MILITARY LAW REVIEW

Volume 229 **Issue 1**

WE'RE DOING THIS WRONG: THE DEPARTMENT OF DEFENSE'S APPLICATION OF THE GUN CONTROL ACT OF 1968 INFRINGES UPON SOME SERVICE MEMBERS' RIGHT TO PURCHASE AND POSSESS PERSONAL FIREARMS

MAJOR RYAN C. LIPTON*

I. Introduction

After the devastating 2017 shooting in Sutherland Springs, Texas, the Department of Defense (DoD) discovered gaps in its criminal reporting procedures that allowed the shooter to purchase the firearm he used to kill twenty-six individuals.[1] The Sutherland Springs shooter was a former active-duty Airman with a general court-martial conviction for domestic violence—a circumstance that precluded him from purchasing and possessing a firearm under Federal law.[2] While the Air Force received the

* Judge Advocate, United States Marine Corps. Presently assigned as Military Justice Policy and Legislation Officer, Headquarters Marine Corps, Judge Advocate Division, Military Justice Branch. LL.M., 2020, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; J.D., 2011, University of Miami School of Law, Coral Gables, Florida; B.A., 2008, University of Miami, Coral Gables, Florida. Previous assignments include Student, 68th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia, 2019–2020; Staff Judge Advocate, Special Purpose Marine Air Ground Task Force – Crisis Response – Central Command 18.2, Al Jaber Air Base, Kuwait, 2018–2019; Trial Counsel, Marine Corps Air Station Miramar, California, 2016–2018; Deputy Staff Judge Advocate, Marine Corps Air Station Miramar, California, 2016–2017; Series Commander, Company B, First Recruit Training Battalion, Marine Corps Recruit Depot Parris Island, South Carolina, 2015–2016; Defense Counsel, Legal Services Support Team, Marine Corps Recruit Depot Parris Island, South Carolina, 2013–2015. Member of the Florida Bar. This paper was submitted in partial completion of the Master of Laws requirements of the 68th Judge Advocate Officer Graduate Course.

[1] *See* INSPECTOR GEN., U.S. DEP'T OF DEF., REPORT NO. DODIG-2019-030, REPORT OF INVESTIGATION INTO THE UNITED STATES AIR FORCE'S FAILURE TO SUBMIT DEVIN KELLEY'S CRIMINAL HISTORY INFORMATION TO THE FEDERAL BUREAU OF INVESTIGATION (2018) [hereinafter DODIG-2019-030]. This investigation is redacted.

[2] 18 U.S.C. § 922(g), (n); *see* DODIG-2019-030, *supra* note 1, at 61.

brunt of the negative media publicity for the Sutherland Springs shooting, two DoD investigations revealed that every military service failed to report to the Department of Justice (DOJ) thousands of individuals who were prohibited from possessing or purchasing a firearm.[3] To close this reporting gap, each service has implemented policy measures designed to ensure Service members who are prohibited from possessing firearms are unable to purchase them from firearms dealers.[4]

The Sutherland Springs shooter fell into one of many categories of individuals who Congress, through 18 U.S.C. § 922(g), (n), prohibited from either possessing or receiving a firearm.[5] One category of prohibited persons is "unlawful users" of controlled substances.[6] In furtherance of that particular prohibition, each service's regulations aim to prevent Service members who have engaged in a single instance of drug use from both possessing and purchasing a firearm.[7] This article establishes that those policies are premised upon a legally deficient application of the unlawful-user prohibition and, consequently, infringe upon some Service members' Second Amendment rights. This article also provides recommendations for how the services should amend their practices to conform to the law.

---

[3] *See* DODIG-2019-030, *supra* note 1; INSPECTOR GEN., U.S. DEP'T OF DEF., REPORT NO. DODIG-2018-035, EVALUATION OF FINGERPRINT CARD AND FINAL DISPOSITION REPORT SUBMISSIONS BY MILITARY SERVICE LAW ENFORCEMENT ORGANIZATIONS (2017) [hereinafter DODIG-2018-035]; *see also* Alex Horton, *The Air Force Failed to Report Dozens of Violent Service Members to FBI Gun Databases*, WASH. POST (Nov. 28, 2017, 6:03 PM), https://www.washingtonpost.com/news/checkpoint/wp/2017/11/28/the-air-force-failed-to-report-dozens-of-violent-service-members-to-fbi-gun-databases; Tom Vanden Brook, *Air Force Failed Four Times to Prevent Sutherland Springs Church Killer from Buying Guns*, USA TODAY (Dec. 7, 2018, 11:37 AM), https://www.usatoday.com/story/news/politics/2018/12/07/air-force-failed-four-times-prevent-sutherland-springs-shooter-gun-purchase/2237400002.

[4] *See* discussion *infra* Part IV.

[5] § 922(g), (n); *see* discussion *infra* Section II.A.

[6] § 922(g)(3). The text of § 922(g)(3) states:

> It shall be unlawful for any person . . . who is an *unlawful user* of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . . to ship or transport in interstate or foreign commerce, or *possess* in or affecting commerce, any firearm or ammunition; or to *receive* any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Id. (emphasis added). Note that the prohibition applies to both *unlawful users* of controlled substances and *addicts* of controlled substances. This article's scope is limited to an analysis of the military's application of the *unlawful-user* prohibition.

[7] *See* discussion *infra* Part IV.

Congress did not define the term "unlawful user" in § 922 or elsewhere in Title 18.[8] In the absence of a definition, the Federal circuit courts developed one. To be considered an unlawful user, one must use a controlled substance with regularity and over an extended period of time.[9] Additionally, the drug use must be contemporaneous with the purchase or possession of a firearm. The services, however, incorrectly enforce the unlawful-user prohibition against Service members through orders and regulations, which apply a different standard.[10] In contrast to the requirements outlined by the Federal courts, each service's policies prohibit Service members from possessing and purchasing firearms after a single occasion of drug use. Moreover, pursuant to those policies, to be considered an unlawful user, that single instance of drug use does not need to be substantiated by a court-martial conviction or a finding of guilt at nonjudicial punishment. In fact, some services declare that a mere positive result on a drug test renders a Service member an unlawful user under the statute.

Part II of this article discusses the framework of Federal firearms statutes and regulations by exploring the relationship between the Gun Control Act of 1968 (GCA), the Brady Handgun Violence Prevention Act (Brady Act), and Chapter 27 of the *Code of Federal Regulations* (C.F.R.). Part III examines the pertinent Federal cases, surveying how the circuits apply the unlawful-user prohibition in the absence of a definition from lawmakers. Part IV explores how each of the services implements the unlawful-user prohibition through policy, revealing a reliance on a definition that was created by the Bureau of Alcohol, Tobacco, and Firearms (ATF) and is in conflict with Federal case law. Part V addresses that conflict by applying the law to those policies while considering the most likely arguments for defending the policies in their current form. Part VI makes recommendations for the ways in which the services and the DoD should amend their practices to comply with the law. Finally, Part VII concludes that the services are incorrectly applying the unlawful-user prohibition without any legal justification, placing unnecessary risk on the services and commanders.

II. Federal Firearms Legislation and Regulations

---

[8] *See* 18 U.S.C. §§ 921–927; *see also* discussion *infra* Part III. There is no dispute that Congress did not define this term.

[9] *See* discussion *infra* Part III.

[10] *See* discussion *infra* Part IV.

This part examines the interplay between (1) Congress' firearm prohibitions outlined in the GCA, now codified in 18 U.S.C. § 922(g), (n); (2) the Brady Act, which directs the Attorney General to establish and supervise a national background check system; and (3) the ATF's administrative regulations, which provide guidance for the enforcement of firearm prohibitions, to include the unlawful-user prohibition.

A. Legislation

Congress passed the GCA in 1968 "to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime in the United States."[11] To that end, the GCA criminalized the possession, receipt, transfer, and sale of firearms for categories of individuals that Congress deemed dangerous.[12] One of those prohibitions, the subject of this article, includes "any person who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."[13]

In its original form, the GCA included only four categories of prohibited persons.[14] Since its enactment, Congress has amended the GCA by expanding the scope of prohibited categories and by imposing strict requirements related to the sale of firearms.[15] In 1993, Congress passed the Brady Act, which accomplished two objectives: (1) mandating that the Attorney General create a comprehensive indexing system called the National Instant Criminal Background Check System (NICS), and (2) imposing a requirement on firearms dealers, commonly referred to as Federal firearms licensees (FFLs), to use the NICS to conduct background checks on prospective buyers prior to completing any firearm sale.[16]

---

[11] S. REP. NO. 90-1097, at 2 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2113–14.
[12] 18 U.S.C. § 922(g), (n).
[13] *Id.* § 922(g)(3).
[14] *See* Gun Control Act of 1968, Pub. L. No. 90-618, sec. 102, § 922(d), 82 Stat. 1213, 1220 (current version at 18 U.S.C. § 922(g)).
[15] 18 U.S.C. § 922(g), (n); *see, e.g.*, Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009-371 to -372 (1996) (codified as amended at 18 U.S.C. § 922(g)(9)) (criminalizing the possession of firearms by individuals convicted of misdemeanor crimes of domestic violence through legislation commonly referred to as the "Lautenberg Amendment").
[16] *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102, 107 Stat. 1536, 1536–41 (1993) (codified as amended at 18 U.S.C. § 922(t)). Licensed dealers, commonly

Indeed, even prior to implementation of the Brady Act, the GCA prohibited FFLs from selling firearms to individuals whom an FFL had "reasonable cause" to believe fell within a prohibited category.[17] However, absent any specific knowledge of the buyer's personal or criminal history, it was difficult for an FFL to determine whether a prospective buyer was a prohibited person. Congress' mandate that the Attorney General establish the NICS was a significant step in tightening this gap. The Brady Act specifically directed the Attorney General to

> establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law.[18]

To date, the GCA continues to prohibit FFLs from selling firearms to any individual whom an FFL has reasonable cause to believe fits into a prohibited category.[19] Effectively, the Brady Act requires firearms dealers to use the NICS to establish the absence of such reasonable cause prior to completing the sale.

B. The NICS Background Check Process

The NICS is an electronically-accessed system that FFLs use to determine the presence of any information that would prohibit a buyer from possessing a firearm. Using a buyer's personal information, the NICS scrubs three databases: (1) the National Crime Information Center (NCIC), (2) the Interstate Identification Index (III), and (3) the NICS Index.[20] The NCIC

---

referred to as Federal firearms licensees (FFLs) are those who are engaged in the business of selling firearms. *See* 18 U.S.C. § 921(a)(11)(A), (a)(21)(C). Thus, often referred to as the "gun show loophole," the requirement to conduct background checks does not extend to individuals who engage in the *occasional* firearm transaction. *See id.* § 921(a)(21)(C).

[17] *See* Gun Control Act of 1968 § 102(d)(1)–(4).

[18] Brady Handgun Violence Prevention Act § 103(b) (codified as amended at 34 U.S.C. § 40901(b)). Notably, in directing the Attorney General to establish the National Instant Background Check System (NICS), Congress specifically chose to use the phrase "would violate," as opposed to "might violate" or "may violate." *See* discussion *infra* Part VI.

[19] 18 U.S.C. § 922(d)(1)–(9).

[20] *See National Instant Criminal Background Check System Posts NICS Index Data*, FED. BUREAU OF INVESTIGATION (Mar. 18, 2016), https://www.fbi.gov/news/pressrel/press-releases/national-instant-criminal-background-check-system-posts-nics-index-data; *see also* FED. BUREAU OF INVESTIGATION, DEP'T OF JUST., NATIONAL INSTANT CRIMINAL

holds records pertaining to individuals who are the subjects of protection orders, active criminal warrants, and immigration violations.[21] The III is a fingerprint-supported index that maintains state and Federal criminal arrest and disposition records.[22] The NICS Index (not to be confused with the overarching NICS background check system) is unique because the Attorney General created it to serve as a repository of information pertaining specifically to individuals prohibited from possessing or purchasing firearms under 18 U.S.C. § 922(g), (n).[23] It is to the NICS Index that military law enforcement agencies submit a Service member's personal information when that Service member's conduct triggers a firearm prohibition.[24]

C. The Administrative Regulation

As one might imagine, the Attorney General's implementation of the NICS was no easy task. Successful implementation called for a variety of state and Federal agencies to coordinate and required the system to be accurate and accessible to FFLs. To facilitate that coordination, the Brady Act authorized the Attorney General, as the head of the DOJ, to "secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code . . . ."[25] To that end, the ATF published regulatory guidance in 1997, now chaptered within 27 C.F.R. § 478.11, which was designed to ensure the relevance and accuracy of the information that Federal agencies would need to provide

---

BACKGROUND CHECK SYSTEM (NICS) SECTION, 2018 OPERATIONS REPORT 1 (2018) [hereinafter 2018 NICS OPERATIONS REPORT].

[21] 2018 NICS OPERATIONS REPORT, *supra* note 20.

[22] *See* BUREAU OF JUST. STATS., DEP'T OF JUST., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2018 at vi, viii (2020).

[23] *See National Instant Criminal Background Check System Posts NICS Index Data*, *supra* note 20; *see also* 2018 NICS OPERATIONS REPORT, *supra* note 20.

