

UP IN SMOKE: PREPARING THE AIR FORCE FOR THE LEGALIZATION OF MARIJUANA

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Abstract

Over the last four decades, public sentiment regarding marijuana has changed drastically. Many states now allow medicinal marijuana to be prescribed and consumed, while some even permit recreational use. The federal government, as both sovereign and employer, is behind the curve. In both roles, the federal government has failed to act meaningfully. Lax enforcement and the shift in public sentiment will force Congress and the President to enact some significant changes to marijuana law in the very near future. If no action is taken, a dramatic clash between state and federal law will ensue within the nation's court system.

The Department of Defense (DoD), specifically the Air Force, has maintained drug testing programs for decades in compliance with federal mandates. Unfortunately, the Air Force and other federal agencies are clinging to outdated policies of the past to justify their current actions. As the professed leader in innovation, the Air Force has a moral responsibility to pioneer a shift in focus within the DoD and the broader federal government. In order to continue its heritage in innovation and adapt to current trends, the Air Force needs to depart from previous policies regarding marijuana. Although such a shift cannot be

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accomplished alone, the Air Force is responsible for leading the DoD and the federal government in a new direction. A proactive three-pronged approach to marijuana in 2023 would include retaining reasonable suspicion and safety mishap testing, devoting greater attention to marijuana use within existing treatment programs, and working with stakeholders to remove marijuana from random urinalysis testing.

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INTRODUCTION

As of January 1, 2020, 145,789 full-time civilian employees were working for the Department of the Air Force.¹ These employees include maintenance personnel, childcare providers, medical professionals, and a

1. U.S. AIR FORCE ACAD., INTERNAL RACIAL DISPARITY REVIEW 12 (2020), <https://www.judicialwatch.org/wp-content/uploads/2023/03/STARRS-v-DOD-prod-1-02894.pdf> [<https://perma.cc/C7R2-V2X2>].

host of other skilled and unskilled contributors to the military mission.² In the Fiscal Year (FY) 2020 Budget overview, the DoD stated that “[c]ivilian personnel within the DoD are key to warfighter readiness, essential enablers to DoD’s mission capabilities and operational readiness, and critical to supporting our All-Volunteer Force and their families The Department’s civilian workforce brings to bear capabilities, expertise, and skills directly impacting DoD’s operational warfighting capabilities . . . DoD’s civilians are an essential part of our National Defense Strategy.”³ Every single one of these positions is critical to Air Force operations, so much so that the Air Force requested a 1.5% increase for its civilian workforce from FY 2019 to FY 2020, the largest of any military branch of service.⁴ To further illustrate how important civilian employees are to the military mission, the Congressional Budget Office (CBO) conducted an analysis published on December 13, 2018, discussing the possibility of converting certain military positions to civilian positions.⁵ The CBO concluded that 80,000 active-duty military positions could be converted to 64,000 civilian positions.⁶ If Congress had implemented the CBO’s proposed conversions, a projected \$14 billion would have been saved from 2019 to 2028.⁷ Civilian employees make sense in terms of total financial savings and efficiency in their roles.⁸ This conclusion is not a slight against military workers but praise for their civilian counterparts. Often, civilian employees can stay in a particular position for far longer than a military member. Civilian employees are not subject to mandatory permanent change of station moves, promotions, or deployments. These employees can develop expertise in their particular field, have the ability to become very efficient, and have a tremendous impact on the Air Force and the entire DoD.

According to the Office of Personnel Management (OPM), there are three categories of federal employees: the Competitive Service, the

2. *Id.* Air Force Personnel Center categories are: Administrative- 40.2%, Professional- 21.9%, Blue Collar- 21.3%, Technical- 11.5%, Clerical- 2.6%, Other- 2.5%.

3. OFF. OF THE UNDER SECRETARY OF DEF. (COMPTROLLER) / CHIEF FIN. OFF., DEFENSE BUDGET OVERVIEW 2–8 (Mar. 2019), https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2020/fy2020_Budget_Request_Overview_Book.pdf [<https://perma.cc/P68C-9HA4>].

4. *Id.* at 2–9. Although it is not explicitly stated which civilian positions are for the newly created Space Force, as currently constituted, the Space Force is a component of the Department of the Air Force. Presumably some of the new civilian positions are destined for that component.

5. *Replace Some Military Personnel with Civilian Employees*, CONG. BUDGET OFF. (Dec. 13, 2018), <https://www.cbo.gov/budget-options/2018/54756> [<https://perma.cc/E54U-UQVV>].

6. *Id.*

7. *Id.*

8. *Id.*

Excepted Service, and the Senior Executive Service.⁹ Since this Article discusses the day-to-day employee, and the overwhelming majority of civil service employees are within the Competitive Service, the term “employee” will refer to a member of the Competitive Service.

Members of the armed forces, both civilian and military, are members of the executive branch. According to federal law, the President has the authority to regulate the conduct of executive branch employees.¹⁰ Nearly two decades after Congress gave the President this authority, President Ronald Reagan issued an executive order on September 15, 1986, demanding that federal workplaces be drug-free.¹¹ President Reagan had very strong feelings against drug use by federal employees. He stated:

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs¹²

In Section 3 of Executive Order 12564, President Reagan tasked each Executive Agency to develop its own drug testing programs.¹³ In subsequent years, the Air Force promulgated a manual and program entitled the *Air Force Civilian Drug Demand Reduction Program* to implement both Executive Order 12564 and 5 U.S.C. § 7301.¹⁴ Specifically, the program includes “guidance and procedures for providing assistance to employees with suspected or identified drug abuse problems, employee education and training, and the identification of illicit drug use through drug testing”¹⁵

9. *Competitive Hiring*, OFF. OF PERS. MGNT., <https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/> [<https://perma.cc/SRA3-UP3H>] (last visited Apr. 19, 2023).

10. 5 U.S.C. § 7301.

11. Exec. Order No. 12,564, 3 C.F.R. § 224 (1986).

12. *Id.*

13. *Id.*

14. *Air Force Manual 44-198*, U.S. AIR FORCE (Jan. 24, 2019), https://static.e-publishing.af.mil/production/1/af_sg/publication/afman44-198/afman44-198.pdf [<https://perma.cc/7VJB-UXYF>] [hereinafter AFMAN 44-198] (the latest revision of the Air Force’s drug testing program); Exec. Order No. 12,564, 3 C.F.R. § 224 (1986); 5 U.S.C. § 7301. The Air Force has had a drug testing program in place for nearly three decades.

15. AFMAN 44-198, *supra* note 14, at para 1.1.2.

The Air Force considers its role in national defense to include the maintenance of a drug-free workplace.¹⁶ This requirement prohibits civilian employees from on- and off-duty illegal drug use.¹⁷ Few would disagree that “[p]erforming duties under the influence of illicit drugs adversely affects safety, risks damage to government property, impairs day-to-day operations, and may expose sensitive information to compromise.”¹⁸ The real question is, what is the compelling government interest to regulate *off-duty* employee conduct? Specifically, what is the justification for regulating off-duty marijuana use while not regulating off-duty alcohol consumption? The official reasoning had been that “[f]ederal employees entrusted with the national defense must be free from the possibility of coercion or influence of criminal elements.”¹⁹

But what if marijuana was *legal*? As several states have begun to legalize either medicinal or recreational marijuana use, the foundation of the government’s interest in off-duty marijuana use has started to erode. The Air Force’s governing regulation states, “[t]his guidance is based on the federal criminal statutes on controlled substances and is not affected by any state laws legalizing use of marijuana or other controlled substances.”²⁰ What happens if the federal law changes with respect to marijuana? On November 3, 2020, Joe Biden was elected to the Executive Office of the President. President Biden inherited a significantly more relaxed national attitude on marijuana than that reflected in the executive orders of President Reagan. Even former-President Trump, a man who has famously abstained from smoking, alcohol, and drug use during his lifetime, has vocally supported medicinal marijuana use in the past if not full recreational legalization.²¹ Trump’s opponents in the 2020 presidential election from the Democratic Party possessed an even *more* relaxed position. In fact, out of the top four nationwide Democratic Presidential candidates as of mid-January 2020²² (Senator Bernie Sanders, Senator Elizabeth Warren, former Mayor Pete Buttigieg, then-former Vice President Joe Biden), only Biden supported *merely* decriminalizing marijuana.²³ The other three candidates favored

16. *Id.* at para 1.2.1.

17. *Id.*

18. *Id.*

19. *Id.* at para 1.2.4.

20. *Id.* at para 1.2.2.

21. Jon Gettman, *Pot Matters: Trump on Marijuana*, HIGH TIMES (Feb. 12, 2016), <https://hightimes.com/news/politics/pot-matters-trump-on-marijuana> [https://perma.cc/82Y3-F8QG].

22. FIVETHIRTYEIGHT, <https://projects.fivethirtyeight.com/polls/president-primary-d/> [https://perma.cc/3YPP-YZTZ] (last visited June 28, 2023).

23. *Legalizing Marijuana*, POLITICO (Feb. 19, 2020), <https://www.politico.com/2020-election/candidates-views-on-the-issues/marijuana-cannabis-legalization/legalizing-marijuana/> [https://perma.cc/GR7R-HY58].

complete legalization, and Senators Warren and Sanders even supported the expungement of convictions for prior marijuana offenses.²⁴ Regardless of the White House occupant in the coming years, they will have a significantly different position regarding marijuana than President Reagan.

Accordingly, as the leading edge of our nation's armed forces,²⁵ the Air Force should act now to position itself for the inevitable change in federal law. Drafting reactive policies has never been how the Air Force fulfills its mission to "Fly, Fight, and Win."²⁶ The Air Force is the branch of innovation.²⁷ As an institution, it has continued to scale its capability and knowledge since its formal inception after World War II.²⁸ Later in the 20th century and into the 21st century, the Air Force broke the sound barrier, developed countless technologies used in everyday life, and pioneered an uncrewed flight.²⁹ Yet for some reason, the Air Force remains apprehensive of the impact should its civilian employees—in their off-duty time, with no mission impact—legally consume a substance that has been around since 500 B.C.³⁰ That cannot be the end of the story. Instead of enforcing the policies of the 1980s, the Air Force should advocate a proactive approach to marijuana use, aligned with public opinion, for its employees in 2020.

Such a proactive drug policy would include three key components: (1) retaining reasonable suspicion and safety mishap testing; (2) devoting more attention to marijuana use within existing drug treatment programs; and (3) working with stakeholders to remove marijuana from random urinalysis testing. This approach would be a responsible change, while affording maximum protection of the Air Force's military mission. Implementing such a policy will poise the Air Force to lead the way when the inevitable arrives, the federal legalization of marijuana.

24. *Id.*

25. *History*, AIR FORCE, <https://www.airforce.com/history> [<https://perma.cc/MRU6-8QB2>] (last visited June 28, 2023).

26. *Mission*, U.S. AIR FORCE, https://www.airforce.com/mission?gclid=Cj0KCQjwpfHzBRCiARIsAHHzyZq_WzLdGojPcQZ0eU5PNq-NNahbnOeMu_Hk91KdRRcpBxNk5L2-CZ4aAoimEALw_wcB&gclid=aw.ds [<https://perma.cc/5TMH-JWEH>] (last visited Apr. 19, 2023).

27. *See Inside Air Force Innovation*, U.S. AIR FORCE, <https://www.airforce.com/experience-the-air-force/airmen-stories/inside-air-force-innovation> [<https://perma.cc/PE2D-8WPA>] (last visited June 26, 2023) (detailing the latest innovations that the Air Force is working on).

