.C. § 812 for the purpose of Article 112a(b)(3), this discussion is dicta, as the granted issue only addressed inclusion through 21 U.S.C. § 813. *See Reichenbach*, 29 M.J. at 129, 133. In *Erickson*, the CAAF expressly rejected the dicta from *Reichenbach* pertaining to preemption. United States v. Erickson, 61 M.J. 230, 233 (C.A.A.F. 2005) ("[T]here is nothing on the face of the statute creating Article 112a or in its legislative history suggesting that Congress intended to preclude the armed forces from relying on Article 134 to punish wrongful use by military

statutory construction is to "engage in a 'plain language' analysis of the relevant statute."[57] Where the plain language of a statute is clear, statutory construction begins and ends with the text. To the extent the text is ambiguous, then courts may employ various canons to interpret its meaning.

a. Plain Language Analysis

Under the plain language of the text, Article 112a(b)(3) only incorporates substances listed in 21 U.S.C. § 812, to the exclusion of substances listed through the regulatory procedures in 21 U.S.C. § 811. When interpreting statutory provisions, the Supreme Court explained that "when the meaning of the statute's terms is plain, [this Court's] job is at an end."[58] Under a plain language analysis, courts review each word under its "ordinary, contemporary, common meaning."[59]

The plain language of Article 112a(b)(3) incorporates only those substances on schedules of "section 202 of the Controlled Substances Act (21 U.S.C. 812)."[60] The text is clear in that it identifies one specific section of the CSA. The inclusion of the statutory section in reference to the same bill section further highlights that the language only references one specific provision of the CSA. Notably absent is any reference to section 201, codified at 21 U.S.C. § 811, for substances scheduled through regulation. Accordingly, a plain language review suggests that only substances listed by Congress in the statutory section are incorporated in Article 112a(b)(3).

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personnel of substances, not covered by Article 112a, capable of producing a mind-altered state. . . . To the extent that dicta in *Reichenbach*, suggests otherwise with respect to prejudicial or service-discrediting conduct . . . we decline to adhere to that view.").

[57] United States v. Tucker, 76 M.J. 257, 258 (C.A.A.F. 2017) (using only the statutory text to determine that the lower court misinterpreted the term "neglects" in Article 134).

[58] Bostock v. Clayton Cnty., 590 U.S. 644, 674 (2020).

[59] Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 414 (2017) (citing Walters v. Metro. Ed. Enters. Inc., 519 U.S. 202, 207 (1997)).

[60] 10 U.S.C. § 912a(b)(3).

b. Other Canons of Construction

While statutory interpretation would normally end with the plain language, even if the statutory language was ambiguous, Article 112a(b)(3) would still only extend to congressionally scheduled substances under 21 U.S.C. § 812. As a general precept, "criminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused."[61] Under this view, the legislative history and statutory scheme support limiting Article 112a to only those substances listed in 21 U.S.C. § 812.

Beyond the text, courts also examine legislative history to ascertain the meaning of a statute.[62] Congress considered and expressly excluded the incorporation of substances scheduled through the regulatory provisions of 21 U.S.C. § 811. Congress passed the final version of Article 112a as the Military Justice Act of 1983.[63] The Military Justice Act of 1982, an earlier version of the bill introduced but not passed the year prior, included the following expanded language: "[E]stablished by section of 202 of the Controlled Substances Act (21 U.S.C. 812), *as amended from time to time by the Attorney General pursuant to the authority of section 201 of the Controlled Substances Act (21 U.S.C. 811)*."[64] This earlier version also omitted Article 112a(b)(2), where the President could devise a schedule of substances.[65] During a hearing on this bill, the general counsel for the Department of War voiced the following concern:

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[61] United States v. Thomas, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). Military courts apply the rule of lenity to resolve significant statutory ambiguities in the favor of the accused. *See* United States v. McPherson, 81 M.J. 372, 382 n.3 (C.A.A.F. 2021) (citing Rewis v. United States, 401 U.S. 808, 812 (1971)); *see also* United States v. Mays, 83 M.J. 277, 281 (C.A.A.F. 2023) (finding lenity inapplicable without significant ambiguity); United States v. Santos, 553 U.S. 507, 514 (2008) (explaining that "[t]his venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead").

[62] *See* United States v. Wise, 64 M.J. 468, 475 (C.A.A.F 2007) ("Unclear language can become clear if the congressional intent behind the legislation is reviewed.").

[63] *See* Pub. L. No. 98-209, § 8, 97 Stat. 1393, 1403–04 (1983) (codified at 10 U.S.C. § 912a).

[64] Military Justice Act of 1982, S. 2521, 97th Cong. § 3(dd)(1) (2d Sess. 1982) (emphasis added).

[65] *Id.*

> S. 2521 relies solely on the schedules of controlled substances at 21 U.S.C. § 812 and 21 C.F.R. to list prohibited substances. This makes an element of proof of the offense that substance alleged is in fact listed in one of those schedules. That, in turn, requires that we supply every office dealing with this kind of offense with a current copy of that volume of the Code of Federal Regulations containing title 21, sections 1300 and following. We would also be required to provide an updating service requiring daily review of the Federal Register. These are cumbersome and expensive costs of administration when the present system will work very well as refined by the pending Executive Order.[66]

The chief judge of the Court of Military Appeals (CMA) also recommended that the punitive article for controlled substances "be simplified in a way that would leave some of the traditional prerogatives to the President, but at the same time would evidence the congressional concern with this national menace and this menace to the military community."[67]

Congress's consideration, and subsequent rejection, of language incorporating substances under 21 U.S.C. § 811 evidences a clear intent to limit the reach of Article 112a(b)(3) to only 21 U.S.C. § 812 in line with the general counsel's concerns. Consistent with the recommendation of the chief judge, the inclusion of presidential authority to list substances also supports the same conclusion and incorporates the suggestion of the general counsel to use executive orders to schedule substances without the cumbersome responsibility of frequently distributing updated federal regulations to the field.