[24] *See* 2018 NICS OPERATIONS REPORT, *supra* note 20; *see also* U.S. DEP'T OF AIR FORCE, POL'Y DIR. 71-1, CRIMINAL INVESTIGATIONS AND COUNTERINTELLIGENCE para. 2.9 (1 July 2019) [hereinafter AFPD 71-1]; U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 12-4 (27 Sept. 2016) [hereinafter AR 190-45]; Marine Administrative Message, 652/18, 091833Z Nov 18, Commandant, Marine Corps, subject: Implementation of Criminal Justice Information Reporting Requirements and Guidance para. 4.c.2.d [hereinafter MARADMIN Message 652/18]; Navy Administrative Message, 076/18, 291241Z Mar 18, Chief, Naval Operations, subject: Gun Control Act of 1968 Criminal Justice Information Reporting Requirements para. 1 [hereinafter NAVADMIN Message 076/18].

[25] *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(e)(1), 107 Stat. 1536, 1542 (1993) (codified as amended at 34 U.S.C. § 40901(e)). Notably, in bestowing this authority upon the Attorney General, Congress used the phrase "would violate," as opposed to "might violate" or "may violate." *See* discussion *infra* Part VI.

to the Attorney General by way of submissions in the NICS Index.[26] That regulation defines each prohibition under 18 U.S.C. § 922(g), (n) by articulating the type of conduct that would render someone prohibited from receiving a firearm.[27] Included in that regulation is the ATF's definition of the unlawful-user prohibition, which reads as follows:

> A person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year. *For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or*

---

[26] 27 C.F.R. § 478.11 (2019). The originating guidance for this regulation provided the following:

> In order to establish NICS in such a way that it incorporates the information needed for all the categories of prohibited persons mentioned above, records systems from both Federal and State agencies will be included in the national system. For example, records on fugitives are needed from State and Federal law enforcement agencies. To ensure that the information provided to the national system is *accurate*, the categories of prohibited persons must be defined in the regulations as clearly as possible.

Definitions for the Categories of Persons Prohibited from Receiving Firearms, 62 Fed. Reg. 34634, 34635 (emphasis added).

[27] 27 C.F.R. § 478.11; *see* discussion *infra* Section V.D.

> *other administrative action based on confirmed drug use, e.g., court-martial conviction, nonjudicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.*[28]

As demonstrated by its lengthy definition, the ATF recognized that Congress' use of the phrase "unlawful user of a controlled substance" left significant room for interpretation. As a result, the ATF interpreted the statute as broadly as it could, presumably in an effort to prevent those who *might* be unlawful users from purchasing firearms. However, the U.S. Courts of Appeals also took note of the statute's lack of clarity. Through decades of case law, the courts have adopted and applied a much different definition—one that now conflicts with the ATF's 1997 definition.

III. The Federal Courts Grapple with Congress' Failure to Define "Unlawful User"

In the 1977 case of *United States v. Ocegueda*,[29] the Ninth Circuit became the first Federal court of appeals to address a challenge to the term "unlawful user" under the GCA. In that case, the trial court convicted Ocegueda of receiving firearms while being an unlawful user of a controlled substance.[30] Ocegueda had a significant history of heroin use, as evidenced by a combination of his own admissions, witness testimony, and drug use convictions that spanned several years before, during, and after the time in which he possessed firearms.[31] On appeal, he argued that the term "unlawful user" was unconstitutionally vague in violation of the Fifth Amendment's due process clause because the term failed to put him on notice as to what conduct the statute criminalized.[32] The Ninth Circuit rejected that argument and affirmed the conviction, holding that, as applied to Ocegueda, the term "unlawful user" was not unconstitutionally vague.[33]

---

[28] 27 C.F.R. § 478.11 (emphasis added). The emphasized text depicts the additions the Bureau of Alcohol, Tobacco, and Firearms (ATF) added based specifically on Department of Defense (DoD) input. *Compare id.*, *with* Definitions for the Categories of Persons Prohibited from Receiving Firearms, 62 Fed. Reg. at 34636; *see* discussion *infra* Section V.D.

[29] United States v. Ocegueda, 564 F.2d 1363 (9th Cir. 1977).

[30] *Id.* at 1365. Notably, the challenge in this case was to 18 U.S.C. § 922(h)(3), not § 922(g)(3), because the statute was organized differently in 1977.

[31] *Id.* at 1366–67.

[32] *Id.* at 1366.

[33] *Id.* Notably, the Ninth Circuit considered *Ocegueda* less than two years after the Supreme Court narrowed the reach of most vagueness challenges. *See* United States v. Powell, 423 U.S. 87, 92 (1975) (holding that attacks based upon non-First Amendment principles may

Considering Ocegueda's prolonged use of heroin, which spanned several years, to include the period of time that he possessed a firearm, the Ninth Circuit reasoned that the term "unlawful user" unquestionably included his conduct.[34] In light of the factual background underlying Ocegueda's conviction, it is unsurprising that the Ninth Circuit found his conduct to be within the scope of the unlawful-user prohibition intended by Congress. However, the *Ocegueda* opinion is significant because it is the first from a Federal circuit to acknowledge that, although the appellant's conduct was clearly contemplated by the term "unlawful user," the phrase may nevertheless be unconstitutionally vague as applied to an individual with a less significant history of drug use or as applied to drug use that occurs outside the time period of an individual's firearm possession or purchase.[35]

The term "unlawful user" consists of two subcomponents: the *unlawful* component and the *user* component. Generally, use of a controlled substance will be considered unlawful if it occurs without a medical prescription or if it involves a controlled substance that cannot be prescribed.[36] For the Ninth Circuit in *Ocegueda*, addressing the unlawful nature of the appellant's use was straightforward, as heroin is a federally prohibited controlled substance for which no lawful use existed and a substance prohibited under California law when used without a prescription.[37] The *user* component of the phrase is the principal focus of both *Ocegueda* and this article.

A. What Makes Someone an Unlawful User?

Without a clear definition, the following four questions remain unanswered concerning the unlawful-user prohibition: (1) Does evidence of drug *possession* create an inference of drug *use*? (2) How frequently

---

only be challenged when considering the facts of the case at hand or as applied); *see generally* United States v. Mazurie, 419 U.S. 544 (1975). As a result, no appellate court will ever consider whether the term "unlawful user" is unconstitutionally vague on its face.

[34] *Ocegueda*, 564 F.2d at 1366.

[35] *Id.* ("Had Ocegueda used a drug that may be used legally by laymen in some circumstances, or had his use of heroin been infrequent and in the distant past, we would be faced with an entirely different vagueness challenge to the term 'unlawful user' in § 922(h)(3). However, Ocegueda's prolonged use of heroin, occurring before, during and after the period of the gun purchases, presents a situation where the term cannot be considered vague under the due process clause of the Fifth Amendment.").

[36] *See* 18 U.S.C. § 922(g)(3) (prohibiting unlawful users of controlled substances from possessing and receiving firearms); 21 U.S.C. § 802(6) (defining the term "controlled substance"); 21 U.S.C. § 812(b)(1)(B) (establishing controlled substance schedules).

[37] *See* 21 U.S.C. § 812(b)(1)(B); *Ocegueda*, 564 F.2d at 1365–66.

must someone use a controlled substance to be considered an unlawful user? Is one-time drug use enough? How about ten times? (3) Whatever the frequency required, once an individual reaches that threshold, is the drug user prohibited from possessing or purchasing a firearm for life? If not, when can a former drug user regain the right to possess or purchase a firearm? (4) To be considered an unlawful user, what proximity of time is required between the drug use and the firearm purchase or possession? The cases discussed below address these four gaps by evaluating the chronological evolution of the statute's legal application in Federal court.

1. The Federal Circuits Fill the Gaps Left by Congress

In 1997, the Tenth Circuit turned its attention to the distinction between drug use and drug possession and considered the question of proximity between the drug use and firearm possession in *United States v. Reed*.[38] Prior to his appeal, the Government charged Reed with six counts of possessing a firearm while being an unlawful user of marijuana, in violation 18 U.S.C. § 922(g)(3).[39] In a pretrial motion, Reed sought to dismiss those charges, arguing that the term "unlawful user" was unconstitutionally vague on its face.[40]

Relying on the Government's proffer of anticipated evidence at trial, the district court granted that motion for some of the charges.[41] That ruling was based on the Government's lack of evidence establishing a temporal nexus between the drug use and firearm possession, as well as the Government's reliance on establishing Reed's marijuana use through an inference from his marijuana possession.[42] Importantly, the district court stated:

> The United States concedes that the statute covers only persons who used marijuana during the time period the person possessed a firearm, noting that the statute applies to any person who "*is* an unlawful user" and not "*was* an unlawful user." In fact, other circuits have held that under 18 U.S.C. § 922(g)(3), or its predecessor, 18 U.S.C. § 922(h)(3), the unlawful use must occur while the accused

[38] *See* United States v. Reed, 114 F.3d 1067 (10th Cir. 1997), *rev'g* 924 F. Supp. 1052 (D. Kan. 1996).
[39] *Id.* at 1068.
[40] *Id.*
[41] *Id.*
[42] *Reed*, 924 F. Supp. at 1056–57.

> is the possessor of the firearm, although not necessarily at the same moment.
>
> . . . [A] facial examination of the statute provides no time frame in which "use" must occur in order for someone to be an "unlawful user". In other words, the statute does not indicate that point in time when someone who *is* an unlawful user, and subject to the statute, becomes someone who *was* an unlawful user, and not subject to the statute.
>
> . . . .
>
> . . . In enacting § 922(g)(3), Congress could have prohibited possession of a controlled substance while in possession of a firearm, but did not do so. . . . [T]he meaning of "user of" in § 922(g)(3) cannot be interpreted to support a violation based on possession alone; "use" of the controlled substance must be alleged.[43]

Following the Government's appeal, the Tenth Circuit reversed the district court's ruling on procedural grounds.[44] Despite the reversal, the Tenth Circuit acknowledged the validity of the district court's concerns related to properly interpreting the statute and confirmed that "there must be some proximity in time between drug use and weapon possession."[45] The court went on to validate the district court's analysis, explaining that "[t]he statute prohibits possession of a weapon by one who 'is' a user, not one who 'was' a user."[46]

Two years later, in *United States v. Edwards*, the Fifth Circuit addressed a similar vagueness challenge.[47] At trial, the district court convicted Edwards of possessing a firearm while being an unlawful user of a controlled substance, in violation 18 U.S.C. § 922(g)(3).[48] The Government's evidence at trial included numerous arrests and convictions for marijuana use over a seven-month period, as well as the appellant's admission that he used marijuana on a daily basis for "two to three years"

---

[43] *Id.* at 1055–56.
[44] *Reed*, 114 F.3d at 1070–71 (holding that the district court erred by failing to consider the vagueness challenge as applied, since non-First Amendment vagueness challenges must be considered as applied to the defendant's conduct).
[45] *Id.* at 1069.
[46] *Id.*
[47] United States v. Edwards, 182 F.3d 333 (5th Cir. 1999).
[48] *Id.* at 335.

during a period of time that overlapped with his firearm possession.[49] Additionally, when the police discovered the firearm at issue, Edwards was in possession of both marijuana and cocaine.[50] Like the Ninth Circuit in *Ocegueda*, the Tenth Circuit held in *Edwards* that the term "unlawful user" was not unconstitutionally vague as applied to the appellant's conduct.[51] The court reasoned that an "ordinary person would understand" that persistent drug use occurring during a period of firearm possession makes one an unlawful user within the meaning of the statute.[52]

In the 2001 case of *United States v. Purdy*, the Ninth Circuit considered whether the appellant's regular use of marijuana, methamphetamine, and cocaine over a four-year period, which was contemporaneous with his firearm possession, placed him on notice that he was an unlawful user within the meaning of 18 U.S.C. § 922(g)(3).[53] Revisiting its analysis in *Ocegueda*, the court held that, as applied to the appellant, the term "unlawful user" was not unconstitutionally vague.[54] The Ninth Circuit reasoned that "Purdy's drug use was sufficiently consistent, 'prolonged,' and close in time to his gun possession" to adequately put him on notice that he fell within the meaning of the statue as intended by Congress.[55] As in *Ocegueda*, considering the extent of the appellant's drug use, this holding is not surprising. However, in *Purdy*, the Ninth Circuit also re-addressed its reservations previously articulated by the *Ocegueda* court: that "infrequent" drug use or drug use in the "distant past" gives rise to an "entirely different" vagueness challenge.[56] The Ninth Circuit took this one step further in *Purdy*, fashioning a definition to be applied to future prosecutions for violations of § 922(g)(3):

> We note, however, that the definition of an "unlawful user" is not without limits. Indeed, in *Ocegueda* we concluded our analysis by stating:
>
> > Had *Ocegueda* used a drug that may be used legally by laymen in some circumstances, or *had his use of heroin*

[49] *Id.* at 335–36.
[50] *Id.* at 336.
[51] *Id.* at 334–35.
[52] *Id.* at 336.
[53] United States v. Purdy, 264 F.3d 809, 811 (9th Cir. 2001).
[54] *Id.* at 813.
[55] *Id.*
[56] *Id.* at 813–14; United States v. Ocegueda, 564 F.2d 1363, 1367 (9th Cir. 1977).