28. *History*, U.S. AIR FORCE, <https://www.airforce.com/history> [<https://perma.cc/GA72-AWCA>] (last visited Apr. 19, 2023).

29. *Technological Innovations in the History of the U.S. Air Force*, AEROTECH NEWS (Sept. 15, 2017), <https://www.aerotechnews.com/nellisafb/2017/09/15/technological-innovations-in-the-history-of-the-u-s-air-force/> [<https://perma.cc/X4YU-3HPU>]; *History*, U.S. AIR FORCE, <https://www.airforce.com/history> [<https://perma.cc/V78V-PMM6>] (last visited Apr. 19, 2023).

30. *Marijuana*, HISTORY (Oct. 10, 2019), <https://www.history.com/topics/crime/history-of-marijuana> [<https://perma.cc/ER7H-QHCC>].

I. BACKGROUND

A. *The History of Drugs in America and the Controlled Substances Act*

In the 19th Century, America became enamored with morphine, heroin, and cocaine.³¹ In 1906, Congress passed the Pure Food and Drug Act, which required manufacturers to disclose the presence of alcohol, opiates, cocaine, and cannabis in certain circumstances.³² While illegal drug use dropped dramatically after World War II, use was revitalized in the 1960s.³³ A new generation of Americans embraced marijuana, amphetamines, and psychedelics.³⁴ In response, Public Law 91-513, known as The Comprehensive Drug Abuse Prevention and Control Act of 1970 (CSA), was passed on October 27, 1970.³⁵ The CSA created the substance schedule system, which remains in place today.³⁶ The CSA categorizes substances into five schedules, with the most potentially harmful drugs having limited medical purposes at one end and less dangerous drugs at the other.³⁷ Since its passage, the CSA has remained largely unchanged through Congress.³⁸ Most of the work of classifying

31. *The History of Drug Use in America*, DRUG ENF'T ADMIN. MUSEUM, <https://museum.dea.gov/history-drug-use-america> [<https://perma.cc/CHU9-UXGG>] (last visited Apr. 19, 2023).

32. Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906).

33. *Illegal Drugs in America: A Modern History*, DRUG ENFORCEMENT ADMINISTRATION MUSEUM & VISITORS CENTER (2004), https://web.archive.org/web/20041222230320/http://www.deamuseum.org/museum_idarmdc.html [<https://perma.cc/TEQ6-ZR5Q>].

34. *Id.*

35. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970). The Drug Enforcement Agency was not created until 1973. *History*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/about/history> [<https://perma.cc/KJ2E-S2DD>] (last visited Apr. 20, 2023).

36. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

37. *Id.*

38. The significant exception to this statement is the Hillory J. Farias and Samantha Reid Date-Rape Prevention Act which put a substance, "GHB", in Schedule I and a derivative of "GHB" in Schedule III. Hillory J. Farias and Samantha Reid Date-Rape Prevention Act, Pub. L. No. 106-172, 114 Stat. 7 (2000). After first passing the House of Representatives in a 423-1 vote, it was sent to the Senate. H.R. 2130, 106th Cong. (1999). The Senate made some modifications and passed the revised version by unanimous consent. *Id.* After receiving the Senate's version, the House of Representatives passed the legislation by a 339-2 margin. *Id.* The namesakes of the legislation are high-school aged teenagers who died as a result of "GHB" being slipped into a soda that they were drinking. Keith Bradsher, *Daughter's Death Prompts Fight on "Date Rape" Drug*, N.Y. TIMES (Oct. 16, 1999), <https://www.nytimes.com/1999/10/16/us/daughter-s-death-prompts-fight-on-date-rape-drug.html> [<https://perma.cc/3GRT-94CG>]; *Girl's Death Linked to 'Date Rape Drug'*, L.A. TIMES (Sept. 11, 1996), <https://www.latimes.com/archives/la-xpm-1996-09-11-mn-42602-story.html> [<https://perma.cc/Y59Q-E8D3>]. Sadly, neither one of these young ladies knew that they had been drugged. *Id.*

or scheduling substances is left to the determination of Executive agencies, like the Drug Enforcement Agency.

B. Present-Day Public Sentiment

In order to understand the current public sentiment, it is essential to account for the gradual changes in attitudes toward marijuana. At the state level, many states have taken advantage of federal legislative inaction and lax enforcement. Certain states acceded to evolving public views on marijuana use. They recognized their primacy in the sphere of criminal justice by *acting* when they saw an opportunity for the legalization of recreational and medicinal marijuana use within their sovereignty. Although various state efforts to decriminalize marijuana began as early as 1973, the mid-1990s ushered in a broad and dramatic shift in marijuana policy.³⁹

Starting with California in 1996 and continuing through the present day, many states have legalized medical marijuana.⁴⁰ However, in a blatant assault on the CSA, both Colorado and Washington became the first states to legalize recreational marijuana in 2012.⁴¹ Both pieces of legislation were ballot measures soundly approved by the voters in their respective states.⁴² In Colorado, just over 2.5 million people voted on Amendment 64, with fifty-five percent approval.⁴³ The Washington

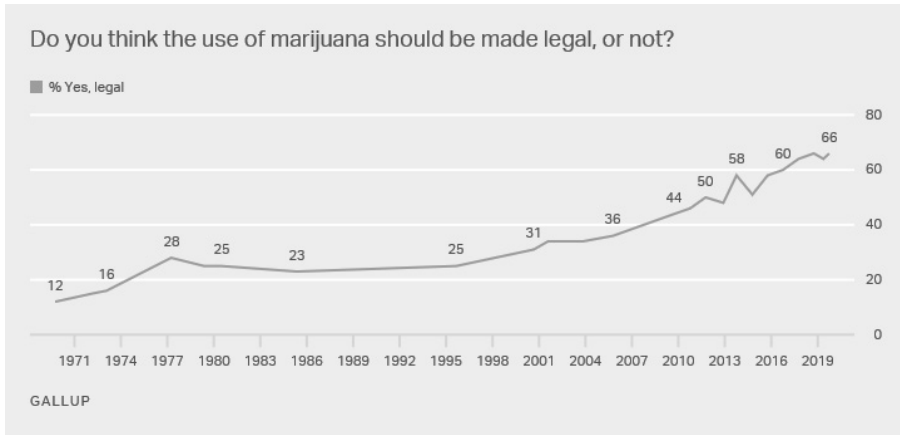
39. Patrick Anderson, *High in America: The True Story Behind NORML and the Politics of Marijuana*, SCHAFER LIBR. OF DRUG POL'Y, <http://www.druglibrary.org/special/anderson/highinamerica.htm> [https://perma.cc/RSY8-4ZAH] (last visited Apr. 23, 2023).

40. *California Proposition 215, Medical Marijuana Initiative (1996)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_215_the_Medical_Marijuana_Initiative_\(1996\)](https://ballotpedia.org/California_Proposition_215_the_Medical_Marijuana_Initiative_(1996)) [https://perma.cc/39B6-CJJN] (last visited Apr. 23, 2023); *State Medical Cannabis Laws*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 17, 2023), <https://www.ncsl.org/health/state-medical-cannabis-laws> [https://perma.cc/5XL4-DLCJ]; CAL. HEALTH & SAFETY CODE § 11362.5 (West 2023); Municipalities have been decriminalizing marijuana as well. For the purposes of this article, only the conflict between state and federal authorities are applicable.

41. COLO. LEGIS. COUNCIL STAFF, MARIJUANA, https://leg.colorado.gov/sites/default/files/14_marijuanalegis.pdf [https://perma.cc/5RWE-DNYV]; Jonathan Martin, *Washington State Voters Made History Tuesday by Legalizing the Recreational Use of Marijuana.*, SEATTLE TIMES (Feb. 23, 2017), <https://www.seattletimes.com/seattle-news/voters-approve-i-502-legalizing-marijuana/> [https://perma.cc/4X24-2BGR]

42. *Colorado Marijuana Legalization Initiative, Amendment 64 (2012)*, BALLOTPEdia, [https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative,_Amendment_64_\(2012\)](https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative,_Amendment_64_(2012)) [https://perma.cc/HG97-STG8]; *November 06, 2012 General Election Results*, WASH. SEC'Y OF STATE (Nov. 27, 2012, 4:55 PM), <https://results.vote.wa.gov/results/20121106/initiative-measure-no-502-concerns-marijuana.html> [https://perma.cc/5PYQ-6T8C].

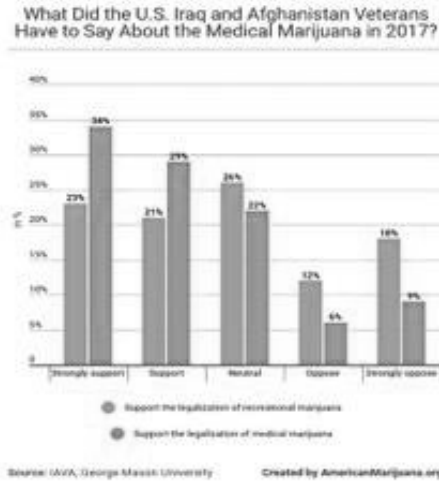
43. *Colorado Marijuana Legalization Initiative, Amendment 64 (2012)*, BALLOTPEdia, https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative,_Amendment_64_ [https://perma.cc/3QWS-HWZM](2012).

Figure 2 - Public opinion polling regarding marijuana legalization⁴⁸

President Reagan stated drug use “undermines public confidence in [federal employees].”⁴⁹ With respect to marijuana, the charts above and below do not reflect that position.

48. *Illegal Drugs*, GALLUP, https://news.gallup.com/poll/1657/Illegal-Drugs.aspx?g_source=link_news&g_campaign=item_258149&g_medium=copy [<https://perma.cc/UE4Z-2YSM>] (last visited Apr. 23, 2023). Unfortunately, this particular question only asks whether or not marijuana should be legalized. It does not delineate between recreational and medicinal use. More specific polling indicates there is a significant drop-off between those who support all legalization and medical marijuana legalization. *See id.* (finding that 86% of people believe that marijuana should be used to help medical issues while 60% believe that people should have the freedom to use marijuana).

49. Exec. Order No. 12,564, 3 C.F.R. § 224 (1986).

Figure 3 - Veteran opinion regarding marijuana use⁵⁰

Medical marijuana only faces fifteen percent opposition among our nation's veterans.⁵¹ United States veterans are a cross-section of society, and their opinion on this particular matter should be given great weight in any discussion of the public perception of the morality of marijuana use.⁵² The idea that marijuana use is morally repugnant, at this point, is entirely outdated.⁵³

C. Current Legislation

In response to the advancement of state law regarding recreational and medicinal marijuana, as well as the change in public support, members of both the House of Representatives and the United States Senate have introduced legislation designed to update federal law with respect to the use of marijuana.⁵⁴

Some of these pieces of legislation are modest acknowledgments of the current situation. For example, one piece of legislation attempts to

50. Dwight Blake, *Medical Marijuana in the United States – Statistics & Facts*, AM. MARIJUANA, <https://americanmarijuana.org/medical-marijuana-statistics/> [<https://perma.cc/D2K5-8UR4>] (last visited March 10, 2020).

51. *Id.*

52. See David Kuhns, *Commentary: Soldiers Represent the Best of America*, U.S. ARMY (May 15, 2009), https://www.army.mil/article/21173/commentary_soldiers_represent_the_best_of_america [<https://perma.cc/5MNA-JSW3>] (arguing that soldiers represent the best of America).