The specific inclusion of section 202 of the CSA and statutory cross-reference to 21 U.S.C. § 812 also implicates other tenets of statutory construction. Under the canon of *expressio unius est exclusio alterius*, "to express or include one thing implies the exclusion of the other."[68]

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[66] *MJA 1982 Hearing*, *supra* note 1, at 43 (statement of William H. Taft IV, General Counsel, Dep't of Def.).

[67] *Id.* at 108 (statement of Hon. Robinson O. Everett, Chief Judge, Ct. of Mil. Appeals).

[68] BLACK'S LAW DICTIONARY (11th ed. 2019). "For example, the rule that 'each citizen is entitled to vote' implies that noncitizens are not entitled to vote." *Id; see* United States v.

Therefore, the deliberate addition of section 202 and cross-reference to the statute are to the exclusion of section 201 and 21 U.S.C. § 811. Similarly, the surplusage canon holds that "if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."[69] A broad incorporation of other sections of the CSA into Article 112a would impermissibly render the specific references provided by Congress to be surplus language.

As noted above, even the President acknowledged the narrow nature of Article 112a through revision of the prescribed definition for controlled substance.[70] Prior to the enactment of Article 112a, the President defined "controlled substance" to include substances on the schedules anywhere within the entirety of the CSA, or "21 U.S.C. 801 et seq."[71] The subsequent revision limited the breadth of the definition in line with the statutory language to only section 202 of the act, or 21 U.S.C § 812.[72]

B. Article 92, UCMJ, and Service Regulations

While Article 112a serves to directly authorize the proscription of substances, its enactment by Congress does not preempt the use of other punitive articles to prohibit additional substances. The CAAF squarely addressed the availability of charging substances under other punitive provisions of the UCMJ:

> The legislative history of Article 112a, however, reflects congressional intent to not cover the class of drug-related offenses in a complete way. See S. Rep. No. 98-53, at 29

Mooney, 77 M.J. 252, 257 (C.A.A.F. 2018) (applying the canon of *expressio unius est exclusio alterius* to interpret Article 57a, UCMJ); United States v. Wilson, 76 M.J. 4, 7 (C.A.A.F. 2017) (applying the canon to a presidentially promulgated definition in the *Manual for Courts-Martial*).

[69] United States v. Sager, 76 M.J. 158, 161–62 (C.A.A.F. 2017) (rejecting the Government's argument "that the words 'asleep, unconscious, or otherwise unaware,' create only one theory of criminality" under Article 120, UCMJ, because such an interpretation would render "the words 'asleep,' 'unconscious,' and 'or' mere surplusage").

[70] *See* discussion *supra* Section II.A.2.

[71] Exec. Order No. 12383, 47 Fed. Reg. 42317, 42318 (Sept. 27, 1982) (amending 1969 MCM, *supra* note 47, ¶ 213).

[72] *See* Exec. Order No. 12473, 49 Fed. Reg. 17152, 17349 (Apr. 23, 1984) (codified at 1984 MCM, *supra* note 48, pt. IV, ¶ 37.c.).

> (1983) (Article 112a "is intended to apply solely to offenses within its express terms. It does not preempt prosecution of drug paraphernalia offenses or other drug-related offenses under Article 92, 133, or 134 of the UCMJ.") There is nothing on the face of the statute creating Article 112a or in its legislative history suggesting that Congress intended to preclude the armed forces from relying on Article 134 to punish wrongful use by military personnel of substances, not covered by Article 112a, capable of producing a mind-altered state. See Military Justice Act of 1983, Pub. L. No. 98-209, § 8(a), 97 Stat. 1393, 1403 (1983).[73]

To this end, the Service components have all implemented individualized regulations in pursuit of proscribing both categories of substances based on their effects and specifically identified substances. A review of these Service regulations reveals some general consistencies but also disparate coverage in the proscription of the acts related to substances. For example, while most prohibitions relate to the use of substances, not all Services extend restrictions to possession, distribution, manufacture, or similar acts. The Service regulations also include errors in their attempt to restate the scope of Article 112a.

1. Army

For the Army, Army Regulation (AR) 600-85, The Army Substance Abuse Program, serves as the comprehensive drug control policy applicable to Soldiers.[74] This regulation accurately restates that Article 112a authorizes the President to proscribe substances and specifically incorporates schedules I through V of Section 202.[75] Curiously, in restating the congressionally named substances under Article 112a(b)(1), the regulation deviates from the language of the statute.[76]

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[73] United States v. Erickson, 61 M.J. 230, 233 (C.A.A.F. 2005).
[74] *See* AR 600-85, *supra* note 14, para. 1-1.
[75] *Id.* para. 4-2(k).
[76] *Compare id.* ("Article 112a, UCMJ specifically prohibits the unlawful use of the following substances: amphetamines, barbiturates, cocaine, ecstasy, opiate, heroin, phencyclidine, tetrahydrocannabinol (THC) Delta-9, oxycodone/oxymorphone,

In addition to reiterating statutory prohibitions, AR 600-85 includes its own expansive list of prohibited substances when used "for the purpose of inducing excitement, intoxication, or stupefaction of the central nervous system." [77] Violations of this regulatory provision are punitive and therefore may form the basis of court-martial charges under Article 92.[78]

Nested within the list of substances that Soldiers are prohibited from using, AR 600-85 also separately punitively proscribes the use, possession, manufacture, sale, distribution, importation, or exportation of any controlled substance analogue, including synthetic cannabis and tetrahydrocannabinol (THC) substitutes. [79] Army Regulation 600-85 contains a third specific punitive provision prohibiting the use of hemp products, "including but not limited to cannabidiol CBD, regardless of the product's THC concentration (for example, THC–8), claimed or actual, and regardless of whether such product may lawfully be bought, sold, and used under the law applicable to civilians."[80] However, this rule excepts the use of cannabinoid formulations approved as drugs by the Food and Drug Administration (FDA) and issued pursuant to a valid prescription.[81]

2. Navy-Marine Corps

The Navy implemented Secretary of the Navy Instruction (SECNAVINST) 5300.28F, Military Substance Abuse Prevention and Control, to "establish policies, procedures, and responsibilities for the

benzodiazepines, lysergic acid diethylamide, steroids, and synthetic cannabis (Spice) and any compound or derivative of any such substance."), *with* 10 U.S.C. § 912a(b)(1) (listing "opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance").