> *been infrequent and in the distant past*, we would be faced with an entirely different vagueness challenge to the term "unlawful user" . . . .
>
> We think this language bears repeating. The facts of this case establish beyond doubt that Purdy's drug use, like that of Ocegueda, was sufficient to put him on notice that he fell within the statutory definition of "unlawful [drug] user." We emphasize, however, that to sustain a conviction under § 922(g)(3), the government must prove—as it did here—that the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm.[57]

With that, the *Purdy* court became the first Federal court of appeals to comprehensively define the unlawful-user prohibition and to articulate the Government's burden when prosecuting an individual under § 922(g)(3).[58] Since then, each circuit to address the issue has adopted the Ninth Circuit's application, requiring the Government to establish that the defendant used drugs with regularity, over an extended period of time, and contemporaneously with the firearm purchase or possession.[59]

The *Purdy* court's definition accounts for three of the four ambiguities Congress inadvertently created. Specifically, it addresses (1) the

---

[57] *Purdy*, 264 F.3d at 812–13 (quoting *Ocegueda*, 564 F.2d at 1366).
[58] *Id.*
[59] *See, e.g.*, United States v. Yancy, 621 F.3d 681, 687 (7th Cir. 2010) ("Every circuit to have considered the question has demanded that the habitual abuse be contemporaneous with the gun possession."); United States v. Marceau, 554 F.3d 24, 30 (1st Cir. 2009) ("In order to avoid unconstitutional vagueness, courts have held that the critical term 'unlawful user' requires a 'temporal nexus between the gun possession and regular drug use.' Refined further, an 'unlawful user' is one who engages in 'regular use over a long period of time proximate to or contemporaneous with the possession of the firearm.'" (first quoting United States v. Edwards, 540 F.3d 1156, 1162 (10th Cir. 2008); and then quoting United States v. McCowan, 469 F.3d 386, 392 n.4 (5th Cir. 2006))); United States v. Augustin, 376 F.3d 135, 138–39 (3d Cir. 2004) ("Those of our sister courts of appeals that have considered 18 U.S.C. § 922(g)(3) have concluded, as do we, that one must be an unlawful user at or about the time he or she possessed the firearm and that to be an unlawful user, one needed to have engaged in regular use over a period of time proximate to or contemporaneous with the possession of the firearm."); United States v. Turnbull, 349 F.3d 558, 561 (8th Cir. 2003), *vacated on other grounds*, 543 U.S. 1099 (2005) (finding *Booker* error); United States v. Jackson, 280 F.3d 403, 406 (4th Cir. 2002) (holding that the appellant's drug use was sufficiently contemporaneous with his firearm possession).

requirement to establish *use* of a controlled substance rather than mere *possession*, (2) the frequency of use, and (3) the temporal nexus between use of a controlled substance and possession of a firearm. However, the *Purdy* definition does not address the *duration* of the prohibition under 18 U.S.C. § 922(g)(3). In *United States v. Yancy*, the Seventh Circuit addressed that issue.[60]

In *Yancy*, the state arrested the appellant while in possession of both a firearm and a small amount of marijuana.[61] Additionally, he confessed that he smoked marijuana on a daily basis for the two years leading up to his arrest.[62] At trial, Yancy conceded that his conduct amounted to a violation of § 922(g)(3) but moved to dismiss the charge, arguing that the statute violated his Second Amendment right to possess a firearm for self-defense as established by the Supreme Court in *District of Columbia v. Heller*.[63] After the district court denied that motion, the appellant entered into a conditional plea of guilty, reserving the right to appeal the conviction on Second Amendment grounds.[64] On appeal, the Seventh Circuit held that the unlawful-user prohibition was a reasonable restriction on the appellant's Second Amendment rights.[65] That holding was premised, in part, on the notion that the unlawful-user prohibition is less onerous than some of the other prohibitions under § 922(g).[66] Specifically, the court noted that unlike the permanent firearm prohibition applicable to those convicted of a felony under § 922(g)(1), drug users under § 922(g)(3) are only subject to a temporary firearm prohibition and may regain the right to possess a firearm once their drug use ceases.[67] Making this distinction, the court recognized that once an individual stops using drugs, the individual can no longer be considered an unlawful user under § 922(g)(3).[68]

The facts of the cases discussed above involve individuals with a significant or consistent history of drug use. However, on the other end of the spectrum are individuals who use drugs infrequently or without any degree of consistency. As the *Ocegueda* and *Purdy* courts noted, it is far

---

[60] *Yancy*, 621 F.3d at 686–87.
[61] *Id.* at 682.
[62] *Id.*
[63] *Id.*; *see* District of Columbia v. Heller, 554 U.S. 570, 635 (2008).
[64] *Yancy*, 621 F.3d at 682–83.
[65] *Id.* at 687.
[66] *Id.* at 686–87.
[67] *Id.* The *Yancy* court deduced that the unlawful-user prohibition must necessarily be temporary because of the requirement of contemporaneous firearm possession and drug use. *Id.* at 687.
[68] *Id.* at 686–87.

more difficult to apply the unlawful-user prohibition to infrequent or irregular drug use.[69]

In *United States v. Augustin*, the Third Circuit considered whether a single instance of marijuana use, which occurred a mere six hours prior to appellant's firearm possession, qualified the appellant as an unlawful user.[70] Augustin smoked marijuana early one evening with two other individuals, one of whom possessed a handgun.[71] Later that evening, the appellant and his two accomplices committed an armed carjacking during which one of the accomplices pointed the gun at the car owner's head.[72] The trio then drove the stolen car for several hours until approximately one o'clock the following morning, when they decided to abandon that vehicle to steal another.[73] During the second carjacking, the appellant possessed the firearm for the first time, using it to point at the victim-motorist while stealing the car and to strike the victim-motorist in the head.[74]

At trial, the district court convicted the appellant under 18 U.S.C. § 922(g)(3).[75] He appealed, arguing that the evidence failed to establish that he was an unlawful user because the only evidence of drug use the Government offered was his single use of marijuana that occurred six hours prior to the time at which he physically possessed the firearm.[76] The Third Circuit agreed and overturned the conviction despite the close proximity of time between the use of marijuana and the firearm possession.[77] Adopting the *Purdy* test, the court reasoned that because the appellant's drug use neither occurred with regularity nor over an extended period of time, he was not an unlawful user under 18 U.S.C. § 922(g)(3).[78]

---

[69] United States v. Purdy, 264 F.3d 809, 813–14 (9th Cir. 2001) (re-addressing the Ninth Circuit's reservations in *Ocegueda* that "infrequent" drug use or drug use in the "distant past" gives rise to an "entirely different" vagueness challenge); United States v. Ocegueda, 564 F.2d 1363, 1367 (9th Cir. 1977).
[70] *See* United States v. Augustin, 376 F.3d 135 (3d Cir. 2004).
[71] *Id.* at 137.
[72] *Id.* at 138.
[73] *Id.*
[74] *Id.* at 137.
[75] *Id.*
[76] *Id.* at 138.
[77] *Id.* at 139.
[78] *Id.* n.6 ("Even assuming that the [G]overnment established that Augustin's gun possession and his isolated use of marijuana were sufficiently close in time, use of drugs with some regularity is required to support a conviction under 18 U.S.C. § 922(g)(3). *See Jackson*, 280 F.3d at 406 ('Section 922(g)(3) does not forbid possession of a firearm *while unlawfully using*

If a single instance of drug use a mere six hours prior to possessing a firearm does not trigger the unlawful-user prohibition, is a Service member, who has been convicted of marijuana use at a special court-martial but who has no other history of drug use or drug possession, prohibited from possessing a firearm? Fortunately, the U.S. Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.) has answered that question.

2. The U.S. Navy-Marine Corps Court of Criminal Appeals Adopts the Federal Circuits' Approach

In *United States v. Freitas*, the N.M.C.C.A. considered whether a Marine was an unlawful user pursuant to 18 U.S.C. § 922(g)(3) when he used marijuana during the period of time in which he also possessed a firearm.[79] Private Freitas acquired a personal firearm in February 2001 and stored it in the bedroom of his off-base residence.[80] He smoked marijuana at his home on 26 March 2001 and tested positive on a unit urinalysis on 4 April 2001.[81] One month later, on 4 May 2001, his friend, another Marine, visited the appellant and committed suicide using the appellant's personal firearm while at the appellant's home.[82] Law enforcement seized the firearm the same day, ending the appellant's firearm possession.[83] Following that seizure, the appellant used marijuana for a second time, which was detected on a 24 May 2001 urinalysis.[84] Thereafter, the appellant's commander referred two specifications of wrongful drug use in violation Article 112a, Uniform Code of Military Justice (UCMJ), to a special court-martial.[85]

On 7 November 2001, pursuant to a pretrial agreement, Private Freitas pleaded guilty to both specifications and did not receive a punitive discharge.[86] At a subsequent special court-martial, the Government charged him with a violation of 18 U.S.C. § 922(g)(3) for possessing a firearm while being an unlawful user of a controlled substance.[87] Pursuant to a second pretrial agreement, the appellant pleaded guilty to that offense.[88] During

---

a controlled substance. Rather, the statute prohibits *unlawful users* of controlled substances (and those addicted to such substances) from possessing firearms.') (emphasis in original).").
[79] United States v. Freitas, 59 M.J. 755 (N-M. Ct. Crim. App. 2004).
[80] *Id.* at 756.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 756, 758–59.
[84] *Id.*
[85] *Id.* at 756.
[86] *Id.*
[87] *Id.*
[88] *Id.*

the providence inquiry and in the stipulation of fact, the appellant asserted that he was an unlawful user of a controlled substance, as established by his use of marijuana on 26 March 2001 and on or about 24 May 2001.[89] The military judge accepted his guilty pleas and determined that that appellant's marijuana use rendered him an unlawful user under 18 U.S.C. § 922(g)(3).[90]

On appeal to the N.M.C.C.A., Private Freitas argued that his use of marijuana did not qualify him as an unlawful user.[91] Consistent with the law established by the Federal courts, the N.M.C.C.A. agreed and set aside the conviction.[92] The court reasoned that his marijuana use was insufficiently consistent and prolonged to qualify him as an unlawful user.[93] Adopting Federal case law, the N.M.C.C.A. articulated that designation of an individual as an unlawful user requires that the drug use be sufficiently consistent, prolonged, and close in time to the firearm possession.[94] Moreover, like in *Augustin*, the *Freitas* court specifically noted that the appellant's use did not trigger the unlawful-user prohibition despite the fact that his use was contemporaneous with his firearm possession.[95] The N.M.C.C.A.'s analysis is critical because it establishes that even when an individual's single instance of drug use is contemporaneous with the firearm possession, that individual will not be considered an unlawful user if the use is not also sufficiently consistent and over a prolonged period of time.[96]

Freitas is the only military appellate opinion to tackle the unlawful-user analysis. Notably, the N.M.C.C.A. applied the unlawful-user definition adopted by the Federal courts, not the interpretation promulgated by the ATF. The N.M.C.C.A.'s adoption of the law applied in Article III courts is significant because it serves as persuasive authority that the unlawful-user prohibition should not apply differently to Service members.

---

[89] *Id.*
[90] *Id.*
[91] *Id.* at 755.
[92] *Id.* at 759.
[93] *Id.*
[94] *Id.* at 757–59.
[95] *Id.* at 759. The court's analysis regarding the appellant's single use suggests that the second use, which occurred shortly after law enforcement seized the firearm, was not relevant to a determination of whether the appellant qualified as an unlawful user. That is because that second use occurred outside of the window within which the appellant possessed the firearm. *Id.*
[96] *Id.*

IV. The DoD Implements the DOJ's Guidance

The ATF's unlawful-user definition, found in 27 C.F.R. § 478.11, has remained fundamentally unchanged since 1997,[97] despite substantial evolution in the law.[98] However, the DOJ continues to rely on the outdated 27 C.F.R. § 478.11 definition through its enforcement of the GCA.[99] Moreover, in reliance on the DOJ's erroneous application, each of the military services applies the unlawful-user prohibition incorrectly and to the detriment of some Service members.