53. See generally Dwight Blake, *Medical Marijuana in the United States – Statistics & Facts*, AM. MARIJUANA (Mar. 10, 2020), <https://americanmarijuana.org/medical-marijuana-statistics/> [<https://perma.cc/NMZ8-MFXA>] (showing an increase in marijuana usage, sale, and acceptance in the past few years).

54. See Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2021) (seeking to decriminalize and deschedule cannabis).

recognize that states should determine for themselves whether they wish to permit the use of marijuana, and it would prohibit the federal government from regulating that space.⁵⁵ Another piece of legislation of particular importance to federal civilian employees seeks to protect federal employees from workplace discipline for medicinal marijuana use that complies with applicable state law.⁵⁶

The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act would add a specialized rule at the end of the CSA regarding marijuana.⁵⁷ The bill was introduced on April 4, 2019, in the House of Representatives and the Senate. Subsequently, the bill proceeded to various committees but languished there since its introduction.⁵⁸ The STATES Act would amend the CSA to say that it “shall not apply to any person acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marijuana.”⁵⁹ Despite bipartisan support, the bill is estimated to possess only a three percent chance of passing.⁶⁰

A different bill, the proposed Fairness in Federal Drug Testing Under State Laws Act, would protect federal employees who legally use medicinal marijuana under state law.⁶¹ It would eliminate the negative consequences of testing positive on a random urinalysis for those federal employees who are consuming medical marijuana legally in an applicable jurisdiction.⁶² The proposed bill states:

[a]n individual . . . who is tested under a drug testing program of any Executive agency without probable cause to believe that the individual is under the influence of marijuana, who tests positive for marijuana use (determined by the presence of tetrahydrocannabinol or marijuana metabolite in the sample provided by the individual), and, in the case of an individual whose use of marijuana was for medical purposes, who is able to provide documentation . . . attesting to the

55. STATES Act, H.R. 2093, 116th Cong. § 5 (2019).

56. Fairness in Federal Drug Testing Under State Laws Act, H.R. 1687, 116th Cong. (2019).

57. H.R. 2093 § 5.

58. *Id.*

59. *Id.*

60. *S. 1028 (116th): States Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/s1028/details> [<https://perma.cc/5BC6-M8CC>] (last visited June 27, 2023) (using a third party to estimate the probability that a piece of legislation will pass). The Senate version was cosponsored by four Democrats and five Republicans. *Id.* The House version had forty-four Democrats and nineteen Republicans listed as cosponsors. *H.R. 2093 (116th): States Act*, GOVTRAK, <https://www.govtrack.us/congress/bills/116/hr2093> [<https://perma.cc/W4KL-6MUH>] (last visited June 27, 2023).

61. Fairness in Federal Drug Testing Under State Laws Act, H.R. 1687, 116th Cong. (2019).

62. *Id.* § 2.

lawful nature of such use under the law of the State, may not, based solely on such a positive test be . . . if the individual is an employee of an Executive Agency, subject to any adverse personnel action.⁶³

Like the STATES Act, this proposed legislation garnered bipartisan support, but only a three percent chance of passing stands.

In contrast to the modest proposals above, other pieces of legislation are significantly more aggressive. H.R. 3884 in the House of Representatives (and its partner S. 2227 in the Senate), entitled the Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2020, is a bill that would drastically change existing federal law.⁶⁴

Introduced on July 23, 2019, the MORE Act not only seeks to establish the marijuana policy of our country moving forward, but it also seems to indicate that, collectively, our country has been wrong all along with respect to marijuana.⁶⁵ The MORE Act states that it is going “[to] decriminalize and deschedule cannabis, to provide for reinvestment in certain persons adversely impacted by the War on Drugs, to provide for expungement of certain cannabis offenses, and for other purposes.”⁶⁶ The House version has 120 cosponsors, including Mr. Earl Blumenauer, from Oregon, who has been a cosponsor of both the STATES and Fairness in Federal Employment Acts mentioned above.⁶⁷ Similar to its House version, S. 2227 has nine cosponsors, who are all Democrats.⁶⁸

The MORE Act does not simply try to remove marijuana from Schedule I—it would remove marijuana from the entire CSA.⁶⁹ If enacted, “[not] later than 180 days after the date of the enactment of this Act, the Attorney General shall . . . [make rules] removing marihuana and

63. *Id.*

64. *H.R. 3884 (116th): MORE Act of 2020*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr3884> [<https://perma.cc/KS9Z-WJJH>] (last visited Apr. 2, 2023). Although the MORE Act is currently circulating through Congress, it certainly is not the first time that Congress has discussed the issue. See generally Alicia Lozano, *House Passes Historic Bill to Decriminalize Cannabis*, NBC NEWS (Dec. 4, 2020), <https://www.nbcnews.com/politics/congress/congress-takes-historic-bill-decriminalize-cannabis-n1249905> [<https://perma.cc/N8XK-YCTP>] (“The House voted Friday on the Marijuana Opportunity Reinvestment and Expungement Act, or MORE Act, which decriminalizes cannabis and clears the way to erase nonviolent federal marijuana convictions.”).

65. *H.R. 3884 (116th): MORE Act of 2020*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr3884> [<https://perma.cc/7PVC-P549>] (last visited Apr. 2, 2023).

66. Marijuana Opportunity Reinvestment and Expungement Act of 2020, H.R. 3884, 116th Cong. (2020).

67. *H.R. 3884 (116th): MORE Act of 2020*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr3884/cosponsors> [<https://perma.cc/9GAY-T79J>] (last visited Apr. 16, 2023).

68. *S. 2227 (116th): MORE Act of 2019*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/s2227/cosponsors> [<https://perma.cc/PW83-VULP>] (last visited Apr. 16, 2023).

69. H.R. 3884.

tetrahydrocannabinols from the schedules of controlled substances.”⁷⁰ A critical component of this piece of legislation is its effective date. On that score, the MORE Act states that:

amendments made by this section to the Controlled Substances Act (21 U.S.C. 801 et seq.) are retroactive and shall apply to any offense committed, case pending, conviction entered, and, in the case of a juvenile, any offense committed, case pending, or adjudication of juvenile delinquency entered before, on, or after the date of enactment of this Act.⁷¹

Of particular note for current or prospective federal employees, Section 7(b) would prohibit federal agencies from using “past or present cannabis or marijuana use as criteria for granting, denying, or rescinding a security clearance.”⁷² Lastly, it prescribes the path to expunge numerous convictions related to marijuana use.⁷³

Regardless of what legislation does or does not pass, there are enough members of Congress sponsoring marijuana legislation that it has become a significant issue in the national discourse.

D. *Private Sector Employers*

At the end of 2013, public sector employment accounted for just sixteen percent of the labor force, with the federal government employing only two percent of our nation’s workers.⁷⁴ Ensuring that federal workers are free from drugs in the workplace is a necessary and noble cause. However, given its relatively small share of the national workforce, it is worth comparing federal policy to those governing the private sector. Unsurprisingly, private-sector employers vary greatly in their approach to drugs and policing drug use. For example, companies like Starbucks, Apple, Microsoft, Twitter, and Google do not conduct drug testing.⁷⁵ These companies employ hundreds of thousands of people yet do not test

70. *Id.* § 3(a)(2).

71. *Id.* § 3(d).

72. *Id.* § 7(b).

73. *Id.* § 10. While not discussed in this note, the MORE Act has additional sections about a cannabis trust fund, the impact of cannabis use on immigration, etc. Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R. 3884, 116th Cong. (2019); S. 2227, 116th Cong. (2019).

74. Gerald Mayer, *Selected Characteristics of Private and Public Sector Workers*, CONG. RSCH. SERV. (Mar. 21, 2014), <https://fas.org/sgp/crs/misc/R41897.pdf> [<https://perma.cc/ETM8-XHSR>]. Interestingly, state and local governments all experienced an increase in their percentages from 1955–2013. *Id.* The federal government decreased from 4.5% to 2%. *Id.*

75. Dragana Randjelovic, *5 Public Companies That Don’t Do Drug Tests in 2019*, YAHOO (Nov. 8, 2019), <https://finance.yahoo.com/news/5-public-companies-don-t-174400405.html> [<https://perma.cc/25B4-W6TC>].

for the consumption of substances. Notably, these companies have thrived despite their lack of testing (or perhaps due to their lack of testing). The companies mentioned above revolutionize the world regularly yet are not concerned with their worker's substance use.

In September 2018, after Elon Musk, the CEO of Tesla and SpaceX, inhaled marijuana on a live YouTube broadcast, NASA announced a safety review of Boeing and SpaceX.⁷⁶ Incidentally, Musk's company, Tesla, does not drug test employees in states that permit marijuana use.⁷⁷ Even amidst this turmoil, Tesla continued to profit. Tesla's share price on February 1, 2016, was \$162.60.⁷⁸ In just over four years, the share price of Tesla on February 17, 2020, was \$901, a 454% increase.⁷⁹ If Tesla's CEO openly smoking marijuana was a concern for stockholders, the numbers do not reflect that concern.

Goodwill, the nationally recognized chain of thrift stores, stopped its testing in February 2020.⁸⁰ According to Goodwill's Director of Workforce Development, "[y]ou can't have people show up high. But just because someone uses pot recreationally doesn't mean it will impact their work."⁸¹ With this very quote, Goodwill's Director of Workforce Development is challenging the former Commander-in-Chief. Recall that President Reagan stated that "employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs."⁸² Goodwill recognized the error of testing their entire workforce and adapted, while the federal government's policies remain. In addition, one of Goodwill's retail competitors, Target, moved from testing all job applicants to only those applying for "safety-sensitive" positions starting in 2014.⁸³

One of the most high-profile industries in the United States, the National Football League (NFL), just reached a collective bargaining agreement with its players in March 2020.⁸⁴ The agreement enacts

76. Margo Roosevelt, *In the Age of Legal Marijuana, Many Employers Drop 'Zero Tolerance' Drug Tests*, L.A. TIMES (Apr. 12, 2019), <https://www.latimes.com/business/la-fi-marijuana-drug-test-hiring-20190412-story.html> [<https://perma.cc/9MCE-MA3R>].

77. *Id.*

78. *Tesla, Inc.*, YAHOO, <https://finance.yahoo.com/quote/TSLA/history?period1=1277784000&period2=1535428800&interval=1mo&filter=history&frequency=1mo> [<https://perma.cc/BFX2-VJKP>] (last visited Apr. 16, 2023).

79. *Id.*

80. Roosevelt, *supra* note 76.

81. *Id.*

82. Exec. Order No. 12,564, 3 C.F.R. § 224 (1986).

83. Roosevelt, *supra* note 76.

84. *Collective Bargaining Agreement*, NFLPA (Mar. 5, 2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf [<https://perma.cc/F9HK-HBBC>].

significant changes in the league's drug testing program to include: no game suspensions for marijuana use (only fines allowed); an increase in nanograms required for a positive urinalysis test (35 ng/mL to 150 ng/mL); and a reduction in the possible testing window to only the two weeks at the beginning of training camp.⁸⁵

If private sector employers are not as concerned with marijuana use, what is the federal government's interest as an employer? Common sense dictates that the federal government's interest as an employer is not to have employees who are openly breaking federal law.