[77] AR 600-85, *supra* note 14, para. 4-2(l) (where listed substances include (1) Chemicals, propellants, or inhalants (huffing); (2) prohibited dietary supplements; (3) anything on the Drug Enforcement Agency's [DEA] controlled substance list; (4) salvia divinorum (diviner's sage); (5) naturally occurring substances which are on the DEA's list of illegal substances; (6) any prescription drug without a current prescription written specifically for the Soldier; and (7) prescription or over-the-counter drugs and medications when used in a manner contrary to their intended medical purpose, in excess of the prescribed dosage, or in a manner other than what is specifically prescribed).

[78] *See id.* para. 4-2(m).

[79] *See id.* para. 4-2(l)(8)(e).

[80] *Id.* para. 4-2(l)(8)(a).

[81] *See id.*

prevention and control of substance misuse and abuse . . . ."[82] Violations of this instruction are punitive for members of the Navy and Marine Corps.[83] Akin to AR 600-85, SECNAVINST 5300.28F attempts to restate the categories of substances proscribed under Article 112a, although it incorrectly provides that the presidential authority involves listing substances "on the Controlled Substance Act (CSA) schedule of controlled substances."[84] The instruction also prohibits a variety of conduct related to categories of substances "with the intent to induce intoxication, excitation, or stupefaction."[85] It further proscribes the misuse of otherwise legal substances "to alter one's mental or physiological state or in a manner unintended by the manufacturer . . . ."[86]

The Navy prohibits members of the Navy and Marine Corps from using hemp products under a separate order, All Navy Message (ALNAV Message) 074/20, Prohibition on the Use of Hemp Products Updated.[87] Similar to AR 600-85, ALNAV Message 074/20 extends to "any product made or derived from hemp (as defined in 7 U.S.C. 1639o), including CBD, regardless of the product's THC concentration, claimed or actual, and regardless of whether such product may lawfully be bought, sold and used under the law applicable to civilians."[88] However, it exempts the use of prescribed cannabinoid formulations that have been approved by the FDA.[89]

The Navy also implemented an additional punitive regulation, Office of the Chief of Naval Operations Instruction (OPNAVINST) 5350.4E, Navy Alcohol and Drug Misuse Prevention and Control.[90] This Navy instruction restates substance prohibitions under Article 112a, with

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[82] SECNAVINST 5300.28F, *supra* note 14, para. 5.
[83] *See id.* paras. 4, 5(b).
[84] *Id.* encl. 5, para. 1(a). The presidential authority under Article 112a(b)(2) is unrelated to the Controlled Substances Act. *See* 10 U.S.C. § 912a(b)(2).
[85] *Id.* encl. 5, para. 1(c). The types of prohibited conduct include: "[W]rongful use, possession, manufacture, distribution, importation into the United States, exportation from the United States, or introduction onto a DoD-controlled installation, vessel, vehicle, or aircraft . . . ." *Id.* The categories of prohibited substances include: "controlled substance analogues (designer drugs), anabolic steroids, naturally occurring intoxicating substances, over-the-counter or prescription medications . . . ." *Id.*
[86] *Id.*
[87] *See* ALNAV Message 074/20, *supra* note 14, paras. 4, 5(a).
[88] *Id.* para. 5(a).
[89] *See id.* para. 5(c).
[90] *See* OPNAVINST 5350.4E, *supra* note 14, ch. 4, para. 7(b).

deviations similar to AR 600-85 and SECNAVINST 5300.28F.[91] For other substances, OPNAVINST 5350.4E prohibits two additional categories of substances "with the intent to induce or enable intoxication, excitement or stupefaction of the central nervous system."[92] It also contains a prohibition on hemp products to include cannabidiol (CBD), with an exception for cannabinoid formulations approved as drugs by the FDA.[93]

3. Air Force

The Air Force implemented its Military Drug Demand Reduction Program, Department of the Air Force Manual (AFMAN) 44-197, to address the impact of drug abuse on mission readiness.[94] Unlike the Army and Navy, the Air Force manual does not provide a restatement of Article 112a authorities, except to reaffirm the continued illegality of marijuana.[95] However, it does include its own punitive proscription of other substances, enforced under Article 92.[96] The Air Force broadly proscribes the use of "any intoxicating substance, other than the lawful use of alcohol or tobacco products, introduced into the body in any manner to alter mood or function."[97] It also prohibits specifically listed intoxicating substances when possessed with the same intent.[98] For use of hemp products,

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[91] *See id.* ch. 4, para. 1(d)(1). Errors include incorrect reference lettering and reference to a "Controlled Substance Act schedule of controlled substances prescribed by the President." *Id*.

[92] *Id.* ch. 4, para. 1(d)(3). The following substances are prohibited to use: "chemicals (e.g., rubbing alcohol, ethanol) and propellants and inhalants (e.g., canned air, nitrous oxide)." The following substances are prohibited to use, possess, manufacture, distribute, import or export: "controlled substance analogues (designer drugs), illicit use of anabolic steroids or anabolic agents, products containing synthetic cannabinoids (e.g., spice), natural substances (e.g., fungi, excretions, plant substances such as salvia divinorum) or a prescribed or over-the-counter drug or pharmaceutical compound." *Id.*

[93] *See id.* ch. 4, para. 1(d)(4).

[94] *See* AFMAN 44-197, *supra* note 14, para. 1.1.

[95] *See id.* para. 1.2.2.

[96] *See id.* para. 1.2.1.