A. The DOJ and the ATF are Providing Incorrect Guidance to the DoD

On 16 January 2013, one month after the tragic shooting at Sandy Hook Elementary School in Newton, Connecticut, President Barack Obama issued a memorandum designed to strengthen the country's background check procedures for firearm purchases.[100] Among other things, that memorandum directed the DOJ to provide guidance to Federal agencies regarding the sharing of Federal records to ensure that individuals within the GCA's prohibited categories are unable to purchase a firearm from an FFL.[101] In furtherance of that directive, the DOJ provided written guidance in March 2013 to all Executive agencies to specifically address the GCA's application to Service members.[102] That document provided explanations and definitions for each of the ten categories of prohibited individuals under the GCA, to include unlawful users of controlled substances.[103] The publication also provided guidance to all Executive agencies regarding the types of records the DOJ views as relevant to determining whether an individual falls within one of those ten categories.[104]

Not surprisingly, the DOJ's guidance pertaining to the unlawful-user prohibition is a mirror image of the language found in 27 C.F.R. § 478.11.[105] In its guidance, the DOJ reinforces its regulation regarding the inference that

---

[97] *See* discussion *supra* Section II.C.
[98] *See generally* discussion *supra* Part III (surveying case law developments in several Federal courts of appeals).
[99] *See* discussion *infra* Section IV.A.
[100] Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System, 78 Fed. Reg. 4297 (Jan. 16, 2013).
[101] *Id.*
[102] U.S. DEP'T OF JUST., GUIDANCE TO AGENCIES REGARDING SUBMISSION OF RELEVANT FEDERAL RECORDS TO THE NICS (2013).
[103] *Id.* at 2.
[104] *Id.* at 2–11.
[105] *Compare id.*, *with* 27 C.F.R. § 478.11 (2019).

may be drawn about a Service member's status as an unlawful user when there is evidence of recent use of a controlled substance, as established by a court-martial conviction, nonjudicial punishment, or an administrative discharge.[106] Additionally, the publication provides the following general guidance regarding submission of records relevant to the unlawful-user prohibition:

> *Records that are relevant to this prohibitor include drug-related convictions, drug-related arrests and disciplinary or other administrative actions in the Armed Forces based on confirmed drug use*. Therapeutic or medical records that are created in the course of treatment in hospitals, medical facilities or analogous contexts that demonstrate drug use or addiction should not be submitted to the NICS. *Likewise, at this time, we are not requesting records of drug testing results.* However, records of non-therapeutic admissions of drug use should be made available to the NICS to the extent your agency determines that doing so is appropriate. *If your agency currently submits records beyond what is required by this Guidance, we ask that you continue doing so without modification.*[107]

The DOJ further articulates that its guidance is "based on statutory and regulatory text *and court decisions* interpreting" the prohibitions under 18 U.S.C. § 922(g).[108] However, the guidance fails to cite to a single case that interprets the term "unlawful user." The only sources to which the DOJ refers are the Federal statute (which does not define the term "unlawful user") and the ATF definition (which, as established above, is inconsistent with the law).[109]

In addition to the March 2013 DOJ guidance, the ATF distributed its own supplemental DoD-specific guidance in a February 2018 presentation, *Federal Firearms Disabilities, NICS, and the U.S. Armed Forces*.[110] This presentation came on the heels of the shooting in Sutherland Springs, Texas, committed by a prior member of the Air Force with firearms he purchased

---

[106] U.S. DEP'T OF JUST., *supra* note 102, at 4–5.
[107] *Id.* at 5.
[108] *Id.* at 2 (emphasis added).
[109] *Id.*
[110] Bureau of Alcohol, Tobacco, Firearms & Explosives, U.S. Dep't of Just., Federal Firearms Disabilities, NICS, and the U.S. Armed Forces (Feb. 6, 2018) (unpublished PowerPoint Presentation) (on file with author) [hereinafter ATF Presentation].

despite a general court-martial conviction for a domestic violence offense—a circumstance that legally prohibited him from possessing a firearm and that should have effectively prevented him from purchasing a firearm from an FFL.[111]

Within the text of its presentation, the ATF acknowledges the GCA's failure to define the term "unlawful user," but reinforces that 27 C.F.R. § 478.11 provides the correct definition.[112] It also contends that its guidance is supported by case law.[113] However, like the DOJ's March 2013 guidance, the ATF's presentation fails to reference any Federal case law defining the unlawful-user prohibition.[114] The presentation articulates that "[i]nferences of use include: conviction for use or possession within the past year; multiple arrests for such offenses in the past 5 years if most recent arrest was within past year; and drug test within past year of use."[115] Notably, the presentation identifies the following unlawful-user prohibition triggers that are specific to the DoD: "court-martial conviction, non-judicial punishment, or administrative discharge based on drug use or drug rehabilitation failure."[116] Additionally, it addresses how the DoD should treat Service members who fail an initial drug test but whose case has not yet been adjudicated (i.e., there is not yet a criminal record of drug use):

> Question: Is a 922(g)(3) disability dependent upon information contained in the NICS database?
>
> No. A person may be 922(g)(3) disabled despite the fact that no records appear in the NICS database (e.g. an active user with no criminal or administrative record). For example, a soldier who fails a random drug test recently given by his/her commanding officer would be prohibited from possessing or receiving firearms or ammunition under 922(g)(3).[117]

The failure of the DOJ and ATF to adopt the law as applied by Federal courts is problematic because the services, to the detriment of some Service

---

[111] 18 U.S.C. § 922(g)(1); DODIG-2019-030, *supra* note 1; DODIG-2018-035, *supra* note 3.
[112] ATF Presentation, *supra* note 110, slide 15.
[113] *Id.*
[114] *Id.* It is unclear whether the Department of Justice (DOJ) disagrees with the definition adopted by the Federal courts or whether the DOJ is simply unaware that the law has evolved since the regulation's inception in 1997.
[115] *Id.* slide 16.
[116] *Id.* slide 17.
[117] *Id.* slide 18.

members, currently rely on that guidance through the implementation of their own policies.[118] Each of the services is enforcing regulations that are intended to prevent unlawful users in the military from possessing or purchasing firearms.[119] However, the services' policies are written in a manner that enforces the unlawful-user prohibition as defined by the ATF, and not as defined by the Federal courts. The section below is a brief survey of each service's policy.

B. Service-Specific Policy

1. Army Policy

On 30 November 2018, the Department of the Army published Execute Order (EXORD) 240-18, *Notification to Soldiers Affected by 18 USC 922, Firearms and Ammunition Possession Prohibition*.[120] The order provides explanations for each of the GCA's ten prohibited categories and articulates the circumstances that trigger a prohibition for Soldiers.[121] Importantly, the order asserts that its explanations for each of the prohibitions is based upon the DOJ's guidance.[122] Further, the order expressly forbids any additional interpretation of the categories beyond the guidance contained in the order.[123]

The EXORD declares that the unlawful-user prohibition is triggered in one of three ways: (1) when a Soldier tests positive for a controlled substance on a urinalysis; (2) when a Soldier receives nonjudicial punishment for a drug offense under Articles 112a or 92, UCMJ; or (3) when a Soldier is convicted at a court-martial for a drug offense under Articles 112a or 92, UCMJ.[124] The order also asserts that when the unlawful-user prohibition is triggered, the result is a "temporary disability that extends one (1) year from the later date of[] the date the drug offense was discovered (positive urinalysis) or the date of adjudication of the drug offense (non-judicial punishment or court-martial)."[125] Additionally, when a Soldier's conduct triggers the prohibition, the EXORD directs the responsible

---

[118] *See* discussion *infra* Section IV.B. This also exposes the DoD to the potential for civil litigation. *See* discussion *infra* Part VI.
[119] *Id.*
[120] U.S. DEP'T OF ARMY, EXECUTE ORDER 240-18, NOTIFICATION TO SOLDIERS AFFECTED BY 18 USC 922, FIREARMS AND AMMUNITION POSSESSION PROHIBITION (30 Nov. 2018).
[121] *Id.* para. 1.A.
[122] *Id.*
[123] *Id.*
[124] *Id.* para. 1.A.3.
[125] *Id.*

commander to notify that Soldier by way of a counseling statement using the precise language included in the EXORD.[126] In the case of the unlawful-user prohibition, the commander must specifically instruct the Soldier that he or she is prohibited from possessing or purchasing firearms for one year and that the Soldier must divest himself or herself of any firearms he or she currently possesses for that one year.[127] Lastly, the EXORD proclaims that a commander's order to a Soldier to divest himself or herself of personally-owned firearms is a lawful and punitive order.[128]

Additionally, pursuant to Army Regulation (AR) 190-45, Army law enforcement personnel have an affirmative obligation to report all Soldiers with a positive urinalysis results in the NICS. [129] The regulation cites to 18 U.S.C. § 922(g)(3) and 27 C.F.R. § 478.11 as the authorities for this requirement.[130] This practice effectively prohibits a Soldier from purchasing a firearm for a one-year period; upon any attempt to purchase a firearm from an FLL within that period, the NICS submission made pursuant to AR 190-45 will alert the FFL that the Soldier is a prohibited person.[131]

2. Marine Corps Policy

On 12 November 2018, the Commandant of the Marine Corps released the service's GCA enforcement policy in Marine Corps Administrative Message 652/18, *Implementation of Criminal Justice Information Reporting Requirements and Guidance*.[132] That message incorporates by reference a Marine Corps Bulletin released on 30 August 2018, *Criminal Justice Information Reporting Requirements and Guidance*.[133] Together, these

---

[126] *Id.* para. 2.
[127] *Id.*
[128] *Id.* para. 1.C.
[129] AR 190-45, *supra* note 24.
[130] *Id.* para. 12-4*a*(1)*(c)* ("Inference of current use may be drawn from evidence of recent use or possession of a controlled substance, or a pattern of use or possession that reasonably covers the present time such as . . . person found through a drug test to use a controlled substance unlawfully, provided test was administered within past year.").
[131] *Id.* para. 12-4*c–d* ("The entry requires that an expiration date be added. The expiration date will be 1 year from the positive urinalysis date. . . . The NICS database will automatically purge the information on the expiration date.").
[132] MARADMIN Message 652/18, *supra* note 24; *see* AR 190-45, *supra* note 24.
[133] Marine Corps Bulletin 5810, Commandant, Marine Corps, subject: Criminal Justice Information Reporting Requirements and Guidance (30 Aug. 2018) [hereinafter Marine Corps Bulletin 5810]. Although the published version reflects a cancellation date of August 2019, its active status has been extended through 31 August 2021. Marine Administrative Message, 644/20, 271902Z Oct 20, Commandant, Marine Corps, subject: Extension of MCBul 5810, "Criminal Justice Information Reporting Requirements and Guidance" para. 1.

publications memorialize the Marine Corps' guidance regarding what conduct triggers a prohibition under 18 U.S.C. § 922(g)(3) and a commander's responsibilities upon learning that a prohibition is triggered.[134]

Unlike the Army, the Marine Corps does not interpret the unlawful-user prohibition to be triggered upon a mere positive drug test result.[135] Instead, it is triggered when: (1) a Marine receives nonjudicial punishment for drug use; (2) an administrative separation board substantiates a Marine's alleged drug use; or (3) a Marine is convicted of drug use at a court-martial.[136] However, in a similar fashion to the Army, Marine Corps Administrative Message 652/18 requires Marine Corps commanders to issue written counseling statements to Marines whose conduct triggers the unlawful-user prohibition, informing the Marine that Federal law prohibits the Marine from receiving or possessing firearms and directing that they "make arrangements for lawful disposal" of those firearms.[137] Further, like the Army's policy, Marine Corps Bulletin 5810 explains that Marines who fall under the unlawful-user prohibition are subject to a "12[-]month prohibition on weapons possession from the date of adjudication."[138] Lastly, Marine Corps policies require commanders to report any conduct which triggers the unlawful-user prohibition to the servicing law enforcement agency, which is typically either the U.S. Marine Corps Criminal Investigative Division or the Naval Criminal Investigative Service.[139]

3. Navy Policy

On 29 March 2018, the Chief of Naval Operations (CNO) released Naval Administrative Message 076/18, *Gun Control Act of 1968 Criminal Justice Information Reporting Requirements*.[140] In that message, the CNO identified four circumstances that trigger the unlawful-user prohibition: (1) a court-martial conviction for wrongful *use* of a controlled substance; (2) a nonjudicial punishment finding of guilty for wrongful *use* of a controlled

---

[134] MARADMIN Message 652/18, *supra* note 24; *see* Marine Corps Bulletin 5810, *supra* note 133.
[135] MARADMIN Message 652/18, *supra* note 24, para. 4.c.1.c; *see* Marine Corps Bulletin 5810, *supra* note 133, at 6-6.
[136] MARADMIN Message 652/18, *supra* note 24, para. 4.c.1.c; *see* Marine Corps Bulletin 5810, *supra* note 133, at 6-6.
[137] MARADMIN Message 652/18, *supra* note 24, para. 4.c.1.d.
[138] Marine Corps Bulletin 5810, *supra* note 133, at 2-2.
[139] MARADMIN Message 652/18, *supra* note 24, paras. 4.c.1.c, 5.b; Marine Corps Bulletin 5810, *supra* note 133, at 2-1 to -2, 6-6.
[140] NAVADMIN Message 076/18, *supra* note 24.

substance; (3) an enlisted administrative separation board's substantiation of an allegation of drug abuse; and (4) an officer board of inquiry's substantiation of an allegation of unlawful drug involvement.[141] Thus, similar to the Marine Corps, the Navy does not interpret the prohibition to be triggered upon a mere positive urinalysis result.[142] Additionally, similar to the policies of both the Marine Corps and the Army, the Navy's policy establishes that when a Sailor's conduct triggers the unlawful-user prohibition, the NICS submission should indicate that the Sailor remain in the NICS Index "for a period of one year per Department of Justice guidance."[143]

In contrast with Army and Marine Corps practice, the Navy's policy does not require its commanders to counsel or provide notice to Sailors who fall into any of the prohibited categories under 18 U.S.C. § 922(g), (n).[144] Navy commanders are similarly not required to order those Sailors to dispose of any personal firearms they already possess.[145] The Navy has also released practice guidance, by way of an instruction, to its judge advocates regarding how to apply these prohibitions during post-trial procedures.[146] That guidance directs trial counsel to include the following language in the statement of trial results when a Sailor is convicted at a special court-martial for wrongful use of a controlled substance: "The accused was found to be an unlawful user of a controlled substance. He/She is prohibited to receive, possess, ship, or transport firearms or ammunition for a period of 12 months following this conviction pursuant to 18 U.S.C. § 922(g)(3)."[147] The instruction also requires trial counsel to ensure that the statement of trial results is forwarded to the Naval Criminal Investigative Service or U.S.

