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UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT

July 18, 1986

From the Office of the Director

Dear Peter,

These are the proposals developed in support of the President's drug abuse initiative. I am holding them very close to protect the President's opportunity to announce those he decides to support.

Carlton and I talked after last week's DPC meeting on drugs. I believe he and I now agree on these proposals, in lieu of some discussed last week.

Connie

1000 707 51 WH 8 12



Office of the Director

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

July 18, 1986

MEMORANDUM FOR: EDWIN MEESE III
ATTORNEY GENERAL

FROM: CONSTANCE HORNER
DIRECTOR *Constance Horner*

SUBJECT: OPM DISCUSSION PAPER
ON SUBSTANCE DRUG POLICY

A General Approach to Policy

The operating principle in a new Federal substance abuse policy has been well articulated in the Organized Crime Commission's report. Policies should be framed that express the "utter unacceptability" of illegal drug use in the Federal workplace.

The principle of "utter unacceptability" can be operationalized a variety of ways beyond "suitable" testing for certain types of high-risk jobs: rehabilitation, education, illegal drug use prevention programs, employee assistance programs, public relations, revised security and suitability inquiries and the invocation of adverse action procedures for illegal drug users.

Any Federal substance abuse policy must be grounded in the distinction between Federal applicants and Federal employees. In pursuing a goal of a safe, healthful, drug-free workplace, we should seek to prevent the entry of users of illegal narcotics into the Federal workforce while simultaneously continuing a rehabilitational program for on-board employees. But, if on-board employees who use drugs illegally, test "positive" a second time, resist rehabilitation, or otherwise undermine the efficiency of the service, adverse action should be invoked, including dismissal.

There are no uniform, Governmentwide policies and standards encompassing various measures, such as drug testing, to exclude drug abusers from the Federal workplace. There is no systematic and uniform program of screening applicants for certain types of jobs Governmentwide, nor for testing employees in those areas. There is a Governmentwide policy geared toward rehabilitating drug and alcohol abusers once they are found in the workplace.

The following specific proposals are tentative, submitted for deliberation and further discussion and appropriate refinement. They are an attempt to provide a program of narcotics prevention, in consonance with the "utter unacceptability" criteria, as well as a program of rehabilitation.

Suggested OPM Proposals

Recommendation No. 1: Propose Legislative changes to make current illegal drug use an absolute disqualifier for entry into Federal employment and a basis for termination, regardless of a claimed "handicapping" condition or effect on job performance. First, add a new section to Title V: "Notwithstanding any other provision of law, an individual who uses illegal narcotics or drugs without a prescription may not be employed in the competitive service." Second, amend the Rehabilitation Act to exclude illegal drug users as a category to be included among those who are deemed to be "handicapped" and strike the nexus between job performance and illegal drug usage.

Rationale: The President's Commission proposes the issuance of policy guidance that would communicate the "utter unacceptability" of illegal drug use in the workplace. At the same time, Federal law forbids the deprivation of Federal employment to any person solely on the grounds of prior drug abuse. The object of current law is rehabilitative. While the rehabilitative spirit of current law is laudable, the public has a right to expect not only the highest level of performance and productivity on the part of Federal applicants, but also their devotion to the laws of the country.

While there is no requirement to hire current drug abusers, and they are normally excluded under OPM "suitability" criteria, such applicants and employees can claim to be handicapped and come under the protective language of the Rehabilitation Act. It then becomes the taxpayers' duty to accommodate a disabling condition brought on by an illegal personal vice. The Federal government is forbidden to discriminate against the handicapped in hiring.

OPM should seek the removal of the "handicapped" protection from illegal drug users because such use is, after all, illegal and, moreover, it is a voluntary act. Those who persistently and voluntarily engage in illegal acts should not be permitted to enter or remain in the Federal workforce. They should be permitted re-entry only after demonstrated rehabilitation. Because of the legal status of alcohol consumption, the traditional nexus between alcoholism or alcohol abuse and performance criteria and its designation as a "handicapping condition" would be retained.