E. *The Federal Government's Interest*

Despite the political and societal momentum toward the decriminalization and legalization of marijuana, possession of marijuana is still illegal under federal law.⁸⁶ Specifically, in Part D (§§ 841–865), simple possession of a controlled substance is illegal under 21 U.S.C. § 844.⁸⁷ Simply having a small amount of marijuana on your person could subject an individual to relatively stiff penalties according to federal law. For example, a first-time offender who is in possession of *any* amount of marijuana could face a year in prison and at least a \$1,000.00 fine.⁸⁸ Of course, that does not necessarily mean that every first-time offender will face such a punishment, but that punishment is available to federal judges. Due to law enforcement, prosecutorial, and judicial discretion, data suggests this provision is not enforced evenly throughout the United States.⁸⁹

Since 1973, the Drug Enforcement Administration (DEA) has been the federal enforcer of the CSA.⁹⁰ As recently as August 11, 2016, the DEA outlined their legal and factual reasons for denying rescheduling or

85. Mike Florio, *New CBA Removes All Substance-Abuse Suspensions for Positive Drug Tests*, NBCSPORTS (Mar. 5, 2020), <https://profootballtalk.nbcsports.com/2020/03/05/new-cba-removes-all-substance-abuse-suspensions-for-positive-drug-tests/> [<https://perma.cc/29T6-3S GY>].

86. *See generally* 21 U.S.C. §§ 801–904 (explaining the control and enforcement of illegal drugs under federal law).

87. The definition of a controlled substance is contained in 21 U.S.C. § 802(6), which states that a controlled substance is “a drug or other substances, or immediate precursor, included in schedule I, II, III, IV, or V [t]he term does not include distilled spirits, wine, malt beverages, or tobacco[.]”

88. 21 U.S.C. § 844.

89. *See The War on Marijuana in Black and White*, AM. C.L. UNION (June 2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf [<https://perma.cc/GDN6-CMY8>] (finding that although the use of marijuana in Black and White communities was similar, Black people were “3.73 times more likely to be arrested for marijuana possession” than White people).

90. *History*, DRUG ENF'T ADMIN., <https://www.dea.gov/about/history> [<https://perma.cc/W5SP-J9MY>] (last visited Apr. 5, 2022).

removing marijuana from the CSA.⁹¹ In deferring to the burdensome scientific process managed by the Food and Drug Administration (FDA), the acting DEA Administrator stated that marijuana “does not have a currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse.”⁹² While reaching this conclusion, the acting DEA Administrator conceded that it is entirely possible that science could eventually render this decision incorrect.⁹³ He stated that the DEA “will remain tethered to science . . . as the statute demands. It certainly would be odd to rely on science when it suits us and ignore it otherwise.”⁹⁴ The DEA basically came to their decision to keep marijuana as a Schedule I substance by virtue of the fact that the FDA had not approved the substance for medical use.⁹⁵ The DEA’s action begs the question, if there are no valid medical purposes for marijuana, why are states authorizing its medical use? Are the states disregarding science? Are the medical professionals who prescribe its use failing to use proper treatment protocols? Alternatively, is the FDA process too slow to react to a growing body of medical research? The DEA’s deference to the FDA approval process does not seem in concert with their statutory mandate to enforce the CSA.

F. *The Air Force Civilian Random Drug Testing Program*

The Air Force has a responsibility under federal law to test its employees, and the Air Force complies with that requirement. In addition to that requirement, the Air Force has its own institutional goals. Those goals are outlined in paragraph 1.3 of AFMAN 44-198, the governing regulation for the testing program, entitled the *Air Force Civilian Drug Demand Reduction Program*.⁹⁶ The first goal is to support and enforce Executive Order 12564.⁹⁷ As mentioned earlier, Executive Order 12564 was signed by President Reagan in an effort to combat illegal drug use by federal employees.⁹⁸ The second goal is to support the Anti-Drug Abuse

91. Letter from Chuck Rosenberg, Acting Administrator, Drug Enf’t Admin., to Gina M. Raimondo et al., Governor, R.I., [https://www.dea.gov/sites/default/files/divisions/hq/2016/Letter 081116.pdf](https://www.dea.gov/sites/default/files/divisions/hq/2016/Letter%2081116.pdf) [<https://perma.cc/FH5R-SJ46>] (last visited Aug. 11, 2016).

92. *Id.* at 5.

93. *Id.*

94. *Id.*

95. *Id.*

96. AFMAN 44-198, *supra* note 14, at para. 1.3.

97. *Id.* at para. 1.3.1.

98. *See* Exec. Order No. 12,564, 3 C.F.R. § 224 (1986) (declaring that federal employees must comply with a drug-free workplace).

Act of 1988.⁹⁹ The Air Force testing program “strives to improve the health, productivity, and overall quality of the civilian force and enhance total force readiness”¹⁰⁰ The program does so by:

Preventing, reducing, and eliminating illicit drug use.

Advising and training managers, supervisors, and employees on how best to address drug abuse issues.

Referring employees to rehabilitative services and treatment.

Restoring employees to full effectiveness.

Maintaining the health and wellness of a fit and ready workforce and drug-free Air Force community.

Deterring civilian personnel from illicit drug use.

Detecting and identifying those individuals who engage in illicit drug use.

Assisting commanders/directors in assessing the security, fitness, readiness, and good order and discipline of their commands.

Providing a basis for action, disciplinary or otherwise, based on an employee’s positive test result.

Ensuring that urine specimens collected as part of the *Anti-Drug Abuse Act* of 1988 are supported by a legally defensible chain of custody procedure at the collection site, during transport, and at the testing laboratory.

Ensuring that all specimens collected under the *Anti-Drug Abuse Act* of 1988 guidelines are tested by a laboratory certified by HHS.

Ensuring that all civilian personnel recognize that the ingestion of non-prescription products that contained controlled substances (as defined by Federal law) and/or illicit ingestion of prescription products may subject the individual to a suspicion of drug abuse and thereby compromise his/her status as an Air Force employee.¹⁰¹

99. AFMAN 44-198, *supra* note 14, at para. 1.3.1; *see generally* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (preventing the manufacturing, distribution, and use of illegal drugs, and for other purposes). This legislation contained a large amount of drug policy that will not be addressed directly in this Article.

100. AFMAN 44-198, *supra* note 14, at para. 1.3.1.

101. *Id.* at para. 1.3.1.

The Air Force implements this program at the installation level. At each installation, there is typically one testing center. The Installation Commander (generally a Colonel in the Grade of O-6) is responsible for ensuring that this program is implemented.¹⁰² The Commander typically delegates this responsibility to a subordinate. This delegation most often occurs in a small office staffed by one base-level employee responsible for all aspects of the testing program.

That employee is known as the Drug Demand Reduction Program Manager (DDRPM) or Drug Testing Program Administrative Manager (DTPAM).¹⁰³ These positions exist to oversee the program, including collection, processing, shipping, and safeguarding information relative to the program.¹⁰⁴ A DDRPM or DTPAM can be a military member or civilian employee, and the same person can fill both management positions.¹⁰⁵ The DDRPM or DTPAM is the “focal point for base level Air Force Civilian Drug Testing Program drug testing issues.”¹⁰⁶ This personnel “will have received training in collecting urine specimens in accordance with HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs.”¹⁰⁷ They train supervisors, commanders, and directors on recognizing, documenting, and referring employees suspected of drug abuse.¹⁰⁸ The DDRPMs or DTPAMs ensure this training includes “behavioral and performance patterns warranting referral for evaluation, procedures for referring employees for initial assessment, and the basis for, as well as the requirements of, the drug testing program.”¹⁰⁹

The DDRPMs or DTPAMs are also responsible for verifying the results for each sample taken, tracking the outstanding results, and coordinating with the forensic laboratory to resolve testing issues.¹¹⁰ Lastly, and most importantly for civilian employees, the DDRPM or DTPAM “[e]nsure[] timely notification, in writing, to the CPS or HRO, the employee’s supervisor, Installation SJA, and the employee’s commander/director of all MRO-verified positives and substituted or adulterated results.”¹¹¹ Once this notification to the supervisors, the

102. *Id.* at para. 2.14. Since this article only discusses what happens to a current Air Force employee, hiring procedures and testing will not be addressed.

103. *Id.* at Abbreviations and Acronyms; *id.* at Terms.

104. *Id.* at Terms.

105. *Id.* at para. 2.18.1.

106. AFMAN 44-198, *supra* note 14, at para. 2.18.2.

107. *Id.* at para. 2.18.3.

108. *Id.* at paras. 2.18.4–2.18.5.

109. *Id.*

110. *Id.* at para. 2.18.9.

111. AFMAN 44-198, *supra* note 14, at para. 2.18.10. The Installation SJA, who is the senior attorney at a given military installation, is a Staff Judge Advocate who evaluates compliance of

human resources staff, and the installation's attorney occurs, disciplinary procedures are typically initiated. Before doing so, however, the regulation requires that a medical review officer (MRO) review the results to rule out a lawful medical reason for the failure.¹¹²

According to AFMAN 44-198, paragraph 3.1.4.1, "[t]he Air Force will randomly test employees in positions identified by Civilian Personnel as TDPs."¹¹³ A "TDP" is a testing designated position.¹¹⁴ The term "Testing Designated Positions" is defined in the terms of the regulation as:

Positions described in Section 7(d) of Executive Order 12564 that are designated by the Air Force. TDPs are characterized by their critical safety or security responsibilities as they relate to the mission of the DOD component. The job functions associated with these positions have a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or U.S. national security. These positions require the highest degree of trust and confidence.¹¹⁵

Every employee that is in a TDP is on notice that they occupy such a position. In fact, the human resources office at the base "must ensure all employees receive written notice when assigned to a TDP."¹¹⁶ Even employees that move from non-TDP positions to a TDP will receive notice that they are now in a TDP.¹¹⁷ This provision aims to ensure that no employee is subject to random urinalysis testing without prior knowledge of their potential for testing.

The Air Force accomplishes random urinalysis testing of its civilian employees no less than two days per month.¹¹⁸ The testing is completed at random using drug testing software.¹¹⁹ The DDRPM or DTPAM implement measures to guard the process closely.¹²⁰ The names and dates of the individuals selected for testing are kept confidential.¹²¹ The Air Force expects an individual to provide a sample on the same day they are

the procedures under AFMAN 44-198. *Id.* at paras. 2.15.2., Abbreviations and Acronyms. MRO is a "licensed physician with the appropriate training to interpret and evaluate positive test results." *Id.* at Terms.

112. *Id.* at para. 2.18.10.

113. *Id.* at para. 3.1.4.1.

114. *Id.* at Terms.

115. *Id.* at para. 3.3.1. Attachment 2 provides categories of employees that are in TDPs; the list is quite extensive. *Id.* at A2.12.

116. *Id.*

117. AFMAN 44-198, *supra* note 14, at para. 3.3.1.

118. *Id.* at para. 3.1.4.4.

119. *Id.*

120. *Id.* at para. 3.1.4.5.

121. *Id.*

notified.¹²² The notification reaches completion through close coordination with the employee's commander and immediate supervisor.¹²³ The employee's supervisor notifies the employee that they must provide a sample within two hours of notification.¹²⁴ Random testing is the heart of the Air Force's attempt to keep the workforce drug-free.