[97] *Id.*

[98] *See id.* The listed substances include: Controlled substance analogues and designer drugs that are not otherwise controlled substances; inhalants, propellants, solvents, household chemicals, and other substances used for "huffing;" prescription or over-the-counter medications when used in a manner contrary to the prescribing medical provider's

AFMAN 44-197 contains a similar provision to the Army and Navy regulations, broadly proscribing ingestion, including delta-8-THC and CBD, with exceptions when approved and prescribed for medical use.[99]

4. Coast Guard

The Coast Guard issued its Military Substance Abuse and Behavioral Addiction Program, Command Instruction (COMDTINST) 1000.10B, to "maintain operational readiness and preserve the safety and security of the total Coast Guard workforce."[100] The instruction provides an inclusive definition of controlled substances through reference to the CSA definitions and Article 112a.[101] The Coast Guard also punitively prohibits any "Prohibited Substance," which includes "the inhalation, injection, consumption, application to skin, or other introduction to the body of any mood altering substance or compound . . . ."[102] In a separate section of COMDTINST 1000.10B, the Coast Guard, like the Army, Navy, and Air Force, proscribes the use of any hemp products, including CBD, regardless of THC concentration or legal status by other federal or state law, except for cannabinoid formulations that have been issued pursuant to a valid prescription and approved by the FDA.[103]

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instructions, the manufacturer's instructions, or the intended medical purpose or in excess of the prescribed dosage; naturally occurring intoxicating substances (e.g., salvia divinorum); and anabolic steroids, performance enhancing drugs, and other substances found in other regulations. *See id.* 1.2.1.1.–1.2.1.5.

[99] *See id.* para. 1.2.2.2.

[100] COMDTINST 1000.10B, *supra* note 14, ch. 1, para. A(1).

[101] *See id.* ch. 6, para. B(1). Elsewhere in the same instruction though, it conspicuously omits schedule V of the Controlled Substance Act without explanation. *See id.* ch. 5, para. A(1).

[102] *Id.* ch. 6, para. B(2). Listed examples include: Analogues of controlled or synthetic-substance that are not otherwise controlled substances; substances that are not or no longer controlled but pose a risk of consumption, absorption, or otherwise induction into the body an excessive amount of a controlled substance; inhalants; propellants; solvents; household chemicals; substances used for huffing; prescription or OTC medications in excess of prescribed dosage; and any naturally occurring intoxicating substances, such as, Salvia divinorum or products containing Salvia divinorum. *See id.* ch. 6, para. B(2)(a)–(i).

[103] *See id.* ch. 7, para. A.5.c.

III. Disparities Under the Existing Landscape

While Congress did not intend Article 112a to be a comprehensive provision for the control of dangerous substances, its implementation under the existing landscape resulted in a set of disjointed, error-prone Service regulations. The differences between the regulations are apparent, with variations in word choice on categorical substance prohibitions, inconsistent inclusion of prohibited acts beyond the use of substances, and inaccurate attempts at restatements of statutory authorities. However, the Services align in their intent to ban the use of hemp products.

Less apparent, though, is the consequential effect this bifurcated approach to substance control has on the prosecution of courts-martial under Article 112a compared to Article 92. The statutory differences have resulted in the development of separate bodies of case law, with divergent standards that shape the substantive elements and *mens rea* requirements during the merits phase of trial. Further, the more precise nature of Article 112a provides the basis for a tailored sentencing scheme, while the broad scope of Article 92 excludes this possibility for controlled substance offenses derived from Service regulations.

A. Merits

During the merits phase of trial, offenses under Article 112a and Article 92 require different standards for elements and *mens rea*. The simplified requirements for Article 112a, accompanied by robust case law, result in more predictable results. A recent Supreme Court case on *mens rea* for controlled substances may also further divide and complicate the prosecution of cases.

1. Elements

Wrongful use of a controlled substance charged under Article 112a requires the Government to prove two elements: "(a) That the accused used a controlled substance; and (b) That the use by the accused was wrongful."[104] To satisfy the first element, the Government must prove the

[104] 2024 MCM, *supra* note 10, pt. IV, ¶ 50.b.(2); *see* United States v. Pope, 69 M.J. 328, 333 (C.A.A.F. 2011) (reviewing the elements of wrongful use of cocaine under Article 112a(b)(1) to address the non-prejudicial errors related to a demonstrative exhibit).

alleged substance falls into one of the three categories of controlled substances defined in Article 112a(b) discussed above.[105] This burden includes establishing the factual predicate that the substance is presidentially listed or scheduled within Section 202 of the CSA for charges under Article 112a(b)(2) or Article 112a(b)(3), respectively.[106] The second element requires the Government to establish that the use of that substance "is without legal justification or authorization."[107]

A violation of a lawful general regulation or order under Article 92 requires the Government to prove three elements: "(a) That there was in effect a certain lawful general order or regulation; (b) That the accused had a duty to obey it; and (c) That the accused violated or failed to obey the order or regulation."[108] For the first element, the Government must present evidence or seek judicial notice of the applicable general regulation.[109] If admitted or noticed, a presumption of lawfulness attaches to properly signed general regulations, and the military judge determines lawfulness as a question of law.[110] Service members within a command are presumed

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[105] *See* United States v. Paul, 73 M.J. 274, 277 (C.A.A.F. 2014). The CAAF held Paul's conviction under Article 112a for wrongful use of 3,4-methylenedioxymethamphetamine, commonly known as ecstasy, was legally insufficient. *Id.* at 276–77, 280. The court first determined the substance is neither a congressionally named substance under Article 112a(b)(1), nor a presidentially listed substance under Article 112a(b)(2). *Id.* at 277. The CAAF then found the Government failed to prove the substance falls under Article 112a(b)(3) because "the Government's evidence did not make the essential connections among ecstasy, 3,4-methylenedioxymethamphetamine, and Schedule I." *Id.* The CAAF also reversed the lower court, which had affirmed Paul's conviction by impermissibly taking judicial notice of the facts the Government failed to prove at trial. *Id.* at 278–80.

[106] *See id.* at 277.

[107] 2024 MCM, *supra* note 10, pt. IV, ¶ 50.c.(5); *see* United States v. Thomas, 65 M.J. 132, 133 (C.A.A.F. 2007); discussion *infra* Section III.A.2.

[108] 2024 MCM, *supra* note 10, pt. IV, ¶ 18.b.(1); *see* United States v. Pope, 63 M.J. 68, 71–72 (C.A.A.F. 2006) (reviewing the elements of Article 92 to affirm the legal sufficiency of the evidence for violations of an Air Force recruiting regulation).

