U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

TO: Edwin Meese III
Attorney General

FROM: Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

SUBJ: Summary of Legal Issues Pertaining to Mandatory Drug Testing of Applicants and Incumbent/Federal Employees

The following is a summary of the preliminary views of the Office of Legal Counsel on the proposal to test both applicants and incumbent federal employees for drug use. The summary addresses (i) the legal authority for such a testing program, (ii) potential constitutional objections thereto, and (iii) any statutory restrictions on personnel actions taken as a result of the findings of a drug test.

Due to the unusual time constraints under which our review of this matter has proceeded, our analysis of these issues is quite tentative. A more complete review of these issues is currently being undertaken by OLC.

I. AUTHORITY FOR DRUG TESTING.

We believe that the President clearly has the authority to institute a drug testing program unless he is prohibited from doing so by a specific constitutional or statutory restriction. Congress has given the President plenary authority to establish such conditions for admission to the civil service as will best promote the efficiency of the service, including the power to "ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought." 5 U.S.C. 3301(2). Government regulations, pursuant to this statute, already provide that an applicant may be found unsuitable for employment due to "abuse of narcotics, drugs, or other controlled substances." 5 C.F.R. 731.301. Drug testing for applicants may thus be authorized to ascertain that an applicant is in conformity with standards suggested by this regulation.

In 5 U.S.C. 7301 Congress has confirmed the President's supervisory authority to regulate the conduct of employees of the

Executive Branch by providing that "[t]he President may prescribe regulations for the conduct of employees in the Executive Branch." Therefore the President may require that those employees not take illegal narcotics. Because a necessary incident of the President's power to set standards of conduct is the power to ascertain that those standards are being followed, the President may establish drug testing programs pursuant to Executive Order to assure that employees are not using illegal drugs.

II. CONSTITUTIONAL PROVISIONS IMPLICATED BY DRUG TESTING.

We believe that the Constitution clearly permits drug testing of applicants for or incumbent employees in sensitive positions. Whether the courts would allow the testing of other applicants or employees without probable cause or reasonable suspicion cannot be predicted with certainty.

A. Fourth Amendment. Courts will probably employ a Fourth Amendment balancing test in order to evaluate the constitutionality of requiring drug testing for applicants or incumbent federal employees. In our view, courts should and likely will recognize both that the government, as an employer, has a greater interest in requiring drug testing than it would for law enforcement purposes alone and that the individual has a lesser expectation of privacy as an employee than as a citizen.

Although the Fourth Amendment generally requires probable cause before a search or seizure may be conducted, the Court has eliminated or lowered the quantum of individualized proof required when the government interest in conducting the search and seizure without probable cause greatly exceeds the privacy interests of those who are to be searched. The government's interest will likely be measured in large part by the nature of the work the employee performs. If the work involves the security of the nation or the safety of others, courts should be more willing to permit widespread drug testing. The applicant's or employee's interests will be defined primarily by the degree of intrusiveness of the search and his legitimate expectation of privacy.

When the balance of interests is substantially in the government's favor, such as when applicants or employees would be involved in work affecting national security or safety, the courts will permit drug screening of such applicants or employees in the relevant job classification without requiring any quantum of individualized suspicion so long as the test is administered randomly or in other ways that prevent harassment or discrimination. When the interests of the government and the individual are more evenly balanced, but still favor the government, courts will likely permit individual drug testing upon reasonable suspicion of drug abuse.

Fourth Amendment objections cannot be obviated merely by insisting that federal employment be conditioned upon the waiver of Fourth Amendment rights. "'[T]he theory that public

employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'" Pickering v. Board of Education, 391 U.S. 563, 568 (1968). "The problem is to arrive at a balance between the interests of the [employee] . . . and the interest of the State, as an employer." Ibid. "[T]his test closely resembles standard Fourth Amendment analysis, under which the reasonableness of a search or seizure is determined by balancing the interests of the government and the individual. While we do not believe that the voluntary nature of public employment is dispositive of the Fourth Amendment question, that fact, together with other attributes of employment, must be taken into account and weigh in favor of the validity of drug testing.

B. Fifth Amendment. No serious due process issues will be raised by a drug testing program so long as a positive urinalysis is confirmed by other reliable methods of testing now available before any adverse personnel action is taken. Moreover, those tested will not be able to raise a claim of self-incrimination, because the Fifth Amendment precludes the compulsory production of evidence only if the evidence is testimonial, see Schmerber v. California, 384 U.S. 757 (1966), and thus does not apply to the compulsory production of a urine specimen.

C. Right of Privacy. We do not believe that analysis under the right of privacy will have any force independent of the Fourth Amendment. The right of privacy has been limited to activities bearing upon procreation and marriage and would not apply to the activities necessary to participate in a drug program.