---

[141] *Id.* para. 3.a.1.

[142] *Id.*; *but see* U.S. DEP'T OF NAVY, USN/USMC COMMANDER'S QUICK REFERENCE LEGAL HANDBOOK (QUICKMAN): MJA16 CHANGE PAGES (2018) ("Under [18 U.S.C. § 922(g)(3)], it is unlawful for a person to receive, possess, ship, or transport firearms or ammunition if that person is . . . [a]n unlawful user of or addicted to any controlled substance. The Navy interprets this provision to apply at the earliest stage at which a commander has identified unlawful use of a controlled substance. This does not apply to tests administered incident to self-referral for treatment . . . ."). Because a positive urinalysis is typically the earliest stage at which a commander identifies unlawful drug use, this language appears to suggest that the prohibition is triggered at that point. Certainly, this interpretation conflicts with NAVADMIN 076/18, which promulgates an exhaustive list of the circumstances triggering the prohibition. It is unclear from where this contrary interpretation derives.

[143] NAVADMIN Message 076/18, *supra* note 24, para. 3.a.2.

[144] *Id.*

[145] *Id.*

[146] *See generally* U.S. DEP'T OF NAVY, JAG/CNLSCINT 5814.1D, POST-TRIAL PROCESSING (2019) (prescribing post-trial processing requirements).

[147] *Id.* enclosure 5, at 2.

Marine Corps Criminal Investigative Division, the convening authority, and the defense counsel.

4. Air Force Policy

The Air Force and Space Force's policy is included within Department of the Air Force Instruction 51-201, which was most recently updated on 5 January 2021.[148] Additional guidance is also promulgated through Air Force Manual 71-102, published on 21 July 2020.[149] Pursuant to those publications, the Air Force interprets the unlawful-user prohibition to be triggered by (1) any conviction or nonjudicial punishment for use or possession of a controlled substance within the last year; (2) an admission to drug use or possession; (3) a positive urinalysis result; or (4) an administrative discharge for drug use, drug rehabilitation failure, or drug possession.[150] The most notable of these four triggers is that the Air Force interprets the prohibition to apply when an Airman tests positive on a urinalysis. In that regard, the Air Force's approach is similar to the Army's but broader than the sea services' application. Like every other service, the Air Force also interprets the unlawful-user prohibition to be temporary in nature, lasting for one year from the date of the disqualifying condition.[151]

There are two other important distinctions in the Air Force policy. First, unlike every other service, the Air Force applies the unlawful-user prohibition to both *use* and *possession* of a controlled substance.[152] Second, unlike the other services, the Air Force has developed a standard form—AF Form 177—that must be used to notify an Airman or Guardian upon the triggering of any prohibition under the GCA.[153] Depending on the specific prohibition triggered, either the unit commander, the court-martial convening authority, the Staff Judge Advocate (SJA), or a law enforcement

---

[148] U.S. DEP'T OF AIR FORCE, DEPARTMENT OF THE AIR FORCE GUIDANCE MEMORANDUM TO AFI 51-201, ADMINISTRATION OF MILITARY JUSTICE (2021) para. 15.28.4 [hereinafter DAFI 51-201] (amending U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (19 Jan. 2019)).

[149] U.S. DEP'T OF AIR FORCE, MANUAL 71-102, AIR FORCE CRIMINAL INDEXING (12 Jul. 2020) para. 4.4.5 [hereinafter AFMAN 71-102]; *see* U.S. Dep't of Air Force, AF Form 177, Notice of Qualification for Prohibition of Firearms, Ammunition, and Explosives (30 Jul. 2020) [hereinafter AF Form 177].

[150] DAFI 51-201, *supra* note 148, para. 15.28.4.2 (explaining that its list of triggers "is not intended to be exhaustive," suggesting that other conduct could trigger the prohibition); AFMAN 71-102, *supra* note 149.

[151] AFMAN 71-102, *supra* note 149, para. 4.3.3.1.

[152] DAFI 51-201, *supra* note 148, para. 15.28.4.2.

[153] AF Form 177, *supra* note 149; AFMAN 71-102, *supra* note 149, para. 4.6.

agent is required to issue this notification through AF Form 177.[154] In the case of an unlawful user, the form serves to notify the Airman or Guardian that he or she is prohibited from possessing and purchasing firearms for a one-year period.[155] Additionally, similar to the approach used by the Army and the Marine Corps, AF Form 177 orders the Airman or Guardian to divest all firearms in his or her possession at the time of the notification.[156] Following the Airman or Guardian's written acknowledgement, the form is provided to the Air Force's NICS Program Manager to ensure the disqualifying condition is reported to the NICS.[157]

V. Reconciling the Conflict Between Law and Policy

Together, Parts III and IV illustrate that the services' policies regarding the unlawful-user prohibition conflict with the law. By applying the prohibition in the manners outlined above, these regulations infringe upon some Service members' Second Amendment rights to possess and purchase firearms. This part explores whether such an infringement is permissible, paying particular attention to the strongest legal arguments for upholding the services' policies in their current forms.

Broadly, the policies outlined in Part IV are designed to enforce the unlawful-user prohibition by achieving two aims: (1) directing commanders to notify unlawful users that they are prohibited from purchasing and possessing personal firearms, and—in the Army, the Air Force, and the Marine Corps—instructing those Service members to dispose of any firearms they possess at the time of that notification; and (2) ensuring that triggering information is reported to the DOJ for inclusion in the NICS Index, effectively preventing the Service member from purchasing a firearm from an FFL. Applying those two aims, consider the following vignette.

Sergeant (SGT) Smith, U.S. Army, resides off post and owns a personal firearm that he acquired lawfully from a local FFL. Sergeant Smith tests positive for cocaine during a unit-wide, command-directed urinalysis. Pursuant to Army EXORD 240-18, SGT Smith's commander reports the positive urinalysis result to CID, which reports SGT Smith's prohibition to the NICS Index. Additionally, pursuant to the EXORD, the commander issues SGT Smith a written order to notify SGT Smith that he is an unlawful user and is therefore prohibited from purchasing or possessing

---

[154] AFMAN 71-102, *supra* note 149, para. 4.6.
[155] AF Form 177, *supra* note 149.
[156] *Id.*
[157] *Id.*

firearms in accordance with 18 U.S.C. § 922(g)(3). The commander's written order further directs SGT Smith to dispose of any firearms that he currently possesses. A week later, prior to any administrative or criminal adjudication of the positive urinalysis result, SGT Smith's commander learns that SGT Smith was shooting his firearm at a local shooting range with some of his fellow Soldiers. As a result, SGT Smith's commander refers three charges to court-martial: (I) wrongful use of cocaine, in violation of Article 112a, UCMJ; (II) violating 18 U.S.C. § 922(g)(3), in violation of Article 134, UCMJ; and (III) disobeying the order to dispose of his firearm, in violation of Article 92, UCMJ. At trial, SGT Smith moves to dismiss Charge III, asserting that the commander's order amounts to an unlawful infringement of his Second Amendment rights. Additionally, SGT Smith hires a civilian attorney and files a lawsuit against the U.S. Army in Federal court. In the civil complaint, SGT Smith asserts that his commander's order prohibiting him from possessing and purchasing firearms, the order directing him to dispose of his personal firearm, and the Army's requirement under the EXORD for SGT Smith's inclusion in the NICS Index unconstitutionally infringe upon his Second Amendment right to possess and purchase a firearm, because he is not an unlawful user of a controlled substance.

A. Military Necessity

Considering the SGT Smith example within the context of the first aim of the services' policies, trial practitioners should expect to litigate whether the commander's order instructing SGT Smith that he is prohibited from possessing or purchasing a firearm and that he must dispose of any firearms he possesses is a lawful order or whether it constitutes an infringement of SGT Smith's Second Amendment rights. Generally, the Government's strongest argument for upholding military action that encroaches upon personal liberties is that Service members do not enjoy the same degree of constitutional freedoms as civilians. In *Parker v. Levy*, the Supreme Court expressed that the need for obedience and the imposition of discipline "may render permissible within the military that which would be constitutionally impermissible outside it."[158]

As identified by two DoD investigations, the Sutherland Springs, Texas, shooter's access to firearms revealed significant gaps in the DoD's

[158] Parker v. Levy, 417 U.S. 733, 758 (1974) (holding that a commissioned officer's violation of Article 134, UCMJ, by "publicly urging enlisted personnel to refuse to obey orders which might send them into combat," was not protected under the First Amendment).

NICS reporting procedures.[159] Namely, DoD law enforcement agencies habitually failed to report to the NICS Index Service members whose conduct triggered a prohibition under 18 U.S.C. § 922(g), (n).[160] There is no doubt that this institutional failure needed to be addressed. The service secretaries and commanders have a shared responsibility to take appropriate measures within the scope of their authority to prevent Service members who fall into a prohibited category from purchasing firearms.[161] However, the critical question here is whether the DoD must enforce the unlawful-user prohibition consistent with Federal case law, or whether there exists a legally sufficient rationale for upholding the policies in their current form, despite the ensuing Second Amendment infringement.

Notwithstanding the importance of the principle of military necessity, the military's need to regulate a Service member's conduct is not without limit. Orders or policies that prohibit personal conduct must bear some relationship to military duty.[162] To be lawful, such policies must be "reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and [be] directly connected with the maintenance of good order in the Service."[163] Additionally, such orders "may not, without such a valid military purpose, interfere with the private rights" of a Service member, nor may orders "conflict with the statutory or constitutional rights" of the recipient of the order.[164] In sum, to be lawful, military orders which interfere with private rights must have a valid military purpose. Moreover, even when such orders have a valid military purpose, they must also be "clear, specific, and narrowly drawn."[165]

---

[159] *See* DODIG-2019-030, *supra* note 1; DODIG-2018-035, *supra* note 3.
[160] DODIG-2019-030, *supra* note 1; DODIG-2018-035, *supra* note 3.
[161] *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(e), 107 Stat. 1536, 1542 (1993) (codified as amended at 34 U.S.C. § 40901(e)) (authorizing the Attorney General to "secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code.").
[162] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16.c.2(a)(iv) (2019) [hereinafter MCM]; United States v. Pugh, 77 M.J. 1, 9 (C.A.A.F. 2017) (affirming the military judge's dismissal of the Government's charged violation of the Secretary of the Air Force's instruction prohibiting Airmen from consuming products containing hemp on grounds that it did not serve a valid military purpose).
[163] *See* MCM, *supra* note 162.
[164] *See id.* pt. IV, ¶ 16.c.2(a)(iv), (v).
[165] *Pugh*, 77 M.J. at 3 (citing United States v. Sterling, 75 M.J. 407, 414 (C.A.A.F. 2016)).

The Court of Appeal for the Armed Forces (C.A.A.F.) recently addressed the limits of this two-part test in *United States v. Pugh*.[166] In that case, Major Pugh was convicted of violating the Secretary of the Air Force's regulation prohibiting Airmen from consuming food products containing hemp, a product derived from marijuana.[167] At trial, the panel convicted the accused of violating this regulation through his consumption of STRONG and KIND food products, which contained hemp seeds.[168] The trial judge granted the accused's post-trial motion to dismiss the charge on the grounds that the Air Force's hemp ban was unlawful because it did not serve a valid military purpose.[169] On appeal, the Government argued that the regulation was necessary to protect the reliability and integrity of the drug testing program.[170] More pointedly, the Government asserted that because false positives for marijuana on urinalyses could occur if Service members consumed hemp, banning hemp was necessary to eliminate the risk of false positives.[171] Factually, the C.A.A.F. rejected that argument, citing the Government expert's trial testimony to support the contention that "commercially available food products containing hemp seeds do not have enough THC [tetrahydrocannabinol, marijuana's primary psychoactive ingredient,] detectable at levels proscribed by the Air Force Drug Testing Program."[172]

Additionally, the C.A.A.F. held that even though the ban *may* have a valid military purpose, it failed the second prong of the analysis because it was not clear, specific, and narrowly drawn.[173] The C.A.A.F. explained that the regulation too broadly prohibited Airmen from consuming an entire class of commercially available and otherwise legal food.[174] Addressing the two-part test, the court arrived at the following conclusion:

> True, the Air Force has a legitimate concern in prohibiting hemp food products that contain enough THC to trigger a positive drug test. However, banning legal, properly

---

[166] *Id.* at 1.
[167] *Id.* at 2–3 n.1. The Air Force instruction maintained that "[s]tudies have shown that products made with hemp seed and hemp seed oil may contain varying levels of tetrahydrocannabinol (THC), an active ingredient of marijuana, which is detectable under the Air Force Drug Testing Program." *Id.*
[168] *Id.* at 2.
[169] *Id.* at 2–3.
[170] *Id.*
[171] *Id.*
[172] *Id.* at 4.
[173] *Id.* at 3.
[174] *Id.* at 4.

