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STUDENT-ATHLETE OR MORE? WHY CADET-ATHLETES AT THE UNITED STATES SERVICE ACADEMIES SHOULD ALSO BENEFIT FROM NIL

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I. INTRODUCTION

While many who are familiar with collegiate athletics have likely heard that student-athletes can market their name, image, and likeness (NIL),¹ they may not necessarily understand the full extent of what NIL is and means for those student-athletes. Along with this, it seems even more unlikely that individuals are aware of the limitations of benefitting from NIL, depending on where a student-athlete goes to school. Student-athletes at most National Collegiate Athletic Association (NCAA) colleges and universities can benefit from NIL agreements without many restrictions, subject to the state's NIL law and the individual school's NIL policy.² However, for student-athletes enrolled at a United States service academy, where they compete in NCAA sanctioned sports,³ NIL opportunities are not available, as they are federal employees.⁴ Put simply, the cadet-athletes at the academies cannot benefit from their NIL due to

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1. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

2. *Id.*

3. *See Schools*, NCAA, <https://www.ncaa.com/schools-index> (last visited May 2, 2023).

4. Chris Vannini, *Who is College Football's Next Group of 5 Power? Plus, Realignment and More: G5 Mailbag*, ATHLETIC (Apr. 11, 2022), <https://theathletic.com/3242772/2022/04/11/college-football-group-of-5-realignment-predictions/>.

the federal law preventing endorsements and private gain of federal employees.⁵ While the prevention of private gain via a law on endorsements is important,⁶ it seems unreasonable to restrict cadet-athletes from benefitting from the exact same laws that a student-athlete at any other university can take advantage of.

This comment will address why cadet-athletes at the United States service academies should be allowed to benefit from their NIL just as student-athletes at other NCAA schools do. This comment will first explain the process of NIL becoming available to student-athletes across the United States, including how some states have passed NIL laws. Second, the comment will detail the nature of attendance at United States service academies and what it requires a cadet-athlete to agree to, which will help explain why cadet-athletes are differentiated from other student-athletes. Third, the comment will analyze the NIL laws of the states where the service academies are located, against the federal law preventing cadet-athletes from benefitting from their NIL. Last, the comment will argue why cadet-athletes should not be prevented from doing so and expound upon why they should be treated just the same as other student-athletes, in this regard.

II. HOW NAME, IMAGE, AND LIKENESS BENEFITS BECAME AVAILABLE TO STUDENT-ATHLETES

The debate around paying student-athletes is far from new; this author can remember classmates writing about the topic for high school English classes and being told that it was a topic that teachers were tired of reading about. However, the ability to pay student-athletes for their name, image, and likeness *is* new, and many states have recently passed laws protecting the ability to do so.⁷ California was the first state to enact an NIL law permitting student-athletes to be paid, which is called the Fair Pay to Play Act.⁸

The Fair Pay to Play Act prohibits universities in California from enforcing any sort of constraint on student-athletes “[e]arning compensation from the use of the student’s name, image, likeness, or athletic reputation”⁹ Further, the

5. See Daniel Oyefusi, *As NCAA Grants NIL Rights to College Athletes, Maryland’s Athletic Departments Prepare to Enter Uncharted Territory*, BALT. SUN (July 1, 2021, 9:48 PM), <https://www.baltimoresun.com/sports/college/bs-sp-ncaa-nil-rights-college-athletes-maryland-20210701-bzvorxtqojh6bj4zd12ktgsqnm-story.html>.

6. Use of Public Office for Private Gain, 5 C.F.R. § 2635.702 (2023).

7. See *NIL Legislation Tracker*, SAUL EWING LLP, <https://www.saul.com/nil-legislation-tracker> (last visited May 2, 2023).

8. Michael McCann, *What’s Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12>.

9. Fair Pay to Play Act, CAL. EDUC. CODE § 67456 (a)(1) (West 2023).

Act goes on to say the same for any “athletic association, conference, or other group or organization with authority over intercollegiate athletics,” and then specifically mentions the NCAA.¹⁰ As a result, this Act allows student-athletes attending universities in California to benefit from their NIL, as no actor in collegiate athletics can prevent it.¹¹ The Act was signed in September of 2019 and originally had an effective date of January 1, 2023.¹² A second bill has since been signed by California’s governor, which advanced the effective date for the Act to September 1, 2021.¹³ This California law was a catalyst for the NCAA to react and adapt to the changing climate of collegiate athletics, as it created an interim policy for its member schools to follow.¹⁴

The policy states that student-athletes “can engage in NIL activities that are consistent with the law of the state where the school is located.”¹⁵ Essentially, the NCAA has deferred all NIL authority and monitoring to the universities.¹⁶ That being said, the NCAA has also declared that it will not result in a rules violation if a student-athlete’s state does not have an NIL law and the student-athlete participates in NIL deals.¹⁷ Overall, this policy is evidence of the NCAA taking a very hands-off approach to NIL, meaning that the NCAA’s opinion is not relevant in an analysis of whether cadet-athletes should be allowed to benefit. However, it seems to be inferred that the NCAA would generally intend for all student-athletes to benefit from NIL, given the caveat of exercising NIL rights regardless of whether a state has a law or not.¹⁸

Both before and after the NCAA guidance, states went ahead with drafting NIL bills and passing them into law.¹⁹ Some of these laws became effective in 2021, with others following shortly thereafter in 2022.²⁰ For the purposes of this comment, the states the service academies are located in will be considered and used as examples throughout. The five United States service academies are

10. *Id.* at § 67456 (a)(2).