1. Disciplinary Outcomes

If a civilian employee's random urinalysis test is positive without a medical justification, it satisfies a "finding of drug use."¹²⁵ As such, the DDRPM or DTPAM must remove the employee from a TDP and assign other duties pending "appropriate disciplinary action."¹²⁶ The supervisor then directs the employee to complete an initial substance abuse assessment.¹²⁷ The supervisor engages with the human resources office to determine "appropriate" discipline.¹²⁸

Using illicit drugs makes an Air Force employee subject to the disciplinary guidance in Air Force Instruction (AFI) 36-704, *Discipline and Adverse Actions of Civilian Employees*.¹²⁹ Drug use in the Air Force, "including marijuana, is subject to disciplinary and adverse action . . . regardless of state laws on their use."¹³⁰ In the Air Force, civilian discipline could include admonishment, reprimand, suspension, or removal.¹³¹ In selecting the appropriate disciplinary penalty, "careful judgment is to be used so that the penalty is not out of proportion to the character of the offense, especially a first offense, and to assure that the penalty is imposed with consistency and equity."¹³² In reaching this decision, the regulation requires consideration of "Douglas Factors."¹³³ A proposed disciplinary penalty must consider the following:

122. *Id.*

123. AFMAN 44-198, *supra* note 14, at para. 3.1.4.6.

124. *Id.* at paras. 3.1.4.6–3.1.4.7. If an individual is not available for some reason, it is the supervisor's responsibility to coordinate this issue with the DDRPM or DTPAM. *Id.* at para. 3.1.4.8.

125. *Id.* at para 5.1. A finding of drug use could also be found through direct observation, evidence from an arrest or criminal conviction, or an employee's voluntary admission. *Id.*

126. *Id.* at para. 5.2.1.

127. *Id.* at para. 5.2.2.

128. *Id.* at para. 5.2.3.

129. AFMAN 44-198, *supra* note 14, at para. 5.2.3.1. AFI 36-704 was updated in September 2022, now referred to as AFI 36-148. See *Air Force Instruction 36-148*, U.S. AIR FORCE (Sept. 27, 2022), https://static.e-publishing.af.mil/production/1/af_a1/publication/dafi36-148/dafi36-148.pdf [<https://perma.cc/2LGP-ZDD7>] [hereinafter AFI 36-148].

130. AFMAN 44-198, *supra* note 14, at para. 5.2.3.1.1.

131. AFI 36-148, *supra* note 129, at para. 1.4.

132. *Id.* at para. 4.1.

133. *Id.*

Seriousness of Offense – The nature and seriousness of the offense, and its relation to the employee’s duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

Job Level and Type of Employment – The employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.

Prior Misconduct – The employee’s past disciplinary record.

Employee’s Past Work Record – The employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.

Erosion of Supervisory Confidence – The effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon the supervisor’s confidence in the employee’s ability to perform assigned duties.

Consistency of Penalty – Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

Consistency of Penalty with Table of Penalties – Consistency of the penalty with an applicable agency table of penalties.

Notoriety – The notoriety of the offense or its impact upon the reputation of the agency.

Notice of warning about conduct – The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.

Potential for Rehabilitation – Potential for the employee’s rehabilitation.

Mitigating Circumstances – Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

Effectiveness of a lesser sanction – The adequacy and effectiveness of alternative sanctions to deter such conduct

in the future by the employee or others.¹³⁴

Regardless of any other factors, employees will face a proposed removal action if they:

[Refused] to obtain counseling or treatment through a treatment program as required by the Executive Order after having been found to have engaged in illicit drug use.

Continued illicit drug use after a first offense of illicit drug use.

Altering or attempting to alter a urine specimen or substituting or attempting to substitute a specimen for their own or that of another employee.

Failure to successfully complete the mandated and/or agreed upon medically approved drug rehabilitation program.¹³⁵

After deciding on the “appropriate” discipline, the “Proposing Official”¹³⁶ proposes the adverse action via a “notice of proposed action.”¹³⁷ This written notice describes the adverse action, the reasons for the action, a statement concerning the employee’s rights regarding the action, and what evidence is being relied upon for the action.¹³⁸ After time to respond to the notice and evidence passes for the employee, a “Deciding Official”¹³⁹ makes a final determination.¹⁴⁰ According to the Air Force’s table of penalties, incidents of either intoxication at work or driving while under the influence of alcohol carry a much lighter punishment than the use of illegal drugs.¹⁴¹ Why are off-duty marijuana

134. *Id.* at Attachment 2.

135. AFMAN 44-198, *supra* note 14, at paras. 5.2.3.2.1–5.2.3.2.4.

136. The regulation defines a Proposing Official, stating “Generally, the first level supervisor recommends, signs and issues the notice of proposed action. However, a supervisor or manager at a higher level within the chain of command may recommend, sign, and issue proposal if first level supervisor if appropriate.” AFI 36-148, *supra* note 129, at Terms.

137. *Id.* at para. 5.1.

138. *Id.* at paras. 5.1.1–5.1.4.

139. A Deciding Official is defined as:

The person who signs the notice of final written decision received the employee’s oral and/or written answer. Management may designate another person to receive the answer as long as that person has the authority to recommend a final decision and serves in a position superior to the employee (not necessarily in a supervisory position or in a higher grade)

Id. at Terms.

140. *See id.* at para. 5.4 (discussing the next steps after an employee receives notice).

141. *See id.* at Attachment 3 (stating that the penalty for the second offense of either intoxication at work or driving while under the influence of alcohol ranges from a five-day

use and on-duty alcohol consumption viewed so differently? This illogical reality is due to an outdated understanding of the toxicology of marijuana and what actually happens to the user.

II. THE TOXICOLOGY AND EFFECTS OF MARIJUANA

Comprehending the toxicology of marijuana is critical to understanding how and why the United States should appropriately regulate the substance. As stated by the previously cited acting DEA Administrator, we should rely on science:

After smoking, blood levels rise very rapidly and then decline to around 10% of the peak values within the first hour. The maximum subjective high is also attained rapidly and persists for about 1 to 2 hours, although some milder psychological effects last for several hours. After oral ingestion the peak for plasma THC and the subjective high is delayed and may occur anywhere from 1 to 4 hours after ingestion, with mild psychological effects persisting for up to 6 hours or more. Although in each case unchanged THC disappears quite rapidly from the circulation, elimination of the drug from the body is in fact quite complex and takes several days. This is largely because the fat-soluble THC and some of its fat-soluble metabolites rapidly leave the blood and enter the fat tissues of the body. As the drug and its metabolites are gradually excreted in the urine (about one-third) and in the feces (about two-thirds) the material in the fat tissues slowly leaks back into the bloodstream and is eventually eliminated. This gives an overall elimination half-time of 3-5 days, and some drug metabolites may persist for several weeks after a single drug exposure.

The unusually long persistence of THC in the body has given cause for some concern, but it is not unique to THC—it is seen also with a number of other fat-soluble drugs, including some of the commonly used psychoactive agents, e.g., diazepam (Valium®). The presence of small amounts of THC in fat tissues has no observable effects, as these tissues do not contain any receptors for cannabis. There is no evidence that THC residues persist in the brain, and the slow leakage of THC from fat tissues into blood does not give rise to drug levels that are high enough to cause any psychological effects. Smoking a second marijuana cigarette a couple of hours after the first generates virtually the same

suspension to removal, while the penalty for the second offense of use of illegal drugs is an automatic removal). While the guide “prescribes no minimum penalty for any cause of action” recall that one of the factors is an agency’s own determination of their severity. *Id.* at paras. 4.2, Attachment 3.

plasma levels of THC as previously. Nevertheless, the drug will tend to accumulate in the body if it is used regularly. While this is not likely to be a problem for occasional or light users, there have been few studies of chronic high-dose cannabis users to see whether the increasing amounts of drug accumulating in fat tissues could have harmful consequences. Is it possible, for example, that such residual stores of drug could sometimes give rise to the flashback experience that some cannabis users report—the sudden recurrence of a subjective high not associated with drug taking?

The persistence of THC and its metabolites in the body certainly causes confusion in other respects, particularly as drug testing procedures can now detect very small amounts of THC and its metabolites. Urine or blood tests for one of the major metabolites, 11-nor-carboxy-THC, for example, use a very sensitive immunoassay and can give positive results for more than 2 weeks after a single drug exposure. The proportion of the carboxy metabolite relative to unchanged THC increases with time and measurements of this ratio can indicate fairly accurately how long ago cannabis was consumed.¹⁴²

Marijuana is only effective in the body for a few hours after ingestion but remains dormant as the body slowly eliminates its metabolites.¹⁴³ How does that compare to alcohol? Generally, “a person will eliminate one average drink or .5 oz (15ml) of alcohol per hour.”¹⁴⁴ Again, an average alcohol user would reduce what they ingest in only hours, thus marijuana would remain stored in the body longer than alcohol. This distinct aspect of marijuana makes it easier on Tuesday to detect a Friday night user long after the effects of the drug have dissipated. The real question for those who persist in testing federal employees for marijuana use is, why do we care?

142. LESLIE L. IVERSON, *THE SCIENCE OF MARIJUANA* 50–51 (2001).

143. See *Marijuana Drug Information*, REDWOOD TOXICOLOGY LAB[’]Y, https://www.redwoodtoxicology.com/resources/drug_info/marijuana [<https://perma.cc/C53U-RM3L>] (last visited Mar. 27, 2023) (“Initially, THC is quickly absorbed into the body tissues and then is slowly released back into the blood stream where it is carried to the liver and metabolized.”); see *How Long Does Weed / THC Stay in Your System?*, WEEDMAPS, <https://weedmaps.com/learn/cannabis-and-your-body/how-long-does-marijuana-stay-system> [<https://perma.cc/QQ37-MTGE>] (last visited Mar. 27, 2023) (“The study claims that THC is detectable in blood for about five hours, but the THC metabolite THC-COOH has a detection time of up to 25 days.”).

144. *Alcohol and the Human Body*, INTOXIMETERS, <https://www.intox.com/physiology/> [<https://perma.cc/A82H-9JUY>] (last visited Mar. 27, 2023).

III. REMOVAL OR RESCHEDULING WITHIN THE CONTROLLED SUBSTANCES ACT

Marijuana's classification within the CSA is on par with severe drugs, such as heroin, LSD, and MDMA (ecstasy), and even *higher* than cocaine.¹⁴⁵ How did that happen? After the CSA passed in 1970, marijuana was placed as a Schedule I substance while President Nixon commissioned a study to assess the potential harm from marijuana use.¹⁴⁶ That study, known as the Shafer Commission Report, declared that marijuana "should not be in Schedule I and even doubted its designation as an illicit substance."¹⁴⁷ Further, it concluded that discouraging marijuana through civil fines and seizure, not criminal means, was the best way to address marijuana use.¹⁴⁸ Specifically, that criminal law is:

[T]oo harsh a tool to apply to personal possession even in the effort to discourage use. It implies an overwhelming indictment of the behavior which we believe is not appropriate. The actual and potential harm of use of the drug is not great enough to justify intrusion by the criminal law into private behavior, a step which our society takes only 'with [sic] the greatest reluctance.'¹⁴⁹

Unfortunately, the federal government took no action in the past, and in the decades to follow, to remedy this mistake.

As previously discussed, Congress can legislate the removal of marijuana from the CSA. While Congress debates appropriate legislation (for who knows how long), the Executive branch could effectively remove marijuana from the list of controlled substances. The current version of the CSA delegates the authority to schedule controlled substances to the Attorney General.¹⁵⁰ Further, the Attorney General may "add to such a schedule or transfer between such schedules any drug or other substance"¹⁵¹ The Attorney General may do so if he "finds that such drug or other substance has a potential for abuse, and makes with respect to such drug or other substance the findings prescribed by

145. U.S. DEP'T OF JUST., CONTROLLED SUBSTANCES – ALPHABETICAL ORDER 12, https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf [<https://perma.cc/762U-3PMC>] (last visited Mar. 27, 2023).