[109] *See* United States v. Williams, 3 M.J. 155, 156–57 (C.M.A. 1977) (setting aside a conviction under Article 92 as legally insufficient because the Government failed to introduce the regulation or request judicial notice).

[110] *See* United States v. Hughey, 46 M.J. 152, 154 (C.A.A.F. 1997) (presuming lawfulness and placing burden on appellant to prove unlawfulness of a regulation that "was issued over the signature of an officer authorized to issue a general regulation"); United States v. New, 55 M.J. 95, 100, 105 (C.A.A.F. 2001) (determining lawfulness to be a question for the military judge and not a distinct element, explaining that "[t]he word 'lawful' reflects a question of law—the validity of the regulation or order with respect to a superior source of law—that is inherent in the terms 'order' and 'regulation' under Article 92. The word

to know and have a duty to follow properly published general regulations.[111] The strict construction rules also apply to the conduct proscribed by regulation.[112]

Article 112a and Article 92 present a different set of elements, although with some similarity. Because the authorities to proscribe substances under Article 112a stem from either statute or executive order, they are much less subject to attack than a properly executed general regulation.[113] However, except for offenses under Article 112a(b)(1), the Government bears an additional evidentiary burden under either article that is easily achieved through judicial notice.[114] The applicability of Article 112a provides broad coverage, while Service regulations create disparity between members of different components.

More significantly, though, general regulations are limited by the particularities of the qualifying effects or attendant acts. As noted above, each Service provides the prohibition of specific substances, but still tethers its language requiring mind-altering, stupefying, or some other effect. The effect of these substances, therefore, becomes an evidentiary burden for the Government in Article 92 offenses, but not for charges under Article 112a. Variance in the different language used to describe the effect of substances is rife with distinctions between the Services. Similarly, Article 92 offenses are limited to the acts specified, so while a substance may seem to be prohibited generally, only Article 112a provides a comprehensive prohibition related to all acts, such as possession, use, and distribution.

'lawful' simply reinforces the opportunity for the accused to challenge the validity of the regulation or order with respect to a superior source of law without establishing a separate and distinct element of the offense.").

[111] *See* United States v. Tolkach, 14 M.J. 239, 244 (C.M.A. 1982) (concluding a general regulation is properly published when it "is received by the official repository for such publications on a base, such as the master publications library. Then it is available for reference by all base personnel.").

[112] *See* United States v. Hinojos, No. 201400439, 2015 WL 5121024, at *4 (N-M. Ct. Crim. App. Aug. 31, 2015) (observing the rules of statutory interpretation, including strict construction, apply to reviewing punitive regulations).

[113] *See* 2024 MCM, *supra* note 10, pt. IV, ¶ 50.b.

[114] *See* United States v. Paul, 73 M.J. 274, 276–80 (C.A.A.F. 2014) (dismissing a specification under Article 112a(b)(3) where the Government failed to prove that ecstasy is a Schedule I controlled substance); United States v. Williams, 3 M.J. 155, 156 (C.M.A. 1977) (dismissing a specification under Article 92 where the Government failed to prove the existence of the regulation at issue).

Of particular note, even though general regulations receive the benefit of a presumption of lawfulness, they are still subject to judicial scrutiny, whereas the prohibition of a properly included substance under Article 112a is not. In *United States v. Pugh*,[115] the CAAF unanimously reversed the decision of the Air Force Court of Criminal Appeals (AFCCA), reversing a military judge's dismissal of a specification under Article 92.[116] The Government charged Pugh with dereliction of duty for violating a lawful general regulation, Air Force Instruction 90-507, by ingesting protein bars containing hemp seeds.[117] The applicable Air Force regulation banned the use of hemp seed and hemp seed oil.[118] The panel convicted Pugh of the dereliction offense, but prior to presentencing, the defense filed a motion to dismiss, alleging the pertinent section of the Air Force regulation was not a lawful order.[119] The military judge reserved the motion until after sentencing, where the panel adjudged a dismissal.[120] During post-trial, the military judge granted the motion to dismiss, finding the regulation to be "overly broad and therefore did not serve a valid military purpose."[121] After a failed attempt at reconsideration, the Government filed an interlocutory appeal under Article 62, UCMJ.[122] The AFCCA reversed the ruling of the military judge and reinstated Pugh's conviction and sentence.[123]

In reversing the AFCCA decision, the CAAF held that Air Force Instruction 90-507 was "an insufficient basis to support a charge of

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[115] United States v. Pugh, 77 M.J. 1 (C.A.A.F. 2017).
[116] *See id*. at 4–5.
[117] *See id.* at 2. The Government also charged Pugh, and he was acquitted of, one specification of wrongful use of marijuana, in violation of Article 112a(b)(1), based upon a positive drug test. *Id.* at 4, n.4. The defense's theory at trial was innocent ingestion of THC from hemp seed products. *See* United States v. Pugh, No. 2016-11, 2017 WL 1325639, at *4 (A.F. Ct. Crim. App. Mar. 10, 2017). Where evidence raises the issue of innocent ingestion, the Government cannot rely on the results of a drug test alone and must establish wrongful use of the substance beyond a reasonable doubt. *See* United States v. Ford, 23 M.J. 331, 335 (C.M.A. 1987). The Government may rely on an inference of wrongful use where it establishes "the reliability of the testing methodology and explain[s] the significance of the results of the test of the accused's sample." United States v. Campbell, 50 M.J. 154, 160 (C.A.A.F. 1999).
[118] *See Pugh*, 77 M.J. at 2.
[119] *See id.*
[120] *See id.*
[121] *Id.*
[122] *See id.*
[123] *See id.*

dereliction when it applies to legal, FDA-approved food products."[124] The Government argued the military purpose of the regulation served to ensure the accuracy of its drug testing program by banning products that could result in a false positive.[125] Rejecting this theory, the court determined that the Air Force has a legitimate purpose in proscribing substances that could interfere with its drug testing program, but "a blanket ban on all legally available commercial food products sold and regulated in the United States" is overly broad in effectuating this purpose.[126] At trial, evidence established that the protein bars at issue in this case, which are sold throughout the United States and on military installations, did not contain enough THC to interfere with the Air Force's drug testing program.[127] Accordingly, the Air Force's failure to narrowly tailor its prohibition to only substances that implicate its purpose resulted in the invalidation of its regulation.