11. *Id.* at § 67456 (a)(1)-(3).

12. *Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports*, OFF. OF GOVERNOR GAVIN NEWSOM (Sept. 30, 2019), <https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports/>.

13. Evan Symon, *Gov. Newsom Signs Student Athlete Compensation Law to Move Up Start Date*, CAL. GLOBE (Sept. 1, 2021, 10:59 AM), <https://californiaglobe.com/articles/gov-newsom-signs-student-athlete-compensation-law-to-move-up-start-date/>.

14. Brutlag Hosick, *supra* note 1.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *See NIL Legislation Tracker, supra* note 7.

20. *See id.*

located in four different states: New York, Maryland, Connecticut, and Colorado.²¹ New York has three NIL bills that have been proposed, so it does not yet have an NIL law for student-athletes in the state to rely upon.²²

On the other hand, Maryland's NIL bill will become effective on July 1, 2023.²³ In both Connecticut and Colorado, the law is already effective as of July 1, 2021.²⁴ The actual text of the laws will be analyzed later in this comment, as part of the discussion on whether cadet-athletes should be able to benefit from NIL, solely based upon the laws of each state. A discussion of the service academies will follow this section.

III. THE UNITED STATES SERVICE ACADEMIES

As previously mentioned, the five United States service academies are located in New York, Maryland, Connecticut, and Colorado.²⁵ There are several conditions and selling points for many when it comes to attending one of the academies, including the fact that there is no cost to cadets for both tuition and room and board.²⁶ On the other hand, the academies have a service requirement that cadets commit to, meaning that they are enlisted in their respective military branch post-graduation.²⁷ Additionally, cadets are paid during their time at the academy,²⁸ which is important to the analysis in this comment. While the comment addresses this idea later, the fact that the cadets are paid by the United States Department of Defense (DOD),²⁹ is part of the reason they are unable to receive NIL benefits, due to the federal law prohibiting private gain of government employees.³⁰

21. See *Military Academies*, VETERAN.COM, <https://veteran.com/military-academies/> (Jan. 9, 2021).

22. *NIL Legislation Tracker*, *supra* note 7.

23. *Id.*

24. *Id.*

25. See *Military Academies*, *supra* note 21.

26. Kristen Moon, *What Students Need to Know Before Applying to One of the United States Military Academies*, FORBES (Aug. 20, 2019, 5:00 AM), <https://www.forbes.com/sites/kristenmoon/2019/08/20/what-students-need-to-know-before-applying-to-one-of-the-united-states-military-academies/?sh=47f649e5348c>.

27. Rocky Mengle, *20 Things You Need to Know About Getting Into a Military Service Academy*, KIPLINGER (Nov. 10, 2020), <https://www.kiplinger.com/slideshow/college/t014-s003-things-to-know-to-get-into-a-service-academy/index.html>.

28. *Frequently Asked Questions*, U.S. AIR FORCE ACAD., <https://www.usafa.edu/parents/faq/> (last visited May 2, 2023).

29. See *Basic Pay – Officers Effective January 1, 2023*, DEF. FIN. & ACCT. SERV. (Jan. 6, 2023), <https://www.dfas.mil/militarymembers/payentitlements/Pay-Tables/Basic-Pay/CO/>.

30. Use of Public Office for Private Gain, 5 C.F.R. § 2635.702 (2023).

In order to attend a United States service academy, an individual must go through the application process.³¹ There are two phases to applying to an academy: prequalification and nomination.³² The prequalification phase is described as, “[a]pplicants must be qualified before submitting an application. This includes physical and medical exams, and an interview. If qualified, students should then complete an online preliminary application in their junior year.”³³ This step is arguably easier, as many individuals can pass health exams and do well in an interview. The second phase, however, requires a nomination to one of the academies by a member of Congress.³⁴ This will likely “be accompanied by face-to-face interviews with the congressperson or their staff.”³⁵ While this phase also requires an interview, it can be assumed that a cadet-hopeful may find the task of receiving the nomination via an interview more daunting, considering that the congressperson will be the deciding party on whether to nominate the individual. Even if a cadet receives the nomination, admission is not guaranteed because “[a] congressperson can submit up to ten nominees, but commonly only one or two are admitted.”³⁶ Because of the previously stated components of service academy admission, it is obvious that an individual must be committed to the process in order to be accepted, and possibly, be a cadet or cadet-athlete at any of the academies.