Section 7352 of Title V declares: "An individual who habitually uses intoxicating beverages to excess may not be employed in the competitive service." The same bar to employment should be imposed on drug abuse, with a clarification that current illegal drug use will not be considered a "handicapping condition" nor an absolute bar to future

Federal employment. The enactment of such provisions will send a strong, clear message to the general public that drug abuse and Federal employment are incompatible.

Recommendation No.2: Inquire into Applicants' Past and Current Illicit Drug Usage on the SF-85 and SF-86, the Standard Suitability and Security Forms, as a means of deterring the hiring of current illegal drug users and providing appropriate information regarding past use for evaluation for security clearance.

Rationale: Just as with the habitual or excessive use of alcohol, the illegal use of narcotics, drugs or other controlled substances is potentially disqualifying for Federal employment under 5 CFR 731.202(b)(6). Despite the fact that illegal drug use is a major national problem, costing approximately \$100 billion in lost productivity each year, OPM currently does not even require a written response about the use of illicit narcotics among Federal applicants. As a first step in the prevention of the use of illicit narcotics in the Federal workplace, OPM should inquire into past, recent and current drug use or alcohol abuse on the part of applicants for Federal positions, on the SF-85 and the SF-86, i.e., forms for both sensitive and non-sensitive positions.

The questions can serve several purposes for Federal investigators and examiners in determining general fitness or access to classified

information. First, the Executive publicly charged with the faithful execution of the laws is entitled to services of those who privately obey the laws, including the Controlled Substances Act. A Federal position is one of public trust, not private right. This principle applies to both sensitive and non-sensitive jobs. Second, the inquiries are narrowly focused to elicit recency and frequency of illegal narcotics usage. The questions are designed to segregate current from more recent drug abusers, and, in turn, from those who, in the past, have enjoyed only a casual experimentation with illicit drugs. Such focused questions will also be of direct benefit to agency adjudicators making final employment decisions by giving them more detailed information on illicit drug use on a case-by-case basis. Third, with such narrowly focused questions, eliciting recency and frequency, OPM can expect to get a higher rate of positive responses. This can broaden the base for further inquiry. If the questions are answered affirmatively, they may be disqualifying. (It is not necessarily disqualifying.) It is a matter left to adjudication. If it is answered falsely and the applicant is hired under false pretences, it is grounds for dismissal. In that respect, the initial inquiry can serve as a front line deterrent to illegal drug using applicants. It can be first step toward prevention.

In OPM's draft revision of its SF-85 (Personnel Investigations Questionnaire for non-sensitive positions), the following questions are proposed:

Suitability Form

SF-85

Your Involvement with Alcohol and Dangerous
or Illegal Drugs, Including Marijuana

This item concerns the abuse of alcoholic beverages and the supplying or using without a prescription of marijuana, hashish, narcotics (opium, morphine, codeine, heroin, etc.), stimulants (cocaine, amphetamines, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), or other dangerous or illegal drugs.

A. At any time in the past 5 years, have you used alcoholic beverages habitually and to excess? Yes No.

B. In the past 5 years, have you used marijuana, narcotics, hallucinogens, or other dangerous or illegal drugs?

Yes No.

C. Have you ever been a supplier or seller of marijuana, narcotics, hallucinogens, or other dangerous or illegal drugs?

_____ Yes _____ No.

D. Are you currently (within the last 3 months) using alcohol in excess or using illegal drugs, including marijuana?

_____ Yes _____ No.

If you answered yes to any of Questions A - D above, provide details including the periods of use and treatment.

Explanation (in your comments
be sure to include a statement
of the frequency of your use
and efforts toward rehabilita-
tion, if any, including the name,

	Type of	address, and zip code, of person
From	To	substance or institution providing
<u>mo/yr</u>	<u>mo/yr</u>	<u>used</u> <u>treatment</u>)

In OPM's draft revision of its SF-86 (Personnel Investigations Questionnaire for Sensitive Positions), the following questions are proposed:

Security Form

SF-86

Your Involvement with Alcohol and Dangerous
or Illegal Drugs, Including Marijuana

This item concerns the abuse of alcoholic beverages and the supplying or using without a prescription of marijuana, hashish, narcotics (opium, morphine, codeine, heroin, etc.), stimulants (cocaine, amphetamines, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), or other dangerous or illegal drugs.