> 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.[175]

Applying the military necessity principles addressed above, let us consider the commander's order issued in the SGT Smith hypothetical. The issue is whether an order informing a Soldier that he or she is prohibited from possessing and purchasing firearms and directing that he or she dispose of any personal firearms (1) has a valid military purpose and (2) is not overly broad, when the order is premised on an inaccurate application of the unlawful-user prohibition. Addressing the first prong, the Government's best argument is that the order is necessary to ensure that the Soldier does not violate Federal law, thereby maintaining the readiness of the force.

Of course, the fundamental problem with this purpose is that SGT Smith's firearm possession would not violate 18 U.S.C. § 922(g)(3), despite his single instance of cocaine use. Sergeant Smith is not an unlawful user because, under Federal case law and consistent with the N.M.C.C.A.'s (non-binding but persuasive) opinion in *Freitas*, he has not engaged in regular drug use over an extended period of time. The only evidence of SGT Smith's use of a controlled substance is a single positive urinalysis. Thus, even assuming the positive drug test result is accurate (i.e., that SGT Smith did, in fact, use cocaine on a single occasion prior to the urinalysis) his one-time use fails to meet the unlawful-user threshold under Federal case law.[176]

This example highlights the difficulty of envisioning how a commander's firearm disposal order imposed upon a Service member who is a single-occasion drug user, has any valid military purpose. The services' incorrect application of the unlawful-user prohibition is a tough hurdle to overcome. For that reason, it is unlikely that practitioners even reach the second prong of the military purpose test, which considers whether the order is overly broad.

---

[175] *Id.*

[176] It important to note that although the SGT Smith example involves a Soldier, this analysis is applicable to all services. While the Army is the only service to impose firearm disposal obligations against its Service members as early as a positive result on a drug test, the same principle applies to all single-occasion drug use cases, including those that result in a court-martial conviction for a violation of Article 112a, UCMJ.

Even if one considers the overarching purpose—a commander's responsibility to ensure the safety of his or her unit through individuals' compliance with 18 U.S.C. § 922(g)(3)—as sufficient to establish prong one of the valid military purpose test, the regulation will still fail the second prong. A commander's intent to ensure the safety of subordinates may be a valid military purpose, but practitioners must still consider whether the specific order at issue is narrowly drafted to achieve that purpose. An order is unlikely to be considered sufficiently narrow when it infringes upon a Service member's Second Amendment rights based upon an incorrect legal interpretation.

The C.A.A.F.'s rationale in *Pugh* provides support for this conclusion. Like the Air Force instruction in that case, which was overly broad because it was designed to prohibit Airmen from consuming *all* legal hemp products out of fear that consuming them *might* lead to a false-positive urinalysis, an Army commander's order to a single-occasion drug user that prohibits possession and purchase of firearms and requires the disposal of firearms, out of a misplaced concern that the unlawful-user prohibition applies to that Soldier, is similarly broad.[177] For those reasons, it is difficult to envision any court upholding such an order as lawful.

In the SGT Smith hypothetical, the Government also charged him with a "Clause 3" Article 134, UCMJ, offense for violating 18 U.S.C. § 922(g)(3).[178] Concerning that charge and applying the facts of the hypothetical to the persuasive Federal case law and the N.M.C.C.A.'s opinion in *Freitas*, practitioners should expect a military judge to enter a finding of not guilty pursuant to Rule for Courts-Martial 917,[179] or for the

---

[177] *See* United States v. Sprague, No. NMCM 91 1266, 1991 CMR LEXIS 1435, at *3 (N-M. Ct. Crim. App. Nov. 21, 1991) ("'Good motives, i.e., to stop future offenses involving alcohol, is not enough,' to make an order legal. Orders given for the admirable, paternalistic reason of preventing future alcohol-related offenses or helping a serviceman battle an alcohol problem are not sufficiently related to military purposes to be valid. The legality of an order not to drink alcoholic beverages, then, must be determined by analyzing the particular circumstances surrounding each case." (citations omitted)).

[178] UCMJ art. 134 (1950) ("Though not specifically mentioned in this chapter . . . crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial . . . ."). Pursuant to this statute, the services retain jurisdiction over a Service member's violation of noncapital crimes prohibited under the United States Code. *See* MCM, *supra* note 162, pt. IV, ¶ 91.c.(4)(a)(1)(i).

[179] *See* MCM, *supra* note 162, R.C.M. 917 (requiring the military judge to enter a finding of not guilty if the "evidence is insufficient to sustain a conviction."). This verdict should be expected regardless of whether the accused elects trial by military judge or by members. If the accused elects a bench trial, the military judge will apply the law and not convict unless the Government establishes regular drug use that occurred over an extended period of time

court-martial to reach a not-guilty verdict. Illustrating this predictable outcome further displays the legal defect of an order that prohibits SGT Smith from purchasing and possessing a firearm and directs SGT Smith to dispose of any firearms he does possess. Specifically, since SGT Smith would never actually be found guilty of violating 18 U.S.C. § 922(g)(3), he should never be considered an unlawful user by his commander.

B. *Wilson v. Lynch*: The Ninth Circuit's Second Amendment Analysis

When considering the second aim of the services' regulations—inclusion in the NICS Index—the Ninth Circuit's 2016 opinion in *Wilson v. Lynch* may provide support for proponents of the ATF's interpretation of the unlawful-user prohibition. In *Wilson*, the appellant possessed a Nevada marijuana registration card, which permitted her to purchase and use marijuana under Nevada state law.[180] The appellant never actually used her registration card to purchase or use marijuana.[181] However, when she attempted to purchase a firearm from an FFL, the FFL refused to sell it to her based solely on her possession of the marijuana card.[182]

Section 922(d)(3) prohibits FFLs from selling a firearm to a purchaser who an FFL has "reasonable cause to believe" is an unlawful user of controlled substances.[183] Prior to Wilson's attempted purchase, the ATF released an "open letter" to all FFLs directing the nationwide denial of firearm sales to individuals carrying marijuana registration cards.[184] Specifically, the open letter directs FFLs to infer that marijuana registration cardholders are unlawful users and that any FFL's knowledge of a prospective buyer's carrying of a marijuana registration card necessarily constitutes reasonable cause to believe the prospective buyer to be an

---

and contemporaneity with the accused's possession of a firearm. Alternatively, if the accused elects to be tried by members, the military judge will instruct them on the Government's requirement to meet that standard in order to reach a guilty verdict.

[180] Wilson v. Lynch, 835 F.3d 1083, 1088 (9th Cir. 2016).

[181] *Id.* at 1091 & n.1. The appellant only possessed a marijuana registration card as a means of exercising her First Amendment right to make a political statement. *Id.*

[182] *Id.* at 1088. The opinion fails to specify how the FFL knew the appellant held a marijuana card.

[183] In contrast with 18 U.S.C. § 922(g)(3), which prohibits possessing a firearm while being an unlawful user, § 922(d)(3) criminalizes the sale of firearms to someone who the seller has "reasonable cause to believe" is an unlawful user. *Compare* 18 U.S.C. § 922(g)(3), *with* § 922(d)(3).

[184] *Wilson*, 835 F.3d at 1080; Arthur Herbert, *Open Letter to All Federal Firearms Licensees*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Sept. 21, 2011), https://www.atf.gov/firearms/docs/open-letter/all-ffls-sept2011-open-letter-marijuana-medicinal-purposes/download.

unlawful user.[185] Relying upon that letter, the FFL refused to sell Wilson a firearm.[186] In response, Wilson filed a claim against the Government in Federal district court, asserting, among four other causes of action,[187] that the FFL's enforcement of the open letter, 27 C.F.R. § 478.11, and 18 U.S.C. § 922(d)(3) violated her Second Amendment rights.[188]

Addressing Wilson's Second Amendment challenge, the Ninth Circuit applied its two-step inquiry, which considers (1) whether the challenged law burdens conduct protected by the scope of the Second Amendment and (2) the appropriate level of scrutiny.[189] Addressing the first question, the court

---

[185] Herbert, *supra* note 184.

> Federal law, 18 U.S.C. § 922(g)(3), prohibits any person who is an "unlawful user of . . . any controlled substance . . ." from shipping, transporting, receiving or possessing firearms or ammunition. Marijuana is listed in the Controlled Substances Act as a Schedule I controlled substance, and there are no exceptions in Federal law for marijuana purportedly used for medicinal purposes, even if such use is sanctioned by State law. Further, Federal law, 18 U.S.C. § 922(d)(3), makes it unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or **having reasonable cause to believe** that such person is an unlawful user of . . . a controlled substance. As provided by 27 C.F.R. § 478.11, "an inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."
>
> Therefore, any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of . . . a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition . . . . [Y]ou may not transfer firearms or ammunition to them. Further, if you are aware that the potential transferee is in possession of a card authorizing the possession and use of marijuana under State law, then you have "reasonable cause to believe" that the person is an unlawful user of a controlled substance. As such, you may not transfer firearms or ammunition to the person . . . .

Id.

[186] *Wilson*, 835 F.3d at 1088.

[187] *Id.* at 1090–91 ("Wilson asserted five causes of action: (1) violation of the Second Amendment, (2) violation of the Equal Protection Clause of the Fifth Amendment, (3) violation of the procedural Due Process Clause of the Fifth Amendment, (4) violation of the substantive Due Process Clause of the Fifth Amendment, and (5) violation of the First Amendment.").

[188] Notably, Wilson asserted in her complaint that she was not an unlawful user of a controlled substance, which the Ninth Circuit accepted as true. This was critical to the Ninth Circuit's determination that it lacked standing to address Wilson's challenge to 18 U.S.C. § 922(g)(3). *Id.* at 1091.

[189] *Id.* at 1092 (citing United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013)).

concluded that because the open letter, in conjunction with 27 C.F.R. § 478.11 and 18 U.S.C. § 922(d)(3), prohibited Wilson from purchasing a firearm, they indeed "directly burden[ed] her core Second Amendment right to possess a firearm."[190] Turning to the second inquiry, the court focused on evaluating the *severity* of that Second Amendment burden.[191] Ultimately, the *Wilson* court determined that the burden was not severe because together, the open letter, 27 C.F.R. § 478.11, and 18 U.S.C. § 922(d)(3) only prevented her from *purchasing* firearms from an FFL but did not bar her from *possessing* firearms outright.[192]

Expanding on this distinction, the court explained that if Wilson purchased firearms prior to acquiring her marijuana registration card, the open letter, 27 C.F.R. § 478.11, and 18 U.S.C. § 922(d)(3) would not have prevented her from keeping those firearms.[193] Further, the court stressed that Wilson could regain the right to purchase firearms by surrendering her marijuana registration card, an act which would eliminate an FFL's "reasonable cause" to believe she is an unlawful user.[194] Because the court found the burden not severe, the court applied intermediate scrutiny and held that the Government's burden on Wilson had a reasonable fit and was therefore lawful.[195]

> Because the degree of fit between 18 U.S.C. § 922(d)(3), 27 C.F.R. § 478.11, and the Open Letter and their purpose of preventing gun violence is reasonable but not airtight, these laws will sometimes burden—albeit minimally and only incidentally—the Second Amendment rights of individuals who are reasonably, but erroneously, suspected of being unlawful drug users. However, the Constitution tolerates these modest collateral burdens in various contexts, and does so here as well.[196]

Proponents of the DOJ's current application of the unlawful-user prohibition would likely cite to the above rationale for support by drawing a parallel between the ATF's open letter and the services' policies requiring law enforcement agencies to submit entries in the NICS Index for Service

---

[190] *Id.*
[191] *Id.* (citing *Chovan*, 735 F.3d at 1138).
[192] *Id.* at 1093.
[193] *Id.*
[194] *Id.*
[195] *Id.* at 1094–95.
[196] *Id.*

members found or suspected to have used a controlled substance on a single occasion. The argument might be as follows: While some Service members—who may not technically be unlawful users under Federal law—will be included the NICS Index pursuant to service policy and therefore prevented from purchasing a firearm, the Constitution tolerates such a modest Second Amendment burden because there is a reasonable fit between the services' policies, 27 C.F.R. § 478.11, and the aim of preventing gun violence. On its face, this is a strong argument. After all, Congress and the President empowered the Attorney General to create the NICS to keep firearms out of the hands of those not legally permitted to possess them in an effort to prevent gun violence.[197]

Despite the seemingly persuasive nature of the above argument, there are some fundamental problems with relying on it as authority to support the services' adoption of the ATF's unlawful-user prohibition. First, *Wilson* represents only one circuit's conclusion that an individual's inability to purchase a firearm from an FFL is not a severe Second Amendment burden that is not subject to strict scrutiny. Not only is the analysis flawed, but it is also not a predictor of how other circuits would address the issue.