The United States Military Academy (USMA), or more commonly referred to as just West Point or Army, is the service academy for the United States Army and is located in West Point, New York.³⁷ West Point hosts a variety of men’s, women’s and co-ed sports for cadets including, for example: baseball, football, hockey, soccer, tennis, swimming and diving, etc.³⁸ In Colorado, “[l]ocated just north of Colorado Springs,” is the United States Air Force Academy (USAFA).³⁹ At the USAFA, a variety of sports, similar to those offered at West Point, are available for both men and women.⁴⁰ The United States Naval

31. *Considering U.S. Military Academies*, COLLEGEDATA.COM, <https://www.collegedata.com/resources/the-facts-on-fit/considering-u.s2.-military-academies> (last visited May 2, 2023).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *See U.S. Military Academy at West Point*, U.S. ARMY, <https://www.goarmy.com/careers-and-jobs/find-your-path/army-officers/military-academy.html> (last visited May 2, 2023).

38. *See Sports*, ARMY W. POINT, <https://goarmywestpoint.com/index.aspx> (last visited May 2, 2023) (hover over the “Sports” tab on main webpage to view the sports at West Point).

39. *Visitors*, U.S. AIR FORCE ACAD., <https://www.usafa.edu/visitors/> (last visited May 2, 2023).

40. *See Teams*, U.S. AIR FORCE ACAD. ATHLETICS, <https://goairforcefalcons.com/> (last visited May 2, 2023) (hover over the “Teams” tab on main webpage to view the sports at USAFA).

Academy (USNA) is located in Annapolis, Maryland, and is the academy for the Navy, along with the Marine Corps.⁴¹ The USNA has many of the same sports available to both men and women as the other academies, with the addition of sailing for co-ed.⁴² The fourth academy, the United States Coast Guard Academy (USCGA), is located in New London, Connecticut;⁴³ the USCGA offers sports similar to those previously described at the other academies.⁴⁴

Last, the United States Merchant Marine Academy (USMMA), which is located in Kings Point, New York,⁴⁵ is not directly affiliated with any particular branch of the United States Military.⁴⁶ It should also be noted, “[t]he Merchant Marine Academy has a close relationship with the U.S. Armed Forces . . . but is not part of the Department of Defense.”⁴⁷ Because of this, this comment will not focus on the USMMA further, as the issue here is regarding those who are paid by the DOD. Overall, because the five academies offer similar sports across the United States, all of the academies appear to be generally suitable for an individual who wants to attend and possibly be a cadet-athlete, as the opportunities are available and can be pursued.

Cadet-athletes at the service academies can be recruited similarly to student-athletes at other NCAA universities, including requirements to follow NCAA recruiting rules.⁴⁸ That being said, there are a few differences, one of which being “an exemption for making contact with recruits during their junior years. The nomination, application, and screening process for all service academy students, athlete or not, begins in the junior year of high school.”⁴⁹ At West Point, there is an opportunity to fill out a “Coach’s Questionnaire” to begin the

41. See *About USNA*, U.S. NAVAL ACAD., <https://www.usna.edu/About/index.php> (last visited May 2, 2023).

42. See *Athletics*, U.S. NAVAL ACAD., <https://www.usna.edu/Athletics/index.php> (last visited May 2, 2023).

43. *About the USCGA*, U.S. COAST GUARD ACAD., <https://uscga.edu/about/> (last visited May 2, 2023).

44. *Recruit Me*, U.S. COAST GUARD ACAD. SPORTS, <https://uscgasports.com/information/recruiting> (last visited May 2, 2023).

45. *About USMMA*, U.S. MERCH. MARINE ACAD., <https://www.usmma.edu/about> (last visited May 2, 2023).

46. See *We Are the U.S. Merchant Marine Academy*, USMMA ALUMNI ASS’N & FOUND., <https://wearetheusmma.com/> (last visited May 2, 2023).

47. *Military Service Academies*, U.S. DEP’T OF DEF. (Aug. 23, 2021), <https://www.defense.gov/Help-Center/Article/Article/2742283/military-service-academies/>.

48. Mike James, *Understanding Service Academy Recruiting*, THEMIDREPORT (July 29, 2017), <https://navy.rivals.com/news/understanding-service-academy-recruiting>.

49. *Id.*

recruitment process, if someone has not been contacted by a coach already.⁵⁰ Similarly, the USCGA has a website that allows for students interested in recruitment to fill out a questionnaire for their sport at the academy.⁵¹ The USNA's website also describes its processes for recruitment, which provides that information regarding a desire to be recruited taken from the preliminary application will be used to begin the process.⁵² The USNA website goes on to explain that individuals can also contact coaches at the academy to explain their interest.⁵³ It is obvious that a good deal of emphasis is put on the students reaching out to coaches and making connections if they hope to play on an academy athletic team.