A. Have you ever used alcoholic beverages habitually and to excess?

_____ Yes _____ No.

B. Have you ever used marijuana, narcotics, hallucinogens, or other dangerous or illegal drugs?

_____ Yes _____ No.

C. Have you ever been a supplier or seller of marijuana, narcotics, hallucinogens, or other dangerous or illegal drugs?

____ Yes ____ No.

D. Are you currently (within the last 3 months) using alcohol in excess or using illegal drugs?

____ Yes ____ No.

If you answered yes to any of Questions A - D above, provide details including the periods of use and treatment, if any.

		Type of	Explanation (in your comments
From	To	substance	be sure to include a statement
<u>mo/yr</u>	<u>mo/yr</u>	<u>used</u>	of the frequency of your use
			and efforts toward rehabilita-
			tion, if any, including the
			name, address, and zip code,
			of person or institution
			<u>providing treatment</u>

Because the questions are directed at applicants rather than employees, there is no perceived "negative" implication for the Federal workforce nor even a suggestion of widespread drug usage on the part of the workforce. It may be strongly supported by Federal employee organizations. It is likely to gain widespread support in Congress, particularly among members who serve on committees having jurisdiction over illegal narcotics.

Recommendation No. 3: Issue Federal Personnel Manual Guidance on the use of Drug Screening

Rationale: Certain agencies are already adopting or considering the use of drug tests as a condition for the receipt of clearances for critical or sensitive jobs. OPM can and should set forth some guidelines for the use of drug tests for personnel security reasons. Governmentwide guidance should continue to allow agency-head discretion and should indicate that national security, law enforcement, and health and safety-related positions would be likely candidates for drug testing before and during employment. The provision of security clearances is another case for serious consideration of testing, including those with access to classified information or classified facilities or materials, especially nuclear facilities and materials. In this case, guidance would remove security-related testing from the arena of labor negotiability.

- Recommend the use of corroborative, alternative tests in any case where an employee tests "positive" and establish minimal

reliability and quality control standards to enhance the protection of employees subject to any such tests. The main idea here is to prevent the use of any "positive" reading of a test for drugs or alcohol disqualification without strong confirmation. OPM's staffing experts have already developed language to ensure such confirmatory standards; including separate urinalysis or blood testing by a reputable laboratory; clinical examination by a physician; or admission by the individual. The language can later be issued as binding regulations.

Recommendation No. 4: Change Adverse Action Regulations to Mandate Termination for a Second Instance of Illegal Drug Use.

Rational: The proposal here is to specify at the conclusion of a one-time "opportunity period" for general rehabilitation, that a first instance of illegal drug use is grounds for referral to rehabilitation or confidential counseling. The second instance of illegal drug use, or being under the influence of an illegal narcotic at the Federal worksite, is to result in a mandatory dismissal from the Federal civil service. The exception to this rule would be, of course, the Agency Head's legal discretion to terminate on the basis of national security in the case of a single instance of illegal drug use. The General Rule: "Two strikes and you're out."

Recommendation No. 5: Proclaim an opportunity period for the rehabilitation of on-board employees who are using illegal drugs.

The Director, OPM, would issue a governmentwide "Employee Letter" outlining the Administration's policy of "zero tolerance" for the illegal use of drugs by Federal employees. The letter would contain an appeal to any employee who is an illegal drug user to seek help during a period of six months from the date of the letter's issuance.

The letter would:

1. Re-emphasize the role and value of employee assistance programs and their availability.
2. Make an appeal to all of those who need confidential counseling to seek it.
3. State that during the six month period, there would be no change in Federal personnel policy, but that at the end of that six months changes in policy would be expected, with a view toward mandating termination of any employees who use illegal drugs.