Despite revisions after *Pugh*, every Service still maintains an expansive, punitive prohibition on the use of hemp products without regard for THC content or the federal and state legality of the products.[128] The exceptions to these rules granted for hemp-derived prescription drugs also do not adequately account for the broadness issue identified by the CAAF. Absent an exception for the use of hemp products that do not interfere with drug testing programs, these regulations continue to be infirm for overbroadness. Unlike Service regulation rules, the prohibition of a controlled substance under Article 112a is immune to such scrutiny.

2. Mens Rea

Article 112a and Article 92 both lack an explicit *mens rea* requirement, resulting in different judicially created standards. According to the Supreme Court, where a statute is silent on *mens rea*, courts must "read into the statute only that *mens rea* which is necessary to separate

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[124] *Id.* at 4.
[125] *See id.*
[126] *Id.*
[127] *See id.*
[128] *See* AR 600-85, *supra* note 14, para. 4-2(l)(8)(a); ALNAV Message 074/20, *supra* note 14, para. 5.a.; OPNAVINST 5350.4E, *supra* note 14, ch. 4, para. 1(d)(4); AFMAN 44-197, *supra* note 14, para. 1.2.2.; COMDTINST 1000.10B, *supra* note 14, ch. 7, para. A(5)(c).

wrongful conduct from 'otherwise innocent conduct.'" [129] This requirement flows from the general rule "that a guilty mind is 'a necessary element in the indictment and proof of every crime.'"[130]

For Article 92 offenses, the CAAF analyzes the applicable regulation to determine the *mens rea* requirement. In *United States v. Haverty*, the court determined a recklessness standard applied to the prohibition of hazing under AR 600-20.[131] Similarly, the court applied a recklessness standard in *United States v. Gifford* for a general order violation of furnishing alcohol to a person under 21 years of age.[132] The court has yet to address the *mens rea* requirement for any of the Service regulations that proscribe substances.

For a wrongful use offense under Article 112a, the CAAF interpreted the wrongfulness prong to require actual knowledge.[133] The court first articulated this knowledge requirement as the "accused must have known that he had custody of or was ingesting the relevant substance and also

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[129] Elonis v. United States, 575 U.S. 723, 736 (2015) (citing Carter v. United States, 530 U.S. 255, 269 (2000) (quoting United States v. X-Citement Video, 513 U.S. 64, 72 (1994))) (internal quotation marks omitted). In *Elonis*, the Supreme Court reviewed a federal civilian criminal statute for communicating threats that lacked an explicit *mens rea* requirement. *See Elonis*, 575 U.S. at 732–34. At trial, Elonis was convicted for making threats based on lyrics he wrote on social media. *See id.* at 731. On *mens rea*, the intermediate appellate court determined the criminal statute only requires the Government to establish Elonis intended to communicate the words that a reasonable person would view as a threat. *See id.* at 732. The Supreme Court rejected this reasonable person standard, instead holding the statute required the Government prove "the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.* at 740.

[130] *Elonis*, 575 U.S. at 734 (quoting United States v. Balint, 258 U.S. 250, 251 (1922)).

[131] *See* United States v. Haverty, 76 M.J. 199, 208 (C.A.A.F. 2017) (reviewing definition of recklessly as: "In such a manner that the actor knew that there was a substantial and unjustifiable risk that the social harm the law was designed to prevent would occur and ignored this risk when engaging in the prohibited conduct.") (citing BLACK'S LAW DICTIONARY 1462 (10th ed. 2014)).

[132] *See* United States v. Gifford, 75 M.J. 140, 141, 146 (C.A.A.F. 2016).

[133] *See* United States v. Thomas, 65 M.J. 132, 134 (C.A.A.F. 2007) (extending the knowledge requirement for possession offenses to introduction offenses under Article 112a). At trial, Thomas pled guilty to wrongful introduction of marijuana onto a military installation. *See id.* at 133. While the plea established Thomas knew he possessed marijuana, the military judge erroneously determined Thomas did not need to know he was entering a military installation to be found guilty. *See id.* at 133, 135. Applying an actual knowledge requirement, the CAAF reduced Thomas's conviction from introduction to possession of marijuana. *See id.* at 135–36.

must have known that the substance was of a contraband nature—regardless whether he knew its particular identity."[134]

Current military jurisprudence supports a broad interpretation of what constitutes "contraband nature" for the purposes of the knowledge requirement under Article 112a. While the statutory text and attendant presidentially promulgated rules of Article 112a do not address the meaning of "contraband nature," the term contraband also appears in Rule 313 of the Military Rules of Evidence (MRE).[135] The drafter's analysis of MRE 313 defines contraband as "material the possession of which is by its very nature unlawful. Material may be declared to be unlawful by appropriate statute, regulation, or order."[136] In *United States v. Heitkamp*,[137] the Army Court of Criminal Appeals (ACCA) adopted this exact definition for purposes of Article 112a.[138] The CMA has similarly endorsed an expansive definition of contraband based on MRE 313, albeit outside the context of controlled substances.[139]

However, more recent Supreme Court precedent draws into question the appropriateness of military courts applying a broad definition based on non-binding guidance. In *McFadden*, the Court addressed the knowledge requirement of the CSA where the substance at issue was an analogue under the Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. § 813 (Analogue Act).[140] In 2011, law enforcement agents in Charlottesville, Virginia, intercepted a package that McFadden shipped

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[134] United States v. Mance, 26 M.J. 244, 256 (C.M.A. 1998) (determining the knowledge requirement for wrongful use or possession offenses under Article 112a in the context of panel instructions).

[135] *See generally* 10 U.S.C. § 912a; 2024 MCM, *supra* note 10, pt. IV, ¶ 50, M.R.E. 313.

[136] MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 22, sec. III, at A22-27 (2016) (incorporated without amendment by 2024 MCM, *supra* note 10, app. 16, sec. III, at A16-2).

[137] United States v. Heitkamp, 65 M.J. 861 (A. Ct. Crim. App. 2007).