The service academies are obviously a unique experience for those who are interested in attending and having a military career post-graduation. It is also obvious that many of the recruitment practices are similar, with some differences that are unique to the service academies.⁵⁴ If these cadet-athletes can be recruited just the same as any other student-athlete, how can it be fair for them not to receive the same treatment under NIL laws? The issue lies with the federal laws and how cadet-athletes are prevented from entering NIL contracts that any other student-athlete could.

IV. LEGAL HISTORY OF THE RIGHT OF PUBLICITY

While the legal history of the right of publicity (ROP) is not necessarily pertinent to this comment, as it focuses more on the federal law versus the state NIL laws, it is still beneficial to understand what student-athletes have done to curb the use of their NIL by others. Along with this, the parameters of the following case can be viewed as a further example of the possibilities of NIL for student-athletes. It is important to understand that the case law focuses on ROP, rather than NIL, but ROP is included in this comment to broadly analogize it to NIL.

In *In re Student-Athlete Name & Likeness Licensing Litigation v. Electronic Arts, Inc.*, student-athlete Samuel Keller sued Electronic Arts (EA) for the use of a character that was essentially identical to him, without the actual use of his

50. See *Recruited Athletes*, U.S. MIL. ACAD. W. POINT, <https://www.westpoint.edu/admissions/contact-admissions-team/recruited-athletes> (last visited May 2, 2023).

51. See *Recruit Me*, *supra* note 44.

52. *Information on Applying to the United States Naval Academy*, NAVAL ACAD. ATHLETICS, <https://navysports.com/sports/2021/8/12/admissions.aspx> (last visited May 2, 2023).

53. *Id.*

54. James, *supra* note 48.

name.⁵⁵ Keller filed a lawsuit, alleging a right of publicity violation.⁵⁶ To defend itself against the second part of a two-part test, “EA raise[d] four affirmative defenses derived from the First Amendment: the ‘transformative use’ test, the *Rogers* test, the ‘public interest’ test, and the ‘public affairs’ exemption.”⁵⁷ The court focused mainly on the transformative use test that EA alleged protection under, concluding that it was not a sufficient defense.⁵⁸ The court stated that EA was not protected by the First Amendment “because it literally recreate[d] Keller in the very setting in which he has achieved renown.”⁵⁹ Basically, EA did not change the player who resembled Keller enough for it not to be obvious that the character was in fact Keller.⁶⁰

Keller was successful in his claim against EA because his right of publicity was violated.⁶¹ This case can be analogized to NIL, as a student-athlete in a state where an NIL law exists would likely argue that the company could have come to him or her to create some sort of deal, rather than using their NIL without permission. If a student-athlete is legally able to make money off the use of their NIL, it seems reasonable to hope that they will be involved in the process of doing so. This comment is now brought back to the issue of federal law versus state NIL law, and how cadet-athletes should be viewed as far as ability to also benefit from NIL deals and opportunities.

V. THE INTERSECTION OF ENDORSEMENT LAWS AND NIL

In examining how NIL opportunities and endorsement laws interact for cadet-athletes, it is important to understand what exactly the federal laws prohibit. In essence, the law states that an employee “may not use [his or her] public office for [his or her] own private gain or for the private gain of friends, relatives, business associates, or any other entity, no matter how worthy.”⁶² This comment will argue that because the private gain is money for their name, image, and likeness, it does not use the individual cadet-athlete’s status as a

55. *In re NCAA Student-Athlete Name & Likeness Licensing Litig. v. Elec. Arts*, 724 F.3d 1268, 1271 (9th Cir. 2013).

56. *Id.* at 1272.

57. *Id.* at 1273.

58. *Id.* at 1284.

59. *Id.* at 1271.

60. *Id.*

61. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig. v. Elec. Arts*, 724 F.3d 1268, 1284 (9th Cir. 2013).

62. *Use of Your Public Office*, U.S. DEP’T OF INTERIOR, <https://www.doi.gov/ethics/use-of-your-public-office> (last visited May 2, 2023).

government employee at all. Instead, it will be argued that NIL deals are related exclusively to the individual in question and their position as an athlete alone.

To explain how NIL deals are related to the cadet-athletes, or student-athletes, on a personal level rather than to employment status, the NIL laws of Connecticut, Colorado, and Maryland will be analyzed against the federal statute. Further, the issue here is clearly a state law versus federal law issue. It is indisputable that federal law is supreme and always supersedes state law.⁶³ However, the matter at hand should be one considered in a different light, as cadet-athletes, while paid government employees,⁶⁴ should be granted the same rights and abilities under state law as any other student-athlete.

Before pursuing an analysis of each state law, it is important to establish that the service academies are in fact institutions of higher education under federal law. Federal law will be considered broadly first, and the corresponding state laws in each section, if applicable. Under the U.S. Code, an institution of higher education: first, admits those who have graduated from high school, second, has legal authority to educate, third, has a course of study that will guide students towards earning an associate's or bachelor's degree, fourth, "is a public or other nonprofit institution," last, has accreditation.⁶⁵ For the purposes of this comment, the most important provisions to consider are three, four, and five.