4. Announce:

(a) A Drug Hotline: The establishment of an OPM Drug/Alcohol "Help Hotline" for Federal employees who have a problem and need confidential professional help. The "Hotline" can be part of the governmentwide OPM Employee Assistance Program.

(b) Drug Education: A continuing Drug and Alcohol Awareness Program; the use of several hard-hitting film strips, educational materials to explain the costs and consequences of drug and alcohol abuse to Federal employees.

Recommendation No. 6: Initiate Immediate Discussion between OPM and OMB and the White House on the Feasibility of Upgraded or Increased Coverage for Alcohol and Drug Related Medical Programs in the Federal Employees Health Benefits.

Rationale: During the 1981 FEHB crisis, when OPM ordered across-the-board benefit reductions, medical benefits covering alcohol and drug abuse were included in those reductions. OPM, as a matter of policy, has nevertheless regularly pressed for the inclusion of alcohol and drug-related medical coverage as part of an overall FEHB benefit package. It has paid dividends. A national study of 3000 persons treated for alcoholism among FEHB enrollees in the Aetna plan, conducted

by NIAAA, found that over a three-year time frame (1980-83) there was a net savings to the program; and the savings increased with time. ("Alcohol and Drugs in the Workplace," BNA Special Report, 1985).

In conjunction with other near-term measures, OPM may want to encourage upgraded coverage for drug and alcohol-related medical problems during this year's negotiation with carriers, consistent with market conditions and the need for a balanced benefits package for Federal employees.

Recommendation No. 7: OPM Should Upgrade and Re-emphasize the Availability of Governmentwide Employee Assistance Programs.

Rationale: In the near term, OPM can perform a valuable service in upgrading and re-emphasizing the role of Employee Assistance Programs as part of any comprehensive Administration anti-drug effort. This can be done through the issuance of a new FPM guidance; a Governmentwide "employee letter" from the Director of OPM, to advise employees of agencies' confidential counseling services, could also be issued. Any employee having such problems can obtain confidential help and return to productive work. A renewed effort on the "rehabilitative" role of OPM to curtail illegal drug use and alcohol abuse would pay bountiful dividends both psychologically and materially.

In the private sector, employee assistance programs have proven to be a valuable resource in combatting illegal drug use, and they are growing.

Approximately 30 percent of the Fortune 500 firms have established EAP's. Their purpose is to get rid of the problem, not the employee. This is a positive, constructive and humane way to deal with "on-the-job" drug and alcohol abusers. Beyond that, EAP's are cost-effective. It is less costly to retain an otherwise good and well-trained employee through an "employee assistance program," than to incur again the initial cost of hiring and training a new employee. Moreover, an effective EAP program will reduce absenteeism, and early referrals to EAP's can have a positive impact on health insurance premiums.

Recommendation No. 8: OPM and the White House Should Initiate an Aggressive Public Relations Campaign Focusing on the Incompatibility of Illicit Drug Use and Federal Employment.

Rationale: A public relations campaign focused on the incompatibility of illicit drug use and application for Federal employment could be very effective. OPM could explore incorporating such a campaign into a broad-based recruiting program. The theme can be simple and direct: "If you are using drugs, get off drugs and get help before you join us." Peer pressure, especially among the young, is a contributing factor in illicit drug use. Making it clear that one's future employment is contingent upon conformity to the law creates an effective counter to peer pressure. An effective public relations campaign conducted by OPM, in cooperation with HHS or the White House, could very well serve the

President in communicating to the public "the utter unacceptability" of drug use in the Federal workplace. Such an effort would also contribute to the cultural delegitimization of illicit drug use.

Recommendation No. 9: OPM Should Issue Regulations Requiring Referral of a Drug or Alcohol Disqualified Applicant for Counseling and Rehabilitation before Reconsideration of the Applicant.

Rationale: Under Section 3301 of Title V, the President has the plenary authority to proscribe rules and regulations for entry into the Civil Service.