[138] *See id.* at 865 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 22, sec. III, at A22-23 (2005)); *but see* United States v. Baba, No. 20210199, 2023 WL 4363224 269, at *6 (A. Ct. Crim. App. June 22, 2023), review denied, 84 M.J. 151 (C.A.A.F. 2023) (purporting to except expired prescribed controlled substances from contraband definition: "The Army's regulatory framework also raised a 'fair notice' issue and presented the question of the required *mens rea* of knowledge of the contraband nature of the drugs. Unlike heroin or cocaine, prescribed controlled substances are not inherently contraband.").

[139] *See* United States v. Thatcher, 28 M.J. 20, 24 (C.M.A. 1989) (holding stolen property is contraband "because the possessor is not entitled to retain possession of such property").

[140] *See* McFadden v. United States, 576 U.S. 186, 188 (2015).

containing suspected "bath salts."[141] Chemical testing revealed the powder to include controlled substance analogues: 3,4-Methylenedioxypyrovalerone, 3,4-Methylenedioxy-N-methylcathinone, and 4-Methyl-N-ethylcathinone.[142] Under the Analogue Act, Federal courts must treat controlled substance analogues as a Schedule I controlled substance for the purpose of any Federal law.[143] At trial, the Government and McFadden litigated the knowledge requirement for offenses of distribution of controlled substance analogues.[144] The trial court ultimately provided the following jury instruction on the knowledge element: "'[T]he defendant knowingly and intentionally distributed a mixture or substance that has' substantially similar effects on the nervous system as a controlled substance and '[t]hat the defendant intended for the mixture or substance to be consumed by humans.'"[145] The jury convicted McFadden on all counts.[146]

In reviewing the issue, the Supreme Court held that the Government can establish the knowledge requirement in two ways for controlled substance analogue offenses charged under the CSA.[147] First, the Government could establish that McFadden knew the substance was some controlled substance, including scheduled substances or substances treated as such under the Analogue Act, even if he did not know the identity of

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[141] *Id.* at 189.
[142] *See id.* at 190.
[143] A controlled substance analogue is defined as a substance:

> (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
> (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
> (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. § 802(32)(A). This definition specifically excludes actual controlled substances. *Id.* § 802(32)(C).
[144] *McFadden*, 576 U.S at 190.
[145] *Id.* (citing appendix at 40).
[146] *See id*.
[147] *See id.* at 194.

the specific substance.[148] Alternatively, the Government could establish that McFadden knew the identity of the specific substance, "even if he did not know its legal status as an analogue."[149] Consequently, the court determined that the knowledge requirement "is not broad enough to include all substances regulated by any law."[150] The Court's analysis turned on a plain reading of the punitive statute under the CSA, 21 U.S.C. § 841, which prohibits knowingly or intentionally distributing a controlled substance.[151]

McFadden appears to invalidate the language from the drafter's analysis that contraband for the purposes of Article 112a can include substances declared unlawful by regulation. Properly applied, an accused must either know the substance is some type of substance prohibited under Article 112a or know its actual identity, which means it has to fit into the statutory definition of Article 112a(b). In effect, this interpretation heightens the Government's burden and narrows the available theories of culpability by eliminating the ability to bootstrap a conviction for actual ingestion of an Article 112a controlled substance with knowledge of a regulatorily proscribed substance. For example, if the evidence establishes the accused believed they used CBD, a regulatorily proscribed substance, but a urinalysis proved the substance was actually THC, a Schedule I controlled substance, the prosecution would fail to prove the *mens rea* requirement of knowledge of some controlled substance or the actual identity of the substance.

Even if subsequent case law avoids the application of *McFadden*, the current "contraband nature" standard would still not be implicated by many substances currently proscribed by the Service regulations. Since mere possession triggers the classification of a substance as contraband, each substance that is lawful unless used in a particular manner would not constitute contraband. Similarly, a substance that is illegal to use, but not illegal to possess, would also not meet the definition. For example, the Services prohibit use, but not possession, of hemp products.[152] Since

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[148] *See id.*
[149] *Id.*
[150] *Id.* at 195.
[151] *See id.* at 192–94.
[152] *See generally* AR 600-85, *supra* note 14, para. 4-2.l.(8)(a); ALNAV Message 074/20, *supra* note 14, para. 5.a.; OPNAVINST 5350.4E, *supra* note 14, ch. 4, para. 1.d.(4); AFMAN 44-197, *supra* note 14, para. 1.2.2.; COMDTINST 1000.10B, *supra* note 14, ch. 7, para. A.5.c.

substances are only contraband if their possession is illegal, hemp products are therefore not contraband.

B. Sentencing

The sentencing schemes also differ significantly for Article 112a offenses and general order violations under Article 92. For Article 112a, the President authorized total forfeitures and a dishonorable discharge for any offense, but separated the maximum possible confinement terms based on categories of the underlying act, then subcategories of substance type.[153] The first category includes acts involving the use, possession, manufacture, and introduction of a controlled substance.[154] Within this group, certain types and amounts of substances authorize confinement for up to two years,[155] and other types and amounts of substances authorize confinement for up to five years.[156] The second main category addresses distribution, importation, and exportation of a controlled substance and possession, manufacture, or introduction with the intent to distribute a controlled substance.[157] Certain substances within this category authorize confinement of up to ten years,[158] and others authorize confinement of up to fifteen years.[159] Additionally, the President provided a special sentencing enhancer, increasing the confinement potential by five years for any Article 112a offense when committed:

> [W]hile the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by

[153] *See* 2024 MCM, *supra* note 10, pt. IV, ¶ 50.d.
[154] *See id.* pt. IV, ¶ 50.d.(1).
[155] *See id.* pt. IV, ¶ 50.d.(1)(b) (including "[m]arijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances").
[156] *See id.* pt. IV, ¶ 50.d.(1)(a) (including "[a]mphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, III controlled substances").
[157] *See id.* pt. IV, ¶ 50.d.(2).
[158] *See id.* pt. IV, ¶ 50.d.(2)(b) (including "[p]henobarbital and Schedule IV and V controlled substances").
[159] *See id.* pt. IV, ¶ 50.d.(2)(a) (including "[a]mphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances").