First and foremost, while cadets commit to service after graduation, they are also at the academy to receive an education.⁶⁶ In fact, "[a]ll five of the major service academies in the U.S. offer highly selective and prestigious bachelor's programs."⁶⁷ Clearly, the service academies being a degree-granting institution is not an issue here. The five service academies are also all public institutions, so that provision is met as well.⁶⁸ West Point, the USMMA, and the USNA are all accredited by the Middle States Commission on Higher Education.⁶⁹ The

63. U.S. CONST. art. VI, cl. 2.

64. See *Basic Pay – Officers Effective January 1, 2023*, *supra* note 29.

65. General Definition of Institution of Higher Education, 20 U.S.C.A. § 1001(a) (West, Westlaw through Pub. L. No. 117-262).

66. Ilana Kowarski, *A Guide to U.S. Service Academies, Military Colleges*, U.S. NEWS (July 22, 2022, 12:11 PM), <https://www.usnews.com/education/best-colleges/articles/a-guide-to-u-s-service-academies-military-colleges>.

67. *Id.*

68. *A Proposal For America's First National Civilian University*, U.S. PUB. SERV. ACAD. 5, <https://www.uspublicserviceacademy.org/USPSAproposal.pdf> (last visited May 2, 2023).

69. *Institution Directory*, MIDDLE STATES COMM'N ON HIGHER EDUC., <https://www.msche.org/institution/> (last visited May 2, 2023) (navigate to the first letter of each applicable academy to view its accreditation status).

USAFA is accredited by the Higher Learning Commission.⁷⁰ Last, the USCGA receives its accreditation from the Association to Advanced Collegiate Schools of Business.⁷¹ Accreditation is another non-issue here. Based on the above considerations, it seems indisputable that the service academies are in fact institutions of higher education under federal law.

A. Connecticut

First, Connecticut has an NIL law that went into effect on July 1, 2021.⁷² The law permits student-athletes to benefit from the use of their name, image, and likeness in various endorsement deals.⁷³ The law states:

[n]o institution of higher education, on the basis of a student athlete's endorsement contract, employment activity or representation by an attorney or sports agent pursuant to subsection (b) of this section, shall (A) prohibit or prevent such student athlete from earning compensation from such endorsement contract or employment activity, (B) prohibit or prevent such student athlete from representation by a duly licensed attorney or sports agent, or (C) restrict or revoke such student athlete's eligibility for a scholarship or to participate in the intercollegiate athletic program at such institution.⁷⁴

Connecticut's law reads more prohibitory on the universities than on student-athletes, as it provides that universities may not prohibit student-athletes from doing certain things relating to their NIL activities.⁷⁵ Further, as the law states, "no institution of higher education" will be permitted to restrict a student-athlete from pursuing their NIL related engagements.⁷⁶

70. Tech. Sgt. Charles Rivezzo, *Air Force Academy Awarded Accreditation Until 2028-2029*, U.S. AIR FORCE ACAD. (Aug. 8, 2019), <https://www.usafa.af.mil/News/Article/1929589/air-force-academy-awarded-accreditation-until-2028-2029/>.

71. *US Coast Guard Academy AACSB Report 2019*, U.S. COAST GUARD ACAD., <https://uscga.edu/academics/majors/management/aacsb-accreditation/> (last visited May 2, 2023).

72. *NIL Legislation Tracker*, *supra* note 7.

73. CONN. GEN. STAT. ANN. § 10a-56(b) (West 2023).

74. *Id.* at § 10a-56(f)(1).

75. *Id.*

76. *Id.*

In Connecticut, an institution of higher education falls into one of two categories.⁷⁷ The first category includes universities that are part of Connecticut's state system, which the USCGA is not included in.⁷⁸ The second category includes nonprofit universities that are not part of the system.⁷⁹ These universities include those: "(A) that ha[ve] degree-granting authority in this state; (B) that ha[ve] its main campus located in this state; (C) that [are] not included in the Connecticut system of public higher education; and (D) whose primary function is not the preparation of students for religious vocation."⁸⁰ As previously established via the federal analysis, the USCGA has the authority to grant bachelor's degrees.⁸¹ The last three points are also not an issue, as the USCGA is located in Connecticut,⁸² and is not included in the state system.⁸³ Part D of the statute is not relevant here. Based on this analysis, the USCGA is an institution of higher education in Connecticut, and by that determination, should be included in the state NIL law when it describes an institution of higher education.⁸⁴

Because the USCGA would fall under the state's NIL law as an institution of higher education, and there is no mention of the cadet-athletes at the USCGA in the law,⁸⁵ it appears that the cadet-athletes are not purposely excluded. If this is the case, then USCGA cadet-athletes would be able to benefit in Connecticut, if the federal law did not exist. There does not appear to be any caveats in the law that would otherwise prevent cadet-athletes at the USCGA from entering into NIL deals. Because of this, it would be legal for cadet-athletes to receive benefits from entering into an NIL contract in Connecticut.