OPM can require agency referral of a drug or alcohol disqualified applicant for counseling and rehabilitation and allow, after an appropriate period of time, reapplication to the Federal service only after written certification from a reputable rehabilitation service that the applicant has been successfully rehabilitated. This can be done at no cost to the government.

Recommendation No. 10:

OPM Should Initiate the Collection of Governmentwide "productivity" Data Correlated with a Qualitative and Quantitative Evaluation of the Effectiveness of Agency Employee Assistance Programs.

Rationale: Though there is no evidence of widespread illegal drug usage in the Federal workforce, available evidence does suggest that the

Federal workplace is not free of problems of alcohol addiction that affect the general society. What is needed is a strong data base to give us some idea of how well we are doing in the war against substance abuse. This data could include indices such as accidents on the job, absenteeism (particularly on Mondays) and sick leave usage. Much of the data is already collected in agencies, but the relationship of the data to alcohol or drug related problems is unclear.

Recommendation No. 11: In Consultation with HHS, OPM Should Issue Regulations Setting Forth Quality Control Standards Governing the use of any Biological Testing of Federal Employees.

Rationale: Drug testing has been a growing practice in private industry for the past two and one half years and it is growing among government agencies. Technology is evolving, but the most common method is urinalysis. Chemical reactions can reveal the presence of various narcotics or drugs, including cocaine, barbituates, amphetamines, marijuana, qualudes, PCP, and alcohol.

The major impact of the Civil Service Reform Act was the decentralization of the Federal management system. The determination as to whether such testing is appropriate and as to what class of employees should be subjected to testing should remain with the agency head.

Agencies, thus far, have been prudent in their approach to drug testing. They have identified categories of critical or sensitive jobs where

testing is appropriate in order to safeguard the safety and security of the public. They have tended to focus on the nature of a position, its performance requirements or the mission of the agency. Few can quarrel with testing for such occupations as Air Traffic Controllers, Firefighters, Pilots, Law Enforcement Officers, Health and Safety Inspectors, and employees at nuclear facilities.

However, every employee who is subject to a test of this sort has the right to the highest degree of accuracy that is humanly possible. Even in the best programs, there is the possibility of error. OPM should set forth regulations, after consultation with the Department of Health and Human Services and the National Institute for Drug Abuse, to ensure high standards for "positive" tests, the confirmation of "positive" results, standards for claim of custody of test specimens, and a high degree of quality control in the testing process.

THE WHITE HOUSE
WASHINGTON

July 15, 1986

You might want to look at this memo prior to the 2:00 DPC meeting on the drug initiative.

The memo has been distributed only to the following:

Regan
Thomas
Kington
Svahn
Turner
Chew

/

PJWallison

THE WHITE HOUSE

WASHINGTON

July 15, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: ROBERT M. KRUGER *RMK*

SUBJECT: National Initiative on Drug Abuse

This memorandum preliminarily identifies legal issues implicated by the various proposals for a national initiative on drug abuse outlined in two memoranda dated July 8, 1986 (copies attached).

1. DRUG-FREE WORKPLACE

- o Testing Federal Employees. Programs to screen and test government employees in positions involving national security, public safety and law enforcement are being implemented or are already in place as follows:

- Department of Defense
 - Military Services (All Personnel)
 - Civilian Employees (Army and Some Navy Employees in Certain Critical Positions)
- Department of Justice
 - Drug Enforcement Administration (New Agents)
 - Federal Bureau of Investigation (New Agents)
 - Immigration and Naturalization Service (New Border Patrol Agents)
 - Bureau of Prisons (Applicants for Law Enforcement Positions; Employees under Suspicion)
- Department of Transportation
 - Coast Guard (All Personnel)
 - FAA (Air Traffic Controllers)
- Department of Treasury
 - U.S. Customs Service

Each program is tailored to meet the particular needs and composition of the agency involved. Generally, they involve the administration of a preliminary unanalysis to detect the presence of certain controlled substances. A positive indication does not become the basis for a personnel action unless drug use is admitted or corroborated. Positive specimens, however, undergo confirming tests, the results of which may result in a referral for counseling or treatment or, in inappropriate circumstances, discharge or demotion.