The two central tenets supporting the Ninth Circuit's conclusion that Wilson's inability to purchase a firearm from an FFL was not severe were that (1) Wilson could regain her right to purchase a firearm by forfeiting her state marijuana registration card and (2) the open letter and 27 C.F.R. § 478.11 did not impede her "right to keep her firearms or to use them to protect herself in her home."[198] The reasoning behind the first tenet is inherently flawed because it contemplates Wilson ridding herself of the very burden the open letter imposes upon her by affirmatively removing herself from the class of individuals the open letter burdens. However, doing so would have obviated her need to challenge the open letter in Federal court. Consequently, the court's reliance upon Wilson's hypothetical ability to

---

[197] *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993) (codified as amended at 34 U.S.C. § 40901(b)); *see also* Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System, 78 Fed. Reg. 4297 (Jan. 16, 2013). Supporters of the approach of the DOJ and DoD might also note that Congress fashioned a remedy for those Service members who are erroneously included in the NICS Index and therefore prevented from purchasing a firearm from an FFL. The Brady Act requires the Attorney General to correct and remove erroneous NICS Index records when petitioned by an individual who has been denied the purchase of a firearm. *See* Brady Handgun Violence Prevention Act § 103(g) (codified as amended at 34 U.S.C. § 40901(g)).

[198] *Wilson*, 835 F.3d at 1093.

turn in her marijuana registration card as indicative of the non-severe nature of the burden is misplaced.

The second tenet, which relies upon Wilson's ability to continue to possess the firearms she may already own despite her present inability to purchase a firearm, is also problematic. The Ninth Circuit is the only Federal circuit court to have addressed a Second Amendment challenge to the ATF's open letter. However, other circuits have addressed similar Government-imposed burdens on the right to purchase firearms.[199] Those opinions, based on the Supreme Court's holding in *District of Columbia v. Heller*, intimate that an outright prohibition on the ability to purchase a firearm, without any alternative means to acquire one, would be considered a severe burden subject to strict scrutiny.[200] It is important to emphasize that reasonable minds may disagree as to whether a restriction that prohibits someone from purchasing firearms, as opposed to possessing firearms, is severely burdensome so as to require strict scrutiny. The Ninth Circuit remains the only Federal court to have analyzed the open letter through this legal framework. However, for the reasons articulated above, one might expect other Federal circuits to apply strict scrutiny to the same set of facts.

To be clear, the appropriate level of scrutiny to apply to a particular prohibition on firearms purchases or possession is an unsettled area of law. This lack of clarity stems, at least in part, from the Supreme Court's decisions in *Heller* and *McDonald v. City of Chicago*. Together, those cases affirm the Second Amendment's status as a fundamental right, yet the Supreme Court has declined to articulate a particular level of scrutiny for *all* types of Second Amendment burdens.[201] Therefore, it is a poor idea to rely upon the Ninth Circuit's application of intermediate scrutiny as a predictor

---

[199] *See* District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008); Mance v. Sessions, 896 F.3d 699, 716 (5th Cir. 2018) (Owen, J., concurring) ("[A] restriction on the commercial sale of a handgun could impinge on the right to possess and bear arms to such an extent that, though not an absolute 'ban' on the possession or use of a handgun, strict scrutiny would be applicable."); Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 195 (5th Cir. 2012); *see also* United States v. Decastro, 682 F.3d 160, 168–67 (2d Cir. 2012) (applying intermediate scrutiny to law prohibiting out-of-state firearm sales because it did not amount to a substantial burden on the appellant due to his alternative means of acquiring a firearm—namely, by purchasing a firearm within his home state).

[200] *Heller*, 554 U.S. at 628–29.

[201] *Id.* at 634–35 ("Justice Breyer chides us for leaving so many applications of the right to keep and bear arms in doubt . . . . But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field."); McDonald v. City of Chicago, 561 U.S. 742, 778–91 (2010) (holding that the Second Amendment is a fundamental right as applied to the states by the Fourteenth Amendment).

of the level of scrutiny which might be applied to a Service member challenging a service's policy enforcing the unlawful-user prohibition.

The other, and more obvious, problem with relying on *Wilson* for support of the services' policies is that there is a major distinction between the burden imposed by the ATF's open letter and the burden imposed by the services' policies. Specifically, as addressed above, unlike the ATF's open letter, the services' policies extend beyond prohibiting a single-occasion drug user from merely purchasing a firearm from an FFL. Instead, the policies also prohibit single-occasion users from *possessing* firearms and, with the exception of the Navy, require those Service members to *dispose of* any firearms they already possess. The *Wilson* court's conclusion that the Second Amendment burden in that case was not severe placed significant weight upon the fact that the ATF's open letter did not prohibit the appellant from retaining any firearms she owned at the time of her attempted purchase. Because the services' policies, in contrast to the ATF's open letter, direct commanders to order their single-occasion drug users that they are prohibited from both purchasing *and* possessing firearms, those policies likely amount to a severe Second Amendment burden. Consequently, it is a mistake for the DOJ and the services to rely upon *Wilson* for the continued implementation of its current policies.

C. Congressional Limitations

Even if proponents of the services' policies disagree with the analysis in Parts A and B of this part, there are additional legislative hurdles to consider. Before addressing them, it is important to recapitulate the analysis thus far. Federal case law and the N.M.C.C.A. define the unlawful-user prohibition as requiring regular drug use over an extended period of time and that the drug use be contemporaneous with the firearm possession. Conversely, the ATF's administrative regulation defines the prohibition in a less-restrictive manner, suggesting that one-time drug use within the past year creates an inference that the individual is an unlawful user. Presently, each of the military services enforces the unlawful-user prohibition in accordance with the ATF's interpretation and not in accordance with the case law defining the statute.

Practitioners cannot ignore the conflict between the ATF's interpretation and the Federal case law defining the prohibition. However, in an attempt to reconcile this, it is reasonable to expect some practitioners to defer to the services' policies under the rationale that the services have a statutory obligation to enforce the unlawful-user prohibition in accordance

with the Attorney General's guidance.[202] Those individuals might further assert that although continued enforcement may result in a Second Amendment infringement against those who are not actually unlawful users, *Wilson* should be interpreted to support the position that the Constitution tolerates such a modest Second Amendment burden. Based on a plain reading of Congress' legislation, there are two problems with accepting this *may-be-an-unlawful-user* approach.

First, the text of the Brady Act establishes that the unlawful-user prohibition was not intended to be interpreted in this manner. Specifically, the Act directed the Attorney General to establish a system designed to notify an FFL of "whether receipt of a firearm by a prospective transferee *would* violate section 922 of title 18, United States Code, or State law."[203] Additionally, the Attorney General's Brady Act authority to acquire information from other Federal agencies is not without limitation. The Brady Act permits the Attorney General to "secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm *would* violate subsection (g) or (n) of section 922 of title 18, United States Code."[204] Accordingly, the Attorney General may only promulgate regulations pursuant to a system designed to notify an FFL when the buyer's possession *would actually violate* 18 U.S.C. § 922(g)(3), not a system designed to prohibit a sale if the buyer's possession *may*, *might*, or even *probably would* violate 18 U.S.C. § 922(g)(3).

The second problem with the *may-be-an-unlawful-user* approach is that it fails to consider key legislation which specifically protects Service members from service-imposed regulations regarding personal firearms. Passed as section 1062(a) of the National Defense Authorization Act (NDAA) of 2011, Congress declared:

> The Secretary of Defense shall not prohibit . . . the otherwise lawful acquisition, possession, ownership, carrying, or other use of a privately owned firearm . . . by a member of the Armed Forces or civilian employee of the Department of Defense on property that is not (1) a military

---

[202] *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(e), 107 Stat. 1536, 1542 (1993) (codified as amended at 34 U.S.C. § 40901(e)) (authorizing the Attorney General to "secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code").

[203] *Id.* § 103(b) (codified in 34 U.S.C. § 40901(b)) (emphasis added).

[204] *Id.* § 103(g) (codified in 34 U.S.C. § 40901(g)) (emphasis added).

> installation; or (2) any other property that is owned or operated by the Department of Defense.[205]

The history of this legislation dates back to the 2009 shooting at Fort Hood, Texas, where a Soldier killed thirteen people and injured at least forty-three others.[206] In response to the Fort Hood tragedy, Defense Secretary Robert M. Gates directed an independent review of the incident to be jointly conducted by Togo D. West, a former Secretary of the Army, and Admiral Vernon E. Clark, a former CNO.[207] Their written report addressed a total of thirty-one findings and recommendations.[208] One of those findings was that the DoD did not have a department-wide policy governing privately owned firearms.[209] The report recommended that the DoD review the need for a DoD-wide personal firearm policy.[210] Subsequently, on 12 April 2010, Secretary Gates published a memorandum addressing all of the recommendations within the independent review.[211] In that memorandum, Secretary Gates directed the Under Secretary of Defense for Intelligence to prepare and coordinate a policy to address privately owned firearms.[212]

Due to the aforementioned congressional intervention, that policy never went into effect. In early 2010, some installation commanders implemented base regulations addressing Service members' personal firearms.[213] Fort Riley's regulation, in particular, drew significant attention from two U.S. Congressmen from Kansas. The Fort Riley regulation required Service members to register all privately owned firearms maintained off base,

---

[205] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1062(a), 124 Stat. 4137, 4363.

[206] *See* FORT HOOD INDEP. REV. COMM., U.S. DEP'T OF DEF., PROTECTING THE FORCE: LESSONS FROM FORT HOOD 1 (2010); *see also* Lauren Cox, *Fort Hood Motive Terrorism or Mental Illness?*, ABC NEWS (Nov. 6 2009, 6:22 PM), https://abcnews.go.com/Health/MindMoodNews/fort-hood-shooters-intentions-mass-murder-terrorism/story?id=9019410.

[207] *See* FORT HOOD INDEP. REV. COMM., *supra* note 206, app. A, at A-1, 2.

[208] *Id.* at 11–53.

[209] *Id.* at 32.

[210] *Id.*

[211] Memorandum from Sec'y of Def. to Sec'ys of the Mil. Dep'ts et al., subject: Interim Recommendations of the Ft. Hood Follow-On Review (12 Apr. 2010).

[212] *Id.*

[213] *In Defense Spending Bill, a Map Around Congressional Gridlock*, WASH. POST (Jan. 4 2011), https://www.washingtonpost.com/wp-dyn/content/article/2011/01/03/AR2011010305667.html ("It seems that in the wake of the Fort Hood shooting . . . [c]ommanders of several bases, including Fort Campbell, Ky., and Fort Bliss, Tex., required registration of guns of personnel living off post. At Fort Riley, Kan., regulations required registration of guns owned not only by military personnel living off base but also by family members living in Kansas.").

prohibited Service members with carry permits from carrying firearms off base, and permitted commanders to limit the caliber of firearms and ammunition which a Service member could own.[214] In response, Kansas Representative Jerry Moran and Kansas Senator James M. Inhofe each introduced legislation to prohibit the DoD and commanders from promulgating regulations that interfere with a Service member's right to lawfully purchase or possess a personal firearm.[215]

Congress eventually passed the measure as part of the 2011 NDAA.[216] Notably, Congress later amended the legislation in 2013 to permit commanders and health providers to ask questions of Service members related to their personal firearms when there are "reasonable grounds to believe such member is at risk for suicide or causing harm to others."[217] However, even in that circumstance, the 2013 amendment does not permit commanders to regulate possession of at-risk Service member's firearms. [218] Instead, commanders may only encourage voluntarily disposal of the Service member's personal firearm.[219]

Ultimately, the pertinent legislation expressly forbids the services from "prohibit[ing] . . . the otherwise lawful acquisition, possession, ownership, carrying, or other use of a privately owned firearm."[220] Congress passed this legislation because it was specifically concerned with the risk that the services would impose policies that prohibit Service members' lawful

---

[214] *Id.* ("The National Rifle Association responded with outrage, and Sen. James Inhofe (R-Okla.) added an amendment to the bill, calling for the destruction of registration records of guns held off bases created as a result of regulations instituted by local commanders. It did permit the Defense Department to continue to set rules for carrying weapons while on duty, in uniform or on a military installation."); *see also* TOM DIAZ, THE LAST GUN 8–11 (2013); *Political Report: Protecting The Rights of Those Who Protect Us*, INST. FOR LEGIS. ACTION (Apr. 19, 2011), https://www.nraila.org/articles/20110419/political-report-protecting-the-rights.

[215] S. 3388, 111th Cong. (2010); H.R. 5700, 111th Cong. (2010).

[216] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1062, 124 Stat. 4137, 4363.

[217] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, sec. 1057, § 1062(c)(3), 126 Stat. 1623, 1938.

[218] *Id.*

[219] *Id.*; *see* Memorandum from Under Sec'y of Def. for Pers. & Readiness for Sec'ys of the Mil. Dep'ts, Chairman of the Joint Chiefs of Staff & Chief of the Nat'l Guard Bureau, subject: Guidance for Commanders and Health Professionals in the Department of Defense on Reducing Access to Lethal Means Through the Voluntary Storage of Privately-Owned Firearms (28 Aug. 2014).