> or under the control of the armed forces; while receiving special pay under 37 U.S.C. § 310; in time of war; or in a confinement facility used by or under the control of the armed forces.[160]

From their plain text, these sentence enhancers concern a heightened nexus to the military mission or environment.

By contrast, general regulation violations carry a flat maximum on punishment. Any violation of a lawful general regulation or order carries the same punitive exposure of total forfeitures, a dishonorable discharge, and confinement for up to two years.[161] While a lower punitive maximum may seem categorically fitting for substances proscribed by regulation as a lower level authority than statutory control, there is still no differentiation based on an accused's conduct relative to that substance. For example, the use of an ecstasy analogue and the distribution of an ecstasy analogue both incur the same punitive exposure. Further, there is no special enhancement for violating regulatory substance prohibitions under Article 92, even though such offenses would rationally implicate the same heightened military nexus concerns as an Article 112a offense.

IV. How to Streamline Controlled Substance Offenses: Executive Order

The President should exercise the authority under Article 112a(b)(2) to prescribe a list of controlled substances. This action would effectuate the original purpose of the provision by providing efficient control of dangerous substances in the military. The President can also provide parity between the Services by adding those substances that commonly afflict all the components. Further, a presidentially prescribed list would enable streamlined prosecution of harmful drugs as controlled substances under Article 112a instead of Article 92.

The blanket authority to prescribe a list of controlled substances is the most efficient measure to combat controlled substances in the military. In reviewing Congress's attempts to tackle drug epidemics, the CMA observed:

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[160] *Id.* pt. IV, ¶ 50.d.
[161] *See id.* pt. IV, ¶ 18.d.(1).

> Confined by Federal drug legislation that ties unlawful conduct to precise chemical definitions, law enforcement authorities have long found themselves at least one step behind drug dealers who possess certain rudimentary scientific abilities. Thus in the 1960's certain mescaline derivates created great problems until controlled under the Drug Abuse Control Amendments and their successor legislation, the Controlled Substances Act (CSA). In the 1970's, various analogs of PCP and methaqualone flourished until eventually brought within the exact definitions of the Act. Again in the 1980's the drug laws have been circumvented by profiteers capable of making minor alterations in the molecular structure of a controlled substance. Recent analogs have been based largely on the substances meperidine and fentanyl, from which models an almost infinite number of imitations can be derived.[162]

The regulatory scheduling authority under 21 U.S.C. § 811 affords Federal civilian authorities a process that is more rapid than legislative changes but still burdened through rule-making procedures.[163] The Analogue Act assists in filling this time gap by encompassing substances with substantially similar features, although this provision does not apply to Article 112a. The only requirement under the statutory language of Article 112a(b)(2) for the President to add substances is to prescribe a list on a schedule of controlled substances.[164] Unlike 21 U.S.C. § 811, Article 112a(b)(2) requires no additional process other than issuing an executive order. Moreover, the President can add substances to this schedule that mirror the language in the Analogue Act, bringing the same effect within Article 112a.

Even though Service regulations provide a similar efficiency, they create disparities among Service members and charging schemes, as discussed above. Presidential action could move substances already consistently covered by Service regulations, such as hemp or analogues.

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[162] United States v. Reichenbach, 29 M.J. 128, 131 (C.M.A. 1989). These rule-making procedures are also subject to judicial scrutiny, which can invalidate scheduling determinations and undermine prosecutions. *See id.* at 134. By contrast, presidential inclusion of substances under Article 112a(b)(2) presents significantly less risk of invalidation because it does not require such procedures. *See* 10 U.S.C. § 912a.

[163] *See Reichenbach*, 29 M.J. at 130–32.

[164] *See* 10 U.S.C. § 912a(b)(2).

Further, if any Service has a substance issue only applicable to its own members, the President's exercise of Article 112a(b)(2) power does not impede or interfere with the Service's authority to continue its own regulatory schemes. Instead, the President could consolidate common problem substances under Article 112a.

The inclusion of these substances through presidential listing will enable enforcement under Article 112a, which eliminates issues with charging under Article 92. Presidentially listed substances would not incur the same scrutiny for overbroadness of military purpose that undermined the charges in *Pugh*. The Supreme Court's decision in *McFadden* also would no longer present a bootstrapping challenge to the *mens rea* requirement, because the substances definitionally would qualify as controlled substances under the statute. As Article 112a substances, the sentencing enhancers for heightened military nexus would apply, and the President could further develop a tailored sentencing landscape based on the severity of the substances or the acts attendant to the substance.

If the President exercised the Article 112a(b)(2) authority for the first time, it would create greater efficiency, uniformity, and effectiveness in combating drug problems in the military. The President could then continue to adjust this list of substances to react to the changing needs of the Services.

V. Conclusion

Despite attempts by Congress, drug abuse continues to have a deleterious effect on military readiness and communities. Congress provided a powerful tool to the executive branch to fight this problem; yet, it has never been invoked. The President should prescribe a list of controlled substances under Article 112a(b)(2) to streamline inconsistencies between statutorily and regulatorily proscribed substances and establish parity among the Services. Congress designed this measure for this specific purpose.

While Congress did not intend for Article 112a to serve as the sole means for accomplishing this goal, it did deliberately empower the President to prescribe a schedule of substances in lieu of incorporating of regulatorily scheduled substances under 21 U.S.C. § 811. This revision in the article came in response to feedback from representatives of the Department of War and the highest military court, that regulations are burdensome and executive authority is flexible and efficient. Yet in the

four decades since the enactment of Article 112a, the President has never used this power, while Congress has made eight amendments to 21 U.S.C. § 812.

The President's authority under Article 112a(b)(2) is a truly unique measure for addressing the elusive challenges of substance control. The President can rapidly promulgate executive orders to combat emergent drug issues. This power is unencumbered by the regulatory processes required for 21 U.S.C. § 811 and expansive in its ability to incorporate other statutory frameworks. Without action, though, the existing system will persist with disparate coverage between the Services and infirmities at the merits and sentencing phases of trial.

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