B. Colorado

In Colorado, the NIL law became effective on July 1, 2021,⁸⁶ so it is incredibly likely that many student-athletes in the state have been taking advantage of opportunities for over a year, since the time this comment was written. The law begins with a declaration on what it makes legal, which states:

77. See CONN. GEN. STAT. ANN. § 10a-173(3) (West 2023); CONN. GEN. STAT. ANN. § 10a-1 (West 2023).

78. CONN. GEN. STAT. ANN. § 10a-1 (West 2023).

79. CONN. GEN. STAT. ANN. § 10a-173(3) (West 2023).

80. *Id.*

81. Kowarski, *supra* note 66.

82. *About the USCGA*, *supra* note 43.

83. CONN. GEN. STAT. ANN. § 10a-1.

84. CONN. GEN. STAT. ANN. § 10a-56(a)(8) (West 2023).

85. *Id.*

86. *NIL Legislation Tracker*, *supra* note 7.

[t]he general assembly finds and declares that every student athlete enrolled at an institution of higher education in this state has a right to: (a) Be paid for the use of the student athlete's name, image, and likeness; and (b) Hire one or more persons to represent the student athlete's interests. (2) The general assembly further declares that a student athlete may not be compelled to forfeit these rights in order to participate in intercollegiate athletics.⁸⁷

Interestingly, the Colorado law includes very specific wording, which states "every student athlete enrolled at an institution of higher education in this state . . ."⁸⁸ Because of this, again, the individual state's consideration of what an institution of higher education is, must be evaluated.

Unfortunately, an analysis of the Colorado law is unclear on whether the USAFA would be considered an institution of higher education in the state. Under the law, there are again two categories.⁸⁹ The categories are: "a participating private institution of higher education or a state institution of higher education,"⁹⁰ of which the USAFA is neither. As previously established, the service academies are public⁹¹ and the USAFA is not part of Colorado's state system.⁹² That being said, the issue lies with how literally to view the word "private," as the law does not specifically define what that singular word means in this context.⁹³ Because of this, it is difficult to determine whether the default is to simply find another Colorado statute that defines an institution of higher education. However, when thinking rationally about the USAFA, it seems impossible to declare it as anything other than an institution of higher education, but this comment will proceed with the analysis here.

With that in mind, it is unclear whether the students at the USAFA were meant to be included in this law, regardless of the federal law. Looking further, the law states that student-athletes cannot be coerced into not participating in NIL activities to maintain their eligibility in sports.⁹⁴ If this is the case, it seems to naturally follow that a cadet-athlete's inability to participate in collegiate

87. S.B. 20-123 § 1, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

88. *Id.*

89. COLO. REV. STAT. ANN. § 23-18-102 (West 2023).

90. *Id.*

91. *A Proposal For America's First National Civilian University*, *supra* note 68, at 5.

92. COLO. REV. STAT. ANN. § 23-18-102.

93. *Id.*

94. COLO. REV. STAT. ANN. § 23-16-301 (West 2023).

athletics because of other laws prohibiting him or her from doing so is them being “compelled to forfeit these rights in order to participate in intercollegiate athletics.”⁹⁵ The definition of an institution of higher education creates further issues for the USAFA cadet-athletes. Regardless, the USAFA cadet-athletes should be able to benefit from NIL opportunities.

C. Maryland

Finally, the last state is Maryland, where the law is not effective until July 1, 2023.⁹⁶ The Maryland NIL law is specifically called the Jordan McNair Safe and Fair Play Act, and again, permits student-athletes in Maryland to benefit from NIL opportunities.⁹⁷ The law’s text states:

(b)(1) A public institution of higher education may not: . . . (i) Uphold any rule, requirement, standard or other limitation that prevents a student athlete from earning compensation from the use of the student athlete’s name, image, or likeness . . . [and] (2) An athletic association, a conference, or any other group or organization with authority over intercollegiate athletics, including the National Collegiate Athletic Association, may not prevent a student athlete from earning compensation as a result of the use of the student athlete’s name, image, or likeness.⁹⁸

Luckily, there is not much concern here over establishing whether the USNA is an institution of higher education. An institution of higher education in Maryland is defined very easily, as it states that it is: “an institution of postsecondary education that generally limits enrollment to graduates of secondary schools, and awards degrees at either the associate, baccalaureate, or graduate level.”⁹⁹ It also can be either a “public, private nonprofit, [or] for-profit . . .”¹⁰⁰ Unfortunately, however, the Maryland law also defines the term for the purposes of this law alone, mentioning the University of Maryland system and

95. *Id.*

96. *NIL Legislation Tracker*, *supra* note 7.