New employees are usually tested before appointment or selection. Other typical testing occasions include: (1) periodically, after selection or appointment, on the basis of neutral criteria, (2) when there is probable cause to believe that an employee is under the influence of a controlled substance while on duty, (3) in an examination following a mishap or safety investigation or (4) as part of a regularly scheduled medical examination.

o Legal Challenges

Fourth Amendment. Serious legal questions confront drug testing programs for federal employees. Several of these questions are currently being litigated. Constitutional challenges based on the Fourth Amendment's prohibition against unreasonable searches and seizures are of foremost concern (the courts have consistently held that requiring a person to provide a sample of his urine is a constitutionally protected seizure). Generally, absent certain exceptions, warrantless searches are per se unreasonable. Testing programs triggered by suspicion that an employee is presently under the influence of drugs have been upheld by the courts. More expansive programs require a showing that the public interest in testing supercedes the intrusiveness of the testing to the individual.

The testing programs listed above arguably involve public interest factors sufficient to meet this test. In permitting urinalysis testing of military personnel, for example, the courts have emphasized low expectations of privacy in the military, the importance of military preparedness and documented drug abuse problems in the armed services. The other agencies listed above can cite similar justifications for testing. Law enforcement personnel are charged with enforcing the United States drug laws and are easy targets for blackmail and corruption. Serious public safety concerns surround law enforcement personnel who carry firearms and other government workers engaged in hazardous activities.

Absent a reasonable suspicion of drug abuse or a compelling security justification, required urinalysis testing may not withstand constitutional challenge. In this regard, courts usually give greater weight to legislative expressions of state interest than to executive pronouncements (thereby placing Congressionally-enacted programs on a stronger Fourth Amendment footing). Where a federal employee consents to urinalysis testing, the voluntariness of that consent may become an issue. If employment is conditioned on the the relinquishment of constitutionally-protected rights, it is unlikely that the consent will be viewed as

voluntary. Applicants, as opposed to incumbent employees, are less well-situated to challenge a consent requirement, due both to their lack of a vested employment interest and the inherently reasonability of job entrance examinations.

Fifth Amendment. Constitutional issues also arise under the due process clause of the Fifth Amendment. These include the opportunity to dispute the results of drug tests, the need for corroborating evidence of malperformance, the reliability of the chain of custody governing specimens and the confidentiality of test results.

Federal Statutes. The Rehabilitation Act of 1973 may provide legal recourse for employees subjected to drug testing. Some alcohol or drug abusers may fit within the definition of handicapped individuals and thus receive protections under the Act from certain adverse actions (i.e. be entitled to an offer or opportunity of rehabilitation). The Act also prohibits the federal government from denying or depriving federal civilian employment "solely" on the basis of prior drug use. 42 U.S.C. 290ee-1.

A number of other federal statutes may serve as a basis for legal challenge to drug testing programs. In a suit against the Department of Defense's civilian drug testing program the National Federation of Federal Employees has alleged violations of inter alia, the Administrative Procedure Act and numerous provisions of the Civil Service Reform Act. The Civil Service statutes have been interpreted as requiring that there be a nexus between the use of drugs by a government employee and his or her performance on the job.

Whatever incompatibility these laws present could be dealt with, at least in part, through legislation clarifying the relationship of drug testing laws to other federal statutes.

Federal Labor-Management Issues. Where tested employees are represented by a union, testing programs may be challenged as terms or conditions of employment subject to labor-management negotiations or, where unilaterally implemented, as unfair labor practices.

Bivens-Type Actions. The Supreme Court has recognized a private cause of action for damages against federal agents who, acting under color of authority, engage in unconstitutional conduct. Individuals ordering or supervising drug testing may be subject to such suits.

o Private Sector Employers and Government Contractors.

Increasing numbers of companies have adopted strategies to attack the problem of chemical abuse (according to a survey 30 percent of the Fortune 500 companies now screen employees or job applicants.) Partly because of the divergent laws, regulations and collective bargaining agreements to which private sector employers are subject, these programs vary widely.