146. Malik Burnett & Amanda Reiman, *How Did Marijuana Become Illegal in the First Place?*, DRUG POLICY ALLIANCE (Oct. 8, 2014), <https://drugpolicy.org/blog/how-did-marijuana-become-illegal-first-place> [<https://perma.cc/NA8S-SKY6>].

147. *Id.*

148. *Marihuana: A Signal of Misunderstanding*, U.S. NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE (1972), http://www.druglibrary.org/schaffer/Library/studies/nc/ncrec1_17.htm [<https://perma.cc/3EMG-3YWH>].

149. *Id.*

150. 21 U.S.C. § 811(a).

151. 21 U.S.C. § 811(a)(1).

subsection (b) of section 812 of this title for the schedule in which drug is to be placed”¹⁵² Apart from adding a substance to the CSA, the Attorney General also has the authority to “remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.”¹⁵³

The Attorney General must consider several factors with each substance to determine whether or not that substance should be included:

Its actual or relative potential for abuse.

Scientific evidence of its pharmacological effect, if known.

The state of current scientific knowledge regarding the drug or other substance.

Its history and current pattern of abuse.

The scope, duration, and significant of abuse.

What, if any, risk there is to the public health.

Its psychic or physiological dependence liability.

Whether the substance is an immediate precursor of a substance already controlled under this subchapter.¹⁵⁴

To be considered a Schedule I substance, a substance must meet even more specific guidelines in addition to the above factors. According to the requirements of the Controlled Substances Act, the Attorney General must find, to place a substance in Schedule I, that the drug (1) “has a high potential for abuse”; (2) “has no currently accepted medical use in treatment in the United States”; and (3) “[t]here is a lack of accepted safety for the use of the drug or other substance under medical supervision.”¹⁵⁵ Due to its lack of medicinal properties, Schedule I substances prohibit prescriptions from being issued.¹⁵⁶ Schedule II substances are very similar in that the drugs (1) “ha[ve] a high potential for abuse”; (2) “ha[ve] a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions”; and (3) abuse “may lead to severe psychological or physical dependence.”¹⁵⁷ The notable difference between Schedule I and Schedule II substances is that Schedule II substances have some recognized

152. *Id.* § 811(a)(1)(A)–(B).

153. *Id.* § 811(a)(2).

154. *Id.* § 811(c).

155. *Id.* § 812(b)(1).

156. *Id.* § 829.

157. 21 U.S.C. § 812(b)(2).

medical purpose or use.¹⁵⁸ Schedule III substances are quite different—the drugs (1) “ha[ve] a potential for abuse less than the drugs or other substances in Schedule I and II” (2) “ha[ve] a currently accepted medical use in treatment in the United States[,]” and (3) “may lead to moderate or low physical dependence or high psychological dependence.”¹⁵⁹

While cocaine is firmly entrenched in Schedule II (since it does have some verified medical purposes), marijuana remains a Schedule I substance.¹⁶⁰ You simply cannot get a prescription for medical marijuana under federal law.¹⁶¹ It seems clear from current medical use prescriptions that marijuana should not be considered a Schedule I or Schedule II substance.¹⁶² If there were legitimate medical concerns about the abuse patterns of medical marijuana users, the DEA and the Attorney General could compile data on its use through the multitude of states that have permitted its use in the medical sphere. At a maximum, marijuana is a Schedule III substance, and the Attorney General could easily make that finding.

IV. THE PROACTIVE APPROACH; HOW THE AIR FORCE CAN DRIVE CHANGE WITHIN THE FEDERAL WORKPLACE

A. *Maintaining Reasonable Suspicion and Safety Mishap Testing*

Unlike random testing, reasonable suspicion and safety mishap testing are specifically tailored to the impact drug abuse may have on the Air Force mission. Facts and circumstances lead trained federal employees to the conclusion that drugs might be involved in a given scenario. Alternatively, testing may be required to rule out drugs as a contributing factor to a mishap or misconduct.

Reasonable suspicion testing is a:

fact-based belief that an employee has engaged in illicit drug use, and that evidence of illicit drug use is presently in the employee’s body, drawn from specific and particularized facts, and reasonable inferences from those facts. Employees in TDP may be tested on a reasonable suspicion of illicit drug use on or off duty. Employees in non-TDP may be

158. *Controlled Drugs: What is a Controlled (Scheduled) Drug*, TEX. STATE BD. PHARMACY, <https://www.pharmacy.texas.gov/consumer/broch2.asp> [<https://perma.cc/6Q37-XH F8>] (last visited Mar. 28, 2023).

159. 21 U.S.C. § 812(b)(3).

160. 21 U.S.C. § 812(c)(10) (Schedule I), (a)(4) (Schedule II).

161. *See* 21 U.S.C. § 812(b)(1)(B) (stating that Schedule I drugs have “no currently accepted medical use in treatment in the United States”).

162. *See Marijuana, A Signal of Misunderstanding*, HATHITRUST DIGITAL LIBR., 546 (Mar. 1972), <https://hdl.handle.net/2027/umn.31951d03118410v> [<https://perma.cc/4WQG-5JRW>] (“[E]quating marijuana with heroin is an inappropriate view of available information as to the effects of cannabis.”).

tested on a reasonable suspicion of on-duty drug use or impairment. If an employee is suspected of illicit drug use or in possession of drug paraphernalia, the appropriate supervisor will gather all information, facts, and circumstances leading to, and supporting this suspicion, then refer the employee to the Drug Demand Reduction Program office for testing.¹⁶³

The evidence accompanying this type of testing could be:

Direct Observation of illicit drug use or possession and /or physical symptoms of being under the influence of a controlled substance. Physical symptoms are based on the behavior, speech, appearance, and/or body odors of the employee.

A pattern of abnormal conduct or erratic behavior consistent with the use of illicit drugs where no other rational explanation or reason for the conduct is readily apparent.

Evidence of drug-related impairment supported by hearsay from identified or unidentified sources supported by corroboration from a manager or supervisor with training and experience in the evaluation of drug-induced job impairment.

Recent arrest or conviction for a drug-related offense, or the identification of an employee as the focus of a criminal investigation into illicit drug possession, use or trafficking.

Information of illicit drug use provided either by reliable and credible sources or independently corroborated.

Evidence the employee has tampered with or avoided a recent or current drug test.¹⁶⁴

Since this type of testing is specific and fact-based, coordination prior to testing is critical. Coordination must be completed with the installation staff judge advocate (attorney), a higher-level supervisor, and the human resources office as to whether reasonable suspicion testing is appropriate before any testing occurs.¹⁶⁵ This coordination includes the attorney's opinion regarding whether or not reasonable suspicion exists in a given fact pattern.¹⁶⁶ The supervisor then prepares a written memorandum that includes "the appropriate dates and times of reported drug-related incidents, the reliable/credible sources of information considered (in

163. AFMAN 44-198, *supra* note 14, at para 3.1.5.1.

164. *Id.* at para 3.1.5.1.1.

165. *Id.* at para. 3.1.5.2.

166. *Id.*

other words, the rationale leading to the test).”¹⁶⁷ The collection procedures are similar to the process outlined in the discussion above concerning random testing, except that the DDR Program office maintains the supervisor’s fact memorandum for two years, and the notice to provide a specimen states explicitly that the test is a reasonable suspicion test.¹⁶⁸

Safety mishap testing is a little different but still crucial to the integrity of safety protocols. When a specific “class” of mishap (e.g., loss of life, a significant amount of money involved, or nuclear in nature) occurs, “employees will be subject to testing for evidence of illicit drug use if the employee’s supervisor reasonably concludes an employee’s conduct may have caused or contributed to the mishap.”¹⁶⁹ In addition to the requirements imposed by the Air Force’s safety program, DoD employees:

may also be subject to testing when, based upon the circumstances of the accident, their actions are reasonably suspected of having caused or contributed to an accident[,] . . . [t]he accident results in a death or personal injury requiring immediate hospitalization[, or] . . . [t]he accident results in damage to government or private property estimated to be in excess of \$10,000.¹⁷⁰

Similar to reasonable suspicion testing, safety mishap testing requires coordination with medical, legal, and safety personnel.¹⁷¹ A factual memorandum is prepared and presented to the higher supervisor for initiation.¹⁷² The employee also receives notice detailing that the testing is occurring pursuant to a safety mishap.¹⁷³

Both reasonable suspicion and safety mishap testing are critical to ensuring a drug-free workplace and protecting mission effectiveness. One possible modification would be to remove reasonable suspicion testing for off-duty drug use. However, due to the breadth of the CSA and the ability of the Air Force to test for any Schedule I or II substance, the value

167. *Id.*

168. *Id.* at para. 3.1.5.2–3.1.5.3.

169. AFMAN 44-198, *supra* note 14, at para 3.1.6.1; *see also Air Force Instruction 91-204*, U.S. AIR FORCE, (Mar. 10, 2021), https://static.e-publishing.af.mil/production/1/af_se/publication/dafi91-204/dafi91-204.pdf [<https://perma.cc/NRN7-5W7H>] (“For all classes and categories of mishaps, commanders have the discretion to test crewmembers or any additional involved military members under their command whose actions or inactions, in their judgment, may have been factors in the mishap.”).

170. AFMAN 44-198, *supra* note 14, at para 3.1.6.2; *see generally* U.S. DEP’T OF DEF. INSTRUCTION 1010.09, DoD CIVILIAN EMPLOYEE DRUG-FREE WORKPLACE TESTING PROGRAM (2012) (prescribing procedures for establishing and maintaining a drug-free workplace).

171. AFMAN 44-198, *supra* note 14, para. 3.1.6.3.

172. *Id.*

173. *Id.*

to supervisors and commanders is too high to alter these procedures.¹⁷⁴ While the effects of marijuana dissipate quickly, other Schedules I and II substances continue to affect the user for far longer. However, marijuana metabolizes more slowly and is detectable for far longer.¹⁷⁵

Moreover, neither reasonable suspicion nor safety mishap testing begins due to a randomized software algorithm. Both systems require significant coordination before receiving a specimen. Testing based on off-duty conduct under reasonable suspicion differs from random testing that includes marijuana. By allowing supervisors to test for any Schedule I or II substance, supervisors could ensure that their employees are drug-free while working. Additionally, by providing a mechanism to test employees after a safety incident, the Air Force protects people and property from the damage or harm that could result from an intoxicated worker. Finally, there are enough procedural safeguards to ensure that reasonable suspicion and safety mishap testing truly achieve the goal of a drug-free workplace. Accordingly, these testing programs should remain in place to further protect the people and mission of the Air Force.

B. *Increase ADAPT Focus on Civilian Marijuana Use*

The Air Force already has a treatment program for alcohol and drug abuse. This program is known as the Air Force Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT)¹⁷⁶ and is governed by Air Force Instruction 44-121.¹⁷⁷ In the Air Force, regulations are organized by series, with the first set of numbers indicating who owns responsibility for a given regulation (e.g., 36-personnel). Interestingly, under its “44” designation, the medical community is responsible for the ADAPT program.¹⁷⁸ Its designation seems to demonstrate the Air Force’s commitment to the medical treatment of alcohol and drug abuse rather than the disciplinary trajectory of the regulations previously mentioned in this Article.

As with most programs (like the drug testing program described above), the Installation Commander is responsible for the ADAPT program.¹⁷⁹ The Installation Commander is responsible for ensuring that ADAPT receives the funding needed to “support counseling, treatment,

174. *Id.* at para. 3.1.2.

175. *Id.*

176. *Id.* at para. 2.6.

177. *Air Force Instruction 44-121*, U.S. AIR FORCE (July 18, 2018); https://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-121/afi44-121.pdf [<https://perma.cc/6PDA-KRD3>] [hereinafter AFI 44-121].