97. Heather Dinich, *Maryland Governor Signs Safety Act Spurred by Death of Terrapins Player Jordan McNair*, ESPN (May 18, 2021, 5:25 PM), https://www.espn.com/college-football/story/_/id/31467676/maryland-governor-signs-safety-act-spurred-death-terrapins-player-jordan-mcnair; MD. CODE ANN., EDUC. § 15-131(d)(1)-(2) (West 2023).

98. MD. CODE ANN., EDUC. § 15-131 (b)(1)-(2) (West 2023).

99. MD. CODE ANN., EDUC. § 10-101(h)(1) (West 2023).

100. *Id.* at § 10-101(h)(2).

Morgan State, specifically.¹⁰¹ Given this, there is an issue in moving forward with the assumption that the USNA is an institution of higher education and falls under the NIL law for that immediate purpose. Because Maryland has multiple different definitions for an institution of higher education, it is difficult to understand why the legislature would purposefully exclude the USNA here (other than the federal law), and not in other legislation. Because of this discrepancy, though, it further promotes why the USNA should be a covered institution for purposes of NIL.

The Maryland law also mentions the NCAA specifically, apparently wanting to make an express declaration that the NCAA cannot interfere with NIL activities of student-athletes in Maryland.¹⁰² There is no specific mention of the USNA in the law,¹⁰³ so it does not seem reasonable to conclude that cadet-athletes are a group included under the legality of NIL activities in Maryland. Regardless of this, under state law, cadet-athletes at the USNA should be permitted to engage in NIL activities, if there was no federal law preventing them from doing so.

Because the state laws permit student-athletes to receive benefits from NIL activities and do not appear to necessarily *expressly* prohibit any of the service academies, this is not a plainly state law issue. Instead, it is an issue of the federal law preempting state law under the Supremacy Clause of the United States Constitution.¹⁰⁴ Next, this comment will explain and address the federal statute preventing cadet-athletes from receiving private gain, and then move discuss why this should not be the case. Additionally, the comment will then expand upon possible alternatives for those cadet-athletes.

D. Federal Law: 5 C.F.R. § 2635.702

Within the Code of Federal Regulations is 5 C.F.R. § 2635.702, the statute that prohibits private gain by federal employees.¹⁰⁵ The statute states:

[a]n employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the

101. MD. CODE ANN., EDUC. § 15-131(a)(2)(i)-(ii).

102. *Id.* at § 15-131(b)(2)-(3).

103. *Id.* at § 15-131.

104. U.S. CONST. art. VI, cl. 2.

105. Use of Public Office for Private Gain, 5 C.F.R. § 2635.702 (2023).

employee is an officer or member, and persons with whom the employee has or seeks employment or business relations.¹⁰⁶

Clearly, the issue that cadet-athletes encounter with this statute is the matter of private gain. As already established, cadet-athletes are paid by the Department of Defense, making them federal employees.¹⁰⁷ Therefore, this statute applies to them and prevents them from being endorsed for any sort of private gain. Additionally, this federal statute will be held supreme over any state NIL law permitting student-athletes to enter into NIL activities, because of the Supremacy Clause.¹⁰⁸ Based on the text of the C.F.R. alone, it is obvious that cadet-athletes at the service academies are in fact prohibited from receiving any compensation tied to an NIL deal.

From a purely textual view, there are no avenues for a cadet-athlete to use to receive NIL money. However, if a cadet-athlete could argue that the text of the statute does not apply to them when considering the nature of NIL activities, he or she may prevail. When breaking down the statute further, it states that “[a]n employee shall not use his public office for his own private gain”¹⁰⁹ Arguably, it would seem that a cadet-athlete is not using his or her position as a federal employee or member of the Armed Forces, but rather as an athlete with his or her own name, to receive any NIL deals that could come his or her way.

As evidence of the individual person being the reason for NIL deals, instances of this happening for student-athletes elsewhere may be considered. For Bryce Young at the University of Alabama, much of the NIL money he received came to him before he even played a single football game.¹¹⁰ Head Football Coach Nick Saban alluded to the fact that the total amount of money Young has gotten under NIL is almost \$1 million.¹¹¹ If this is true, it seems that Bryce Young was not being paid for his position as a football player at Alabama (what will be considered the equivalent of public office for cadet-athletes), but rather who he is as a person and his overall athletic ability. A similar example involves a previously undisclosed football student-athlete, who had not yet even

106. *Id.*

107. See *Basic Pay – Officers Effective January 1, 2023*, *supra* note 29.

108. See U.S. CONST. art. VI, cl. 2.

109. 5 C.F.R. § 2635.702 (2023).

110. David Kenyon, *The Biggest and Most Notable NIL Deals in College Football so Far*, BLEACHER REP. (July 26, 2021), <https://bleacherreport.com/articles/2946352-the-biggest-and-most-notable-nil-deals-in-college-football-so-far>.