[220] Ike Skelton National Defense Authorization Act for Fiscal Year 2011 § 1062(a).

purchase or possession of firearms.[221] Necessarily, this legislation prohibits the services from relying on a good-faith rationale—that the DoD-wide implementation of the unlawful-user prohibition is otherwise permissible when done pursuant to a good-faith, yet incorrect, understanding of the law or pursuant to a belief that the single-occasion drug user *might* be an unlawful user who, out of an abundance of caution, *should* be prohibited from purchasing or possessing a firearm. Congress' measure also undercuts the military necessity argument for continued implementation of the unlawful-user prohibition in its current state. Effectively, through this legislation, Congress declared that there will never be a valid military purpose for a service policy which infringes upon a Service member's lawful purchase or possession of a personal firearm.

D. The Misunderstood Purpose of the ATF's Definition

Another concern with adopting the ATF's unlawful-user definition is that its application is limited in scope. It is important to remember that the ATF's definitions for each of the prohibited categories, found in 27 C.F.R. § 478.11, exist to facilitate the Attorney General's implementation and supervision of the NICS. The Brady Act directs the Attorney General to "establish a national instant criminal background check system that any *licensee* may contact . . . for information . . . on whether *receipt* of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law."[222] Additionally, the act authorizes the Attorney General to "secure directly from any department or agency of the United States such information on persons for whom *receipt* of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code."[223] Congress also gave the Attorney General limited authority to develop regulations to implement the NICS.[224] Considering all of this, it is clear that Congress charged the Attorney General with creating a system designed to facilitate background checks during firearms purchases from FFLs. However, Congress did not grant the Attorney General authority to redraft or interpret the criminal code.

---

[221] *See In Defense Spending Bill, a Map Around Congressional Gridlock*, *supra* note 213; *see also* DIAZ, *supra* note 214.

[222] Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993) (codified at 34 U.S.C. § 40901(b)) (emphasis added).

[223] *Id.* § 103(e) (codified at 34 U.S.C. § 40901(b)).

[224] 18 U.S.C. § 926(a) ("The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . .").

The ATF drafted its first definitions for each of the prohibited categories in 1996 when the bureau fell under the Department of the Treasury, not under the DOJ, as it currently sits.[225] Notably, the ATF titled its 1996 proposal and its 1997 final publication "*Definitions for the Categories of Persons Prohibited from* Receiving *Firearms*."[226] From the title alone, the ATF certainly understood that its role was to provide guidance to FFLs and law enforcement agencies to facilitate implementation of the NICS during firearm transactions. Additionally, in its 1996 proposal, the ATF explained that the definitions were designed to "facilitate the implementation of the national instant criminal background check system (NICS) required under the Brady Handgun Violence Prevention Act."[227]

Presently, the ATF's prohibited category definitions are chaptered within its "*Commerce in Firearms and Ammunition*" regulations, the applicability of which are expressly limited to commercial transactions involving firearms and ammunition.[228] Those regulations establish procedural and substantive guidelines for individuals and businesses who transact commercially in firearms and ammunition.[229] A subchapter of these regulations, titled "Definitions," is where the ATF's interpretations of the prohibited categories, to include the unlawful-user prohibition, exist.[230]

Additionally, although its unlawful-user definition currently conflicts with case law, there is reason to believe that ATF's original intent was for its definition to comply with the judiciary's interpretation of the prohibition. In its 1996 proposal to introduce the unlawful-user definition, the ATF acknowledged the ambiguity of the unlawful-user prohibition as drafted in the criminal code and cited to *United States v. Ocegueda* for support of its proposed definition.[231] As illustrated in Part III, the unlawful-user prohibition has evolved substantially since the Ninth Circuit decided *Ocegueda*. However, the ATF's definition has failed to evolve with the

---

[225] Definitions for the Categories of Persons Prohibited from Receiving Firearms, 61 Fed. Reg. 47095 (proposed Sept. 6, 1996) (to be codified at 27 C.F.R. pt. 178).
[226] *See* Definitions for the Categories of Persons Prohibited from Receiving Firearms, 62 Fed. Reg. 34634 (June 27, 1997) (to be codified at 27 C.F.R. pt. 178) (emphasis added); Definitions for the Categories of Persons Prohibited from Receiving Firearms, 61 Fed. Reg. at 47095 (emphasis added).
[227] Definitions for the Categories of Persons Prohibited from Receiving Firearms, 61 Fed. Reg. at 47095.
[228] *See* 27 C.F.R. § 478.1(a), (b) (2019).
[229] *Id.* § 478.1(b).
[230] *See id.* § 478.11.
[231] *See* Definitions for the Categories of Persons Prohibited from Receiving Firearms, 61 Fed. Reg. at 47096.

law. For that reason, there is a strong argument that, even outside of the military, the DOJ is incorrectly applying the unlawful-user prohibition through its enforcement of the NICS.

Regardless of the incongruence between the ATF definition and the Federal case law definition, it is critical that practitioners not forget the limits of the ATF definition's applicability. Even if the ATF is within its authority to interpret the unlawful-user prohibition contrary to Federal case law, judge advocates must remember that the purpose and scope of that definition is to regulate firearm transactions in furtherance of the Attorney General's authority to implement the NICS, not to define the criminal code. Thus, it is a mistake for the services to adopt the ATF's unlawful-user definition for any other purpose, to include ordering single-occasion users that they are prohibited from purchasing or possessing a personal firearm or ordering single-occasion users to dispose of any personal firearms the Service member possesses.

VI. Recommendations

Nothing suggests that the services' incorrect application of 18 U.S.C. § 922(g)(3) is malicious or even intentional. Rather, the services appear to be misguided by legally deficient DOJ and ATF guidance that has not kept up with the law. Nevertheless, the DoD-wide adoption of the ATF's unlawful-user definition creates unnecessary risk for the services and their commanders. Continuing to enforce the ATF's definition increases the DoD's susceptibility to civil litigation and congressional complaints or inquiries. Inevitably, a Service member who uses an illicit drug on a single occasion and is erroneously included in the NICS Index, ordered that he or she is prohibited from purchasing or possessing firearms, or directed to dispose of the firearms he or she does possess, will file suit in Federal district court. When this happens, the services will be on the losing side of the argument. Such an outcome is especially likely when one considers Congress' particular aversion for service-imposed Second Amendment limitations, as evidenced by the protections it implemented though Section 1062 of the 2011 NDAA.[232]

The services' adoption of the ATF's unlawful-user definition also imposes unnecessary risk upon commanders who must maintain good order and discipline within their units. Pursuant to these policies, the services

---

[232] *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1062(a), 124 Stat. 4137, 4363.

have provided commanders with legally deficient methods for handling single-occasion drug users. Generally, it is poor policy to arm commanders with regulations that they cannot actually enforce. As demonstrated through the SGT Smith example in Part V, when the single-occasion drug user refuses a commander's order to dispose of the firearms the individual possesses, the commander will be devoid of any legally sufficient mechanism to enforce that order. Consequently, and equally concerning, these policies leave SJAs in a difficult position. Commanders must comply with the service policies and SJAs must advise their commanders on how to enforce good order and discipline within the confines of the commander's authority. Despite the policies' conflict with the law, it is unreasonable to expect SJAs to advise their commanders to act contrary to service-level policy.

Similarly, the services' adoption of the ATF's unlawful-user prohibition has led to a confounded application of the duration of the firearm possession and purchase prohibition, once triggered. Notably, a convicted felon will always be prohibited from possessing a firearm under 18 U.S.C. § 922(g)(1).[233] However, such is not necessarily the case for those who fall within the unlawful-user prohibition. Importantly, 18 U.S.C § 922(g)(3) prohibits firearm possession for those who *are* unlawful users, not those who *were* unlawful users.[234] Thus, individuals who were once unlawful users, but later cease their drug use, may regain their right to possess a firearm.[235]

The services have dealt with this by imposing a one-year firearm prohibition for those determined to be unlawful users.[236] However, the rationale supporting the one-year ban is tenuous at best. This one-year prohibition is likely derived from the ATF's definition, which proclaims that "[a]n inference of current use may be drawn from evidence of a recent use or possession" and further explains that recent use includes "a conviction for use or possession of a controlled substance *within the past year* . . . or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered *within the past year*."[237] Much like the ATF's open letter in *Wilson*, this regulation serves to place the FFLs on notice that they may infer that a buyer is an unlawful user if the NICS

---

[233] "It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).
[234] *See supra* notes 38–46 and accompanying text.
[235] *See supra* note 59 and accompanying text.
[236] *See* discussion *supra* Section IV.B.
[237] *See* 27 C.F.R. § 478.11 (2019).

establishes the buyer's drug use within the past year. However, through policy, the services reverse-engineered this inference by imposing a one-year prohibition against Service members determined to be unlawful users.[238]

Even more troubling is that the services do not apply this one-year prohibition from the date of the unlawful drug use. Instead, the one-year prohibition starts on the date of adjudication for that drug use, which can be several months later.[239] If the services desire to continue regulating personal firearm possession by applying the ATF's unlawful-user definition, they should review their implementation of the one-year prohibition. It appears to be derived from an oversimplification of the ATF's definition, but it is not supported by law. At a minimum, the one-year prohibition should commence on the date of drug use, as opposed to the date of adjudication.

Additionally, the services' policies are inconsistent with each other, and service leaders must address this. To illustrate, it should not be the case that a Soldier, Airman, or Guardian who tests positive for a controlled substance on a urinalysis be included in the NICS Index immediately, while a Marine or Sailor who tests positive not be included in the NICS Index until a follow-on adjudication. Inconsistent application between the services creates the potential for NICS reporting gaps. The overarching goal of the policies enforcing the prohibitions under 18 U.S.C. § 922(g), (n) is to create a system that accurately and adequately prevents a prohibited person from purchasing firearms. Putting aside the legal accuracy of any single service policy, the public would likely bristle at a firearm background check system applied inconsistently within the DoD. This risk is uniquely heightened when one considers the services' history of inconsistent criminal justice reporting, which served as the underlying impetus for the creation of these policies. For those reasons, the services must work together to promulgate identical policies, or, alternatively, the DoD should implement a department-wide policy addressing and defining all of the prohibited categories under 18 U.S.C. § 922(g), (n).

Moving forward, it is imperative that the services recognize the limited role of the Attorney General, the DOJ, and the ATF in this process. Those entities certainly have an interest in ensuring that the DoD's law enforcement agencies accurately and consistently report Service members to the NICS when they fall into a prohibited category under 18 U.S.C.

---

[238] *See* Herbert, *supra* note 184.
[239] *See* discussion *supra* Section IV.B.

§ 922(g), (n). However, that is where DOJ and ATF involvement should end. Certainly, because the services are professions of arms, they must continue to identify Service members who may be prohibited from carrying Government-issued weapons. That is an area of regulation for which continued service policy may be justified. However, the services should reevaluate their perceived obligation to regulate Service members' *personal* firearm possession. Congress has already done so through the prohibitions articulated in 18 U.S.C. § 922(g), (n), and commanders are vested with the authority to refer charges to court-martial for violating that statute. Accordingly, the UCMJ provides a sufficient enforcement mechanism for maintaining good order and discipline.

VII. Conclusion

The Federal courts of appeals—the judicial bodies vested with the authority to interpret criminal statues—interpret Congress' unlawful-user prohibition in one way while the ATF—an administrative agency without authority to draft or interpret criminal statutes—interprets the prohibition in its own manner. Consequently, the services' reliance upon the ATF's unlawful-user definition as the basis for its policies is incorrect.

It is difficult to envision a legally defensible rationale for continued adoption of the ATF's interpretation. Principally, it is unlikely that any military appellate court would conclude that there is a valid military purpose for upholding the services' implementation of the ATF's unlawful-user definition when it contradicts Federal law. Additionally, because the policies prohibit single-occasion drug users from both purchasing a firearm from an FFL and possessing a firearm outright, the policies likely amount to a severe Second Amendment burden and are therefore unlawful. Moreover, by relying upon the ATF's definition, the policies run afoul of section 1062 of the 2011 NDAA, which specifically prevents the services from implementing regulations that prohibit a Service member's lawful possession or acquisition of a personal firearm.

Lastly, the services' dependence upon the ATF's unlawful-user definition to regulate a Service member's personal firearm possession is improper because the purpose of that definition—and every definition found within 27 C.F.R. § 478.11—is to regulate firearm transactions in furtherance of the Attorney General's limited authority to establish and supervise the operation of the NICS. Therefore, even if the ATF's legally deficient definition is acceptable for the limited purpose of submitting information

to the NICS, any application of the ATF's definition beyond that narrow purpose is inappropriate.

Accordingly, the services should cease the practice of adopting the ATF's definition as a trigger for ordering Service members that they are prohibited from purchasing and possessing firearms and that they must dispose of their personal firearms. Continued improper application of the unlawful-user prohibition creates unnecessary risk for the services and for individual commanders. Consistent with the recommendations offered above, the services should amend their policies or the DoD should promulgate a department-wide regulation to ensure the unlawful-user prohibition is implemented uniformly and in a manner that conforms to the law.