178. *Id.*

179. *Id.* at para. 1.7.1.

prevention and outreach efforts.”¹⁸⁰ However, the daily operations are vested in a local ADAPT Program Manager.¹⁸¹

The ADAPT Program Manager must be a privileged mental health provider.¹⁸² The ADAPT Program Manager will have attended or must attend, within six months of assignment, specific training on ADAPT.¹⁸³ The ADAPT Program Manager is responsible for assisting leadership “with identifying and referring individuals needing” ADAPT services and leading treatment team meetings.¹⁸⁴ In many cases, these individuals supervise a staff of certified and non-certified alcohol and drug abuse counselors.¹⁸⁵

First, to use the ADAPT Program, a person has to be eligible for their services.¹⁸⁶ ADAPT’s eligibility is narrow to the outside world but relatively broad within the military community. Any military healthcare beneficiary can use ADAPT, as well as civilian employees, per AFMAN 44-198.¹⁸⁷ The primary purposes and objectives of the ADAPT Program are:

[to] promote readiness, health, and wellness through the prevention and treatment of substance misuse and abuse; to minimize the negative consequences of substance misuse and abuse, to the individual, family, and organization; to provide comprehensive education and treatment to individuals who experience problems attributed to substance misuse or abuse; and to restore function and return members to unrestricted duty status, or to assist them in their transition to civilian life, as appropriate.¹⁸⁸

ADAPT records are treated as mental health treatment records and will “reflect findings during the initial assessment, intake and patient orientation, diagnosis, treatment plan, course of treatment, referrals, case management activities, progress reviews, and status upon termination.”¹⁸⁹ As they are medical records, they are subject to the

180. *Id.* at para. 1.7.4.

181. *Id.* at para. 1.9.1.

182. *Id.* at para. 1.9.5 (noting that although this requirement can be manipulated if the program manager is not licensed, functions requiring a license must be verified and co-signed by a licensed mental health provider).

183. AFMAN 44-198, *supra* note 14, at para. 1.9.6.

184. *Id.* at para. 1.9.7–1.9.8.

185. *Id.* at para. 1.9.11.

186. AFI 44-121, *supra* note 177.

187. *Id.* at para. 3.6. The most current edition of this regulation references an outdated version of the civilian drug testing program.

188. *Id.* at para. 3.4.1.

189. *Id.* at para. 2.1.1.

Health Insurance Portability and Accountability Act (HIPAA).¹⁹⁰ Generally, if patients are undergoing treatment, military commanders typically have a HIPAA exemption that allows a covered healthcare provider to disclose information to make a fitness for duty determination using the minimal amount of information necessary.¹⁹¹ However, HIPAA includes modifications for this exemption for mental health and substance abuse treatment at a DoD healthcare facility. Specifically, “DoD healthcare providers shall **not** notify a Service member’s commander when the member obtains mental health care and/or substance misuse education services—**unless** one of the below conditions or circumstances apply. If they apply, then disclosure is required.”¹⁹² Those conditions are harm to self, harm to others, harm to mission, special personnel, inpatient care, acute medical conditions interfering with duty, substance misuse treatment program, command-directed mental health evaluation, or other special circumstances.¹⁹³ While civilian employees can self-refer to ADAPT services, the restriction on sharing information with the employee’s commander does not apply to civilian employees.¹⁹⁴ If a civilian employee self-refers to ADAPT, it is a guarantee that the commander will find out about this action. Effective immediately, civilian employees should receive the same protection from disclosure of protected health information to their supervisors as is currently enjoyed by military members.

ADAPT has treatment protocols for alcohol and illicit drug use, but the language of the provisions is very different. For example, the alcohol paragraph of ADAPT states that:

The Air Force policy recognizes that alcohol misuse negatively affects individual behavior, duty performance, and/or physical and mental health. The Air Force provides comprehensive clinical assistance to Active Duty Service Members, and will support referral coordination for other

190. *Air Force Instruction 41-200*, U.S. AIR FORCE (July 25, 2017), https://static.e-publishing.af.mil/production/1/af_sg/publication/afi41-200/afi41-200.pdf [<https://perma.cc/D5YH-K82J>].

191. DHA Privacy and Civil Liberties Office, *The Military Command Exception and Disclosing PHI of Armed Forces Personnel*, HEALTH.MIL 1 (2022), <https://www.health.mil/Reference-Center> [<https://perma.cc/2UA5-923Q>] (search “Military Command Exception”; then click on “Military Command Exception and Disclosing PHI of Armed Forces Personnel”); see generally 45 CFR § 164.512(k)(1) (2023) (listing the exceptions where an entity may disclose protected health information).

192. DHA Privacy and Civil Liberties Office, *supra* note 191, at 2.

193. *Id.*

194. Memorandum from the Defense Health Agency to the Dep’t of Defense (Mar. 19, 2020).

eligible beneficiaries, seeking help for an alcohol problem.¹⁹⁵

This language is incredibly supportive, seemingly without disdain or disapproval of the individual experiencing the addiction. Compare that provision with the one for illicit drug use:

The Air Force does not tolerate the illegal or improper use of drugs by Air Force personnel. Such use is a serious breach of discipline; is incompatible with service in the Air Force; automatically places the member's continued service in jeopardy; can lead to criminal prosecution resulting in a punitive discharge or administrative actions, including separation or discharge under other than honorable conditions.¹⁹⁶

These two paragraphs, included in the regulation right next to one another, could not be more different in approach.

The assertion “addiction is addiction” is backed up by numerous studies that show what happens to the brain when an addict performs their chosen activity.¹⁹⁷ According to experts, addiction “is a complex condition, a brain disease that is manifest[ed] by compulsive substance use despite harmful consequence.”¹⁹⁸ Usually, people “with a substance use disorder have distorted thinking, behavior and body functions.”¹⁹⁹ These effects are primarily due to a change in how the brain functions.²⁰⁰ The shift in brain function causes the addict to “have intense cravings for the drug and make[s] it hard to stop using the drug.”²⁰¹ Imaging “show[s] changes in the areas of the brain that relate to judgment, decision making, learning, memory, and behavior control.”²⁰² Sadly, people with addictive disorders “may be aware of their problem, but be unable to stop it even if

195. AFI 44-121, *supra* note 177, at para. 3.1.1.

196. *Id.* at para. 3.2.1.

197. While sex addiction, gambling, and other addictive behaviors are performed differently, they share commonality with addiction when it comes to the brain. In order to limit the scope of this discussion, I will only address substance addiction. Psychology Today Staff, *What is Addiction?*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/addiction> [https://perma.cc/Y7BH-RYXJ] (last visited Apr. 2, 2023).

198. *Glossary*, CNTY. OF L.A. PUB. HEALTH, <http://publichealth.lacounty.gov/sapc/manage/painsafely/docs/Glossary%20FINAL.pdf?pdf> [https://perma.cc/85ZQ-EB47] (last visited Apr. 2, 2023).

199. *What is a Substance Use Disorder?*, AM. PSYCHIATRY ASS'N, <https://www.psychiatry.org/patients-families/addiction/what-is-addiction> [https://perma.cc/9F T7-ZY9M] (last visited Apr. 3, 2023).

200. *Id.*

201. *Id.*

202. *Id.*

they want and try to. The addiction may cause health problems as well as problems at work and with family members and friends.”²⁰³

Figure 4 - A clipping from the American Psychiatric Association website.²⁰⁴

People can develop an addiction to:

- Alcohol
- Marijuana
- PCP, LSD and other hallucinogens
- Inhalants, such as, paint thinners and glue
- Opioid pain killers, such as codeine and oxycodone, heroin
- Sedatives, hypnotics and anxiolytics (medicines for anxiety such as tranquilizers)
- Cocaine, methamphetamine and other stimulants
- Tobacco

Alcohol and marijuana are next to each other on the American Psychiatric Association website, but in the Air Force’s assessment, these two substances are entirely different.

While safe haven provisions are in place, they are weak. According to the Air Force, it will not initiate disciplinary action for illicit drug use for any employee who meets each of the following conditions:

Voluntarily identifies himself/herself as a user of illicit drugs prior to being notified of the required to provide a specimen for testing or being identified through other means (in other words, drug testing, investigation)

Obtains and cooperates with appropriate counseling or rehabilitation

Agrees to and signs a last chance or state of agreement

Thereafter refrains from illicit drug use.²⁰⁵

Even if a member meets every condition, this does not stop the Air Force from initiating disciplinary action against the individual employee for

203. *Id.*

204. *Id.*

205. AFMAN 44-198, *supra* note 14, at para. 5.3.

other misconduct.²⁰⁶ Drug possession or paraphernalia can subject an individual to disciplinary action in the regulation. A logical hypothetical would include an individual self-referring to ADAPT but having a pipe in their car parked at the treatment facility. While the individual is receiving treatment or trying to change their behavior, a law enforcement officer receives notice of a pipe in the car, and the employee undergoes discipline. The outcome seems illogical.

If the goals of ADAPT are as described above, why would the Air Force pursue discipline for that individual? The answer appears rooted in the foundation of the drug-free workplace regulations of the Reagan era. Rather than viewing marijuana use like alcohol, the federal government chose to ascribe moral failure to this particular substance, despite overwhelming evidence from the scientific community. The Air Force regulation should undergo revision immediately and should not differentiate between alcohol and marijuana. Since this regulation and program exist within the medical sphere, they should endure as medical conditions and not criminal misbehavior.

The Air Force's safe haven provision needs editing. Placing a "last chance" restriction on a recovering addict more than likely chills the likelihood of a habitual user struggling to quit from self-referring to ADAPT. Without revision, why would an employee not sit and wait for a random urinalysis and take their chances with a random test? By waiting for a positive random urinalysis sample, only random choice would expose their use. If they self-refer to ADAPT, they will make their use known. The Air Force and the DoD should focus on keeping drugs and alcohol out of the workplace. Moreover, employees who are trying to make a significant course correction in their life should not receive unclear employment. The dichotomy only exacerbates the problems that the employee is already facing. Instead, the Air Force should look towards long-term care and outcomes for the individual employee. The Air Force will likely see its safe haven provision used more effectively as a result.

C. The Removal of Marijuana from Random Drug Testing

Removing marijuana from the CSA via legislation may be the best solution, but it will not come quickly. Even with widespread and bipartisan support, a bill takes time to get through Congress. If the CSA did not include marijuana, the Air Force would no longer be required to test for its "illegal" or "illicit" use. As long as marijuana has been subject to the CSA, organizations have asked the federal government to either

206. *Id.*

move it from Schedule I or remove it altogether, with no success.²⁰⁷ After the acting DEA Administrator penned his response to the Governors of Washington and Rhode Island in 2016,²⁰⁸ it does not seem likely that the DEA would support such an action. However, the fact that an acting DEA Administrator does not support rescheduling marijuana does not mean that others who outrank him in the Executive branch would, or should, come to the same conclusion.

The Air Force should be asking for policy changes from the various Executive branch stakeholders. The first policy change should be a modification of Executive Order 12564. Second, the Air Force should ask that the Attorney General determine that marijuana does not belong within Schedule I, or Congress should remove it entirely. Lastly, the Air Force should ask that Congress remove marijuana from the mandatory testing requirements of the Department of Health and Human Services (HHS) regulations. These policies were well-intentioned at their inception, but current scientific data and evolved popular opinion now demand action to revise these outdated policies.