111. *Id.*

officially committed to attend his school.¹¹² The deal was reported to culminate in a total of \$8 million.¹¹³ Again, because the commitment wasn't made official by the student-athlete and the university in question,¹¹⁴ at the time of writing this comment, it seems impossible to rely upon the fact the individual is being paid for his position. Instead, it seems obvious that the athlete is being paid for who he is as an individual, and not at all because of his association with the prospective collegiate athletics program. These two examples may aid a cadet-athlete's case, as they could present examples showing how other student-athletes have been paid for their individuality and athletic abilities, without any tie to a position on an athletic team at a university.

If a cadet-athlete could present this argument as a loophole to the federal statute, he or she may prove that cadet-athletes are not using their position as federal employees, but simply as student-athletes, like those at other universities. If a cadet-athlete on the Navy Football team is an outstanding athlete, chances are, people care less about him being in the Navy or Marine Corps in the future, than they do about his individuality as a person right now. This is not to say that fans do not prefer certain athletes because they play for a favorite school, but instead it is to examine how individual athletes can be favored for who they are, as well. The point also remains that there is an issue of fairness, as it seems blatantly unfair that cadet-athletes' decisions to serve their country bars them from opportunities that are otherwise available to a student-athlete.

VI. THE FUTURE OF NIL AND THE SERVICE ACADEMIES

While there may be some small avenue for cadet-athletes to argue around the federal law and the use of their public office, it is impossible to predict how this would play out for anyone who tried. If a cadet-athlete were to bring the matter before a court, there is no telling what the outcome would be. If the above arguments were to prove unhelpful, it seems like there is not much hope, unless the federal law were to be amended in a way that provided an exception for cadet-athletes and NIL. Similarly, it may be time for the federal government to attempt to create legislation, which is where the cadet-athletes could be included, by either expressly allowing or denying their ability to engage in NIL activities.

112. Madeline Coleman, *Report: Class of 2023 Football Recruit Signed NIL Deal Potentially Worth Over \$8 Million*, SPORTS ILLUSTRATED (Mar. 12, 2022), <https://www.si.com/college/2022/03/12/five-star-recruit-signed-nil-deal-8-million>.

113. *Id.*

114. *Id.*

While the following idea seems to be vague, there are sources that allege the United States Armed Forces are looking into a model that would allow them to recruit student-athletes and grant them scholarships for enlisting.¹¹⁵ If this is true, those who enlist and are recruited student-athletes would receive normal military pay,¹¹⁶ as well as scholarship money.¹¹⁷ In a way, it seems as though cadet-athletes may find themselves more interested in this opportunity, as it could be a way to bring in money that they could have received through NIL opportunities as a student-athlete anywhere else. This author believes that the scholarship money would be equivalent to receiving NIL, all while following any applicable federal laws. Along with this, it seems as though those individuals would have a greater opportunity at scholarship money through this system, because “[m]any individuals who decide to enlist lack either the health requirements or physical endurance required to succeed in the military, and those two concerns are almost entirely wiped out when recruiting a college athlete.”¹¹⁸ In the end, this seems like an interesting opportunity for both the Armed Forces and prospective student-athletes. While this would not take the place of NIL, it seems as though it would be a larger amount of money in the pocket of individuals who decide to go this route instead. The future of NIL may be unclear now, but it seems that many states are in the process of, or will begin to, consider NIL laws.¹¹⁹ Because of this, it will be up to the states and the federal government to continue offering guidance on NIL.

VII. CONCLUSION

While NIL opportunities are available to student-athletes at NCAA schools in the states of Connecticut, Colorado, and Maryland,¹²⁰ cadet-athletes at the service academies are not afforded the same due to federal law.¹²¹ Arguably, this is an unfair double standard, given that if a cadet-athlete had chosen not to serve their country post-graduation, they could be making money from their NIL at any other college or university in a given state. While the federal law’s text is clearly prohibitory, and it does not seem that a strictly textual argument would work in a cadet-athlete’s favor, one may be able to use an approach that

115. Reid Meyer, *Armed Forces Considering the NIL Space*, ATHLETES TO ATHLETES (May 2, 2022), <https://athletestoathletes.com/armed-forces-considering-the-nil-space/>.

116. *Military Salary – Pay Overview*, MILITARY.COM, <https://www.military.com/benefits/military-pay/military-pay-overview.html> (last visited May 2, 2023).

117. Meyer, *supra* note 115.

118. *Id.*

119. *See NIL Legislation Tracker*, *supra* note 7.

120. *Id.*

121. Use of Public Office for Private Gain, 5 C.F.R. § 2635.702 (2023).

argues against the interpretation of “public office.”¹²² If a cadet-athlete proved that they are marketing themselves strictly as an athlete, and not an employee of the federal government, perhaps he or she would find success in making NIL opportunities available to all of those at the service academies. While the likelihood of success cannot be predicted, it seems clear that cadet-athletes should have these same opportunities as any other student-athlete. If NIL is available to student-athletes at colleges or universities in a state, it should be available to all those who qualify as student-athletes.

122. *Id.*