While not strictly subject to constitutionally standards governing privacy and due process, private employers may encounter state constitutional or statutory privacy provisions, common law protection against the tort of invasion of privacy and common law protection against libel and slander. Accordingly, national employers must sometimes devise different programs for different jurisdictions in which they operate. It may not be possible for all private sector employers to meet a single definition of a drug-free workplace without risking state court litigation and in some jurisdictions substantial tort liability. Work rules, including drug testing programs, for unionized employees are usually the subject of company-specific collective bargaining agreements.

Unless federal preemption of these various state laws is contemplated, recognition of a drug-free workplace may have to be a relative concept measured in terms of efforts made and goals achieved rather than an absolute imperative.

One problem with imposing requirements on federal contractors is that such a program could subject otherwise private conduct to some of the aforementioned constitutional challenges (i.e. create an element of state action). It may be difficult to view compliance with such requirements as voluntary without appearing to be inconsistent with the Administration's position on the regulations issued by the Labor Department which implement the Executive Order on affirmative action. In that case, the Administration presumably views implementation of affirmative action programs as a form of state action subject to constitutional challenge.

2. DRUG-FREE SCHOOLS

Withholding federal dollars from schools not working toward drug-free environments may not be possible without legislation. The specific grant awards, contracts and regulations which govern the flow of funds from various departments and agencies to colleges and universities establish eligibility requirements and limit the use to which such funds can be put. Generally,

however, compliance with federal law is not a term or condition of a governmental award (Civil rights statutes constitute one exception).

3. DRUG TREATMENT

Mandatory (i.e., involuntary) treatment for intravenous drug users would raise many of the same constitutional issues discussed above even if applied only to individuals convicted of crimes. However, courts regularly make successful completion of a drug treatment program a condition for bail or release or an alternative to incarceration. The Administration may want to urge wider use of this option or militate for improvements in and increased funding for existing treatment programs, many of which are presently viewed as inadequate by law enforcement personnel.

4. INTERNATIONAL

The so-called Posse Comitatus statute prohibits use of any part of the Army or the Air Force to execute the laws of the United States except in cases and circumstances expressly authorized by the Constitution or Act of Congress. In recent years, Congress has enacted broad exceptions to this prohibition, making available to civilian law enforcement officials (1) information collected during the course of military operations, (2) military equipment and facilities, (3) training and advice by members of the armed services and, (4) under certain conditions, military personnel to operate and maintain military equipment. In appropriate circumstances, military personnel may operate equipment outside the United States for use as a base of operations by Federal law enforcement officials to enforce the Controlled Substances Act and the Controlled Substances Import and Export Act and to transport law enforcement officials in connection with such operations. Congress has also recently reaffirmed, however, that military personnel may not participate in an interdiction of a vessel or aircraft, a search and seizure, arrest or other similar activity unless such participation is expressly authorized by law. If consultation with the Secretary of Defense regarding specific initiatives indicates that existing constraints do not provide sufficient latitude, new legislation may be necessary.

5. LAW ENFORCEMENT

Proposals directed at toughening law enforcement and criminal penalties for drug abuse (e.g. calling upon judges to hold drug dealers for a minimum of seven days as a threat to the community) raise issues under constitutional and statutory provisions concerning presentment (the right to be arraigned before a magistrate), bail, and the right to a speedy trial.

While the President may urge the U.S. Sentencing Commission to recommend tougher sentences for drug offenders, he probably would want to avoid particular statements which are inconsistent with sentencing recommendations derived from prior initiatives sponsored by the Administration. Moreover, the appearance of interference in matters that are constitutionally within the province of the judicial branch counsels care in articulating the Administration's position. In calling for the arrest of all known drug dealers, the President would not want to suggest that local law enforcement agencies (1) should take any action in contravention of Fourth and Fifth Amendment rights or (2) do not at present arrest individuals whom they reasonably suspect to be dealing in illicit drugs. Such initiatives are probably better phrased in terms of devoting more resources to the fight against drugs.