President Reagan issued Executive Order 12564 to prohibit the “use of illegal drugs, on or off duty.”²⁰⁹ In some states, marijuana is “legal,” whether recreational or medicinal. As such, the Air Force should advocate for a reading of that Executive Order that would not include testing for marijuana in a random urinalysis. The testing process is overly complicated, but the interplay between state and federal law is even more complex. The testing program is supposed to be able to produce a right or wrong response. Yet every installation across the Air Force (and every entity with federal employees) is asked to address a grey issue. How much time and resources are siphoned from mission accomplishment to handle an otherwise legal behavior? Marijuana in 2023 is significantly more nuanced than it was in the late 1980s. A new Executive Order with a simple paragraph removing marijuana from the federal drug-free workplace requirements would remedy this issue without threatening the mission.

President Trump signed the First Step Act on December 21, 2018, in one of the signature pieces of legislation passed during his administration.²¹⁰ While this act revised many Bureau of Prisons’ (BOP)

207. John Hudak & Grace Wallack, *How to Reschedule Marijuana, and Why it’s Unlikely Anytime Soon*, BROOKINGS (Feb. 13, 2015), <https://www.brookings.edu/articles/how-to-reschedule-marijuana-and-why-its-unlikely-anytime-soon/> [<https://perma.cc/9M3Y-BDNR>].

208. Letter from Chuck Rosenberg, Acting Adm’r, U.S. Drug Enf’t Admin., to Gina Raimondo, Governor, R.I., and Jay Inslee, Governor, Wash. (Aug. 11, 2016).

209. Exec. Order No. 12,564, 3 C.F.R. § 224 (1986).

210. *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/overview.jsp> [<https://perma.cc/N42S-U6VS>] (last visited Mar. 30, 2023).

policies, it also modified mandatory minimum drug sentences.²¹¹ As a result of this legislation, 16,000 inmates are enrolled in a drug treatment program, and 721 defendants received sentence reductions.²¹² Out of the 721 people that have received modified sentences, the program has released 573 people.²¹³ It is fair to say that President Trump has an eye focused on drug offenses. Given the current state of public opinion and that 2024 is an election year, Executive Order 12564 is particularly ripe for modification.

Next, the Attorney General carries the responsibility under the CSA to determine the appropriate scheduling of substances.²¹⁴ Marijuana lacks two essential qualifying elements of a Schedule I substance under the CSA requirements. First, Schedule I should no longer define marijuana as not having an accepted medical use. To find otherwise would be insulting to the medical community and patients who are currently prescribe and use marijuana in the jurisdictions where medicinal use is approved. In reality, states that approved medicinal marijuana prescribed 1,826 fewer doses of pain medications over three years than states where medicinal marijuana remained illegal.²¹⁵ In May 2018, there were approximately 2.1 million “legal” medical marijuana users.²¹⁶ That amount of use merits some decisive action from the federal government.

Second, marijuana does not belong in Schedule I because there is an accepted safe use of the drug under medical supervision. Millions consume marijuana for medicinal purposes safely. Logically, medical professionals prescribing medicinal marijuana would risk significant tort litigation if the medical field viewed the prescribed medicines as unsafe. Medical professionals are unlikely to act against their interests and risk their careers. Therefore, the argument that marijuana is dangerous for medical supervision fails to pass muster.

Even if Congress does not remove marijuana entirely from the CSA, it should be moved from Schedule I to a lesser regulated Schedule, ideally Schedule III or below. If marijuana remains a Schedule I drug, America’s leadership must ignore the tsunami of popular opinion lauding its usefulness.

211. *Id.*

212. *President Donald J. Trump Is Committed to Building on the Successes of the First Step Act*, THE WHITE HOUSE (Apr. 1, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/> [<https://perma.cc/34JE-3ZD5>].

213. *Id.*

214. 21 U.S.C. § 811.

215. Dwight K. Blake, *Medical Marijuana in the United States – Statistics & Facts*, AM. MARIJUANA (July 29, 2021), <https://americanmarijuana.org/medical-marijuana-statistics/> [<https://perma.cc/3HN8-NKD6>].

216. *Id.*

Assuming that marijuana stays a Schedule I substance, there are still actions the Air Force could pursue in its own best interest. Unfortunately, a significant burden to change testing would occur in changing the requirements of the federal drug-free workplace program. As noted in DoDI 1010.09, the *DoD Civilian Employee Drug-Free Workplace Program*, the program's purpose is to establish and maintain a drug-free workplace program in compliance with the HHS mandatory guidelines.²¹⁷ The DoD published a revised guideline on January 23, 2017, effective October 1, 2017.²¹⁸ HHS clarifies which substances are testable in a urine specimen. According to the guidelines, a federal agency (like the Air Force) “*must ensure that each specimen is tested for marijuana and cocaine metabolites*” yet “*is authorized to test each specimen for opioids, amphetamines, and phencyclidine . . .*”²¹⁹ How HHS concluded that marijuana *had* to be tested for, while significantly more serious drugs were optional to the agency, is confusing at best. This conclusion allows the agencies little discretion in attempting to enact policies on their own.

The Air Force could pursue one last change by working with other administrative agencies. This change would be similar to one change enacted by the NFL. That change would raise the laboratory cutoff to a number that would indicate habitual use rather than a one-time or infrequent ingestion. As of October 1, 2017, the initial test cutoff was 50 ng/ML, with a confirmation of 15 ng/ML.²²⁰ Recall that the NFL raised its cutoff value three times higher than the Air Force's. Working with HHS, the Air Force could still implement (however misguided) testing for marijuana. The result of having a higher cutoff would be that you would more than likely catch more frequent users of marijuana, and the resulting discipline would merit administrative effort.

Even in the status quo, the likelihood of significant discipline disbursed for infrequent and low-volume marijuana use is low. Several factors account for this assessment, including the discretion available to supervisors, human resource professionals, and the attorneys defending the agency's action. Similar to prosecutorial discretion for criminal offenses, the agency could choose not to pursue the removal of a first-time marijuana user, instead focusing on the more problematic habitual users.

As noted earlier, the recommended disciplinary action in response to drug use ranges from a reprimand to removal. Under the governing

217. U.S. DEP'T OF DEF., DoDI 1010.09, DoD CIVILIAN EMPLOYEE DRUG-FREE WORKPLACE PROGRAM, (2012). Change 1 becomes effective June 28, 2018. *Id.*

218. Mandatory Guidelines for Federal Workplace Drug Testing Programs, 82 Fed. Reg. 7920 (Jan. 23, 2017).

219. *Id.* at Subpart C—Urine Drug and Specimen Validity Tests § 3.1 (emphasis added).

220. *Id.* at § 3.4.

regulation for adverse actions for civilian employees, the removal of a federal employee “is the most severe disciplinary action.”²²¹ As such, removal actions require a significant amount of administrative procedures, including a notice of proposed action that provides:

A written notice stating the specific reason(s) for the proposed action and inform the employee of his or her right to review the material relied upon to support the reason(s) for the action given in the notice.

The right to representation by an attorney or other representative at the employee’s expense.

A reasonable amount of official time to review the material relied upon to support the proposed action, to prepare a response, and to secure affidavits.²²²

Generally, the employee is given thirty days of advance notice during a removal action.²²³ After the Deciding Official has made their decision, “a written notice specifying the reason(s) for the decision and advising the employee of his or her appeal rights is provided at the earliest practicable date.”²²⁴ Further, if the Deciding Official does decide to remove the employee, the employee can appeal to the Merit Systems Protection Board (MSPB).²²⁵ The average MSPB case resolves within 180 days of filing.²²⁶ Even if the Air Force seeks to remove an individual, an administrative law judge at the MSPB could disagree and reinstate the employee.²²⁷ After reinstatement, that employee would be surrounded by people who sought their termination. Thus, the employee’s likelihood of seeking treatment after such an episode would be low.

Suppose the ultimate goal is a drug-free workplace, and the agency wants to remove the drug user from federal employment. In that case, there are too many variables to account for in having marijuana remain a “must” test substance. Thus, Air Force should aim to pursue these different avenues to remove marijuana from its random urinalysis testing.

221. AFI 36-148, *supra* note 129, at para. 9.4.

222. *Id.* at para. 9.5.1.

223. *Id.* at para 9.5.2.

224. *Id.* at para 9.5.4.

225. *Id.* at para. 5.9.2.

226. *Federal Employees – Discipline / Removal*, WORKPLACE FAIRNESS IT’S EVERYONE’S JOB, <https://www.workplacefairness.org/federal-employee-adverse-action> [<https://perma.cc/AYY6-26YX>] (click on question 4. “How long will it take to process my case?”).

227. *Id.* (click on question 12. “What remedies are available to me?”).

CONCLUSION

According to a study completed in 2018, 43.5 million Americans above the age of 12 used marijuana within the past 12 months.²²⁸ That is a remarkable number, considering marijuana's status as an illegal controlled substance under the CSA. Similar "illegal" drugs recorded much lower consumption.²²⁹ Alcohol, however, had nearly three times as many users and three times as many users with a use disorder.²³⁰ The United States is moving towards societal acceptance of marijuana. Perhaps our country is not ready for the recreational version (sorry, Washington and Colorado). Still, overwhelming opinion polling and data demonstrate that the federal government needs to depart from its past policies concerning medical marijuana.

Merriam-Webster Dictionary defines the word "ignore" as "[to] refuse to take notice of" or "to reject (a bill of indictment) as ungrounded."²³¹ This definition is the gentlest assessment of the federal government's inability to regulate this sphere. Despite not being accurate, the popularized myth of an ostrich burying its head in the sand is more accurate.²³² In this myth, an ostrich recognizes the danger, and instead of the typical "fight or flight," the ostrich buries its head in the sand to avoid further detection of that danger, hoping that it will simply go away.²³³ The federal government has chosen to pretend the battle for legalized marijuana is not an issue, despite popular opinion and state action, causing significant problems across the country.

Despite the efforts of some members of Congress, the federal government has not acted in any meaningful way. While the Fairness in Federal Drug Testing Under State Laws Act²³⁴ (which solves the core issues identified in this Article) languishes in the House Committee, the Air Force should align itself with popular sentiment. The Air Force has a solemn responsibility to move as proactively as possible toward

228. Rachel N. Lipari & Eunice Park Lee, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2018 National Survey on Drug Use and Health*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (2019), <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.htm> [https://perma.cc/3NM8-G9FM].

229. *Id.* (finding that 1.9 million people used methamphetamine, 5.5 million people used cocaine, 808,000 people used heroin, 10.3 million people used opioids, 58.8 million people used tobacco with 47 million of the users via cigarette smoke, and 139.8 million people use alcohol).

230. *Id.*

231. *Ignore*, MERRIAM-WEBSTER, (11th ed. 2023).

232. Bambi Turner, *Do Ostriches Really Bury Their Heads in the Sand?*, HOWSTUFFWORKS (Apr. 5, 2021), <https://animals.howstuffworks.com/birds/do-ostriches-really-bury-heads-in-sand.htm> [https://perma.cc/GW9E-UAYS].

233. *Id.*

234. Fairness in Federal Drug Testing Under State Laws Act, H.R. 1687, 116th Cong. (2019) (as referred to the House Committee on Oversight and Reform on Mar. 12, 2019).

responsible policies that afford the maximum protection of its mission. These policies would include: (1) leaving reasonable suspicion and safety mishap testing in place; (2) devoting more attention from ADAPT to marijuana treatment; and (3) working with other Executive branch stakeholders to remove marijuana from random urinalysis testing. By accomplishing these objectives, the Air Force will prepare itself for what is sure to come, which is the federal legalization of marijuana.