III. STATUTORY PROVISIONS RELATING TO PERSONNEL ACTIONS TAKEN ON THE BASIS OF DRUG TESTING RESULTS

A. Drug Abuse Act. The Drug Abuse Office and Treatment Act of 1972, 42 U.S.C. 290ee-1, imposes certain restrictions on the government's ability to deny or terminate employment of drug users. The precise extent of these restrictions is uncertain under existing authorities. The Drug Abuse Act requires federal employers to develop and maintain "appropriate prevention, treatment, and rehabilitation programs and services for drug abuse among Federal civilian employees," and generally forbids deprivation or denial of federal civilian employment "solely on the ground of prior drug abuse." Applicants or employees who have engaged in prior abuse, however, may be excluded or removed from the FBI, CIA, NSA, and from any national security or "sensitive" positions. Moreover, an employee "who cannot properly function in his employment" may always be dismissed.

The Drug Abuse Act can be read in two ways, with very different results. If "prior" drug abuse means only a record or history of such use, it does not forbid the denial of employment because of an applicant's current drug use. Thus, a job applicant could be excluded from any federal position because of a positive drug test. In contrast, incumbent employees, unless

they are incapable of properly performing their jobs, would be initially protected from dismissal for current drug use by the statutory requirement of treatment programs, and could be dismissed only after unsuccessful attempts at rehabilitation.

The statute's language also admits of a construction under which "prior" drug abuse would include any drug abuse by persons willing to enter treatment programs. Under this construction, applicants and incumbents must be treated identically. A person could neither be turned away nor fired simply because of drug abuse. Thus, if a drug-abusing applicant is the best candidate for a job, he must be hired. Once hired, he must be offered treatment and rehabilitation before dismissal for his drug use, unless he cannot do the job.

The first construction is clearly the more logical, and we believe more likely accords with congressional intent. The possibility exists, however, that courts would adopt the second view. As yet, we know of no case construing the Drug Abuse Act.

B. Rehabilitation Act. The Rehabilitation Act of 1973 (29 U.S.C. 791, et seq.), requires federal employers to have affirmative action plans for hiring and advancement of handicapped persons. Courts have construed this statute to impose a non-discrimination requirement on employees, and in 1978 Congress created a remedy under this law for handicapped persons suffering discrimination.

A 1977 opinion of the Attorney General found drug addiction (as well as alcoholism) to qualify as a handicap under the 1973 Act. The 1978 amendments to the Act largely ratify this opinion. Persons with a history or record of addiction, or who are regarded as addicts, are handicapped under this section even if they are not currently addicts.

While not entirely free from doubt, we believe that addicts, who are handicapped, can be distinguished from casual users (even heavy users), who would not be considered handicapped. If we are correct, drug users would have only those rights, if any, under the Drug Abuse Act which we discussed above.

Handicap discrimination is prohibited under the Act only if the handicapped person is qualified for the job in spite of his handicap. Thus, if a person's drug addiction renders him unable to perform a job, he can be dismissed or rejected. If he can do the job, the requirement of affirmative action in our view means that treatment and rehabilitation must be made available before the addict is dismissed, just as under the Drug Abuse Act.

A policy of taking adverse action only against addicts (and not against casual drug users) may thus implicate the Rehabilitation Act. However, because not all drug users are handicapped, it is at least arguable that a broad policy of excluding drug users generally from the federal workforce would not be based on handicap, and thus would be outside the Rehabilitation Act.

It appears arguable that the general provisions of the Rehabilitation Act are entirely displaced in this area by the more specific requirements of the Drug Abuse Act. We are presently investigating this argument.

As I said in your absence, I think we are largely in accord. The bottom line is that we should proceed slowly + carefully in this testing area.

THE WHITE HOUSE

WASHINGTON

July 23, 1986

MEMORANDUM FOR THE DOMESTIC POLICY COUNCIL

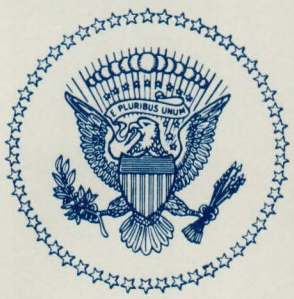
FROM: RALPH C. BLEDSOE
Executive Secretary

SUBJECT: Background Materials on Drug Abuse Policy

Enclosed are two documents to serve as background materials for the July 24, 1986 discussion on Drug Abuse Policy. The first is a copy of the National Strategy for Prevention of Drug Abuse and Drug Trafficking, prepared in 1984. This describes the strategy developed in 1981 by the President.

The second document is a typed Summary of the National Strategy.

An additional discussion paper will be handed out at the meeting, focusing on a more immediate issue.



1984 NATIONAL STRATEGY

FOR PREVENTION OF DRUG ABUSE AND DRUG TRAFFICKING

This is not a presidential record. This marker is used as an administrative marker by the Ronald W. Reagan Presidential Library Staff. This marker identifies that there was an object in this folder that could not be scanned due to its size.
